

**The gender responsiveness of the African Commission on Human and Peoples'
Rights**

By Mariam Wambui Kamunyu

**A thesis submitted in fulfilment of the requirements for the degree of
Doctor of Laws (LLD)**

In the Faculty of Law, University of Pretoria

2018, November

Supervisor: Professor Frans Viljoen

Declaration

I declare that this thesis, 'The gender responsiveness of the African Commission on Human and Peoples' Rights', which I hereby submit for the degree Doctor of Laws (LLD), at the Faculty of Law, University of Pretoria, is my own work and has not been previously submitted by me for a degree at this or any other tertiary institution.



Mariam Wambui Kamunyu

Student No.: 14449715

Date: 12 November 2018

Dedication

This thesis is dedicated to my father, PK Muhoro who shelved his own doctoral ambitions to reunite with his then young family. To my mother, Dorcas Kamunyu, for whom I pursued this ambition long after I had given up doing it for myself. To both ... supportive, consistent and for lovingly taking care of my precious Salma while I was away, thereby ensuring that history did not repeat itself.

Acknowledgement

It takes a village! This thesis would not have been possible without the support of many, here I mention a few.

Professor Frans Viljoen. I could not have wished for a better supervisor. Equal in brilliance and kindness. Your unrivalled expertise and consistent support made my doctoral experience worthwhile and life-changing. Asante sana mwalimu.

To my comrades in the doctoral struggle, Adebayo, Michael, Ayo and Henrietta, thank you for your friendship, what can I say, misery loves company ☺! To Jane, Sofia and Tabitha, thank you for the feminist sisterhood. To my friends turned family, Annette, Madge, Joyce and Faith, thank you for enduring my antisocial tendencies these last few years and still cheering me on.

To Edward, thank you for everything! And for always knowing when to push and when to pull back.

To my sisters dear, Segina and Bidde. Thank you, one of you for your dependable cheering and nagging ☺ the other for the space and support. Also, for finally taking me seriously and for not doing it all the time.

To my darling daughter Salma, with whom I began this journey in all senses of the phrase. I made it, not in spite of, but because of you.

Thengĩũ Ngai!

Table of contents

Declaration	2
Dedication	3
Acknowledgement	4
Table of contents	5
Abstract.....	10
1 Introduction.....	13
1.1 Background to the study.....	13
1.2 Research problem.....	18
1.3 Research questions.....	22
1.4 Clarification of terms, study delineation, limitations and assumptions.....	22
1.4.1 Clarification of terms.....	22
1.4.2 Study delineation and limitations.....	23
1.4.3 Assumptions.....	24
1.5 Significance of the study.....	24
1.6 Literature review.....	24
1.7 Research methodology.....	32
1.8 Chapter outline.....	33
2 Developing the concept of gender responsiveness.....	35
2.1 Introduction.....	35
2.2 The evolution of human rights and the exclusion of women.....	35
2.2.1 Demonstrating the exclusion of women in the development of human rights	35
2.2.2 Problematizing gender neutrality as a response to exclusion.....	42
2.3 Defining gender responsiveness.....	44
2.4 Delineating gender responsiveness.....	51
2.4.1 Substantive equality.....	52
2.4.1.1 The four-dimensional approach to substantive equality.....	56
2.4.1.2 Recognition of difference.....	58
2.4.2 Inclusion.....	60
2.4.3 Recognition of intersectional identities.....	61
2.4.4 Contextualised African response.....	65
2.4.4.1 Recognition of the lived realities of women in Africa.....	67
2.4.4.2 Enhancing the cultural legitimacy of human rights.....	69
2.5 How can an African treaty body be gender responsive?.....	79
2.6 Conclusion.....	81

3	Assessing the African Commission’s gender responsiveness in interpreting human rights norms.....	82
3.1	Introduction.....	82
3.2	Assessing the gender responsiveness of the norms of the African Charter and the Maputo Protocol	82
3.2.1	The African Charter and women’s rights protection	83
3.2.2	The Maputo Protocol and women’s rights protection.....	97
3.2.2.1	Extent to which the Maputo Protocol can achieve substantive equality 99	
3.2.2.2	Extent to which the Maputo Protocol is inclusive	102
3.2.2.3	The Maputo Protocol and intersectional identities	103
3.2.2.4	The Maputo Protocol as a contextualised African response	104
3.2.2.5	Implementation, monitoring and interpretation of the Maputo Protocol 109	
3.3	Evaluating the gender responsiveness of the African Commission’s individual communications procedure in interpreting human rights norms	112
3.3.1	Analysis of cases focused on women’s rights violations	113
3.3.1.1	<i>Egyptian Initiative for Personal Rights and Interights v Egypt</i>	113
3.3.1.2	<i>Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia</i>	123
3.3.2	Analysis of cases that have an implication for women’s rights jurisprudence.....	131
3.3.2.1	<i>Malawi African Association, Amnesty International & others v Mauritania</i> 132	
3.3.2.2	<i>Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan</i>	133
3.3.2.3	<i>Curtis Francis Doebbler v Sudan</i>	134
3.3.2.4	<i>Zimbabwe Human Rights NGO Forum v Zimbabwe</i>	136
3.3.2.5	<i>Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya</i>	138
3.4	Evaluating the gender responsiveness of the African Commission’s inter-state communications procedure in interpreting human rights norms	141
3.5	Evaluating the gender responsiveness of the African Commission’s investigative missions.....	143
3.6	Conclusion	145
4	The gender responsiveness of the African Commission in the execution of its promotional mandate.....	147
4.1	Introduction.....	147
4.2	Evaluating the gender responsiveness of the special mechanisms of the African Commission.....	147

4.2.1	The Special Rapporteur on the Rights of Women in Africa	149
4.2.1.1	Establishment of the mandate	150
4.2.1.2	The role of the SRRWA in the development and adoption of the Maputo Protocol	151
4.2.1.3	Women’s rights promotional missions of the SRRWA	153
4.2.1.4	Studies on the situation of women’s rights in Africa.....	158
4.2.1.5	Involvement in the development of resolutions and other soft law instruments.....	160
4.2.2	Other special rapporteurs.....	162
4.2.2.1	The Special Rapporteur on Human Rights Defenders.....	162
4.2.2.2	The Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa.....	166
4.2.2.3	The Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons.....	168
4.2.2.4	The Special Rapporteur on Freedom of Expression and Access to Information	172
4.2.3	Committees and working groups	173
4.2.3.1	Committee for the Prevention of Torture in Africa	173
4.2.3.2	Committee on the Protection of the Rights of People Living with HIV	176
4.2.3.3	Working groups	178
4.3	Evaluating the gender responsiveness of the African Commission’s soft law instruments.....	180
4.3.1	Resolutions.....	181
4.3.1.1	Thematic resolutions with an implication on women’s rights.....	181
4.3.1.2	Country-specific resolutions with implications for women’s rights ...	189
4.3.2	General Comments.....	192
4.3.2.1	General Comment on women and HIV.....	192
4.3.2.2	General Comment No. 2 on sexual and reproductive health rights	194
4.3.2.3	Joint General Comment on child marriage.....	196
4.3.2.4	General Comment No. 4 on the right to redress for victims of torture	197
4.3.3	Guidelines.....	199
4.3.3.1	Guidelines on combatting sexual violence and its consequences in Africa	199
4.3.3.2	Other Guidelines with implications for women’s rights.....	201
4.4	State reporting.....	205
4.4.1	State reporting guidelines.....	206

4.4.2	The gender responsiveness of the state reporting practice of the African Commission	210
4.4.2.1	State reporting under the African Charter regime	210
4.4.2.2	State reporting under the Maputo Protocol regime	213
4.5	Conclusion	220
5	Assessing the gender responsiveness of the African Commission in its external relations with other actors	221
5.1	Introduction	221
5.2	Evaluating the African Commission’s relationship with other African treaty monitoring bodies.....	222
5.2.1	Examining the African Commission’s relationship with the African Court for complementarity and gender responsiveness	222
5.2.1.1	Pathways of access to the African Court for women’s rights protection	223
5.2.1.2	Examining the Commission’s referral practice for gender responsiveness	225
5.2.2	The Commission’s relationship with the African Committee of Experts on the Rights and Welfare of the Child	229
5.2.3	Examining the African Commission’s relations with Regional Economic Communities from a rights perspective	233
5.2.3.1	Regional Economic Communities as avenues for women’s rights protection.....	233
5.2.3.2	The Commission’s practice and prospects concerning RECs.....	236
5.3	Assessing the gender responsiveness of the African Commission’s relationship with select organs of the African Union	240
5.3.1	The relationship with the AU Assembly, the Executive Council and the Permanent Representatives Committee.....	240
5.3.2	The relationship with pertinent units and mechanisms of the AU Commission concerned with women’s rights.....	246
5.4	Evaluating the gender responsiveness of the African Commission in its dealings with NGOs	250
5.4.1	NGOs engagement with the Commission’s protective mandate through the individual communications procedure	250
5.4.1.1	Litigants’ perspectives	250
5.4.1.2	Exploring the dearth of women’s rights litigation	255
5.4.2	NGOs participation in the Commission’s promotional mandate.....	258
5.4.2.1	Ease of granting observer status.....	258
5.4.2.2	Collaborative development of norms and joint campaigns with NGOs	260
5.4.2.3	Participation of NGOs in the proceedings of the Commission: Shadow reports and statements	262

5.4.2.4	The Commission’s receptiveness to the NGO Forum.....	263
5.5	Conclusion	266
6	Conclusion	268
6.1	Introduction.....	268
6.2	Key findings.....	268
6.2.1	Do the Commission’s interventions result in substantive equality?	269
6.2.2	Is the African Commission inclusive in its approach?	271
6.2.3	Does the African Commission recognise and respond to the intersectional identities of women in Africa?.....	273
6.2.4	Does the African Commission apply a contextualised African response in its work?.....	275
6.2.5	Ultimately, is the African Commission gender responsive?	278
6.3	Proposals towards enhancing the Commission’s gender responsiveness	279
6.3.1	Review of the African Commission’s women’s rights architecture: Introducing a Maputo Protocol division.....	279
6.3.2	Proposals towards enhancing the Commission’s mandates towards gender responsiveness	282
6.3.2.1	Popularisation of norms and standards.....	282
6.3.2.2	Communications procedure.....	282
6.3.2.3	Leveraging external relations.....	284
6.3.2.4	Engendering compliance of the Commission’s recommendations	284
6.4	Proposed areas for future research.....	287
6.5	Conclusion	289
	Bibliography	291
	Annex	326

Abstract

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) provides extensive protection to women's rights concerns. Through its provisions, it exhibits an African fingerprint that engenders its prospects of redressing the key concerns women in Africa face. Yet, the African human rights system is characterised by a significant schism between its normative robustness, on the one hand, and the poor situation of women's rights, on the other. Using the yardstick of 'gender responsiveness', this thesis accordingly examines the role played by the African Commission on Human and Peoples' Rights (African Commission), a key African Union human rights body, in redressing this discrepancy.

The concept 'gender responsiveness', defined as the extent to which norms and procedures effectively address the main concerns of women in Africa, is in this thesis for the first time used as the framework of analysis for an African human rights institution. The concept is understood as comprising four elements: the imperative of substantive equality in favour of women; the necessity for women's inclusion; the recognition of women's intersectional identities; and the need for a contextual African response to women's issues.

Diverse and overlapping factors influence the extent of the Commission's gender responsiveness. For instance, this thesis finds that before the entry of the Maputo Protocol, the Commission's outputs were less gender responsive, as the African Charter on Human and Peoples' Rights offers scant normative prospects to the redress of women's rights violations. Accordingly, the Commission has taken to rectifying this initial normative lapse through the development of an elaborate canvas of women's rights norms as exemplified by its involvement in the development of the Maputo Protocol, and in the adoption of soft law instruments such as General Comments and guidelines. At the same time, this normative strength fails to improve the situation of women's rights in Africa. While this failure is not solely attributable to the Commission, this thesis finds that the Commission does not pay equal attention in the popularisation and enforcement of women's rights laws and standards thereby heightening the *de jure* and *de facto* inconsistency complained of.

The thesis finds that while there is a progressive increase in attention to women's rights concerns, the Commission's endeavours infrequently resulted in substantive equality. In particular, the Commission greatly underutilises its protective mandate to advance women's rights. Women's rights adjudication is minimal and has failed to lead to the transformation of women's lived realities. This thesis also finds that, while the Commission develops norms that recognise women's intersectional identities, in practice it fails to apply these norms towards alleviating women's vulnerabilities that result in intersectional discrimination.

Women's inclusion at the Commission has delivered mixed results. The Commission's favourable gender composition has failed to bring about significantly enhanced gender responsiveness. Conversely, NGOs exerted far-reaching influence on the Commission's promotional mandate, and through their inclusion contributed to women-focused outcomes, such as General Comments.

African Union human rights treaties are premised on the promise of delivering human rights in an autochthonous manner. This thesis finds that the Commission often recognises the concerns that women in Africa face, but does not as frequently address itself to the enhancement of the cultural context, and the related issue of the legitimacy of women's human rights in Africa.

In its overall assessment of the Commission's execution of its mandate, the study reveals a progressive trend in the Commission's endeavours towards the greater protection and promotion of women's rights, particularly when contrasted to its earlier days. However, serious shortcomings and missed opportunities prevented the Commission from having achieved a more favourable impact.

To the extent that the Commission's practice does not reveal a gender responsive approach, the study examines the potential and makes recommendations towards improving gender responsiveness in the future. Drawing on the findings and emerging questions in this study, areas of further research are identified.

Key words: African Commission on Human and Peoples' Rights, women's rights in Africa, gender responsiveness, substantive equality, inclusion, intersectional identities, African response.

1 Introduction

1.1 Background to the study

‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’¹ This article and others in the Universal Declaration of Human Rights (Universal Declaration) along with its preamble² aptly capture the concept of universality, which is one of the critical elements of human rights. Since this thesis is preoccupied with gender responsiveness, it is telling to note that right from the beginning of the development of the human rights normative trajectory, the Universal Declaration called on a spirit of “brotherhood”, a gendered term whose meaning could easily have been conveyed by a more neutral term such as fraternity that does not invite an exclusivity challenge.

The understanding of universality as espoused by the Universal Declaration receives support from Jack Donnelly whose simple premise holds that since human rights are intrinsic on the basis of being human, they are then *prima facie* universal by definition.³ The global consensus on universality was further reaffirmed in the Vienna Declaration and Programme of Action (Vienna Declaration), which was adopted by the World Conference on Human Rights in Vienna on 25 June 1993. In its first article, the Vienna Declaration asserts that ‘[t]he universal nature of these rights and freedoms is beyond question’⁴ in reference to human rights and fundamental freedoms in the Universal Declaration and other international human rights instruments. While the universality of human rights is largely accepted, it is not entirely unchallenged. “The strongest challenge has been to claims of cultural universality.”⁵ Simply enunciated, the claim to the cultural challenge is that ‘the concept of human rights is a Western idea, imposed on the rest of the world, and that many cultures are resistant and unreceptive to the idea.’⁶ The reason

¹ Universal Declaration of Human Rights, article 1.

² Universal Declaration (as above) the preamble begins, ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’

³ J Donnelly ‘Cultural relativism and universal human rights’ (1984) 6 *Human Rights Quarterly* 400. See also J Donnelly ‘The relative universality of human rights’ (2007) 29 *Human Rights Quarterly* 281.

⁴ Vienna Declaration and Programme of Action, article 1.

⁵ L Henkin ‘The universality of the concept of human rights’ (1989) 506 *Annals of the American Academy of Political Science* 12.

⁶ As above 14.

for this resistance is allegedly premised on the fact that in being Western, some human rights are culturally foreign and therefore not applicable in non-Western contexts.⁷

The basis for regional human rights systems is therefore in part a response to the challenge of cultural universality. These systems should not however be seen as an affront to universality; to the contrary, regional human rights systems present an avenue to realise international human rights cognisant of regional particularities. In fact, one author in defence of universality goes as far as to conclude that ‘there are no regional human rights norms; there are only regional arrangements which supervise compliance with international standards.’⁸ While I do not concur and deem this assertion to be an exercise in hyperbole, I agree with the same author where she states that one of the roles of regional human rights bodies is ‘to provide a common minimum human rights standard for the region’.⁹

The other challenge to the universality of human rights is from a women’s rights perspective. Rebecca Cook for instance observes how respect for human rights fails to be universal on account of how international human rights law has not yet been deployed effectively ‘to redress the disadvantages and injustices experienced by women by reason only of their being women.’¹⁰ This exclusion challenge in fact extends to cultural relativity itself as many women’s rights violations are perpetuated under the guise of culture. Dianne Otto notes that ‘[i]n this project [of cultural relativism], states share a masculinist interest in defending the *status quo* of gender, albeit with manifold local variations.’¹¹ Otto further notes that both universalists and cultural relativists ‘reproduce a masculine narrative of legitimation.’¹² In illustration, Egypt entered a reservation to article 18(3) of the African Charter on Human and Peoples’ Rights (African Charter)¹³ to the effect that

⁷ A Pollis & P Schwab ‘Human rights: A Western construct with limited applicability’ in A Pollis & P Schwab (eds) *Human rights: Cultural and ideological perspectives* (1979) in the first chapter argue that the Western construction of human rights leads to their limited applicability in the non-Western world owing to cultural, developmental and ideological differences.

⁸ CM Cerna ‘Universality of human rights and cultural diversity: Implementation of human rights in different socio-cultural contexts’ (1994) 16 *Human Rights Quarterly* 752.

⁹ As above 749.

¹⁰ RJ Cook ‘Women’s international human rights law: The way forward’ in RJ Cook (ed) *Human rights of women: National and international perspectives* (2012) 3.

¹¹ D Otto ‘Rethinking the “universality” of human rights law’ (1997-1998) 29 *Columbia Human Rights Law Review* 13,14.

¹² As above 14.

¹³ African Charter on Human and Peoples’ Rights, article 18(3) which provides for ‘the elimination of every discrimination against women and also ensure[s] the protection of the rights of women and the child as stipulated in international declarations and conventions.

the article will be implemented in accordance with Islamic law;¹⁴ a reservation which is plainly premised on a claim to cultural relativity to the detriment of women's rights. This indictment of detriment is settled by Abdullahi An-Na'im when he observes the 'inferior status of women under Shari'a when compared to other contemporary legal systems or when judged by emerging international standards.'¹⁵ An-Na'im also lends support to the notion that the 'balance of universality and cultural relativity of human rights, especially of women'¹⁶ has proven extremely difficult to achieve and maintain. An-Na'im's solution to this challenge is in sync with this thesis' main proposition that '[o]ur commitment should not be to the rights of women in the abstract, or as contained in high-sounding international instruments ... It should be a commitment to the rights of women in practice'.¹⁷

The foregoing challenges to the universality of human rights aid in elaborating the rationale for setting up regional arrangements for the promotion and protection of human rights. Regional arrangements are deemed to better respond to regional peculiarities and the contexts of their constituents including women. Accordingly, regional human rights regimes being the European human rights system, the Inter-American system and the African human rights system (AHRs) have established various bodies, to oversee state compliance to human rights while cognisant of regional peculiarities. For the AHRs, that body is the African Commission on Human and Peoples' Rights, the subject of this research.

The evolution of the AHRs is marked by various significant phases. The first and most significant consists of the adoption of the African Charter by the Organisation of African Unity (OAU) in 1981.¹⁸ the African Charter entered into force in 1986 and has since been ratified by 54 of the 55 African Union (AU) member states with the exception of its newest returning member Morocco.¹⁹ The African Charter made provision for its implementation

¹⁴ African Commission on Human and Peoples' Rights <http://www.achpr.org/instruments/achpr/> (accessed 23 July 2015).

¹⁵ A An-Na'im 'The rights of women and international law in the Muslim context' (1987-1988) 9 *Whittier Law Review* 495.

¹⁶ As above 515.

¹⁷ An-Na'im n 15 above 516.

¹⁸ The OAU is now the African Union.

¹⁹ Information available at African Union 'List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples' Rights' available at https://au.int/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 19 August 2018).

organ, the African Commission. The African Commission was established in 1987 marking another significant phase of the AHRS.²⁰

The African Commission is established to promote human and peoples' rights and to ensure their protection within Africa.²¹ These objectives grant the Commission its dual mandate of human rights protection and promotion making it one of the most flexible human rights treaty bodies. The Commission's initial struggles particularly in executing its protective mandate are well documented prompting fervent calls for its strengthening (or replacement by others) through the establishment of an African Court.²² The narrative of ineffectiveness is no different from a women's rights perspective. Early commentators recorded the Commission's lack of equitable gender balance in its composition, over five years into existence, the Commission did not have a single female commissioner.²³ It was rightfully observed that the 'absence of female Commissioners [was] a poor reflection of the Commission's capacity to inspire confidence about its ability to protect the rights of women and to promote the equal treatment of women.'²⁴ Further, in a treatise reflecting on 30 years of the African Charter's implementation, the Commission is criticised for its lack of proactivity in the promotion and protection of women's rights coupled with its reticence in engaging states on their women's rights commitments.²⁵

²⁰ R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 11.

²¹ African Charter n 13 above art 30.

²² GJ Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 432 who in making a strong claim then for the establishment of an African Court asserted that the African Commission 'has relatively weak powers of implementation and investigation. It has no powers of enforcement. Its decisions either have declaratory effect or are merely recommendatory.' M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342-363 in articulating the rationale for an African Court regards the African Commission as weak and ineffectual and considers its decisions non-binding, lacking in enforcement mechanisms and attracting little attention from governments. NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 45 *Yale Human Rights and Development Law Journal* 98 who in identifying the potential effectiveness of the African Court points to the need to avoid the structural and normative deficiencies that have plagued the African Commission throughout its existence and which maladies are centred around the non-binding nature of the Commission's decisions. F Viljoen 'A human rights court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 13 in an article introducing the African Court observes that the need for political confirmation of the African Commission's recommendations before they become final has weakened the Commission's findings and resultantly inhibited state compliance.

²³ EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 16-17 notes that the 11-member membership of the Commission was all male until June 1993. One female commissioner was added in 1993 and another in 1995 and it would take many more years before this number became fully equitable.

²⁴ C Beyani 'Toward a more effective guarantee of women's rights in the African human rights system' in R Cook (ed) *Human rights of women: National and international perspectives* (1994) 303.

²⁵ R Manjoo 'Women's human rights in Africa' in M Ssenyonjo *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012) 148.

In trying to comprehend this gender blindness, one may perhaps advance the view that the Commission's normative framework for women's rights protection was relatively small in those early days. When the Commission began its work, it relied mainly and perhaps only on the African Charter for normative guidance as the AHRS normative framework was not as elaborate as it is today. For women's concerns, only two articles within the African Charter relate expressly to women's rights protection. The first, the Charter's general non-discrimination clause in article 2 which entitles individuals to enjoy all rights in the 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.'²⁶ The second and more central provision, article 18(3) which relates more explicitly to women by requiring states to '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.'²⁷ However, even this cannot serve as a justification, as it would appear that the Charter itself had anticipated this dearth of normative guidance within the AHRS thereby directing the Commission to look to 'international declarations and conventions'²⁸ in the protection of women's rights. Further, the Charter directs the Commission to 'draw inspiration from international law on human and peoples' rights'²⁹ and to 'take into consideration ... other general or special international conventions'.³⁰ Accordingly, the Commission also had for its usage and inspiration the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which a critical mass of states were in any event subject to.³¹

Thereafter, the Commission somewhat redeemed itself with its efforts to develop and lobby for the adoption and entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Accordingly, women in Africa have obtained procedural equality to a large extent via the

²⁶ African Charter n 13 above art 2 (emphasis mine).

²⁷ African Charter n 13 above art 18(3).

²⁸ African Charter n 13 above art 18(3).

²⁹ African Charter n 13 above art 60.

³⁰ African Charter n 13 above art 61.

³¹ At the time that the African Charter entered into force in 1986, 22 African states had already ratified CEDAW, by 1990 these ratifications rose to 27 and by 1999, 47 African states were party to CEDAW. Information available at United Nations Treaty Collection https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed 30 October 2018).

legal architecture. The African Charter together with the Maputo Protocol lay out a robust normative framework for the promotion and protection of women's rights in Africa.³²

1.2 Research problem

Women in Africa suffer multiple human rights violations. This is evidenced by rampant sexual and gender-based violence against them, persisting harmful cultural practices, inequality in family and social life, unequal representation in leadership and political spheres, poorer access to socio-economic rights and a myriad of other challenges and gender-based discrimination. Women in fact suffer disproportionately from discrimination as it is often based not only on sex but also on intersecting grounds such as age, religion, ethnic group, social class and sexual orientation.

The significance of these concerns is generally unchallenged and in fact officially acknowledged. African ministers in charge of gender and women affairs meeting at the Seventh African Regional Conference on Women (Beijing + 10)³³ concluded that 'normative gains are not yet reflected in substantial changes in women's lives. African women, especially those living in rural communities and those with disabilities, still face daunting challenges.'³⁴ This narrative remains consistent a decade after the abovementioned convening of the African Ministers responsible for gender and women's affairs. In 2014, they noted 'with concern the uneven progress made on achieving gender equality and women's empowerment and the challenges that African countries continue to face in implementing the Beijing Platform for Action'³⁵ which calls for transformational change for women and girls in Africa. Where gender inequality thrives, women are subjected to several violations or disadvantages on account of their gender. 'On a macro level, these disadvantages translate into wider, cross-cutting socio-economic, political

³² For a brief historical overview and thematic discussion of the Maputo Protocol see: F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72-84.

³³ Seventh African regional conference on women (Beijing + 10) decade review of the implementation of the Dakar and Beijing platforms for action: Outcome and the way forward Addis Ababa 12-14 October 2004 available at <http://www.un.org/womenwatch/daw/Review/english/documents/ECAOutcomeDocument-English.pdf> (accessed 3 August 2015).

³⁴ Beijing + 10 (as above).

³⁵ Addis Ababa Declaration on Accelerating the Implementation of the Beijing Platform for Action made during the Ninth African Regional Conference on Women (Beijing+20) Addis Ababa, Ethiopia 17-19 November 2014. Available at http://www.uneca.org/sites/default/files/uploaded-documents/Beijing20/acg14-0009-ore-declaration_addis_regional_conference_beijing_20_14-01567.pdf (accessed 3 August 2015).

and security challenges.³⁶ Overall, in the African context, gender inequality is deeply entrenched despite regional normative standards that should ideally guarantee the contrary. The African Commission has also frequently acknowledged these human rights challenges to women.³⁷

While the African Commission is not expected to be a panacea to all the problems facing women in Africa, there is a sense that the Commission has not effectively lived up to its mandate to respond to the concerns that women in Africa face that are within its purview. Despite the present-day robustness of the normative framework for women's rights protection in Africa, the Commission's interventions often fail to result in substantive equality for women in Africa. This is particularly puzzling given the fact that the Commission's composition is particularly gender balanced with in fact more women than men comprising and leading the Commission in the last few years.³⁸ Through the African Commission's protective mandate, the Commission has the ability to hold states accountable to their commitment to women's rights. In practice, it is trite knowledge that the dearth of women's rights cases is not singularly attributable to the Commission. That said, its handling of even the few cases seems to fall short of best practice in terms of adherence to existing women's rights standards as scrutinised later in this thesis. The African Commission also has a promotional mandate through which it can prompt states into more women's rights conscious action. In practice, women's rights issues do not seem to feature in the Commission's radar as much as they could in the exercise of their promotional activities such as in the supervision of state reporting.

³⁶ W Byanyima 'Africa and gender equality: Priorities of the AU' in J Akokpari, A Ndinga-Muvumba & T Murithi (eds) *The African Union and its institutions* (2008) 319.

³⁷ See for instance: Resolution on the Situation of Women and Children in Africa, ACHPR/Res.66(XXXV)04 adopted at the 35th Ordinary Session, Banjul, The Gambia, 21 May – 4 June 2004, Resolution on Maternal Mortality in Africa, ACHPR/Res.135(XLIV)08 at the 44th Ordinary Session, Abuja, Nigeria, 10 – 24 November 2008, Resolution on the Situation of Women and Children in Armed Conflict, ACHPR/Res.283(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014, Resolution on the Situation of Women in the Democratic Republic of Congo ACHPR/Res.103(XXXX)06 adopted at the 40th Ordinary Session, Banjul, The Gambia, 15 - 29 November 2006, Resolution on the Crimes Committed against Women in the Democratic Republic of Congo, ACHPR/Res.173(XLVIII)10 adopted at the 48th Ordinary Session, Banjul, The Gambia, 10 - 24 November 2010, Resolution on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo, ACHPR/Res.284(LV)14 adopted at the 48th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014 and Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt, ACHPR/Res.288(EXT.OS/XVI)14 adopted at the 16th Extraordinary Session, Kigali, Rwanda, 20 - 29 July 2014.

³⁸ African Commission on Human and Peoples' Rights, About ACHPR. Available at <http://www.achpr.org/about/> (accessed 25 July 2018) and African Commission on Human and Peoples' Rights, About ACHPR, Former commissioners <http://www.achpr.org/about/former-commissioners/> (accessed 25 July 2018).

The Commission's weaknesses have led some to call for the establishment of a separate body altogether under the belief that this might improve women's rights protection. Reflecting on the Commission's achievements with regard to women's rights during its 20th anniversary, one commentator concluded as follows:³⁹

There needs to be a specialist body similar to the CEDAW committee to monitor implementation of the protocol. The African Commission on Human and Peoples' Rights, in its work to monitor the charter, has not paid enough attention to the protocol. Even though it has appointed a Special Rapporteur on the Rights of Women, this office needs more human and financial resources to carry out its mandate effectively. State parties are bound by Article 26 of the protocol to report on progress in its implementation, but they are not likely to take this seriously if they are not required to report to a particular body specifically set up to monitor the protocol.

This call was reiterated by the former UN Special Rapporteur on violence against women, its causes and consequences, who concluded in her assessment of the Maputo Protocol that 'it would have been better if a separate body had been established under the Protocol to deal specifically with such human rights issues affecting women.'⁴⁰ More recently, this call has been renewed, with Ashwanee Budoo prompting the consideration of a separate committee among other mechanisms,⁴¹ and Annika Rudman making a definite proposal for a women's rights committee as being a key to current challenges in the enforcement of the Maputo Protocol.⁴²

While the deficiencies of the African Commission are admitted and in fact inform this study, women's rights protection and promotion activities, recent initiatives seem to imply a more positive trajectory. Some interventions of the African Commission point to positive developments for women's rights in the region. The African Commission has for example taken to expanding the normative framework for women's rights protection through a growing practice of developing thematic soft law instruments such as general comments and guidelines akin to the long-standing practice in the UN human rights system. The Commission has adopted three general comments on women's rights issues. The first is on article 14(1)(d) and (e) of the Maputo Protocol on women's rights on the

³⁹ R Musa 'Women, equality and the African human rights system' in H Abbas (ed) *Africa's long road to rights: Reflections on the 20th anniversary of the African Commission on Human and Peoples' Rights* (2007) 34.

⁴⁰ Manjoo 'Women's human rights in Africa' n 25 above 149.

⁴¹ A Budoo 'Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union' (2018) 18 *African Human Rights Law Journal* 58-74.

⁴² A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 319-345.

right to self-protection and to be protected from HIV infection, as well as their right to be informed of their HIV status and that of their partners.⁴³ The second unpacks article 14(1)(a), (b), (c) and (f) on women's right to control their fertility, choice of contraception and family planning education; article 14(2)(a) on women's rights to adequate, affordable and accessible health services; and article 14(2)(c) on the right to abortion.⁴⁴ The third is a Joint General Comment on child marriage co-developed with the African Committee of Experts on the Rights and Welfare of the Child.⁴⁵ The Comments aim to give full effect to the respective rights by ensuring that states understand the meaning of those rights and the respective state obligations that arise.

In light of the foregoing, the normative robustness of the AHRS for women's rights protection signals the maturity and progress of the first phase of women's emancipation in Africa, that of attaining procedural equality. The next phase necessarily requires for the continent's normative landscape to transform the daily experiences of women in Africa and the African Commission's mandate can contribute to this transformative process. As stated, through literature and the author's own personal interactions with the Commission, there is the sense that the Commission is not fully utilising its mandate in favour of women's rights. At the same time, an exhaustive discussion of the totality of the Commission's mandate with regards to women's rights has not been undertaken. This dearth limits a holistic understanding of the Commission's practice but more importantly its prospects towards reconciling the significant dissonance between the *de facto* and *de jure* situation of women's rights in Africa.

⁴³ General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa available at <http://www.achpr.org/instruments/general-comments-rights-women/> (accessed 5 August 2015).

⁴⁴ General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa available at <http://www.achpr.org/instruments/general-comment-two-rights-women/> (accessed 5 August 2015).

⁴⁵ Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child available at http://www.achpr.org/files/news/2018/01/d321/joint_gc_acerwc_achpr_ending_child_marriage_eng.pdf (accessed 23 April 2018).

1.3 Research questions

In order to assess the Commission, this thesis develops an original framework of analysis referred to as gender responsiveness and then establishes to what extent the African Commission is gender responsive in its mandate. The reason for the development of an original framework for analysis is that drawing from the introductory sentiments, a discussion on women's rights in Africa needs to be cognisant of both cultural and women's rights driven objections to the universality of rights. Accordingly, the framework for analysis developed in this thesis is designed to assess and respond specifically to a human rights treaty body in Africa.

In light of the foregoing, the main preoccupation of this thesis is to develop a framework for analysis and then establish to what extent the African Commission is gender responsive. Accordingly, this study answers the following research questions:

1. What are the elements of a gender responsive approach of a human rights treaty body in Africa?
2. Does the African Commission execute its protective mandate in a gender responsive manner?
3. Does the African Commission execute its promotional mandate in a gender responsive manner?
4. Is the African Commission gender responsive in its relations with external intergovernmental and non-governmental actors?

1.4 Clarification of terms, study delineation, limitations and assumptions

1.4.1 Clarification of terms

While the term 'gender responsiveness' is not novel, it has not received much scholarly attention from an international human rights law perspective. The term is therefore uniquely defined and delineated in line with the women's rights concerns of international human rights law in Africa. In this study, gender responsiveness refers to the extent to which norms and procedures effectively address the main concerns that women in Africa face. The term is further elaborated upon in the literature review below and in chapter 2.

1.4.2 Study delineation and limitations

In assessing the gender responsiveness of the African Commission's mandate, this thesis is delineated by a substantive and temporal scope of work. Substantively, this work includes in the scope of its analysis communications, state reports, standard-setting documents and reports of protective and promotional missions. Clearly it would be impossible to closely analyse such an abundance of material in its totality. The choice of specific sources in this thesis is informed by those instances where the mandate in question deals with women's rights issues or overlooked a clear opportunity to do so. A thorough desktop review guides the delineation process such that ultimately almost all materials have at least cursorily been reviewed, but not all are included in the analysis. Any other approach would render the thesis too broad and monotonous while not necessarily affecting the value or direction of the findings.

The study is also informed by a temporal scope. The African Commission was established in 1987 and has therefore been in existence for more than three decades. It is therefore impossible to cover in equal measure the full range of all the years and accordingly there is a more limited coverage of the early years. The effective cut-off date of the study's temporal scope is 31 August 2018 and efforts have been made to update the work up until this date.

The observable limitation relates to the study's use of a gender responsiveness framework of analysis to assess the Commission. Gender responsiveness is categorised into four parameters, and the individual parameters sometimes consist of different factors. While categorisation in this regard provides a useful and practical tool to guide the discussion, one possible limitation is that it can have a reductionist effect to the analysis. This limitation can be mitigated in two ways: first, the gender responsiveness parameters are developed not as rigid strictures, rather as highly interactive and mutually reinforcing elements. Second, having anticipated the limitation, the analysis in the thesis is undertaken in a nuanced manner. Ultimately, the benefit of erring on the side of structure sidesteps the alternative, namely, an abstract and possibly haphazard assessment of what is a very broad study area.

1.4.3 Assumptions

While this thesis interrogates the working of a supra-national regional human rights institution, it remains undeniably true that human rights matters at the national level are realised through national institutions. However, the study assumes that the extent to which gender responsiveness is sustained at the African Commission will have a direct bearing on substantive equality at the domestic level. This assumption is based on the expectation of subsidiarity grounded in article 1 of the African Charter. This article lays out the theoretical foundation of the notion that states have the primary obligation to give effect to human rights.⁴⁶ The Commission consequently exists to check and guide states in this regard. Accordingly, this study does not engage in an impact assessment of the status of women's rights at the national level but will instead use country contexts and women's rights situations to illustrate how the African Commission carried out its mandate.

1.5 Significance of the study

The gender responsiveness framework serves two dual objectives. First, it serves as a framework of analysis in assessing the Commission's twin mandates and its relations with external actors from a women's rights perspective. Second, it provides as a guide to inform the Commission's future interventions in the area of women's rights. The Commission needs to be more proactive in its approach towards women's rights concerns. A conscious and proactive approach will steer the Commission towards more positive developments and less missed opportunities and ultimately to an effective utilisation of its mandate towards women's rights promotion and protection.

1.6 Literature review

Gender responsiveness

As alluded to in the background to the study, international human rights law has traditionally not been cognisant of women's concerns and scholars such as Rebecca Cook have argued that international human rights law needs to be re-characterised as gender

⁴⁶ African Charter n 13 above art 1.

conscious.⁴⁷ Gender responsiveness aims to re-characterise international human rights law and such re-characterisation calls for a feminist enquiry and this thesis is accordingly grounded in feminist legal theory. Nicola Lacey succinctly captures feminist legal theory in her book on the same when she writes:⁴⁸

Normatively, therefore, feminist legal theory aspires to produce both a reasoned critique of current legal arrangements and—in some versions— a positive conception or vision of how law might be constructed in ways which move towards ideals of sex equality or gender justice.

Writing still about feminist legal theory and the rights of women in a separate work, Lacey asserts that feminist legal theory ‘is characterised by a particularly intimate linkage between theory and practice: both with a rejection of any strong division between the two’⁴⁹ and adds that feminist legal theory ‘is conceptualised as an interpretive approach which seeks to get beyond the surface level of legal doctrine and legal discourse’.⁵⁰ Feminist legal theory is therefore a most apt theoretical paradigm for a thesis whose research problem is grounded in deciphering dissonance between robust women’s rights norms and their lack of equality in practice while at the same time questioning those very norms.

Beyond the underlying theory, a specific feminist method is developed to guide the analysis in this thesis. Writing about feminist legal methods in a treatise on feminist legal theory, Katharine Bartlett outlines the importance of feminists articulating their methods to enhance and anchor their claims.⁵¹ Hilary Charlesworth on feminist scholarship in international law concludes that ‘feminist methodologies suggest that prescriptions of women’s equality must respond to the needs and desires of the women we think we are helping [and] [u]nderstanding these needs is not always easy’.⁵² The solution to this challenge, she advances, ‘is to devise practical and responsive feminist methods to support feminist political projects.’ The development of the gender responsiveness method is informed by and a response to such counsel. Bartlett notes that feminist

⁴⁷ RJ Cook ‘Women’s international human rights law: The way forward’ in RJ Cook (ed) *Human rights of women: National and international perspectives* (2012) 10.

⁴⁸ N Lacey *Unspeakable subjects: Feminist essays in legal and social theory* (1998) 3.

⁴⁹ N Lacey ‘Feminist legal theory and the rights of women’ in K Knop (ed) *Gender and human rights* (2004) 17.

⁵⁰ As above 19.

⁵¹ KT Bartlett ‘Feminist legal methods’ in KT Bartlett & R Kennedy (eds) *Feminist legal theory: Readings in law and gender* (1991) 370-393.

⁵² H Charlesworth ‘Talking to ourselves? Feminist scholarship in international law’ in S Kouvo & Z Pearson *Feminist perspectives on contemporary international law: Between resistance and compliance?* (2011) 32.

methods are in fact a means to feminist ends and are also ends in themselves.⁵³ Likewise, in this thesis, gender responsiveness is a means to assessing the Commission and the development of the feminist method is an end in itself.

Gender responsiveness as a feminist method is informed specifically by difference feminism which is a variety of feminist legal theory, as feminist legal theory is in itself not a unitary genre.⁵⁴ Lacey exhaustively discusses difference feminism exemplifying its dynamic role in law in constructing and underpinning gender hierarchies.⁵⁵ This is important in exposing the gendered nature of law's power and trying to imagine how it might be configured differently.⁵⁶ Essentially, the need for a gender responsive approach draws its justification from an acknowledgement of the differences between men and women and consequently the need for approaches that respond to these differences. "Difference" became a major theme in feminist legal theory in the 1980's.⁵⁷ Difference theory is understood in two main ways; one way 'considers differences among women of different races, classes, and sexual orientations.'⁵⁸ However, the preoccupation of this study and the need for gender responsiveness is the 'major strand [which] discusses differences between women and men.'⁵⁹

This approach of the understanding and utility of the difference theory receives support from Martha Fineman a preeminent feminist theorist in her work on the theory of difference in feminist legal scholarship. Fineman similarly articulates the theory of difference as one that is concerned with the differences between men and women and in fact considers the difference approach to be one of 'theoretical and political necessity'. She notes that failure to establish differences between men and women has effectively led to laws that predominantly represent only male experiences and norms. She contends that 'critiquing the law from a feminist perspective requires understanding how women's

⁵³ Bartlett n 51 above 393.

⁵⁴ Lacey 'Feminist legal theory and the rights of women' n 49 above 17.

⁵⁵ Lacey *Unspeakable subjects: Feminist essays in legal and social theory* n 48 above 192.

⁵⁶ Lacey *Unspeakable subjects: Feminist essays in legal and social theory* n 48 above 218.

⁵⁷ M Becker, CG Bowman, VF Nourse & KA Yuracko *Cases and materials on feminist jurisprudence: Taking women seriously* (2007) 91.

⁵⁸ This understanding of difference has its roots in the socialist and radical lesbian feminism of the seventies. Becker, Bowman, Nourse & Yuracko as above 91.

⁵⁹ Becker, Bowman, Nourse & Yuracko n 57 above 91.

perceptions and experiences differ from men's and how such differences are relevant to the development and implementation of legal doctrines and theories.⁶⁰

In her work on feminist legal theory and the rights of women, Nicola Lacey articulates how '[d]ifference feminism moves beyond standard rule of law values such as formal equality.'⁶¹ She instead associates difference feminism as the tool to question and criticise gender neutrality. The antithesis of gender responsiveness is perhaps gender neutrality that is grounded in liberal feminism whose underlying strategy according to Lacey is said to be:⁶²

[The] assimilation of women to a standard set by and for men: wherever a woman can make herself look sufficiently like a man, can conform her life to male patterns or standards, she will be treated equally.

This criticism of gender neutrality and liberal feminism is also made by Cook who notes the following:⁶³

Liberal feminism attempts to realise the equal treatment guaranteed by existing law, and thereby discounts intrinsic differences between men and women. A problem with this approach is that it fails to understand the structural imbalance of power between men and women and the systemic nature of discrimination.

Similarly, Fineman in her article on feminist theory in law observes that when equality is translated as "sameness of treatment", it 'actually operates as a conceptual obstacle to the formulation and implementation of solutions to the unique economic and societal problems women encounter.'⁶⁴ All these criticisms lend themselves to the need for a gender responsive approach that accommodates differences.

Lacey further positions difference feminism to be characterised by the following themes: the substance of law as reflecting, implicitly, a male point of view; the constitution of the legal subject as male; legal methods as masculine; the images of women and men, femininity and masculinity in legal discourse; the conceptual framework of legal reasoning; and the enforcement of laws.⁶⁵

⁶⁰ ML Fineman 'Challenging law, establishing differences: The future of feminist legal scholarship' (1990) 42 *Florida Law Review* 26.

⁶¹ N Lacey 'Feminist legal theory and the rights of women' in K Knop (ed) *Gender and human rights* (2004) 26.

⁶² N Lacey 'Feminist legal theory and the rights of women' in K Knop as above 26.

⁶³ RJ Cook 'Women's international human rights law: The way forward' in RJ Cook n 47 above 5.

⁶⁴ MA Fineman 'Feminist theory in law: The difference it makes' (1992) 2 *Columbia Journal of Gender and Law* 1,2.

⁶⁵ N Lacey 'Feminist legal theory and the rights of women' in K Knop n 49 above 26-30.

The foregoing characterisation and discussion of the difference approach of feminist legal theory lends itself perfectly to the research at hand. The study will similarly examine the normative conceptualisation of the AHRs, the norms developed by the Commission itself as well as its implementation with the view of assessing whether the same is constructed and applied from a male or neutral conceptualisation to the detriment of women's rights. A thesis on gender responsiveness also necessarily calls for a look at various theoretical approaches and academic works on equality and inequality; this discussion is likewise grounded in feminist legal theory.⁶⁶

This thesis in its background presents two objections to the universality of the international human rights law project, from a cultural as well as from a women's rights perspective. Grounding this thesis in feminist legal theory accordingly responds to one of these concerns, the women's rights concern. However, in order to appropriately assess and respond to women's rights concerns in Africa, gender responsiveness will be nuanced and infused with African feminist theories and other African perspectives associated with eminent African scholarship.

Gender responsiveness as envisaged in this thesis cannot be developed from a purely Western feminist lens. One of its tenets in particular, that of a contextualised African response, is better developed and in fact can perhaps only be construed from an African feminist lens. At this juncture, it is important to nuance the theoretical approach taken in this thesis in this regard. It differs for instance from some trends in African gender scholarship that position African scholarship on gender completely at odds with Western feminism. Oyeronke Oyewumi for instance deems gender distinction to be a completely Western concept and in her book on Western gender discourse in the Yoruba society of Nigeria, she completely rejects any association or application of Western categorisation, claiming that Yorubas organised socially purely on the basis of seniority with gender playing no role.⁶⁷ She reiterates this hypothesis in a separate book chapter arguing that the conceptualisation of gender is Eurocentric, concluding that African social categories

⁶⁶ A comprehensive discussion on equality from a feminist perspective is to be found in: KT Barlett & R Kennedy (eds) *Feminist legal theory: Readings in law and gender* (1991); S Kouvo & Z Pearson (eds) *Feminist perspectives on contemporary international law: Between resistance and compliance?* (2011); D Buss & A Manji *International law: Modern feminist approaches* (2005).

⁶⁷ O Oyewumi *The invention of women: Making an African sense of Western gender discourse* (1997).

are 'fluid, highly situational and not determined by body type.'⁶⁸ Oyewumi's views in this regard are subject to an extensive criticism by Bibi Bakare-Yusuf who cautions against and rejects 'any attempt to assign a particular conceptual category as belonging only to the "West" and therefore inapplicable to the African situation.'⁶⁹ To do so, she argues is quite ironic, for an exclusionary approach to difference, as she wittily observes is arguably quite Western. More importantly though, she makes the following assertion:⁷⁰

For millenia, Africa has been part of Europe just as Europe has been part of Africa. Out of this relation, a whole series of borrowed traditions from both sides have been, and continue to be, brewed and fermented. To deny this inter-cultural exchange and reject all theoretical imports from Europe is to violate the order of knowledge.

Even if one were to agree with views such as those of Oyewumi, it is at best an anthropological fixation. This is because the situation has long since changed and gender is an indisputable organising factor in African societies today. As another commentator rightfully quotes Oyewumi herself, '[f]or females, therefore, colonisation was a two-fold process of racial discrimination and gender subordination.'⁷¹

From a purely pragmatic stance, the theoretical stance taken in this thesis, namely, to seamlessly interweave Western and African knowledge-sets, has long been settled and is raised here to exemplify that the methodological approach is conscious rather than haphazard. The hegemony of Western culture on Africa owing to the realities of colonialism and neo-colonial influence, necessitate a methodology that is alive to all these factors. Sylvia Tamale advances the same position when she asks the question: 'Can gender theory be used to analyse non-Western societies?'⁷² In response, she corroborates the approach in this thesis noting that colonialism left behind a formal structure resembling that of Western societies and concludes:⁷³

[T]he scaffolding of Western gender theory can be applicable to African societies for two reasons: first, because the general social and legal structure of most postcolonial African states is based on a Western model; second, and more important, because the division of labor in Africa, as in

⁶⁸ O Oyewumi 'Conceptualising gender: Eurocentric foundations of feminist concepts and the challenge of African epistemologies' in S Anfred *et al African gender scholarship: Concepts, methodologies and paradigms* (2004) 8.

⁶⁹ B Bakare-Yusuf "'Yorubas don't do gender": A critical review of Oyeronke Oyewumi's *The invention of women: Making an African sense of Western gender discourses*' in S Anfred *et al African gender scholarship: Concepts, methodologies and paradigms* (2004) 79.

⁷⁰ As above.

⁷¹ O Oyewumi *The invention of women: Making an African sense of Western gender discourse* as cited in FC Steady (ed) 'An investigative framework for gender research in Africa in the new millenium' in S Anfred *et al* (eds) *African gender scholarship: Concepts, methodologies and paradigms* (2004) 49.

⁷² S Tamale *When hens begin to crow: Gender and parliamentary politics in Uganda* (1999) 30.

⁷³ As above 30-31.

Western societies, has always been based on sex—a major principle of gender theory in explaining the universal oppression of women.

Tamale however cautions that, in African contexts, a pure analysis of gender oppression is not sufficient and attention must be paid to other factors that inform gender discourse. Gender responsiveness as developed in this thesis indeed takes this into account and it is for this reason that one of the parameters of gender responsiveness is the recognition of the intersectional identities of women in Africa and the resultant multiple oppressions. Bringing this discussion to a conclusion are Charlesworth's views on this concern, of the perceived dissonance of the Western and African feminisms:⁷⁴

[P]atriarchy and the devaluing of women, although manifested differently within different societies, are almost universal... the very basis of feminist theory is the experience of women, there will inevitably be tension between universal theories and local experience in any feminist account of international law... But while no monolithic "women's point of view" can be assumed, it is also important to acknowledge commonalities across cultures.

The gender responsiveness approach is reflecting of the foregoing views by Tamale and Charlesworth which moreover enables it to attain a flexibility that recognises the inherent dualism that exists in any human rights conversation in African particularly concerning women.

The African Commission

The African Commission has been the subject of broad and continuous scholarly attention. One of the earliest works is such as the treatise by Evelyn Ankumah⁷⁵ who conducts a thorough exposition of the Commission akin to what this work attempts to undertake but this time from a gender responsive perspective. Rachel Murray's take on the African Commission is from an international law perspective where in addition to a historical overview and introduction to the Commission, she tests the Commission's personality against certain theoretical concepts.⁷⁶

Frans Viljoen makes a significant contribution through *International human rights law in Africa*.⁷⁷ The treatise explores the entire African human rights system ranging from the normative framework to the institutional architecture. Viljoen undertakes a thorough

⁷⁴ H Charlesworth 'What are "women's international human rights"?' in RJ Cook (ed) *Human rights of women: National and international perspectives* (2012) 62-63.

⁷⁵ EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996).

⁷⁶ R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000).

⁷⁷ F Viljoen *International Human Rights Law in Africa* (2012).

analysis of the African Commission's mandate with commentary on its character and development across the years.

Fareda Banda's *Women, law and human rights: An African perspective*⁷⁸ is a treatise on international human rights law from an African perspective. It centres on the centrality of the gender question within the cultural relativism debate and in doing so includes discussion on the role of the African Commission and the provisions of the Maputo Protocol.

Other writers that address the African Commission are Killander and Manjoo. Magnus Killander in a treatise commemorating 30 years of the African Charter,⁷⁹ succinctly reviews all facets of the Commission's mandate. The present work attempts such a review on an expanded scale and from a women's rights perspective. Also useful in the same treatise is Rashida Manjoo's chapter on women's rights in Africa, which explores a broad scope of the normative landscape of the AHRS, including at the sub-regional level from a women's rights perspective.⁸⁰ In doing so she includes brief discussion points of the African Commission and the Special Rapporteur on the Rights of Women in Africa.

There are also recent works released in the course of writing this thesis that in great depth discuss distinct elements of the African Commission or the Maputo Protocol and have proven useful to this work. Ebenezer Durojaye and Olubayo Oluduro's⁸¹ article for instance reviews the women's rights jurisprudence of the Commission examining its inculcation of the woman question, an examination similar to that of gender responsiveness albeit on related but different parameters. Annika Rudman's⁸² and Ashwanee Budoo's⁸³ articles examine the enforcement of the Maputo Protocol and

⁷⁸ F Banda *Women, law and human rights* (2005) 41-45.

⁷⁹ M Killander 'The African Commission on Human and Peoples' Rights' in M Ssenyonjo *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012).

⁸⁰ R Manjoo 'Women's human rights in Africa' in M Ssenyonjo *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012).

⁸¹ E Durojaye & O Oluduro 'The African Commission on Human and Peoples' Rights and the woman question' (2016) 24 *Female Legal Studies* 315-336.

⁸² A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 319-345.

⁸³ A Budoo 'Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union' (2018) 18 *African Human Rights Law Journal* 58-74.

consider the role and performance of the Commission. Rudman does so from an access to justice perspective illustrating how the absence of a women's rights committee has adversely impacted the enforcement of the Maputo Protocol. Budoo similarly posits weaknesses of the current enforcement mechanisms for the Protocol, and advances varied architectural changes that may alleviate current challenges.

The foregoing literature review illustrates that clearly there are numerous writings on feminist methods that serve as influence for the present work. Clearly also, there have been several works, the foregoing is in fact a limited review, assessing the mandate of the African Commission, and some of them touching on women's rights. The present study seeks to contribute to and further weave threads into the robust scholarly tapestry. The present study represents a novel contribution in its development of a feminist method uniquely suited to an African human rights treaty mechanism and undertaking an exposition of the totality of the Commission's mandate in a singular treatise from a gender responsive perspective.

1.7 Research methodology

From a theoretical perspective, this thesis is anchored in feminist legal theory. More specifically, a particular feminist method, gender responsiveness, is formulated and relied on. As articulated in the literature review, gender responsiveness is in turn influenced by two feminist approaches, difference feminism and African feminism.

In terms of the research methods, the thesis takes on two approaches. In the first approach, the bulk of the research is doctrinal. It is as such, undertaken through a textual, literature-based analytical examination of primary sources such as treaties, cases, resolutions, declarations and recommendations, activity reports, state reports, concluding observations and several other African Commission documents. In addition, secondary sources comprising of existing literature on the area of research are also examined.

In the second approach, the study employs empirical research in a limited extent in chapter 5 in order to gain first-hand knowledge of the perspectives of women's rights

NGO representatives on the gender responsiveness of the African Commission. The empirical research was undertaken having received the requisite ethical clearance from the Research Ethics Committee, Faculty of Law, University of Pretoria. The research protocol entailed semi-structured questionnaires which were administered through interviews. Key respondents were identified by selecting up to ten women's rights focused NGOs based on two qualifiers: those who had observer status before the African Commission and those who did not but nonetheless interacted with the Commission. Those NGOs that had brought cases before the Commission were specifically targeted and since observer status is not a prequalification to litigate at the Commission, these NGOs were covered by the dual criteria. The questionnaire focused on determining the respondent's perceptions on access and gender responsiveness of the Commission in order to complement the doctrinal findings. An interview with the Special Rapporteur on the Rights of Women in Africa was also undertaken in order to obtain an introspective view of the Commission's gender responsiveness and in some instances the mandate-holder's views served to contextualise the doctrinal findings as well as the views of the NGO actors. The list of interviewees and the research protocol relied on are included in the annex.

1.8 Chapter outline

This thesis consists of six chapters.

The present chapter, chapter 1, introduces the study. It does so by means of a background to the study and the research problem that set out the rationale for the study. This is followed by the research questions, clarification of terms, delimitation of the study, literature review, research methodology and the overview of subsequent chapters.

Chapter 2 develops a framework for analysis by formulating the elements of a gender responsive approach for a human rights regime in Africa. In constructing this approach and deducing its respective elements, reliance is placed on existing works from a feminist legal approach together with an African feminist perspective in some instances. The objective is to develop a framework for analysis that can be used in this study as well as

in other subsequent works as a feminist method for assessing African human rights treaty mechanisms.

Chapter 3 reviews the gender responsiveness of the African Commission's protective mandate. Germane to this is the normative framework available for women's rights protection and the analysis accordingly begins with an assessment of the African Charter and the Maputo Protocol. The analysis then scrutinises the protective activities of the Commission by virtue of its communications procedure and investigative missions.

Chapter 4 analyses the gender responsiveness of the African Commission's promotional mandate. The discussion begins with an assessment of the Commission's special mechanisms necessarily comprising a detailed discussion of the Special Rapporteur on the Rights of Women in Africa and proceeding to evaluate other special mechanisms. Following this is a review of the Commission's practice in developing soft law normative standards. The Commission's gender responsiveness is inferred from the analysis of the normative instruments themselves such as general comments and guidelines. Finally, the analysis evaluates the gender responsiveness of the Commission's state reporting practice ranging from its reporting guidelines, reporting under the African Charter as well as under the Maputo Protocol.

Chapter 5 analyses the gender responsiveness of the relationship between the African Commission with other intergovernmental and non-governmental organisations with a women's rights mandate or those who interact with the Commission in the course of its protective and promotional mandates. At the intergovernmental level this includes the assessment of the Commission's relationship with AU political organs, the African Court and up to the sub-regional level. At the non-governmental level, the assessment focuses on the perspective of NGOs that have observer status before the African Commission.

Chapter 6 concludes the study drawing from the findings and the extent of gender responsiveness. This entails a restatement of the research questions along with the emerging findings in a thematic manner. The findings lead to recommendations and finally areas of future research are suggested.

2 Developing the concept of gender responsiveness

2.1 Introduction

One of the main preoccupations of this thesis is to develop the concept of gender responsiveness as a framework for analysis, which can then be utilised to establish to what extent an African treaty body is gender responsive. This chapter begins by historically tracing the evolution and development of human rights. This retrospection is informed by a need to demonstrate that because women were excluded from the initial conceptualisation of human rights, this has had a negative impact on the realisation of their rights. At first, law responded to this exclusion by being gender-neutral; and the effectiveness of this reaction is questioned. The chapter then develops the concept of gender responsiveness. This is done by first reviewing the use of the term in other fields and using these existing understandings to inform a definition of gender responsiveness well suited to an African treaty body. This definition is then deconstructed to facilitate a clear conceptualisation of the various parameters that together amount to gender responsiveness. The chapter concludes by illustrating how the concept of gender responsiveness will be utilised to make deductions as to an African treaty body's gender responsiveness. In this thesis, the African Commission on Human and Peoples' Rights (African Commission) serves as the subject of examination.

2.2 The evolution of human rights and the exclusion of women

2.2.1 Demonstrating the exclusion of women in the development of human rights

Human rights have come a long way with the universal regime as well as the African human rights system boasting a plethora of human rights treaties and a large body of soft law. Notwithstanding this rich normative framework, women's empowerment and equality in Africa and around the world is far from optimum. Human Rights Watch notes this of the status of women's rights today:¹

Despite great strides made by the international women's rights movement over many years, women and girls around the world are still married as children or trafficked into forced labor and sex slavery. They are refused access to education and political participation, and some are trapped

¹ Human Rights Watch <https://www.hrw.org/topic/womens-rights> (accessed 28 July 2016).

in conflicts where rape is perpetrated as a weapon of war. Around the world, deaths related to pregnancy and childbirth are needlessly high, and women are prevented from making deeply personal choices in their private lives.

Similarly, with regard to a report assessing progress of the world's women in 2015 and 2016, UN Women make the overall assessment that 'all too often, women's economic and social rights are held back, because they are forced to fit into a 'man's world'.² This latter assessment of a "man's world" mirrors the crux of the problem this thesis seeks to address, that a significant challenge in achieving women's rights is as a result of trying to fit square pegs in round holes. Feminist academics such as Rebecca Cook observe that the international human rights system has effectively become a structure for the protection of men's rights. She asserts that 'international human rights and the legal instruments that protect them were developed primarily by men in a male-oriented world.'³ Other commentators also note that 'in the classical juridical framework, gender [signals] the exclusions inherent in the universal category of humanity.'⁴ This thesis argues that the exclusion of women is in fact by design, that international human rights were conceptualised in an exclusionary manner. A corroboration of this assertion demands a look at history.

A review of history generally reveals the predominant trend of non-recognition of women and how they were seldom counted or included in historical accounts of key events and developments. Commentators note that: 'From the very beginning, historians engaged in cultural chauvinism to produce a distorted record in which women are virtually invisible; it is almost as if women are ahistorical.'⁵ The blatant historical exclusion of women led feminists and historians to devise the term '*herstory*' (as opposed to "*history*").⁶ This is

² UN Women *Progress of the world's women 2015 – 2016: Transforming economies, realizing rights* (2015) available at <http://www.unwomen.org/en/digital-library/publications/2015/4/progress-of-the-worlds-women-2015> (accessed 28 July 2016).

³ RJ Cook 'Women's international human rights law: The way forward' in RJ Cook (ed) *Human rights of women: National and international perspectives* (2012) 10.

⁴ R Sturman 'Gender and the human: An introduction' (2011) 23 *Gender & History* 230.

⁵ SL Sims 'Women's history and the public schools' (1992) 14 *Women's Rights Law Reporter* 10.

⁶ On herstory or history from a woman's perspective, see further: MA Celeste 'A brief herstory of Colorado women trailblazers in the law' (2003) 32 *Colorado Lawyer* 29-32, R Robson 'Lesbianism in Anglo-European legal history' (1990) 5 *Wisconsin Women's Law Journal* 1-42, TA Thomas 'Misappropriating women's history in the law and politics of abortion' (2012) 36 *Seattle University Law Review* 1-68, RM Ryan 'The sex right: A legal history of the marital rape exemption' (1995) 20 *Law and Social Inquiry* 941-1004, VG Petkovic 'The globalisation of gender and history in contemporary Serbian women's writing' (2014) 4 *Journal of Research in Gender Studies* 985-994, F Banner 'Rewriting history: The use of feminist narratives to deconstruct the myth of the capital defendant' (2001) 26 *New York University Review of Law & Social Change* 569-614, SM Meagher 'Histories, herstories and moral traditions' (1990) 16 *Social Theory and Practice* 61-84 and FH Tucker 'The study of women in history' (1972) 20 *Improving College and University Teaching* 16-17 (emphasis mine).

where historical accounts are rewritten from a feminist perspective, from *her* or from women's point of view. These accounts serve to provide alternative and perhaps more accurate historical narratives and they emphasize women's roles in various historical events.

Looking at the history specific to human rights, a brief and selective synopsis reveals that the exclusion of women pre-dates the conceptualisation of modern human rights and in fact probably influenced the development of the same. Certain historical events and human rights documents significantly influenced the course of modern human rights. The English Magna Carta and Petition of Right of 1215 and 1628 respectively, the United States Constitution and the Bill of Rights of 1787 and 1791 respectively and the *Déclaration des droits de l'homme et du citoyen* (French Declaration of the Rights of Man and of the Citizen/ French Declaration) of 1789 lay the foundation for individual rights and influenced the trajectory of contemporary human rights. In particular, the French Declaration and its ideals are deemed to have influenced the development of human rights both in Europe and universally.⁷ The French Declaration embodied the 18th Century French Revolution ideals of liberty, equality and fraternity. This triad of ideals had a significant role in the conceptualisation of what is arguably the most pivotal international human rights document, the Universal Declaration of Human Rights (Universal Declaration). It is for this reason that the French Declaration receives special mention in trying to unravel the stimuli that influenced modern human rights and whether the same were inclusive of women. In this regard therefore, feminist claims during and post the French Revolution 'revealed the limits of the principles of liberty, equality and fraternity and raised doubts about their universal applicability.'⁸ Universal applicability in this regard was questioned as at the time, women were not envisaged in the conceptualisation of rights and were explicitly denied citizenship and political participation through law. Feminists of the time decried what they deemed to be a sexist document leading one of the preeminent French feminists, Olympe de Gauges, to draft

⁷ On the influence of the French declaration on constitutions see: L Henkin 'Revolutions and constitutions' (1989) 49 *Louisiana Law Review* 1023-1056, RR Ludwikowski 'The French Declaration on the Rights of Man and Citizen and the American constitutional development' (1990) 38 *American Journal of Comparative Law Supplement* 445-462 and Z Peteri 'The Declaration of the Rights of Man and Citizen and the Hungarian Constitution' (1991) 33 *Acta Juridica Hungarica* 57-74.

⁸ JW Scott *Only paradoxes to offer: French feminists and the rights of man* (1996) xi.

the Declaration of the Rights of Woman and of the Female Citizen in order to depict the failing of the French Declaration in achieving equality.⁹

The French Declaration which undeniably excluded women and whose universality was challenged on this account then went on to considerably influence the conceptualisation of the Universal Declaration. In fact, this influence is well documented in the *travaux préparatoires* which note that a French representative was part of the drafting committee of the Universal Declaration and embedded in it French doctrines of the eighteenth century.¹⁰ Further, the eighteenth century French thinkers along with the triad of equality, liberty and fraternity are also noted in the *travaux préparatoires* as major influences to the Universal Declaration.¹¹ In fact, one delegate described the French influenced triad of liberty, equality and fraternity as amounting to the ‘basic postulates of the declaration’.¹² It is therefore not a far-fetched proposition to suggest that the Universal Declaration and other documents carried prejudices of their cradles such as the French Declaration. In fact, article 1 of the Universal Declaration hints at this inherent prejudice where it provides: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’¹³ The use of the gendered term “brotherhood” points to the sexist disposition of the time and lends support to the supposition that the conceptualisation of human rights excluded women from the very start. This challenge of the Universal Declaration is in fact not unique and others have also alluded to its exclusionary stance from a cultural relativism¹⁴ as well as from a gender perspective,

⁹ For more on the Declaration on the Rights of Woman and of the Female Citizen see: MJ Diamond ‘Olympe de Gouges and the French Revolution: The construction of gender as critique’ (1990) 15 *Dialectical Anthropology* 95-105 and JW Scott ‘French feminists and the rights of ‘man’: Olympe de Gouges’s declarations’ (1989) 28 *History Workshop* 1-21.

¹⁰ WA Schabas *The Universal Declaration of Human Rights: The travaux préparatoires Volume I October 1946 to November 1947* (2013) 2174.

¹¹ As above comments by Mr Chang (China) 2173.

¹² Schabas n 10 above Comments by Mr Santa Cruz (Chile) 2196.

¹³ Universal Declaration of Human Rights, art 1.

¹⁴ On challenging the universality of the Universal Declaration from a cultural perspective, see one of the leading works: A Pollis & P Schwab ‘Human rights: A western construct with limited applicability’ in A Pollis & P Schwab (eds) *Human Rights: Cultural and Ideological Perspectives* (1980). See also: K Mickelson ‘How universal is the Universal Declaration’ (1998) 47 *University of New Brunswick Law Journal* 19-48 and TE Higgins ‘Anti-essentialism, relativism, and human rights’ (1996) 19 *Harvard Women’s Law Journal* 89-126. Others while acknowledging the challenge of cultural relativism warn against using it as a basis to abrogate the human rights regime arguing instead that the relativism debate should inform a cross-cultural understanding but not defeat the implementation of human rights, see: B Ibhawoh ‘Cultural relativism and human rights: Reconsidering the Africanist discourse’ (2001) 19 *Netherlands Quarterly of Human Rights* 43-62. Others also propose that regional documents such as the African Charter on Human and Peoples’ Rights have now settled this challenge, see: RT Nhlapo ‘International protection of human rights and the family: African variations on a common theme’ (1989) 3 *International Journal of Law and the Family* 1-20.

both schools of thought going as far as calling for its review. One feminist organisation in fact went ahead and redrafted the Universal Declaration from a gender perspective¹⁵ in an effort akin to that of Olympe de Gauges when she wrote the Declaration of the Rights of Woman and of the Female Citizen. The rewrite in its preamble provides:¹⁶

CONSIDERING that the contemporary formulation of human rights emerged within a historical context in which the concept of the human being was by and large limited to that of a male, western, white, adult, heterosexual and owner of assets.

CONCERNED that because of this limited conception of the human being, the rights of women, indigenous people, homosexuals and lesbians, children, the elderly, disabled people and other groups have been restricted.

CONVINCED that a holistic and inclusive concept of humanity is necessary for the full realization of human rights...

The foregoing views support the exclusionary nature in the conceptualisation and history of human rights already discussed here. The Universal Declaration described as the 'normative foundation of international human rights'¹⁷ then gave rise to other binding treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both of 1966. The three international human rights documents are together referred to as the international bill of rights. While these documents were not explicitly sexist in nature, in that they all contained broad equality and non-discrimination clauses, perhaps testament to their exclusionary conceptualisation, they failed to address discrimination against women in a meaningful way. In this regard, in 1963 the United Nations (UN) acknowledged that 'the general human rights regime was not, in fact, working as well as it might to protect and promote the rights of women.'¹⁸ The reason for this failure is now apparent; men in a man's world and from a man's perspective had developed the documents.

Similarly, Hilary Charlesworth and Christine Chinkin in their feminist treatise on international law conclude that the absence of women in the development of international law has resulted in its exclusion of women's issues and perspectives.¹⁹ This realisation led to the development of the Convention on the Elimination of All Forms of

¹⁵ CLADEM 'Declaration of human rights from a gender perspective' (2002) available at http://www.cladem.org/en/images/stories/publications/Declaracion_INGLES.pdf (accessed 29 July 2016).

¹⁶ As above 2.

¹⁷ Mickelson n 14 above 19-20.

¹⁸ United Nations <http://www.un.org/womenwatch/daw/cedaw/history.htm> (accessed 30 July 2016).

¹⁹ H Charlesworth & C Chinkin *The boundaries of international law: A feminist analysis* (2000).

Discrimination against Women (CEDAW Convention). The CEDAW Convention represented the first time an international human rights law treaty focused on women's rights. It is credited for the following:²⁰

1. expanding the understanding of modern international human rights standards in general; 2. the "mainstreaming" of a gender analysis, or integrating women's rights into the broader human rights context, in terms of both standards and implementation; 3. prompting domestic or national implementation efforts; and 4. fostering and propelling a rights-based approach into the operations of well-placed UN field agencies.

Overall, the intrinsic exclusion of gender in the conceptualisation of international human rights led to the amplification of ostensibly unnecessary affirmations such as "women's rights are human rights".²¹

From the perspective of the development of the African human rights system, the foregoing narrative of exclusion is similar. The Charter of the Organization of African Unity (OAU Charter)²² for instance makes no provision for gender in any express or implied terms. In addition, women are noted as having been 'neglected in the drafting of the Charter and that this was one of the reasons for its downfall'.²³ The OAU Charter's succeeding document, the Constitutive Act of the African Union (Constitutive Act) marks a feeble improvement²⁴ but is also dismal in its inculcation of a gender perspective. In line with this assertion, following are a few illustrations from the Constitutive Act and the Protocol on Amendments to the Constitutive Act of the African Union (Amendment Protocol).²⁵ The preamble of the Constitutive Act in its very first sentence in fact begins by unwittingly admitting to the exclusion of women asserted by this thesis in the establishment of the OAU where it avers: 'We, Heads of State ... *Inspired* by the noble

²⁰ AF Bayefsky 'The CEDAW Convention: It's contribution today' (2000) 94 *American Society of International Law* 197-203.

²¹ This quote is most popularly attributable to (though not originated by) Hilary Clinton as it was the title of the speech she gave at the historically significant UN Fourth World Conference on Women in Beijing, China in 1995, see: HR Clinton 'Women's rights are human rights' (2002) 29 *Human Rights* 2-2.

²² The OAU Charter was replaced by the Constitutive Act of the African Union in 2001 when the OAU was succeeded by the African Union.

²³ R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 134. The quote references Commissioner Ondziel-Gnelenga, at the 29th session of the African Commission on Human and Peoples' Rights in Libya during a debate on the AU the transcript of which is on file with Murray.

²⁴ It mentions the terms "gender" and "women" once each. Of gender, in art 4 it lists promotion of gender equality as one of its principles. Of women, the preamble in para 7 provides: 'GUIDED by our common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples';

²⁵ Protocol on Amendments to the Constitutive Act of the African Union (2003). It was adopted in 2003 but has not entered into force as at February 2017 as it requires ratification by a two-thirds majority of member states.

ideals which guided the *founding fathers* of our continental Organisation ...'.²⁶ The reference to founding fathers is sexist and sheer confirmation of the exclusion of women in establishing the organisation that would later conceptualise the African human rights system. In fact, the Amendment Protocol also highlights this *faux pas* as it proposes to amend the Preamble to the Constitutive Act, by replacing the words “founding fathers” with “founders”.²⁷ Other proposed amendments similarly serve as admissions of the Constitutive Act’s exclusion of women. The Amendment Protocol proposes to add a new objective to ‘(i) ensure the effective participation of women in decision-making, particularly in the political, economic and socio-cultural areas;’²⁸ in an attempt to engender the objectives that currently do not envisage women or the promotion of their interests by the AU. The Amendment Protocol also proposes ‘substitution of the word ‘Chairman’ with ‘Chairperson’²⁹ wherever it is used in the Constitutive Act. The present term “Chairman” betrays the impression that top leadership positions within the AU are the preserve of men.

The African Charter on Human and Peoples’ Rights (African Charter) is pivotal for its contribution to the evolution of the African human rights system. It is also significant for this work as it establishes the African Commission on Human and Peoples’ Rights, which is the subject for examination in this thesis. The African Charter contributes to the narrative of exclusion established here at the universal and regional platforms. On this, Frans Viljoen makes the observation: ‘Male dominance and female subordination (bordering on disregard) are suggested by the language of the Charter. Male pronouns and words such as chairman are used throughout the document.’³⁰ Further, while the Charter contains a general non-discrimination clause, which prohibits discrimination on the basis of “sex”,³¹ it contains only one other provision on women’s rights,³² which shall be the subject of a more extensive analysis later in this thesis.

²⁶ Constitutive Act of the African Union preamble para 1 (emphasis mine).

²⁷ As above art 2.

²⁸ Constitutive Act n 26 above art 3.

²⁹ Constitutive Act n 26 above art 6.

³⁰ F Viljoen *International Human Rights Law in Africa* (2012) 251-252.

³¹ African Charter on Human and Peoples’ Rights art 2.

³² As above art 18(3) provides: ‘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.’

In conclusion, the foregoing historical synopsis demonstrates that the exclusion of women is well entrenched in the conceptualisation, evolution and expression of human rights at the international level and in the African human rights system. As this thesis has argued, excluding over half of the world's population is untenable and should be redressed. In fact, equality is far from a lofty philosophical goal; the ramifications of inequality result in substantial and even deadly consequences for women and girls as so poignantly covered in the following passage:³³

The global statistics on the abuse of girls are numbing. It appears that more girls have been killed in the last fifty years, precisely because they were girls, than men were killed in all the battles of the twentieth century. More girls are killed in this routine "gendercide" in any one decade than people were slaughtered in all the genocides of the twentieth century In the nineteenth century, the central moral challenge was slavery. In the twentieth century, it was the battle against totalitarianism. We believe that in this century the paramount moral challenge will be the struggle for gender equality around the world.

In remedy of the established exclusion of women and resultant inequalities, Viljoen makes the assertion: "To effectively address the marginalization of women in Africa, a female perspective and presence is essential."³⁴ The conceptualisation of this perspective is thus the preoccupation of this thesis.

2.2.2 Problematising gender neutrality as a response to exclusion

The exclusion of women in history and in the development and conceptualisation of human rights is now well established. This thesis now seeks to consider other ways in which women's equality is compromised particularly in the realm of human rights norms. As earlier here presented, there is now a predominant and increasing consensus that exclusion of half of the world's population (women) is immoral and indefensible. A similarly prejudiced but seemingly innocuous concept is that of gender neutrality. One of the initial responses to sexist laws or those drafted in an exclusionary manner was to remedy exclusion with gender neutrality. Underlying gender-neutral provisions is the principle that 'men and women are to be treated equally in order to ensure that gender will no longer operate as a basis for the allocation of benefits and burdens in society.'³⁵

³³ ND Kristof & S WuDunn *Half the sky: Turning oppression into opportunity for women worldwide* (2010) xvii.

³⁴ Viljoen n 30 above 250.

³⁵ NH Kaufman & SA Lindquist 'Critiquing gender-neutral treaty language: The Convention on Elimination of All Forms of Discrimination against Women' in J Peters & A Wolper *Women's rights, human rights: International feminist perspectives* (1995) 114.

Gender neutrality results in identical treatment of men and women in the language used to articulate norms and in their application.³⁶

It has been argued that gender neutral laws are not an effective tool against gender inequality, that laws that are aimed towards men and women fail to effectively deal with women's issues.³⁷ On the gender neutral approach the Office of the United Nations High Commissioner for Human Rights similarly makes the assertion that: 'Laws, policies or programmes can also have detrimental effects on women even though they appear to be gender-neutral. This is known as *de facto* discrimination.'³⁸ In fact, as early as the 1980s, feminist debates had led to conclusions that 'gender-neutral and neutralizing institutions, such as democratic political structures and markets, did not eliminate gender differentials.'³⁹ In reality therefore, gender neutrality can amount to another form of exclusion. To illustrate this for instance, some have defined gender neutral as follows:⁴⁰

The claim some people make when they want to present themselves as not practising gender-based discrimination. What it often masks, however, is the failure to take gender issues into consideration, and this can translate into discrimination against girls as it fails to pay attention to the distinct and special needs of girls and boys.

Assessing gender-neutrality goes beyond examining the language of the provisions and includes an examination of their application and impact. For instance women's rights based on a heavy legal equality model that do not address underlying structures of dominance can also be said to be gender-neutral. In making this assessment, some scholars have developed criteria for examining gender-neutral provisions from a feminist perspective. The criteria are set out in the form questions: (i) Does the provision advance the ability of women to speak in their own voices? (ii) Does the language escape the male standard? (iii) Are there safeguards protecting against hostile interpretation? (iv) Are

³⁶ On gender neutrality see: O Sarassin, U Gabriel & P Gygax 'Sexism and attitudes towards gender-neutral language: The case of English, French, and German' (2012) 71 *Swiss Journal of Psychology* 113-124, United Nations High Commissioner for Human Rights *Women's rights are human rights* (2014) available at <http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> (accessed 1 August 2016), International Labour Organization *ABC of women worker's rights and gender equality* (2007) available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf (accessed 1 August 2016).

³⁷ V Mclean 'Is gender-neutral drafting an effective tool against gender inequality within the legal system?' (2013) 39 *Commonwealth Law Bulletin* 445.

³⁸ United Nations High Commissioner for Human Rights n 36 above 30.

³⁹ O'Neill 'Justice, gender and international boundaries' (1989) *World Institute for Development Economics Research of the United Nations University* 5.

⁴⁰ Forum for African Women Educationalists *Gender responsive pedagogy: A teacher's handbook* (2005) 2.

there remedies that specifically address injustices that affect women? (v) Does the treaty require the state to engage in active public policy as opposed to passive steps?⁴¹ In addition to assessing gender neutrality, these questions also imply the elements that would be needed in order to redress gender-neutral provisions.

Finally, gender neutrality is comparable and arguably amounts to gender blindness, which is the ‘failure to recognize the differences between males and females and therefore leading to failure to provide for the differences.’⁴² Ultimately, gender neutrality is an inadequate response to exclusion as it only responds superficially while not taking differences into account and thereby resulting in *de facto* discrimination. This leads us to explore a more suitable approach by way of gender responsiveness discussed hereafter.

2.3 Defining gender responsiveness

Having established systemic exclusion of women in the evolution of human rights and the resultant inequalities, this thesis intends to define and develop the concept of gender responsiveness. The aim is twofold. The first objective is to employ this new concept as a framework for the analysis of an African human rights treaty body or mechanism. The second objective is to propose an alternative and effective strategy for realising gender equality within the African human rights system; that of gender responsiveness.

The existing definitions of gender responsiveness will inform the development of the concept in this thesis. In the justice sector, Stephanie Covington in discussing comprehensive care for incarcerated females defines gender responsiveness as ‘creating an environment... and content that reflects an understanding of the realities of women's lives and is responsive to their needs and strengths.’⁴³ In discussing gender-responsive approaches, Barbara Bloom and Covington note that the said ‘definition emphasizes two major aspects of program development: content and context.’⁴⁴ From this, one notes that

⁴¹ Kaufman & Lindquist n 35 above 120-124.

⁴² Forum for African Women Educationalists *Gender responsive pedagogy: A teacher's handbook* (2005) 2.

⁴³ SS Covington ‘Creating Gender-Responsive Programs: The Next Step for Women's Services’ (2001) 63 *Corrections Today* 3.

⁴⁴ BE Bloom & SS Covington ‘Effective gender-responsive interventions in juvenile justice: Addressing the lives of delinquent girls’ Paper presented at the 2001 Annual Meeting of the American Society of Criminology Atlanta, Georgia, November 7-10, 2001 7 available at <http://www.centerforgenderandjustice.org/assets/files/7.pdf> (accessed 2 August 2016).

measures towards gender responsiveness can only be effective if they are designed bearing in mind the target's context. With regards to gender responsiveness in the justice system, one commentator adopts the definition by Covington and notes that the most important principle necessary to have a successful gender responsive programme is 'the acknowledgement that gender makes a difference.'⁴⁵ This definition corroborates the argument previously made that adopting a gender-neutral approach is akin to treating unlike things equally.

In the area of pedagogy, gender responsiveness has been defined as 'taking action to correct gender bias and discrimination so as to ensure gender equality and equity.'⁴⁶ This definition brings out a critical element of gender responsiveness that distinguishes it from other approaches; recognition of inequality should lead to a corresponding action.

The World Health Organization (WHO) has also developed a gender responsive checklist to aid in the implementation of sexual and reproductive health policies that integrate approaches to achieving gender equality. The WHO identifies five guiding principles in defining its gender responsive approach. The first is that gender should be considered as a social determinant of health alongside other determinants such as culture, religion, ethnicity, education and social and economic background. Second, policies should promote and use sex disaggregated data (SDD) and gender analysis. Third, implementers should have the capacity and elementary understanding of gender issues and the related social determinants of health as mentioned. Fourth, implementers are to be held accountable for the gender equality goals in order to result in sustainable and equitable outcomes. The fifth principle calls for the promotion and protection of human rights norms towards addressing gender-based discrimination.⁴⁷

UN Women note that gender responsiveness is critical towards effectively ending violence against women and girls and that it is especially important to 'be responsive to the specific gender dynamics and social and cultural reference points that prescribe the

⁴⁵ A Commee-McCourt 'Gender responsiveness in the juvenile justice system' Independent study (2008) 3.

⁴⁶ Forum for African Women Educationalists *Gender responsive pedagogy: A teacher's handbook* (2005) 2.

⁴⁷ World Health Organization Europe 'Checklist for assessing the gender responsiveness of sexual and reproductive health policies: Pilot document for adaptation to national contexts'. Available at <http://www.euro.who.int/en/health-topics/health-determinants/gender/publications/2010/checklist-for-assessing-the-gender-responsiveness-of-sexual-and-reproductive-health-policies> (accessed 3 August 2016).

roles of men and women in any given society.’⁴⁸ In order to ensure gender responsiveness, UN Women also notes the importance of recognizing that ‘gender equalities are compounded for certain groups of women and girls (because of their age, ethnicity, national origin, occupation or other characteristics)’.⁴⁹ Similar to WHO, they also note that the capacity of implementers must be developed in relation to gender, capacity here comprising of knowledge, skills and attitudes. They also note that a gender responsive approach entails human rights promotion by requiring that women be sensitised on their rights in order to claim them. From the foregoing WHO checklist and UN Women understanding, a key suggestion is that a gender responsive approach entails a whole gamut of sub-elements that implementers should bear in mind.

Guided by an understanding of gender responsiveness in other subjects, this thesis intends to develop a definition of gender responsiveness for an African human rights mechanism. From all the foregoing definitions, one can deduce two constant elements as being critical to gender responsiveness. The first, is recognising gender and potential or resultant inequalities and the second, is that an action or set of actions must follow towards preventing or eliminating gender inequalities. Put another way, recognition entails an understanding of women’s lived realities and the actions that follow should be in response to their needs.

Accordingly, in this thesis, gender responsiveness is defined as the extent to which norms and procedures effectively address the main concerns that women in Africa face.

Finally, gender responsiveness can be compared with and in some instances distinguished from other related terms such as gender mainstreaming, gender sensitivity, gender budgeting and gender transformation. In 1997, the UN called for the mainstreaming of a gender perspective into all its policies and programmes. Towards this, the UN Economic and Social Council (ECOSOC) defined the concept of gender mainstreaming as follows:⁵⁰

⁴⁸ UN Women *Virtual knowledge centre to end violence against women and girls* available at <http://www.endvawnow.org/en/articles/306-ensuring-gender-responsiveness.html> (accessed 3 August 2016).

⁴⁹ As above.

⁵⁰ United Nations General Assembly ‘Official records of the General Assembly, Fifty-second session, Supplement no.3 (A/52/3/Rev.1)’ (1997) ch IV para 4 available at <http://www.un.org/documents/ga/docs/52/plenary/a52-3.htm> (accessed 7 August 2016).

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.

Since then, gender mainstreaming became a popular phrase and strategy particularly in the development and human rights world.⁵¹

Despite its prevalence, gender mainstreaming has been criticised for failing to achieve equality and in fact unwittingly result in the marginalisation of women's concerns. Charlesworth in her authoritative article⁵² on the subject makes a cogent case that gender mainstreaming is a conservative and toothless approach that does not really transform institutions, structures and the international order in a manner that would result in a genuine mainstreaming of women's issues. That in fact, the popularity of the approach is actually because of its vagueness and weakness. For instance, she makes the following argument:⁵³

The strategy of gender mainstreaming has deployed the idea of gender in a very limited way and has allowed the mainstream to tame and deradicalize claims to equality. The use of gender mainstreaming as a reform strategy has made issues of inequality between women and men harder to identify and to deal with. In this sense, mainstreaming has effectively drowned out the project of equality between women and men.

Other feminists and mainstreaming commentators have likewise pointed out numerous flaws in the approach of gender mainstreaming.⁵⁴ They essentially argue that while gender mainstreaming has its benefits, it has several unintended consequences that actually serve to defeat the equality project. One writer notes that mainstreaming women's concerns has its dangers and results in 'the problem of co-optation [and]

⁵¹ On gender mainstreaming see further: CA Brautigam 'Mainstreaming a gender perspective in the work of the United Nations human rights treaty bodies' (1997) 91 *American Society of International Law Proceedings* 389-394, SA Yeshanew 'Mainstreaming human rights in development programmes and projects: Experience from the work of a United Nations agency' (2014) 32 *Nordic Journal of Human Rights* 372-386, M Bellitto 'Gender mainstreaming in the United States: A new vision of equality' (2015) 22 *UCLA Women's Law Journal* 125-150.

⁵² H Charlesworth 'Not waving but drowning: Gender mainstreaming and human rights in the United Nations' (2005) 18 *Harvard Human Rights Journal* 1-19.

⁵³ As above 2.

⁵⁴ See: MC Dunlap 'The F word: Mainstreaming and marginalizing feminism' (1990) 4 *Berkeley Women's Law Journal* 251-258, S Lee 'Legal feminism and the UN's gender mainstreaming policy: Still searching for the blind spot' (2013) 6 *Journal of East Asia and International Law* 367-384, J True 'The unfulfilled mandate – Gender mainstreaming and UN peace operations' (2009) 10 *Georgetown Journal of International Affairs* 41-50, E Riddel-Dixon 'Mainstreaming women's rights: Problems and prospects within the Centre for Human Rights' (1999) 5 *Global Governance* 149-172.

transmutation'.⁵⁵ Other writers similarly note that the 'generic equality analysis approach'⁵⁶ typical of mainstreaming brings with it the risk of '[d]ilution and blandness'.⁵⁷ The UN itself has in fact acknowledged the weaknesses of gender mainstreaming. The ECOSOC in a Resolution on gender mainstreaming in the UN system expressed concern on the 'gaps between policy and practice, with particular challenges relating to inadequate institutional mechanisms, including in the area of data collection, accountability, monitoring, reporting and training, as well as inadequate resource allocation'.⁵⁸ The Resolution went further to call upon 'UN agencies, funds and programmes, to intensify efforts to address the challenges to the integration of gender perspectives in policies and programmes'.⁵⁹

Gender mainstreaming has also been said to refer to 'programmes where gender norms, roles and inequalities have been considered and awareness of these issues has been raised, although appropriate actions may not necessarily have been taken'.⁶⁰ This further distinguishes it from gender responsiveness, which necessarily requires action to remedy inequalities.

The approach has not fared any better in the African human rights system. The African Union (AU) identifies and mentions gender mainstreaming as one of its strategies as is laid out in a number of its documents.⁶¹ Of these efforts by the AU, one commentator notes that despite several formal commitments, the gender mainstreaming approach has merely resulted in 'theoretical promises [whose translation] into concrete action remains

⁵⁵ C Menkel-Meadow 'Mainstreaming feminist legal theory' (1992) 23 *Pacific Law Journal* 1496.

⁵⁶ ICM Cairns 'Gender mainstreaming & 'equality-proofing' in British law-making: A comment on the impact of the Equality Act 2010' (2013) 4 *Aberdeen Student Law Review* 103.

⁵⁷ F Mackay & K Bilton 'Learning from experience: Lessons in mainstreaming equal opportunities' (2003) University of Edinburgh, Governance of Scotland Forum 152 cited in Cairns as above 103.

⁵⁸ United Nations Economic and Social Council 'Mainstreaming a gender perspective into all policies and programmes in the United Nations system, ECOSOC Resolution 2005/31' (2005) para 3 available at <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-31.pdf> (accessed 7 August 2016).

⁵⁹ As above para 4.

⁶⁰ World Health Organisation *Integrating gender into HIV/AIDS programmes in the health sector: Tools to improve responsiveness to women's needs* (2009) 17 available at <https://www.ncbi.nlm.nih.gov/books/NBK143050/box/section1.box4/?report=objectonly> (accessed 8 August 2016).

⁶¹ See for instance the African Union Gender Policy which mentions gender mainstreaming a number of times available at http://www.un.org/en/africa/osaa/pdf/au/gender_policy_2009.pdf (accessed 8 August 2017). See also the Statutes of the Commission of the African Union art 12(3).

a formidable challenge.⁶² Gender mainstreaming is therefore a popular but increasingly discredited approach towards achieving equality.

Gender sensitivity is another related though distinct term from gender responsiveness. It can be defined as:⁶³

[T]he aim of understanding and taking account of the societal and cultural factors involved in gender-based exclusion and discrimination in the most diverse spheres of public and private life.

It focuses mainly on instances of structural disadvantage in the positions and roles of women.

Gender sensitivity is closely related to gender mainstreaming. The Inter-Parliamentary Union, for instance makes the case that parliaments become gender sensitive through gender mainstreaming strategies.⁶⁴ In this regard, therefore, sensitivity may also suffer the pitfalls associated with gender mainstreaming. The WHO's Department of Gender, Women and Health distinguishes gender sensitivity from gender responsiveness, noting that gender responsive programmes 'go beyond raising sensitivity and awareness and actually do something about gender inequalities.'⁶⁵ Notwithstanding this distinction, gender sensitivity is arguably an essential first step towards realizing equality; but perhaps only if this approach is employed in concert with another more holistic and effective strategy.

The last two approaches following, gender budgeting and gender transformation, comprise elements that are similar to some of the parameters of a gender responsive approach. Gender budgeting on its part refers to a budgeting means through which governments can realise women's human rights and equality through efficient and continuous allocation of resources towards their needs.⁶⁶ One study exemplifies how gender budgeting is an unequivocal state obligation under the African human rights system and in particular under the Protocol to the African Charter on Human and Peoples'

⁶² D Olowu 'Mainstreaming women, equating men: Charting an inclusionary approach to transformative development in the African Decade for Women' (2011) 15 *Law, Democracy and Development* 166.

⁶³ European Institute for Gender Equality 'Gender equality glossary and thesaurus'. Available at <http://eige.europa.eu/rdc/thesaurus/terms/1218> (accessed 8 August 2016).

⁶⁴ Inter-Parliamentary Union *Gender-sensitive parliaments: A global review of good practice* (2011) 1-102 available at <http://www.ipu.org/pdf/publications/gsp11-e.pdf> (accessed 8 August 2016).

⁶⁵ As above 17.

⁶⁶ This definition of gender budgeting is as informed by: A Budoo 'The role of gender budgeting in implementing the obligation to provide resources to realise women's human rights in Africa' unpublished PhD thesis, University of Pretoria (2016) 16-19.

Rights on the Rights of Women in Africa (Maputo Protocol) in particular.⁶⁷ In illustration for instance, in protecting the right to life, integrity and security of the person, states are called upon to ‘provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women’.⁶⁸ Gender budgeting is clearly indispensable to the attainment of equality. The gender responsiveness model captures this notion in its understanding of substantive equality that has the achievement of *structural changes* as one of its key parameters. Structural changes comprise gender budgeting as elaborated in the next section but go beyond to include elements such as reasonable accommodation.

Gender transformation is another term that is related to gender responsiveness. Gender transformation refers to the need for representation and diversity in the composition of various organs such as judiciaries and parliaments, in order to remedy historical injustices of exclusion.⁶⁹ The gender transformation project has however suffered a few limitations in its quest for representation. One commentator for instance makes the case that the ‘generalisation that women are equal, [and that] they have all been dominated by men, is nonsense.’⁷⁰ This is because such a generalisation ignores other critical factors such as race and class. In a study on representation, interviewees from South Africa’s African National Congress (ANC) party, ‘maintained that it was too simplistic to equate woman with gender and women’s interests with gender interests.’⁷¹ This is ostensibly because in terms of social structure, women just like men can be agents of patriarchy.

For transformation to be successful in redressing historical injustices, it clearly has to be more than about numbers. In this regard, one author suggests as follows:

Transformation is not only about demographic change ... but also, and perhaps more significantly, about a deeper, substantive change. A richer, more layered conception of transformation is

⁶⁷ Budoo above 30-86.

⁶⁸ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art 4(2)(i).

⁶⁹ This understanding of gender transformation is informed by: M Olivier ‘A perspective on gender transformation of the South African judiciary’ (2013) 130 *South African Law Journal* 448-464, T Mtintso ‘Representivity: False sisterhood or universal women’s interests? The South African experience’ (2003) 29 *Feminist Studies* 569-579, J Sudbury ‘*Other kinds of dreams: Black women’s organisations and the politics of transformation*’ (1998) and T Masengu ‘It’s a man’s world: Barriers to gender transformation in the South African judiciary. Perspectives from women advocates and attorneys’ (2016) 23 *International Journal of the Legal Profession* 305-319.

⁷⁰ Mtintso as above 571.

⁷¹ Mtintso n 69 above 571.

preferable - one that recognizes the importance of an attitudinal shift ... towards transformative [and] value-laden [approaches].⁷²

The foregoing understanding of gender transformation fits in well with one of the elements of gender responsiveness, that of inclusion. Inclusion is elaborated further in the next section which delineates the features of a gender responsive approach.

While differences have been highlighted, the foregoing gender approaches like gender responsiveness seek to achieve gender equality. In light of the benefits and limitations of these existing gender approaches towards achieving gender equality, the gender responsiveness model learns from these methods and above all aims to be holistic in its approach.

2.4 Delineating gender responsiveness

This thesis defines gender responsiveness as the extent to which norms and procedures effectively address the main concerns faced by women in Africa. This thesis intends to use this conceptualisation as framework for analysis to assess the gender responsiveness of the African Commission. Accordingly, this calls for a delineation of the definition into useful sub-elements that will drive the referenced assessment. In addition, in the definition of gender responsiveness, the terms “extent to which” and “effectively” also denote that gender responsiveness may be total or partial. The sub-elements in this regard will thus also be useful towards ascertaining *extent* and *effectiveness* of the gender responsiveness of the norms and procedures that will be examined.

Accordingly, this thesis proposes four parameters to guide the analysis of gender responsiveness. A gender responsive approach: (i) results in substantive equality; (ii) is inclusive; (iii) recognises the intersectional identity of women; and (iv) adopts a contextualised African response. The identification of these parameters and the consequent development is driven by feminist theory and informed by the predominant determinants and variables that inform equality discourse.

⁷² Olivier n 69 above 451.

2.4.1 Substantive equality

The right to equality is essential to and has progressively driven international human rights law discourse.⁷³ Equality is particularly central to women's rights and feminist discourse and thus necessarily one of the elements that a gender responsive approach must address. 'The most basic concept of equality is the Aristotelian notion that likes should be treated alike.'⁷⁴ This notion is the expression of formal equality. A formal equality approach entails prohibition of direct discrimination via law and policy. Formal equality however received resounding criticism from feminists and other commentators for varying reasons the most pertinent being that it failed 'to address deeply entrenched and complex patterns of group disadvantage'.⁷⁵ In fact, equal treatment in the context of past or structural discrimination actually perpetuates disadvantage and discrimination.⁷⁶

Substantive equality emerged as a response to the limitations of formal equality.⁷⁷ Where formal equality struggles to address a group's historical injustices or disadvantage, substantive equality allows for reverse discrimination also known as affirmative action. Reverse discrimination for instance cannot be sustained under formal equality, which deems it contradictory to its symmetrical nature.⁷⁸

Substantive equality contextualises discrimination in light of its resultant inequalities. Formal equality on the other hand views women as one homogenous group with shared biological features. This approach is not useful, as not all forms of sex or gender-based discrimination manifest in a systemic manner or in a manner where a disproportionate impact on women may be evidenced. Catharine MacKinnon in her writings on substantive equality offers that women are not a demographic with shared biological features as formal equality imagines them to be. Instead, '[w]omen are a social group formed by

⁷³ Consider for instance the emergence of treaties dealing predominantly with equality and non-discrimination such as the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa etc.

⁷⁴ S Fredman *Discrimination law* (2002) 7.

⁷⁵ C Albertyn, S Fredman & J Fudge 'Introduction: Substantive equality, social rights and women: A comparative perspective' (2007) 23 *South African Journal on Human Rights* 209.

⁷⁶ S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 723.

⁷⁷ On substantive equality generally see: S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712-738, C Barnard & B Hepple 'Substantive equality' (2000) 59 *Cambridge Law Journal* 562-585, SJ Kenney 'Pregnancy discrimination: Towards substantive equality' (1995) 10 *Wisconsin Women's Law Journal* 351-402, S Balan 'Formal and substantive equality of opportunity' (2012) 4 *Cogito: Multidisciplinary Research Journal* 85-95, KT Bartlett 'Gender law' (1994) 1 *Duke Journal of Gender Law & Policy* 1-20.

⁷⁸ Fredman *Discrimination law* n 74 above 127-128.

gender inequality in all its substantive domains, which are sexual, economic and others.⁷⁹ This understanding differentiates between gender and sex and the important assertion that, it is gender and not sex that results in inequalities. All human beings being equal and men and women being equally human, one can hardly argue with this assertion. Noting that gender is the social reality of sex, MacKinnon contends that it results in gender hierarchy, which is ‘the transnational social system of masculinity over femininity that [places] men over women predicated on the lie of male superiority and female inferiority.’⁸⁰ Accordingly, substantive equality responds to the inequalities responding from gender hierarchy unlike formal equality, which insists on equal treatment with no regard to differences on account of gender, which may be beyond the individual’s control.

Additionally, substantive equality is responsive to the needs of an individual woman as opposed to the homogenous entity of women. In this regard, MacKinnon notes that ‘[t]he substance of substantive inequality can be visited on a single person, so long as it is grounded in the concrete historical discriminatory social reality of group membership.’⁸¹ Accordingly, a truly gender responsive approach that applies substantive equality should be able to ensure equality for an individual even if the discrimination meted against them is not systemic.

In practice therefore, substantive equality counters one of the main drawbacks of formal equality, which often requires the use of a comparator in order to prove discrimination; for instance, in asking whether a man would have suffered a similar inequality in order to establish discriminatory treatment. The use of a comparator in this way is inappropriate as it fails to consider the higher gender hierarchy that men enjoy otherwise known as male privilege.

To understand the practical utility of substantive equality as a repertoire of tools in the gender responsive approach, a definition of substantive equality is desirable. From the

⁷⁹ CA MacKinnon ‘Substantive equality: A perspective’ (2011) 96 *Minnesota Law Review* 13.

⁸⁰ As above.

⁸¹ MacKinnon ‘Substantive equality: A perspective’ n 79 above 13.

foregoing and in her other works,⁸² MacKinnon advances that social hierarchy is the key principle underlying substantive equality discourse because social hierarchy is at the core of social inequality. Despite this authoritative stance,⁸³ the meaning of substantive equality is highly contested. ‘Scholars, legislators, and judges have elucidated various core meanings, chief amongst them, *equality of results*, *equality of opportunity*, and *dignity*.’⁸⁴ These salient features have then made their way into laws as: ‘unfair discrimination, disparate impact or indirect discrimination, reasonable accommodation and harassment.’⁸⁵

Equality of results overcomes the limitations of equal treatment by recognising that the sameness approach can result in inequalities. It therefore requires not just equal treatment but also equal outcomes. The challenge with equality of results is that a focus on outcomes brings qualitative change but does not necessarily change the structures that perpetuate discrimination.⁸⁶ An equality of opportunity approach ‘aims to equalise the starting point; allowing the competitors to be judged on individual merit once the race has begun.’⁸⁷ The underlying principle is one concerned simply with the removal of procedural obstacles to equality and is consequently not concerned with outcomes. Accordingly, the equality of opportunity approach ‘is fully compatible with unequal results’.⁸⁸ For instance, in the workplace, an equality of opportunity approach may ensure that a procedural obstacle to equality such as the use of fair job criteria is put in place. In spite of this, women ‘who lack the prerequisite qualifications as a result of past discrimination will still be unable to meet job-related criteria’⁸⁹ amounting to cyclical discrimination. A quote by former US President Lyndon Johnson sums up the problem

⁸² CA MacKinnon *Sexual harassment of working women* (1979), CA MacKinnon ‘Difference and dominance: On sex discrimination’ in CA MacKinnon *Feminism unmodified: Discourses on life and law* (1987), CA MacKinnon *Sex equality* (2001, 2007, 2016), MacKinnon ‘Substantive equality: A perspective’ n 79 above and CA MacKinnon ‘Substantive equality revisited: A reply to Sandra Fredman’ (2016) 14 *International Journal of Constitutional Law* 739-746.

⁸³ MacKinnon is credited for originating substantive equality theory in *Sexual harassment of working women* and making significant contributions to equality discourse as above. See also: S McIntyre ‘Timely interventions: MacKinnon’s contribution to Canadian equality jurisprudence’ (2010) 46 *Tulsa Law Review* 81.

⁸⁴ Fredman ‘Substantive equality revisited’ n 76 above 713 (emphasis mine).

⁸⁵ As above.

⁸⁶ Fredman *Discrimination law* n 74 above 11-14 & Fredman ‘Substantive equality revisited’ n 76 above 722.

⁸⁷ Fredman *Discrimination law* n 74 above 14.

⁸⁸ Fredman ‘Substantive equality revisited’ n 76 above 723.

⁸⁹ As above.

with equality of opportunity where he said that it is ‘not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates.’⁹⁰

Dignity has also been utilised as an approach to substantive equality in various jurisdictions such as Canada and South Africa who have located dignity as central to the guarantee of equality and their treatment of discrimination. The Supreme Court of Canada have found that the purpose of the Canadian Charter’s equality guarantee is ‘to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens, through the stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstance’.⁹¹ South Africa on its part has various provisions in its Constitutions that reinforce the primacy of dignity in equality. Section 1 provides that South Africa is founded on the values of ‘human dignity, the achievement of equality and the advancement of human rights and freedoms.’⁹² South African courts are also mandated to ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’.⁹³ The Constitutional Court of South Africa in its equality jurisprudence has similarly emphasised the dignity approach stating in one instance that unfair discrimination ‘principally means treating persons differently in a way which impairs their fundamental dignity as human beings.’⁹⁴ However, in criticism, ‘dignity is not the panacea it is often imagined to be.’⁹⁵ In practice its use has revealed that it is open to different interpretations some of which may be counter to the tenets of equality.⁹⁶

Equality of results, opportunity and dignity as approaches to substantive equality present various counterproductive challenges. Social hierarchy remains unchallenged. However, owing to the multifaceted ways in which inequality manifests coupled with the intricate intersectional identities of women in Africa, a more versatile and nuanced approach to substantive equality is sought where hierarchy can encompass one of a few other criteria.

⁹⁰ LB Johnson ‘Address at Howard University (4 June 1965) cited in A Thernstrom ‘Voting rights, another affirmative action mess’ (1996) 43 *University of California Los Angeles Law Review* 2037 as cited in Fredman ‘Substantive equality revisited’ n 76 above 723.

⁹¹ *Miron v Trudel* (1995) 2 SCR 418 para 489 as cited in Fredman *Discrimination law* n 74 above 17.

⁹² The Constitution of the Republic of South Africa, 1996 sec 1.

⁹³ As above sec 39(1)(a).

⁹⁴ *Prinsloo v Van der Linde* 1996 4 (CCT) para 31 as cited in Fredman ‘Substantive equality revisited’ n 76 above 725.

⁹⁵ Fredman ‘Substantive equality revisited’ n 76 above 725.

⁹⁶ As above.

2.4.1.1 The four-dimensional approach to substantive equality

Sandra Fredman acknowledges the contested nature of the meaning of substantive equality but nevertheless contends that it ‘should not be collapsed into a single formula, such as dignity or equality of opportunity or results.’⁹⁷ She proposes a four dimensional principle: (i) to redress disadvantage; (ii) to address stigma, stereotyping, prejudice and violence; (iii) to enhance voice and participation; and (iv) to accommodate difference and achieve structural change.⁹⁸ Fredman stresses that the four dimensions are interactive and allow synergies as opposed to viewing each dimension as a pre-established lexical priority. The four-dimensional approach provides a framework for analysis that better accommodates the multifaceted nature of equality in assessing ‘whether actions, practices or institutions impede or further the right to equality.’⁹⁹ Accordingly, this approach fits perfectly within the gender responsiveness model, which, refers to the extent to which norms, and procedures effectively address the main concerns that women in Africa face. That being the case, an exposition of the four-dimensional approach now follows.

The first dimension is concerned with redressing disadvantage. One of the ways that substantive equality distinguishes itself from formal equality is its asymmetrical nature, which enables it to focus on historically disadvantaged groups such as women.¹⁰⁰ Here ‘it is not so much an individual’s status or group identity which is the problem, but the detrimental consequences attached to that status.’¹⁰¹ This view also aligns with MacKinnon’s on how women’s inequality is based on their group membership that enjoys a lower gender hierarchy and accordingly the principle of hierarchy can be situated in this dimension. This dimension advances substantive equality by calling for a reconciliation of affirmative action (to redress the disadvantage) with equality.

The second dimension seeks to redress stigma, stereotyping, humiliation and violence on the basis of gender among other factors. This dimension entails the concept of

⁹⁷ Fredman ‘Substantive equality revisited’ n 76 above 712.

⁹⁸ Fredman ‘Substantive equality revisited’ n 76 above 713.

⁹⁹ As above.

¹⁰⁰ Fredman ‘Substantive equality revisited’ n 76 above 728.

¹⁰¹ As above 729.

“recognition” which ‘refers to the central importance of inter-personal affirmation to our sense of who we are.’¹⁰² Misrecognition of a person’s identity in this regard results in recognition of inequalities that manifest through the person’s denigration. This dimension differs from dignity because rather than address people on an individual basis, it views them as products of social construction. In this way, substantive equality is capable of addressing gender as a social construct. As contrasted for instance with the equal treatment approach which focuses on sex but not its social consequences.¹⁰³

The third dimension is concerned with participation in terms of political voice and social inclusion. Historical discrimination often means that the subjugated group is hampered in political participation. In addressing this challenge, excluded groups are afforded recourse to equality through “judicial review” and their political participation may also be enhanced through various means such as parliamentary membership via quotas. Social inclusion on the other hand includes ensuring equality in participation by reintegration into the society and the removal of hindrances to participation.¹⁰⁴

The fourth dimension relates to accommodating difference and structural change. It is contrasted with a formal equality approach that regards gender and other status as irrelevant. This dimension in respecting and accommodating difference requires that ‘existing social structures must be changed to accommodate difference, rather than requiring members of out-groups to conform to the dominant norm.’¹⁰⁵ An example for instance is changing work environments to accommodate women with children as opposed to expecting women with childcare responsibilities to conform to a system that was not designed with them in mind. In the realm of disability rights, this dimension manifests as reasonable accommodation.¹⁰⁶ Structural changes may also necessitate fiscal expenditure thereby inculcating the gender budgeting method as discussed in the previous section. This last dimension is not without challenge. In practice, it presents a dilemma between making general structural changes as opposed to exceptionalist

¹⁰² Fredman ‘Substantive equality revisited’ n 76 above 731.

¹⁰³ As above.

¹⁰⁴ Fredman ‘Substantive equality revisited’ n 76 above 731-732.

¹⁰⁵ As above 732-733.

¹⁰⁶ In the Convention on the Rights of Persons with Disabilities art 2, “Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

approaches. Fredman suggests that with regards to gender, the norm should be changed but there are some limited circumstances in other discourses that can permit exceptionalism. Another challenge is that structural changes in response to the demand for accommodation can be costly and are often conveyed, as unreasonable. Here she offers that duty bearers should nonetheless bear the costs because “[w]hatever cost is not borne by employers or the State is left on the shoulders of those who are least able to bear it.”¹⁰⁷

The foregoing dimensions are multi-dimensional with possible complementarities and conflicts. In utilising them as an approach to substantive equality, it is not enough to focus on only one dimension. Accordingly, the dimensions should reinforce each other and interactively respond to the weakness of each.

The foregoing approach is also not without criticism. MacKinnon in a direct response to Fredman criticises the four-dimensional approach to substantive equality in favour of the utilisation of social hierarchy as the identifying principle.¹⁰⁸ However, MacKinnon’s analysis of the approach is based on isolated criticism of each dimension. Fredman in rejoinder contends that to select each dimension and criticise it as if it was a separate lexical principle misunderstands and discounts the multi-dimensional aspect of this approach to substantive equality.¹⁰⁹ She maintains that the rationale of the ‘four-dimensional framework is to provide a sufficiently nuanced tool to detect the complex ways in which inequality of power occurs and thereby to be in a position to address them.’¹¹⁰ It is for this reason that this thesis maintains its support and adoption of the four-dimensional approach to equality.

2.4.1.2 Recognition of difference

Antecedent to substantive equality, gender responsiveness is also concerned with the recognition of difference. Difference can manifest by way of sex or gender. Difference unique to one’s sex may relate to pregnancy, child bearing and breastfeeding. Difference

¹⁰⁷ Fredman ‘Substantive equality revisited’ n 76 above 733-734.

¹⁰⁸ ‘Substantive equality revisited: A reply to Sandra Fredman’ (2016) 14 *International Journal of Constitutional Law* 739-746.

¹⁰⁹ S Fredman ‘Substantive equality revisited: A rejoinder to Catharine MacKinnon’ (2016) 14 *International Journal of Constitutional Law* 747-751.

¹¹⁰ As above 747.

can also result from the different gender roles that society assigns to men and women. Accordingly, these differences should be borne in mind in the formulation of norms and in their implementation. Early feminist writings in the area assert the rationale and importance of recognising difference. Jennifer Jaff in her article ‘The difference that difference makes’,¹¹¹ makes the argument that because these differences exist and cannot be disputed, an obvious tension results in trying to enforce sameness in treatment where differences exist. Jaff makes the case that the tension between sameness of treatment and the importance of recognising difference manifests in various ways. One of the ways is in the law itself when it uses vague terms such as “equality”. She argues that while equality appears to be a neutral principle, its application presents various challenges:¹¹²

Equal to whom, to what? ... As with all terms which derive their meaning only from their relation to a norm, the choice of that norm becomes all important – and that choice is necessarily subjective because the law itself provides no guidance to the decision maker as to what the “correct” choice is.

Since the choice or the standard is subjective, the interpretation of equality then becomes subject to the biases and beliefs of the implementers. Another writer corroborates this argument noting that, ‘the standard [to determine equality] is set on male terms that overlook important gender differences.’¹¹³ Accordingly, discrimination of women no doubt results from the vagueness of ‘equality’ laws that do not recognise difference coupled with subjective interpretation often influenced by dominant male standards.

The importance of the foregoing for this thesis is that equality to ascertain gender responsiveness will be assessed with “difference” in mind. Are the norms and their application resulting in sameness of treatment or different treatment? As established, the difficulty with same or equal treatment is that it often means that women’s needs have not been borne in mind. This view is further supported in a paper on gender responsiveness, which emphasises the importance of difference:¹¹⁴

When examining gender-specific programming, it is important to recognize *equality does not mean “sameness.”* Equality is not about providing the same programs, treatment and opportunities for

¹¹¹ J Jaff ‘The difference that difference makes’(1989) 19 *Cumberland Law Review* 467-496.

¹¹² As above 470.

¹¹³ NH Rafter ‘Equality or difference’ (1992) 3 *Federal Prisons Journal* 17.

¹¹⁴ J Belknap, M Dunn & K Holsinger ‘Moving toward juvenile justice and youth serving systems that address the distinct experience of the adolescent female’ Report to the Governor Columbus, Ohio Office of Criminal Justice Services (1997) 23 cited in Bloom & Covington n 24 above 6.

girls and boys ... Equality is about providing opportunities that mean the same to each gender. This new definition legitimizes the differences between boy and girls.

2.4.2 Inclusion

The background to this chapter laid out an elaborate narrative of the exclusion of women historically, in the conceptualisation of human rights and consequently in the enjoyment of human rights. Inclusion is therefore the response to the unfairness of exclusion and is an important parameter to gender responsiveness.¹¹⁵ While acknowledging that inclusion is a broad subject, this thesis is concerned with it from the following points of inquiry: Are the norms inclusive? Are the mechanisms and structures implementing the norms inclusive? Are the procedures by the implementers inclusive? In assessing inclusion, this thesis will employ two parameters. The first, is the examination of quantitative and qualitative sex disaggregated data (SDD) and secondly, an examination of measures towards substantive inclusion.

The first parameter is quantitative and concerned with optics and numbers. Do the norms mention women and specific measures to address their needs? Are women represented in the structures implementing the norms? Essentially, are women and their issues quantitatively visible? One of the ways to measure this is through the analysis of sex disaggregated data, which entails an assessment of the composition of the structure or mechanism and whether women are adequately represented. Human rights treaty bodies must mirror the society's they serve and this calls for the inclusion of women in these bodies whether organically (that is, achieved naturally through elections/appointment) or through positive measures such as affirmative action. For purposes of this thesis, structures and mechanisms will be considered representative if they comprise of at least 50% of women. This is informed by the African Union position that calls for equal representation of women in decision making. The AU in its Gender Policy calls for the 'enforcement of the AU 50/50 Gender Parity Principle'.¹¹⁶ Inclusion of women in this way at the very least addresses the historical blatant exclusion of women. However, for

¹¹⁵ On inclusion see further: L Epperson 'Legislating inclusion' (2012) 6 *Harvard Law & Policy Review* 91-114, L Finkle & MA Bridgeman 'Committed to inclusion' (2009) 28 *Legal Management* 24-30 and H Collins 'Discrimination, equality and social inclusion' (2003) 66 *Modern Law Review* 16-43.

¹¹⁶ African Union Gender Policy, Commitment 1. Available at http://www.un.org/en/africa/osaa/pdf/au/gender_policy_2009.pdf (accessed 8 August 2016).

it to result to transformative change for women and their issues, inclusion must be more meaningful. It is well acknowledged that a superficial inclusion of women such as through tokenism¹¹⁷ or in order to check boxes may not address subtle or covert forms of discrimination. This arguably leads us to the second limb of inclusion, which is substantive inclusion. Here we are concerned with the question of whether women are qualitatively and substantively included.

In an article problematizing inclusion,¹¹⁸ Yuvraj Joshi makes the argument that for inclusion to truly counter the injustice of exclusion, it needs to be transformative and not merely superficial. On exclusion he notes that it manifests as ‘an issue of *access* (i.e. whether someone is allowed into an institution) and one of *participation* (i.e. whether someone can partake in and benefit from the institution).’¹¹⁹ Influenced by this view, this thesis will test substantive inclusion by assessing women’s levels of access and participation to the institution as well as its mechanisms. Finally, Joshi also makes the argument that ‘institutional inclusion is not a goal in itself; rather, it is a means to achieve social justice.’¹²⁰ For instance, evidence of inclusion may not necessarily result in institutional transformation. For this reason then, inclusion is appropriately tested here as one and alongside other parameters to determine gender responsiveness.

2.4.3 Recognition of intersectional identities

In describing womanhood in Africa, one African feminist notes that for the African woman, ‘each individual occupies a multiplicity of overlapping and intersecting positions, with various relationships to privilege and disadvantage.’¹²¹ This is because women in Africa have multiple and intersecting identities that often result in multi-structured levels oppression. When women experience discrimination on multiple grounds, this amounts

¹¹⁷ Tokenism is defined as ‘actions that are the result of pretending to give advantage to those groups in society who are often treated unfairly, in order to give the appearance of fairness.’ Available at Cambridge Dictionary <http://dictionary.cambridge.org/dictionary/english/tokenism> (accessed 8 August 2016). On tokenism see further: PS Figa ‘Women in the profession: Beyond tokenism’ (1995) 24 *Colorado Lawyer* 2513-2518, PE Andrews ‘Affirmative action in South Africa: Transformation or tokenism’ (1999) 15 *Law in Context: A Socio-Legal Journal* 80-109 and EK Scott ‘Beyond tokenism: The making of racially diverse feminist organizations’ (2005) 52 *Social Problems* 232-254.

¹¹⁸ Y Joshi ‘The trouble with inclusion’ (2014) 21 *Virginia Journal of Social Policy & the Law* 207-266.

¹¹⁹ As above, 212.

¹²⁰ Joshi n 118 above 209.

¹²¹ O Oyewumi ‘Introduction: Feminism, sisterhood, and other foreign relations’ in O Oyewumi (ed) *African women and feminism: Reflecting on the politics of sisterhood* (2003) 2.

to intersectional discrimination.¹²² This necessarily calls for a more nuanced understanding and intersectional analysis of discrimination against women. In addition to sex and gender, women could also be simultaneously discriminated on account of other factors such as: age, sexual orientation, disability, socio-economic status, race et cetera. In communicating their gender responsive approach, the UN Women note the importance of recognizing that 'gender equalities are compounded for certain groups of women and girls (because of their age, ethnicity, national origin, occupation or other characteristics)'.¹²³ Similarly one of the definitions of gender responsiveness discussed earlier by Bloom and Covington emphasises content and context as major factors noting that 'for programming to be effective for girls, it needs to deal in a comprehensive and integrated way with the multiple issues that are impacting girls' lives.'¹²⁴

Accordingly, a gender responsive approach in being cognisant to context should respond to the intersectional identity of women in Africa and the resultant intersectional discrimination. As this thesis has already argued, norms and procedures should not envisage women as one homogenous entity with shared biological features. To the contrary, women are more of a group with a shared history of discrimination and justice that manifests based on varying factors which are social, sexual, economic et cetera.¹²⁵ To be gender responsive therefore, there needs to be recognition of the varying determinants that occasioned inequality.

The intersectional nature of discrimination results in double jeopardy¹²⁶ for the women concerned. In Africa some of the identities that are perhaps most disproportionately

¹²² On the intersectional nature of discrimination against women see generally: J Bond, J Bruggeman, S Katyal & L Miller-Muro 'Intersectional international human rights' (2004) 5 *Georgetown Journal of Gender and the Law* 858-880, R Sifris 'Involuntary sterilization of HIV-Positive women: An example of intersectional discrimination' (2015) 37 *Human Rights Quarterly* 464-491, LA Crooms 'Indivisible rights and intersectional identities or, what do women's human rights have to do with the Race Convention?' (1997) 40 *Howard Law Journal* 619-640, J Day 'Closing the loophole - Why intersectional claims are needed to address discrimination against older women' (2014) 75 *Ohio State Law Journal* 447-475.

¹²³ UN Women *Virtual knowledge centre to end violence against women and girls* available at <http://www.endvawnow.org/en/articles/306-ensuring-gender-responsiveness.html> (accessed 3 August 2016).

¹²⁴ Bloom & Covington n 44 above 7.

¹²⁵ MacKinnon 'Substantive equality: A perspective' n 79 above 13.

¹²⁶ Should be differentiated from the criminal law defence of double jeopardy that prevents the accused from being prosecuted twice for the same offence. Here, it is used to refer to the dual or multiple levels of subordination, vulnerability or oppression that women experience. See further: E Greenman & Y Xie 'Double jeopardy? The interaction of gender and race on earnings in the United States' (2008) 86 *Social Forces* 1217-1244, K Crenshaw 'Race, gender and sexual harassment' (1992) 65 *Southern California Law Review* 1467-1476, MH Chen 'Two wrongs make a right: Hybrid claims of discrimination' (2004) 79 *New York University Law Review* 685-711.

affected by intersectional discrimination owing to dual or multiple vulnerabilities include: Rural women, young women (including girls), lesbian women and women with disabilities and this is by no means an exhaustive list. Here we consider rural women and lesbians by way of illustration.

Rural women face particular problems on account of their sex and gender coupled with their rural context. This vulnerability of rural women is well recognised in international human rights law.¹²⁷ One writer notes that rural women ‘suffer from a double burden of exploitation: along with their menfolk, as part of the rural poor; and, in addition, as members of the female sex.’¹²⁸ The exploitation referred to results from their hard labour in production that is not commensurate to returns. In addition to poor working conditions and low wages, they largely have minimal or no access to health services, reproductive health care, education, credit facilities as well as employment opportunities altogether amounting to a lower social and economic status.¹²⁹ Rural women are also disproportionately affected by harmful cultural practices such as female genital mutilation since the guise of “culture” is easier to deploy in rural settings.¹³⁰

Lesbians and other female sexual minorities also have intersectional identities. For instance, while this thesis has shown the marginalisation of women in history, it is exacerbated for lesbian women. In legal history for instance, commentators have found them to be ‘non-existent, undocumented, overlooked, misconstrued, imperceptible [and] invisible’.¹³¹ Lesbians find themselves exposed on multiple levels ranging from, sexism, homophobia and heteronormativity, the latter two of which result in heterosexual hegemony.¹³² To illustrate further, one commentator notes that ‘a black lesbian’s liberation depends upon dismantling at least three institutions of oppression:

¹²⁷ CEDAW art 14 and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art 14(2)(a) & art 19(d).

¹²⁸ Z Ahmad ‘The plight of rural women: Alternatives for action’ (1980) 119 *International Labour Review* 425.

¹²⁹ As above 425–433. See also J Klugman ‘Women’s health and human rights: Public spending on health and the military one decade after the African Women’s Protocol’ (2014) 14 *African Human Rights Law Journal* 715 where the disproportionate share of abortion-related deaths in Sub-Saharan Africa is on account of unsafe abortions in poor and rural areas that are often associated with ‘traditionally-restrictive regimes’.

¹³⁰ C Yusuf & Y Fessha ‘Female genital mutilation as a rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania’ (2013) 13 *African Human Rights Law Journal* 376 & 382.

¹³¹ R Robson ‘Lesbianism in Anglo-European legal history’ (1990) 5 *Wisconsin Women’s Law Journal* 1.

¹³² For a detailed examination of heteronormativity and heterosexual hegemony see further: MMC Varela, N Dhawan & A Engel (eds) *Hegemony and heteronormativity: Revisiting “The political” in queer politics* (2016).

homophobia, racism and sexism.¹³³ Faced with this tripartite of vulnerabilities for instance, black lesbians in South Africa have been subjected to violence against women in the form of “corrective rape”.¹³⁴ In addition to the risk of increased violence, lesbian couples in almost all countries in Africa are also denied other rights such as the right to marriage and with it the accompanying legal benefits that heterosexual couples enjoy. Their rights to freedom of association and expression are also hampered through state sanctioned non-registration and other forms of intimidation of lesbian organisations.¹³⁵

The foregoing serves to demonstrate the manner in which the gender responsive approach in this thesis will respond to the nuanced identities of women in Africa. In analysing intersectional discrimination, this thesis will adopt the intersectional discrimination approach proposed by the UN human rights system via the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the Committee on the Elimination of Racial Discrimination (CERD).

The CEDAW Committee on its part has developed a fluid and expansive understanding of intersectional discrimination whereby if sex and gender is one of the factors of discrimination, it automatically becomes necessary to examine how other identity factors contribute to the discrimination.¹³⁶ This approach breaks away from the traditional style mostly found in national contexts. In the criticised approach, each aspect of discrimination is proved based on recognised grounds in a manner that completely fails to consider the nuanced, synergistic and complex manner in which intersectional identities experience discrimination. This approach is supported from an African feminist perspective where one scholar asserts: ‘It would be counterproductive in the African setting to single out gender ... as the primary source and focus of political agitation.’¹³⁷

¹³³ SE Rush ‘Sexual orientation: A plea for inclusion’ (1995) 10 *Berkeley Women’s Law Journal* 70.

¹³⁴ See L Di Silvio ‘Correcting corrective rape: Carmichele and developing South Africa’s affirmative obligations to prevent violence against women’ (2011) 99 *Georgetown Law Journal* 1469-1516. This article also defines corrective rape: ‘an act of violence against women committed by men ostensibly to “cure” lesbians of their nonconforming sexual orientation’ 1470.

¹³⁵ Consider for instance the long-standing struggle between Gays and Lesbians of Zimbabwe (GALZ) and the Zimbabwean government, which often speaks strongly against and has criminalized same-sex sexual activity. See further: T Shoko “‘Worse than dogs and pigs?’ Attitudes towards homosexual practice in Zimbabwe’ (2010) 57 *Journal of Homosexuality* 634-649.

¹³⁶ M Campbell ‘CEDAW and women’s intersecting identities: A pioneering new approach to intersectional discrimination’ (2015) 11 *DIREITO GV Law Review* 479-504.

¹³⁷ Oyewumi ‘Introduction: Feminism, sisterhood, and other foreign relations’ n 121 above 2.

In examining the various intersectional grounds therefore, the approach by CERD is useful. In General Recommendation 25 on gender-related dimensions of racial discrimination, they outline a methodology to ensure that they fully take into account the gender-related dimensions of racial discrimination by paying particular consideration to four factors of the discrimination: (a) the form and manifestation; (b) the circumstances in which it occurred; (c) the consequences; and (d) the availability of remedies and complaint mechanisms.¹³⁸ The foregoing methods by the CEDAW Committee and CERD will be employed in this thesis in undertaking an analysis of intersectional discrimination towards examining gender responsiveness.

2.4.4 Contextualised African response

The hegemony of western culture on Africa owing to the realities of colonialism and neo-colonial influence, together with the overall cultural relativist views that challenge the universality of human rights, necessitate an inquiry into the conceptualisation and implementation of women's rights in Africa. This calls for a contextualised African¹³⁹ response. This parameter of gender responsiveness is in response to the exclusion of African perspectives in international human rights law and particularly in feminist discourse. In this regard, Charlesworth acknowledges that feminist analysis of international law requires a more nuanced perspective noting for instance that: 'Feminists from the developing world have been critical of the wholesale application of western feminist theories to their societies and the creation of monolithic categories such as "third world women."' ¹⁴⁰ However, her commitment to diversifying feminist analysis may be propositioned as disingenuous as barely a paragraph later she cautions:¹⁴¹

At the same time, I think that it is important not to become paralyzed to the point of total relativism in this project, to insist that feminism disintegrate into a series of local or regional struggles. We should focus at least initially, on areas common in women's experience.

¹³⁸ Committee on the Elimination of Racial Discrimination 'General recommendation XXV on gender-related dimensions of racial discrimination' para 5 available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=11 (accessed 2 September 2016).

¹³⁹ The use of the term "African" here should not be misconstrued to contribute to the misguided narrative that views Africa as one homogeneous nation blind to its great diversity and such an implication, if at all is highly regretted. The term is used here and in this thesis for ease in communication to present contrast to predominant western feminist views.

¹⁴⁰ H Charlesworth 'Alienating Oscar – Feminist analysis of international law' (1993) 25 *Studies in Transnational Legal Policy* 4.

¹⁴¹ As above 4.

Charleworth's likening of a diversified perspective of feminism to "disintegration" merely reinforces the hegemony of western feminism. Her suggestion to focus on areas common to women's experience, clearly a call to sisterhood, is also problematic as the "common areas" would likely be determined by western experiences. Oyeronke Oyewumi who makes the following assertion similarly makes this criticism:¹⁴²

From its inception, a recurrent criticism of white feminism... is that white feminists have considered their experience of womanhood in their culture as the prototype female experience and have used it to define feminism. I contend that the articulation of sisterhood as a framework for cross-boundary feminist relations is very much tied to the use of white women's experiences as the basis for feminist engagements.

Accordingly, western or mainstream feminism emerges as an inappropriate vehicle to develop the concept of a contextualised African response. A more useful discourse is one that insists on a more nuanced and contextualised feminism suitable for application in Africa. An African feminist perspective should necessarily guide contextualised African responses.

African feminism is well recognised in academic scholarship, 'scholars differentiate between white feminism, black feminism, Western feminism, Third world feminism, and African feminism.'¹⁴³ Its place in international feminist discourse is similarly recognised and well-articulated by Joe Oloka-Onyango and Sylvia Tamale.¹⁴⁴ In examining African perspectives, they cover wide ground on international feminism ranging from affirming women's rights as human rights to discussing the relevance of relativism. Germane to the present discussion, they note that 'there's a glaring need for the evolution of an endogenous approach to the implementation of women's human rights in Africa'.¹⁴⁵ This approach or an African feminist response necessarily involves responding to women's rights issues in Africa cognisant of the region's context and peculiarities.

In addition to being grounded in African feminism, a contextualised African response in this thesis is defined as encompassing two main ideas. First, in being contextualised, it

¹⁴² Oyewumi 'Introduction: Feminism, sisterhood, and other foreign relations' n 121 above 4.

¹⁴³ As above 1.

¹⁴⁴ J 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* 691-731.

¹⁴⁵ As above 720.

considers the lived realities of women in Africa. Secondly, it promotes a positive cultural context.

2.4.4.1 Recognition of the lived realities of women in Africa

A contextualised African response recognises and accordingly responds to the lived realities of women in Africa. This requires recognising the pertinent issues that affect women and the realisation of their rights in Africa. Overall, women in Africa experience violations on almost every realm ranging from the private to public spheres. Since it is impossible to be exhaustive in this regard, this thesis depicts one view of women's lived realities by the use of three illustrations. The illustrations that have been selected represent women's rights violations that specifically affect women in Africa and depict issues that can be said to be pervasive and are yet to find suitable redress.

Violence against women makes its way to the top of the list owing to its pervasiveness, impact and the manner in which it is insidiously tolerated in certain contexts. It manifests as rape, domestic violence, assault among other forms. In its wake, it violates a myriad of rights including the rights to dignity, life, health, and physical integrity as well as having negative social and economic consequences for the women involved and society in general. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) defines violence against women as follows:¹⁴⁶

"Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

Since violence against women is a form of gender-based violence,¹⁴⁷ this means that its roots are drawn from societal gender inequalities. Some commentators agree noting that 'abuse of women and girls, regardless of where and how it occurs, is best understood within a "gender" framework because it stems in part from women's and girls' subordinate status in society.'¹⁴⁸ For that reason, a contextualised African response will

¹⁴⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) art 1(j).

¹⁴⁷ The Declaration on the Elimination of Violence against Women in art 1 defines the term violence against women as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

¹⁴⁸ L Heise, M Ellsberg & M Gottemoeller 'Ending violence against women' (1999) 27 *Population Reports* 3.

mean that any interventions in response to violence against women must aim to address its root causes which are specific to various contexts. For instance, this must necessarily mean paying attention to the vulnerabilities that may exacerbate violence against women for certain individuals or groups. 'For instance, women with disabilities, migrant women, women with non-binary gender identity and sexual minorities can be particularly vulnerable to violence.'¹⁴⁹

Women's sexual and reproductive health rights are heavily compromised in Africa on account of high maternal mortality rates, hampered access to safe abortions and women's disproportionate vulnerability to HIV and AIDS. Maternal mortality is particularly an African problem. Sub-Saharan Africa has the world's highest maternal mortality rates with women facing a 1 in 36 lifetime risk of maternal death compared to 1 in 3,300 in high income countries.¹⁵⁰ Worse still, most of the causes of maternal death are preventable. Case in point, unsafe abortions account for 'at least 9% of maternal deaths'¹⁵¹ in Africa. These needless deaths are as a result of restrictive national laws on access to safe abortions. 'As of 2015, an estimated 90% of women of childbearing age in Africa live in countries with restrictive abortion laws'.¹⁵² This statistic is in stark contrast to the enabling environment provided by the Maputo Protocol which authorises the right to a medical abortion in a number of instances.¹⁵³ The import of these grim statistics is that a contextualised African response must be cognisant of this context and respond to it accordingly. In practice, this response may manifest in various ways. For instance, one woman's case alleging the violation of her right to a safe abortion can be examined to evaluate whether it is part of a systemic problem. If found to be part of a systemic problem, the resultant remedies can also be structured in such a manner as to have the broadest impact beyond the singular litigant thus positively altering women's lived realities.

¹⁴⁹ African Union Commission & Office of the United Nations High Commissioner for Human Rights *Women's rights in Africa* (2017) 30. Available at http://www.ohchr.org/Documents/Issues/Women/WRGS/WomensRightsinAfrica_singlepages.pdf (accessed 4 April 2017).

¹⁵⁰ UNICEF 'Maternal health: Maternal mortality.' Available at <https://data.unicef.org/topic/maternal-health/maternal-mortality/#> (accessed 4 April 2017).

¹⁵¹ Guttmacher Institute 'Abortion in Africa: May 2016 Fact sheet.' Available at <https://www.guttmacher.org/factsheet/facts-abortion-africa#1> (accessed 4 April 2017).

¹⁵² As above.

¹⁵³ Maputo Protocol n 146 above art 14(2)(c) authorises 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 foetus.

Harmful practices against women are highlighted here owing to their prevalent nature and ability to simultaneously violate a startling number of women's rights. The Maputo Protocol defines harmful practices as 'all behaviour, attitudes and/or practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.¹⁵⁴ Some of the most pervasive harmful practices include female genital mutilation (FGM) and child marriage. The practice of FGM is often carried out under the guise of culture or religion or both. While the exact number remains unknown owing to the insidious nature of the practice, 'more than 200 million girls and women alive today have been cut in 30 countries in Africa, the Middle East and Asia where FGM is concentrated.'¹⁵⁵ FGM has absolutely no health benefits for women and girls whereas it violates their rights to health, dignity, physical integrity, freedom from discrimination and sometimes even life. Child marriage is similarly pervasive with its prevalence in Africa higher than the global average.¹⁵⁶ It violates girls' rights to reproductive health, dignity, physical integrity, education and freedom from discrimination. It also defeats their best interests and threatens their survival, development and protection. A contextualised African response in this regard for instance may include having targeted interventions to those countries with particularly high prevalence rates of a specific harmful practice. It will also include recognising intersectional identities and their impact in exacerbating a harmful practice. For instance, to illustrate this intersectionality, in addition to being vulnerable owing to their gender and age, '[a]frican child brides are most likely found in *rural* areas and among the *poorest* segment of the population.'¹⁵⁷ Further, since most of these practices are perpetuated under the guise of culture, it will also necessitate a nuanced and innovative engagement with culture as is hereafter articulated.

2.4.4.2 Enhancing the cultural legitimacy of human rights

Women's rights in Africa interact with culture in both positive and negative ways. A contextualised African response needs to promote and enable a positive cultural context

¹⁵⁴ Maputo Protocol n 146 above art 1(g).

¹⁵⁵ WHO 'Female genital mutilation: Fact sheet updated February 2017'. Available at <http://www.who.int/mediacentre/factsheets/fs241/en/> (accessed 4 April 2017).

¹⁵⁶ UNICEF 'A profile of child marriage in Africa.' Available at [https://www.unicef.org/wcaro/english/UNICEF-Child-Marriage-Brochure-low-Single\(1\).pdf](https://www.unicef.org/wcaro/english/UNICEF-Child-Marriage-Brochure-low-Single(1).pdf) (accessed 4 April 2017).

¹⁵⁷ As above (emphasis mine).

for the realisation of women's rights in Africa in relation to culturally based challenges. There is no denying that culture, in its varying perceptions, is a major organising factor and enjoys social legitimacy in many African spaces ranging from the private to the public realm. Accordingly, one of the key issues that a contextualised African response must contend with is that of African culture and its manifestation in varying practices as well as through customary law. With regard to the use of the term "African culture", this thesis identifies with Tamale who explains:¹⁵⁸

Reference to 'African culture' is not because I have no sense of the richness and diversity of African people's heritage. I use the term deliberately to highlight those aspects of cultural ideology that are widely shared among Africans (e.g. the communitarian, solidaritarian and *ubuntu* ethos), and politically to call attention to the common historical legacies inscribed in cultures within Africa by forces such as colonialism, capitalism, imperialism and globalisation.

In human rights and women's rights discourse, reference to African culture conjures up negative imagery and is equated and in fact conflated with harmful cultural practices. This is no doubt one of the effects of a western conception of human rights. In western literature for instance, African culture is often presented or misrepresented as being at odds with human rights values.¹⁵⁹ A contextualised African response must accordingly negate this automatic and lazy association of African culture to resultant harm to women. Nkiru Nzegwu cautions that most of what is presented as African culture is actually fraught with misrepresentations. Using the Nigerian Igbo community as an example, she makes the case that early western ethnographers, Christian missionaries, colonial anthropologists and educationists viewed Igbo families 'through their patriarchal lens and the male-privileging value scheme of Western epistemology.'¹⁶⁰ Propelled through

¹⁵⁸ S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 49.

¹⁵⁹ See for instance J Donnelly *Universal human rights in theory and practice* (2003) 71-86. In his chapter on non-western conceptions of human rights, he makes the culturally arrogant argument that all non-western societies did not have a concept of human rights. Of traditional Africa in particular, where African scholars have submitted evidence of a concept of human rights he presents their arguments and dismisses all their works as "irrelevant" arguing that all examples refer to other concepts and practices but not to human rights. Even where he acquiesces that Africans had personal rights, he makes the rather debasing proposition that for all African societies, these rights were not based on their humanity but rather on other criteria such as age, sex, lineage, achievement or community membership. He makes the overall sweeping conclusion: 'Recognition of human rights simply was not the way of traditional Africa, with obvious and important consequences for political practice.' With this last averment and in other sections of his book Donnelly not so subtly implies that African societies are therefore culturally predisposed to human rights violations. This absurd insinuation is further confirmed by L Volpp 'Feminism versus multiculturalism' (2001) 101 *Columbia Law Review* 1186-1187 who criticizes this insinuation: 'Incidents of sexual violence in the West are frequently thought to reflect the behaviour of a few deviants-rather than as part of our culture. In contrast, incidents of violence in the Third World or immigrant communities are thought to characterize the culture of entire nations.'

¹⁶⁰ N Nzegwu *Family matters: Feminist concepts in African philosophy of culture* (2006) 6.

this interpretive scheme, they proceeded to generate descriptions that reinforced their misinterpretation of patriarchy as the organising principle of the Igbo.

Oloka-Onyango and Tamale similarly support this view noting that colonialism sought 'to transform existing social, political and cultural structures of organization',¹⁶¹ while colonial laws 'superimposed elements which were manifestly alien to the context in which they were introduced.'¹⁶² The import of this persists to date and introduced a double jeopardy for women which presents as follows:¹⁶³

Women were de-equalized-first (alongside the men) through the mechanics of the juridical system imposed by the colonialists which discriminated against "natives" and secondly through the reinterpreted "customary law" that was progressively (re)constructed by the colonialists and specific African men.

Notwithstanding the foregoing defence of African culture and its apparent distortion, a contextualised African response cannot be naïve to the negative utilisations of culture in the historical and continued subjugation of women. Fareda Banda in her article dedicated to Martin Chanock¹⁶⁴ holds that one of 'Chanock's greatest achievements is that he has fostered a greater understanding, within human rights discourse, of culture and tradition as gendered and as needing to be scrutinised for bias.'¹⁶⁵ She highlights his views further that 'culture has been branded by states as a means to circumvent or limit their implementation of human rights.'¹⁶⁶

Accordingly, a contextualised African response must respond to the foregoing predicaments that accompany African culture i.e. its potential for distortion as well as its potential and propensity to gender bias. A contextualised African response offers instead the promotion of a positive cultural context that can support the realisation of women's rights. As remedy to the distortion of African culture, Nzegwu calls for the emergence of

¹⁶¹ Oloka-Onyango & Tamale n 144 above 723.

¹⁶² K Mann & R Roberts *Law in Colonial Africa* (1991) 9 as cited in Oloka-Onyango & Tamale n 144 above 723.

¹⁶³ M Chanock 'Neither customary nor legal: African customary law in an era of family law reform' (1989) 3 *International Journal of Law and the Family* 72-88 and LA Obiora 'Reconsidering customary law' (1993) 17 *Legal Studies Forum* 217-252 as cited in Oloka-Onyango & Tamale n 144 above 724.

¹⁶⁴ F Banda 'This one is from the ladies: Thank you Martin Chanock, honorary African feminist' (2010) 28 *Law in Context: A Socio-Legal Journal* 8-26.

¹⁶⁵ As above 15.

¹⁶⁶ M Chanock 'Human rights and cultural branding: Who speaks and how' in AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 41-42 as cited in Banda 'This one is from the ladies: Thank you Martin Chanock, honorary African feminist' n 164 above 15.

a culture that is rid of 'fictive traditions and ideologies that forced women to adopt a diminished world view.'¹⁶⁷ She insists that we should do away with 'prevailing anti-female ideology in the culture' having established that its basis is fictive.¹⁶⁸ This idea is in line with the very nature of culture, which is fluid as opposed to a static unchanging factor.

Culture's gendered potential for bias alongside its propensity to propagate women's subjugation has over time led to the perceived incompatibility of "culture" and "rights", casting these two notions as polar opposites with the latter taking on a hegemonic stance globally. Accordingly, a contextualised African response proposing a positive cultural context must from the onset confront this predicament.

The paradigm of culture and rights is an essential discussion for the African context for varying reasons. To begin with, the emancipatory potential of human rights must necessarily be examined against culture, which is ubiquitous and dictates the lived realities of women in Africa. Tamale captures the heart of the controversy best when she advances:¹⁶⁹

If, however, the concepts of 'rights' and 'culture' continue to be viewed as being at odds, it would mean that African women would have to first strip themselves of culture before enjoying their rights.

It is then apparent that in order to strike the balance between gender equality and cultural identity, a contextually African response must reconcile rights with culture. Cowan *et al* take on this hypothesis from an anthropological perspective with useful insights. When they highlight how 'local concerns continue to shape how universal categories of rights are implemented, resisted and transformed',¹⁷⁰ they validate the need for the present discussion. They further illustrate how rights and culture have largely been positioned and debated in binary opposition. They warn 'that the debate has tended to exaggerate the irreconcilability of the terms 'rights' and 'culture'.¹⁷¹ They propose instead other varying positions including: a right to culture, rights as culture and culture

¹⁶⁷ Nzegwu n 160 above 21.

¹⁶⁸ Nzegwu n 160 above 21.

¹⁶⁹ Tamale-'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' n 158 above 55.

¹⁷⁰ JK Cowan, MB Dembour & RA Wilson (eds) *Culture and rights: Anthropological perspectives* (2001) 1.

¹⁷¹ As above 8.

as analytic to rights. These alternatives create a new path and move ‘from a focus on supposedly irreconcilable worldviews to that of the inherent tensions between an abstract ideal [rights] and its implementation in the real world [culture], between principle and practice’.¹⁷²

The approach by Cowan *et al* of a “new path” to reconcile culture and rights receives support from African feminists. Celestine Nyamu poses the question: ‘Are local norms and practices fences or pathways?’¹⁷³ As if in answer, Tamale asserts that: ‘Culture is a neglected pathway to women’s justice.’¹⁷⁴ Nyamu in an earlier work articulates how human rights can respond to the cultural legitimization of gender hierarchy.¹⁷⁵ She cautions against abolitionist approaches that simply call for the abolition of cultural practices that offend human rights and replacing them with international human rights norms. Such an approach is also criticised by African scholars such as Thandabantu Nhlapo who in discussing “culture vs. human rights” takes issue with an abolitionist approach which presumes that women’s rights are non-existent in African customary law and inversely that women’s rights would only thrive under international human rights law.¹⁷⁶ Nyamu similarly argues in a subsequent body of work that ‘the assumption that local practices offer no basis for women’s human rights pre-empts an open-minded assessment of local practice’,¹⁷⁷ an assessment which she believes could ‘lead to the recognition and utilization of whatever positive openings are presented by general principles of fairness and justice in a community’s value system.’¹⁷⁸ Tamale equally cautions that a narrow view that presents culture and rights as invariably opposed and antagonistic ignores ‘the emancipatory potential of culture to enhance the quality of women’s lives in Africa.’¹⁷⁹

¹⁷² Cowan *et al* n 170 above 8.

¹⁷³ C Nyamu-Musembi ‘Are local norms and practices fences or pathways? The example of women’s property rights’ societies’ in AA An-Na’im (ed) *Cultural transformation and human rights in Africa* (2002) 126-150.

¹⁷⁴ Tamale ‘The right to culture and the culture of rights: A critical perspective on women’s sexual rights in Africa’ n 158 above 55.

¹⁷⁵ C Nyamu ‘How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?’ (2000) 41 *Harvard International Law Journal* 381-418.

¹⁷⁶ T Nhlapo ‘Cultural diversity, human rights and the family in contemporary Africa: Lessons from the South African constitutional debate’ (1995) 9 *International Journal of Law and the Family* 216. For a further criticism of the abolitionist approach see also: A An-Na’im ‘Promises we should all keep in common cause’ in J Cohen, M Howard & MC Nassbaum (eds) *Is multiculturalism bad for women?* (1999).

¹⁷⁷ Nyamu-Musembi ‘Are local norms and practices fences or pathways? The example of women’s property rights’ n 173 above 126.

¹⁷⁸ As above.

¹⁷⁹ Tamale ‘The right to culture and the culture of rights: A critical perspective on women’s sexual rights in Africa’ n 158 above 48.

Having established the need to reconcile the concepts of culture and rights as central to advancing women's rights in Africa, a methodology then begs. This calls for the development of the concept of a "positive cultural context" that is the subject of the present discussion. This concept is selected for the reason that it intrinsically embraces the reconciliation of culture and rights. How so? On "culture", the concept *prima facie* propagates the retention or utilisation of culture, which has been established as essential. On "rights", the concept already exists as a human rights norm in the African context. The Maputo Protocol in article 17 provides that 'women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.'¹⁸⁰ A positive cultural concept therefore embraces the idea of a "right to culture", "rights as culture" or "culture as analytic to rights" which were earlier proposed as alternatives towards reconciling the unworkable "culture vs. rights" viewpoint.

In developing the model for a positive cultural context, the various seminal works of Abdullahi An-Na'im are instrumental and offer great insights and nuanced discussions of the dynamic between culture and human rights.¹⁸¹ An-Na'im in discussing cultural transformation and human rights in African societies begins by elaborating on what he refers to as the "human rights paradigm".¹⁸² Essentially, this paradigm is premised on the idea of international supervision of domestic human rights protection together with the normative and institutional arrangements for such international supervision. This paradigm came about because states cannot be fully trusted to limit their own power in favour of citizens hence the need for international protection to ensure bare minimums for human rights protection.¹⁸³ In the context of this thesis, this human rights paradigm is represented by the African human rights system with its various norms and institutional arrangements such as the African Commission. The human rights paradigm encounters challenges in the sense that even though it is an international means to ensure

¹⁸⁰ Maputo Protocol n 146 above art 17(1).

¹⁸¹ See generally: AA An-Na'im & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990), AA An-Na'im (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (1992), AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002), AA An-Na'im 'State responsibility under international human rights law to change religious and customary laws' in RJ Cook *Human rights of women: National and international perspectives* (1994) and AA An-Na'im 'Promises we should all keep in common cause' in J Cohen, M Howard & MC Nassbaum (eds) *Is multiculturalism bad for women?* (1999).

¹⁸² AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002).

¹⁸³ AA An-Na'im 'Cultural transformation and human rights in African societies' in AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 14-15.

promotion and protection of human rights at the domestic level, it cannot do so without the cooperation of the state. This is indeed the case of the African human rights system, despite a proliferation of regional human rights norms and implementing institutions, states have largely ignored this human rights paradigm¹⁸⁴ and consequently women's lived realities, as earlier illustrated, still do not reflect the richness of the system. The human rights norms seem to slide off as opposed to permeate the societal fabric. An-Na'im *et al* propose that a possible solution to this difficulty is to work through cultural transformation.

Cultural transformation is defined as:¹⁸⁵

The dynamics of change as internal processes of societal adaptation by a variety of actors in response to a wide range of stimuli at different levels, rather than simply the product of internal hegemony or external imposition.

The process of cultural transformation is one of the simultaneous interaction between the elements of "internal discourse" and "cross-cultural dialogue". In internal discourse, 'proponents of an internationally recognized human right seek to justify and legitimize that right in terms of their own culture.'¹⁸⁶ Internal discourse results in deliberations on cultural legitimacy and is premised on the ability of human beings to change their culture. In contrast for instance, those in favour of abolitionist approaches are guided (or misguided) by the belief that local settings where African culture is widely adhered to are 'the repository for unchanging patriarchal values and... local norms as bounded, immutable and well settled.'¹⁸⁷ In fact, the reverse is true, culture is anything but bounded and static. An-Na'im alludes that 'every culture is constantly changing through the interactions of a wide variety of actors and factors at different levels of society.'¹⁸⁸ Cowan *et al* similarly advance that:¹⁸⁹

The popular conception that a group is defined by a distinctive culture and that cultures are discrete, clearly bounded and internally homogeneous, with relatively fixed meanings and values

¹⁸⁴ See for instance: GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465-492 and F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1-2 where they highlight states' non-compliance with the findings of the African Commission.

¹⁸⁵ As above 13.

¹⁸⁶ AA An-Na'im 'State responsibility under international human rights law to change religious and customary laws' in RJ Cook *Human rights of women: National and international perspectives* (1994) 179.

¹⁸⁷ Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights' n 187 above 145.

¹⁸⁸ An-Na'im 'Cultural transformation and human rights in African societies' n 183 above 13.

¹⁸⁹ Cowan *et al* n 170 above 3.

– what we call an *essentialist* view of ‘culture’ – echoes what was until recently a dominant... understanding of ‘culture’.

Another anthropological scholar in offering human rights as cultural practice¹⁹⁰ also proposes that culture should not be viewed as a bounded element, rather as fluid and more so as a practice that is embedded in people’s lived realities. In demonstrating that culture is multi-vocal she advances by way of example, the celebrated 1990s *Unity Dow* case from Botswana. The case elicited mixed reactions and demonstrated that that even within one country, there is no agreement on what amounts to “culture”. The unbounded and multi-vocal nature of culture and its dynamic with rights is excellently captured where she asserts:¹⁹¹

This culture is itself being vehemently contested, negotiated, and debated. This suggests that the numerous disagreements and conflicts within this debate are not simply unpleasant, external disturbances to an otherwise stable and harmonious “Botswana culture,” but rather, constitutive of it. Disagreement and conflict are culture, and in this particular case, the culture of human rights. In her work she also acknowledges that cultural reinterpretation can be achieved through An-Na’im’s approach of internal discourse and cross-cultural dialogue towards enhancing cultural legitimacy and asserting human rights as cultural practice.

Nyamu advances that this understanding of culture as flexible is critical ‘in order to challenge the arguments that deploy culture as a justification for gender inequalities.’¹⁹² Tamale similarly asserts that cultures are fluid and interactive and that because ‘the institution of gender is constructed within the context of ‘culture’ ... [this] requires that African feminists work within the specificities of culture to realise their goals.’

The foregoing discussion has similar implications for customary law in legally plural contexts. Just like with the submitted evolving ideology of culture, the recommendation is to move ‘beyond a narrow statist construction of customary law to embrace the actual day-to-day practice of people’¹⁹³ as suggested by Banda. This reconstruction and transformation of culture and customary laws can be achieved through the process of

¹⁹⁰ AS Preis ‘Human rights as cultural practice: An anthropological critique’ (1996) 18 *Human Rights Quarterly* 286-315.

¹⁹¹ As above 305.

¹⁹² Nyamu ‘How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?’ n 175 above 382.

¹⁹³ As above 11.

internal discourse within each culture. This approach is in harmony with a contextualised African response that seeks to respond to the lived realities of women in Africa.

Cross-cultural dialogue on its part can be said to be the process of promoting and sustaining cross-cultural legitimacy for an international system of human rights.¹⁹⁴ In further reconciling culture and rights, the organs of the African human rights system such as the African Commission are called to engage in cross-cultural dialogue. In fact, in this regard, An-Na'im asserts that: 'It is neither possible, nor desirable in my view, for an international system of human rights standards to be culturally neutral.'¹⁹⁵ He warns that cultural neutrality breeds two further difficulties. The first, without interpreting human rights norms with cultural circumstances in mind, it will be impossible for human rights norms to take hold in non-Western societies. Secondly, where culture is not tested against human rights norms, regressive practices are likely to be retained or propagated.¹⁹⁶ Barring any potential disagreement therefore, cross-cultural dialogue is undeniably a pragmatic response that provides a suitable pathway to avoid these two unfavourable consequences.

In rejecting cultural neutrality, a question then begs: 'Since different cultures embody different varied moral views, would it not be a form of cultural imperialism to use the standards of one culture to judge another?'¹⁹⁷ An-Na'im advances the following solution:¹⁹⁸

The only way to avoid that charge... is by developing and applying a collaboratively constructed set of standards that are at least not peculiar to a specific culture, if not equally valid for all cultures. This is what the human rights paradigm should seek to achieve, and is capable of achieving.

To be effective, cultural transformation involves deploying both internal discourse and cross-cultural dialogue in an interactive manner. External actors, such as international human rights actors, state machinery or civil society can support internal discourse

¹⁹⁴ An-Na'im 'State responsibility under international human rights law to change religious and customary laws' n 186 above 173-174.

¹⁹⁵ As above 173.

¹⁹⁶ An-Na'im 'State responsibility under international human rights law to change religious and customary laws' n 186 above 174.

¹⁹⁷ An-Na'im 'Cultural transformation and human rights in African societies' n 182 above 34.

¹⁹⁸ As above.

through cross-cultural dialogue with a caveat to neither undermine nor make impositions on the process.¹⁹⁹

In view of the foregoing, this thesis adds an important caveat from Chaloka Beyani:²⁰⁰

Without recourse to standards of human rights as a guide for modifying custom, the danger is inherent that the general process of modifying custom will largely depend on power relations that disadvantage women in African societies. This is due to the fact custom has traditionally reflected male interests, dominance and power over women.

Admittedly, cultural transformation may not always be feasible in light of its non-hegemonic stance or in instances where there is total irreconcilability of human rights and culture. With an example of the latter for instance, Chanock notes that ‘there are features of post-colonial African “cultures” that do not conform with the universalized version of rights rhetoric’.²⁰¹ An-Na’im while making a strong case for cross-cultural dialogue nevertheless concedes that where such a dilemma exists, ‘consideration can therefore be given to insights gained from other experiences of discourse and dialogue in adjusting and adapting the proposed approach to the circumstances and context of each case.’²⁰²

Overall, a positive cultural context should enhance the cultural legitimacy of human rights through cultural transformation or other suitable approaches. An-Na’im proffers the feasibility of such a project when he observes:²⁰³

[T]he increasing availability of human rights norms and institutions as part of the present tool kits of African societies can enhance the possibilities of building strategies of action to promote and protect these rights as a culturally sanctioned objective.

It must also be noted that a positive cultural context as has been developed here goes beyond universalist versus relativist positions. This thesis situates itself in neither school of thought and adopts the stance offered by Cowan *et al* when they propose:²⁰⁴

¹⁹⁹ An-Na’im ‘State responsibility under international human rights law to change religious and customary laws’ n 186 above 179.

²⁰⁰ C Beyani ‘Toward a more effective guarantee of women’s rights in the African human rights system’ in R Cook (ed) *Human rights of women: National and international perspectives* (1994) 299.

²⁰¹ M Chanock ‘Human rights and cultural branding: Who speaks and how’ in AA An-Na’im (ed) *Cultural transformation and human rights in Africa* (2002) 44.

²⁰² An-Na’im ‘State responsibility under international human rights law to change religious and customary laws’ n 186 above 181.

²⁰³ An-Na’im ‘Cultural transformation and human rights in African societies’ n 183 above 25.

²⁰⁴ Cowan *et al* n 170 above 6.

Rather than seeing universalism and cultural relativism as alternatives one must choose, once and for all, one should see the tension between the positions as part of the continuous process of negotiating ever-changing and interrelated global and local norms.

A similar view by Tamale brings it home when she advises: 'African feminisms cannot afford the luxury of donning either the universalist garb or the relativist one.'²⁰⁵ Accordingly, a positive cultural context traverses this binary in a nuanced manner and employs a delicate balance. On the one hand wary of the temptation to associate all unexamined African culture with harm while on the other hand cognisant of the guise under which culture has been deployed by societies and states as a means to circumvent women's rights.

Finally, any lingering scepticism that gender equality can permeate African culture is perhaps reasonable, owing to the historical injustices dealt to women while supposedly propagating culture. A useful rejoinder in this regard is offered by Chanock who reminds us that: 'Gender equality ... could just as well have been described as alien to Western cultures as to non-Western ones ... It is the product of intense political struggle and cultural work, not immanence.'²⁰⁶

In summation therefore, a contextualised African response considers the experiences of women in Africa and promotes the utilisation of a positive cultural context for the realisation of women's rights. It must also be underscored that while the term contextualised "African" response is used here to communicate the idea in principle. In this thesis and in examining gender responsiveness, the analysis of what is "African" will be highly nuanced cognisant of the continent's multi-state, multi-cultural, multi-ethnic social setup and accommodating the diversity of perspectives that often result in intersectional identities for women in Africa as has been elaborated.

2.5 How can an African treaty body be gender responsive?

Having defined and deconstructed the concept of gender responsiveness. The more specific research question for this thesis must now be addressed. How can an African

²⁰⁵ S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 55.

²⁰⁶ M Chanock 'Human rights and cultural branding: Who speaks and how' n 201 above 43.

treaty body be gender responsive? In developing the definition of gender responsiveness, this thesis deduced two main factors that distinguished this approach. The first is in the recognition of gender inequalities and the second is in taking subsequent action in response. Accordingly, an African treaty body must also be seen to demonstrate this dual approach. For instance, the African Commission no doubt recognises gender inequalities. This is evident for instance through its promotional mandate where one of its special mechanisms is dedicated to women's rights, the Special Rapporteur on the Rights of Women in Africa (SRRWA).²⁰⁷ This thesis will explore in greater detail other illustrations that evidence the African Commission's recognition or non-recognition of gender inequalities. However, mere recognition is not sufficient and makes no difference to women's lives. Outcomes are essential and in fact one of the key distinctive qualities of the gender responsive approach. The critical interrogation therefore lies in whether an African treaty body can effectively respond to these inequalities; that is the predominant question that this thesis seeks to address.

In view of the foregoing, the ideal African human rights treaty body recognises and responds to gender inequalities. Having done so, it may be deemed to be gender responsive. In determining its extent of gender responsiveness, the following parameters will be applied as previously here delineated:

- Do the interventions of the African treaty body result in substantive equality for the women involved?
- Is the African treaty body internally inclusive in its composition and structure? Is the African treaty body externally accessible through its mechanisms and in its workings?
- How does the African treaty body recognise and respond to the intersectional identities of women in Africa?
- Does the African treaty body apply a contextualised African response in its workings?

A number or all of these parameters may be relevant in examining various elements of the African treaty body and therefore gender responsiveness will be measured by extent.

²⁰⁷ This mandate was established by the African Commission at its 23rd Ordinary Session in Banjul, The Gambia in April 1998. For more background details see: African Commission on Human and Peoples' Rights <http://www.achpr.org/mechanisms/rights-of-women/> (accessed 10 October 2016).

This approach where the analysis of gender responsiveness is deconstructed also creates clearer opportunities for future work and reform by detailing the exact areas of strength and weakness. The methodology of gender responsiveness will be tested and articulated utilising the African Commission as the main subject of examination.

2.6 Conclusion

This chapter began by analysing the history of the conceptualisation of human rights and in so doing demonstrated its inherent exclusion of women and a gender perspective. Exclusion emerged as a dominant theme that manifests itself through inequalities, discrimination and the marginalisation of women. Towards resolving this problem most laws transitioned from an exclusionary nature to a gender neutral one; a position which has been proved as equally inadequate and leading to indirect discrimination.

In light of the foregoing problem, gender responsiveness is proposed as a solution. As discussed, gender responsiveness refers to the extent to which norms and procedures effectively address the main concerns faced by women in Africa. Further, in delineating gender responsiveness, four parameters have been identified. A gender responsive approach: (i) results in substantive equality; (ii) is inclusive; (iii) recognises the intersectional identity of women; and (iv) adopts a contextualised African response.

Finally, the feminist method gender responsiveness as developed in this thesis has dual aims. Its first aim is to measure the extent to which the African Commission has been gender responsive in interpreting norms and in its procedures, as is indeed undertaken in this thesis. A second aim of gender responsiveness is that it may serve as a perspective that can be utilised by lawmakers, policy makers and implementers of the African human rights system towards the promotion and protection of women's rights in Africa. In the next chapters, this thesis applies this concept of gender responsiveness as a framework for analysing the various mandates and workings of the African Commission.

3 Assessing the African Commission's gender responsiveness in interpreting human rights norms

3.1 Introduction

The previous chapter developed the concept of gender responsiveness. In this chapter, this framework for analysis is utilised to assess the gender responsiveness of the African Commission on Human and Peoples' Rights (African Commission or Commission) in interpreting the norms of the African human rights system. Specifically, this chapter begins by evaluating whether and how the African Commission has utilised its protective mandate to interpret norms deriving from the African Charter on Human and Peoples' Rights (African Charter or Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol or Protocol). Preceding this evaluation, these instruments will be examined for their normative value for women's rights protection, put another way, are the norms gender responsive? This is followed by a section on the evaluation of whether and how the African Commission has utilised its protective mandate in a gender responsive manner. This evaluation takes the form of case analysis of classic women's rights cases as well as those that have implications for women's rights jurisprudence. The Commission's investigative missions are also discussed. The chapter concludes with an overall assessment of the African Commission's gender responsiveness in its protective mandate.

3.2 Assessing the gender responsiveness of the norms of the African Charter and the Maputo Protocol

The African Charter and the Maputo Protocol are selected for the reason that they fall under the African Commission's protective mandate and are the main sources of women's rights within the African human rights system at the regional level. This section is intended to demonstrate the normative framework that the African Commission relies on in its protective mandate. The essence is to lay a foundation for a latter critique of the African Commission in a twofold manner: (i) To what extent is the foundation gender responsive and has the Commission made use of it effectively? (ii) If or where the foundation is not gender responsive, how has the Commission utilised its protective mandate to remedy this?

3.2.1 The African Charter and women's rights protection

In assessing the gender responsiveness of the African Charter, its drafting history is pertinent. In the previous chapter, it was established that there was a correlation between the exclusion of women in the conceptualisation of a human rights instrument and its consequent inadequacy in addressing women's rights. On the African Charter, Frans Viljoen makes the observation that the 'negotiations resulting in the OAU Charter and the African Charter were characterised by the absence of any meaningful contribution by women.'¹ The exclusion of women at the conceptualisation stage positions the first scepticism of the African Charter's ability to be gender responsive.

A review of the drafting history of the Charter is also indicative of the undesirable impact of women's exclusion at the drafting stage. To illustrate, according to the *travaux preparatoires*, the first draft of the African Charter (the Mbaye draft)² contained a number of progressive provisions, with normative value for women's rights, which did not eventually materialise in the final draft. The then article 1 had a non-discrimination clause and in article 1(2), a clause providing:³

Where the exercise of any of the rights or freedoms referred to in paragraph 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, *in accordance with their constitutional processes and the provision of this Charter*, such legislative or other measures as may be necessary to give effect to these rights and freedoms.

Such a provision might have been useful to ensure that constitutions of African states truly guaranteed non-discrimination as '[m]any post-independence constitutions of African states exempted personal (private) laws (e.g. marriage, divorce, adoption, burial, inheritance and succession) from the operation of the non-discrimination principle.'⁴ The Mbaye draft also had a number of progressive provisions specific to women's concerns that would have undoubtedly enhanced the normative value of the African Charter for women's rights protection and promotion. An excerpt of these provisions is listed below:⁵

Article 5

¹ F Viljoen *International human rights law in Africa* (2012) 249.

² K Mbaye 'Draft African Charter on Human and Peoples' Rights' reprinted in C Heyns (ed) *Human rights law in Africa* (1999) 65-77.

³ As above 66 (emphasis mine).

⁴ S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 54.

⁵ K Mbaye n 2 above 66-67 (emphasis mine).

1. Men *and women* have equal economic, social and cultural rights.

Article 6

3. Every person has the right to the enjoyment of just and favourable conditions of work which ensure in particular;

(a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and *equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.*

(ii) ...

(b) *Safe and healthy* working conditions.

(c) *Equal opportunity for everyone* to be promoted in his employment to an appropriate higher level, subject to no consideration other than those of seniority and competence.

Article 8

2. *Marriage* shall be entered into *with the free consent of the intending spouses.*

3. The States Parties shall take appropriate steps to ensure the *equality of rights and the adequate balancing of responsibilities of the spouses, during marriage, and in the event of its dissolution.* In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own interest.

4. The law shall recognise *equal rights for children born out of wedlock* and those born in wedlock.

5. Mothers have the right to special protection during reasonable periods before and after childbirth. They have *the right to paid leave or leave with adequate social security benefits.*

7. All children have the right to a decent and healthy development through education and special medical care. *Such cultural practices harmful to normal growth and development of the child, such as child marriage and female circumcision, shall be abolished.*

It is appalling that all of the foregoing provisions from the Mbaye draft did not materialise in the final draft. Chaloka Beyani in discussing the history of the African Charter offers a probable explanation: 'Male attitudes toward the treatment of women have dominated the conception of human rights, and permeated their application to women in a lopsided manner.'⁶

The provisions of the African Charter are now assessed for their gender responsiveness. This predominantly entails a discussion of provisions with potential significance for women's rights protection. The preamble to any human rights instrument is useful towards ascertaining its underlying spirit and objectives. In the African Charter's preamble, African states avow their duty to achieve total liberation in Africa, which they deem to include the dismantling of all forms of discrimination including on the basis of

⁶ C Beyani 'Toward a more effective guarantee of women's rights in the African human rights system' in RJ Cook (ed) *Human rights of women: National and international perspectives* (2012) 288.

sex.⁷ This demonstrates that states were cognisant of the existing violations in the continent including those perpetrated against women simply because they are women. The preamble further notes that the African Charter takes ‘into consideration the virtues of their [African states] historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples’ rights’.⁸ This proclamation accordingly reconciles African traditions, cultures and civilisation with the achievement of human rights as mutually attainable goals. These two ideas from the preamble can be said to be gender responsive, the former idea (dismantling discrimination) for pursuing substantive equality and the latter (African values) for a contextualised African response that enhances the cultural legitimacy of human rights. On this last point, commentators of the African Charter have also made the observation that it reflects an African fingerprint.⁹ While celebrated for being autochthonous elsewhere,¹⁰ the Charter’s African fingerprint initially caused concerns among scholars who feared ‘that reference to traditional values in the Charter would take precedence over women’s concerns.’¹¹ This thesis attempts to address this concern later in this section.

Aside from the preamble, the African Charter has a few provisions with specific potential for women’s rights protection. Article 2 contains a general non-discrimination clause providing as follows:¹²

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, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

⁷ African Charter on Human and Peoples’ Rights preamble para 8.

⁸ As above para 4.

⁹ See for instance: Viljoen *International human rights law in Africa* n 1 above 214 and M Mutua ‘The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties’ (1995) 35 *Virginia Journal of International Law* 339-380.

¹⁰ F Viljoen ‘Africa’s contribution to the development of international human rights and humanitarian law’ (2001) 1 *African Human Rights Law Journal* 19-22 where he brings out the Charter’s autochthonous nature as one of its greatest contributions to international human rights law.

¹¹ S Wright ‘Economic rights and social justice: A feminist analysis of some international human rights conventions’ (1992) *Australian Yearbook of International Law* 258 as cited in R Murray ‘Women’s rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa’ in D Buss & A Manji (eds) *International law: Modern feminist approaches* (2005) 258. See also RT Nhlapo ‘International protection of human rights and the family: African variations on a common theme’ (1989) 3 *International Journal of Law and the Family* 14 who queries the reconcilability of the values of the African civilisation and the call to states to eliminate discrimination.

¹² African Charter n 7 above art 2.

It must be noted that article 2 is an ancillary provision, which is to say that its violation is alleged in relation to the violation of a substantive right. Fatsah Ouguergouz also categorises it more as a principle of interpretation, in that he asserts that article 2 ‘is a non-autonomous provision, as it can only be invoked in relation to the implementation of a right protected by the African Charter.’¹³

Article 2 is gender responsive to a fair extent. It can be relied on to make a claim of intersectional discrimination as it includes sex, among and as part of other grounds that encompass the intersectional identity of women in Africa. Identities not listed in this list but forming grounds that result in discrimination can also be the basis of a claim and are covered by the ground “other status”. Noticeably absent and significant for women’s rights discourse, gender is not included as a ground for discrimination. Katherine Franke asserts that antidiscrimination law should not be limited to distinctions based on sex, ‘but should also include the social processes that construct and make coherent the categories male and female.’¹⁴ Some commentators of the African Charter suggest that the exclusion of gender as a discrimination ground is possibly ‘because the adoption of the African Charter predates the use of terms such as gender and sexual orientation.’¹⁵ This exclusion potentially impedes sexual and gender minorities such as transgender women from expressly making discrimination claims on the basis of gender.¹⁶ Nevertheless, this potential drawback is mitigated as there is now scholarly and jurisprudential agreement that sexual orientation is a prohibited ground of discrimination either implicit in the

¹³ F Ouguergouz *The African Charter on Human and Peoples’ Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 80.

¹⁴ KM Franke ‘The central mistake of sex discrimination law: The disaggregation of sex from gender’ (1995) 144 *University of Pennsylvania Law Review* 3.

¹⁵ R Murray & F Viljoen ‘Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples’ Rights and the African Union’ (2007) 29 *Human Rights Quarterly* 91.

¹⁶ Ideally any of the non-envisaged grounds of discrimination at the time of drafting can be pleaded under the ground “other status” and therefore the difficulty for sexual minorities to bring discrimination claims is not predominantly a normative one. Rather, the difficulty is forecasted in light of the recent homophobic wave in Africa manifesting through criminalisation legislations and retrogressive rhetoric from governments. On this see a more comprehensive discussion: AM Ibrahim ‘LGBT rights in Africa and the discursive role of international human rights law’ (2015) 15 *African Human Rights Law Journal* 263-281.

ground sex or as an independent category.¹⁷ While the ground sex has no doubt come to include discrimination based on gender and gender identity, Franke argues that the use of the ground sex in this way has produced jurisprudential confusion in two ways. First, is that sex-based equal protection litigation ‘is often caught between a commitment to formal sexual equality and a visceral belief in real differences between men and women which the law should take into account.’¹⁸ Secondly:¹⁹

This confusion is compounded by the fact that the term "sex" when used in the law often means any one or a combination of the following: biological sex (female or male), core gender identity (woman or man), gender role identity (feminine or masculine), or sexual behavior (genital or reproductive behavior).

Murray and Viljoen similarly concede ‘that such an expansive definition may militate against the more common understanding of the term “sex.”’²⁰ This jurisprudential confusion could be avoided if the African Commission develops a consistent philosophy around its discrimination discourse.²¹

Closely linked to article 2, article 3(1) provides that ‘[e]very individual shall be equal before the law’²² and article 3(2) that ‘[e]very individual shall be entitled to equal protection of the law.’²³ Article 3 is therefore concerned with procedural equality. Unlike article 2 which is an ancillary or non-autonomous provision, article 3 has a scope that is not bound to provisions within the African Charter, but goes beyond to include all human rights and national laws.²⁴ A strict reading of articles 2 and 3 seemingly favours formal as opposed to substantive equality. The use of the term “distinction” in article 2 for instance may disallow distinctions of all kinds including positive discrimination or affirmative

¹⁷ In this regard see here various cases from the UN Human Rights Committee, the African Commission and the Inter-American Court respectively that all unambiguously find sexual orientation to be a protected ground of discrimination. Communication 488/92, *Toonen v Australia*, UNHR Committee (March 1994), UN Doc CCPR/C/50/D/488 (1992), Communication 245/02, *Zimbabwe Human Rights NGO Forum v Zimbabwe* ACHPR (discussed later in this thesis in section 3.3.2.4) and *Karen Atala and Daughters v Chile* IACHR (23 July 2008) Ser L/Doc 22 Rev 1. See also a comprehensive discussion in: Murray & Viljoen n 15 above 86-111 and A Rudman ‘The protection against discrimination based on sexual orientation under the African human rights system’ (2015) 15 *African Human Rights Law Journal* 1-27.

¹⁸ Franke n 14 above 7.

¹⁹ As above.

²⁰ Murray & Viljoen n 15 above 92.

²¹ Murray & Viljoen n 15 above 89. For instance, the European Court of Human Rights has developed a consistent, broad and purposive understanding of the right to privacy as a basis for claims based on sexual orientation and granting protection to sexual minorities. In this regard the Commission’s approach so far seems to be to recognise sexual orientation as an independent ground of discrimination as in the *Zimbabwe Human Rights NGO Forum v Zimbabwe* case in n 17 above.

²² African Charter n 7 above art 3(1).

²³ African Charter n 7 above art 3(2).

²⁴ Ouguergouz n 13 above 81.

action. In recommending sameness of treatment, article 3 is also more aligned to procedural equality. Ouguergouz notes that article 2 'would have gained precision if the term "discrimination" had been substituted for that of "distinction".'²⁵ He notes how similar phrasing in other international human rights instruments has been contested leading to clarifications by the United Nations (UN) Human Rights Committee and the European Commission and Court of Human Rights to the effect that difference in treatment does not necessarily amount to discrimination.²⁶ In addition to taking cognisance of the clarifications from the UN and European systems, a holistic reading of the African Charter and specifically article 18(3), which is representative of substantive equality, also cures the possibility of misconstruing affirmative action as amounting to unlawful discrimination.

Article 18(3) represents the cornerstone of women's rights protection within the African Charter. It provides:²⁷

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.

This provision arguably goes beyond formal equality and requires substantive equality by recognising that women need different treatment to redress historical disadvantage and in this respect it is gender responsive. Unlike article 2, article 18(3) is a stand-alone provision that covers "any" type of discrimination as opposed to discrimination based only on a right within the African Charter. This widened scope covering any discrimination is further enhanced by the provision's reference to "international declarations and conventions", such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and '[w]hen invoked collectively, these provisions considerably expand upon the legal jurisdiction of the Commission'.²⁸ This was particularly significant before the entry of the Maputo Protocol, when reliance on CEDAW was critical towards augmenting the normative inadequacies of the Charter in

²⁵ Ouguergouz n 13 above 81.

²⁶ Communication No. 182/1984, *F.H. Zwaan-de-Vries v Netherlands*, UNHR Committee (9 April 1987), UN Doc Supp. No. 40 (A/42/40) at 160 (1987), Application No. 5178/71, *De Geillustreerde Pers N.V. v Netherlands*, European Commission on Human Rights, UN Human Rights Committee (HRC), General Comment No. 18 Non-discrimination, 10 November 1989, UN Doc HRI/GEN/1/Rev.1 and UN Human Rights Committee (HRC), CCPR General Comment No. 28 Equality of rights between men and women (Art 3), 29 March 2000, UN Doc CCPR/C/21/Rev.1.

²⁷ African Charter n 7 above art 18(3).

²⁸ Beyani n 6 above 301.

light of women's concerns. In fact, commentators at the time stressed the utility of CEDAW as it expanded the substantive basis for women's rights protection guaranteed in article 18(3). Beyani, for instance, makes this point where he stresses:²⁹

A functional collaboration between the African Commission and CEDAW in the protection of the rights of women is indispensable because:

- (a) the standards of the Convention are either incorporated or rendered applicable within the Charter by its Article 18(3);
- (b) some of the states parties to the African Charter are also states parties to the Convention; and
- (c) some states parties to the African Charter are not States Parties to the Convention.

The 1989 state reporting guidelines³⁰ themselves required states to report in exacting detail in relation to each provision of CEDAW hence demonstrating the heavy reliance on CEDAW at the time. In bolstering the provisions of an African-specific treaty with international human rights provisions, this provision is in harmony with the gender responsive model that ascribes to neither the universalist nor cultural relativist arguments but aims to traverse both realms towards enhancing women's protection. Read together with article 60 of the African Charter,³¹ this provision avails the African Commission with a wide normative framework to address women's rights violations.

Having discussed its positive attributes, being the only provision that specifically addresses women's concerns in the African Charter, article 18(3) is to a significant extent inadequate and inappropriate for two main reasons.

First, it unsuitably categorises women and children together in a paternalistic protectionist manner that implies that women like children are vulnerable, have reduced

²⁹ As above.

³⁰ African Commission on Human and Peoples' Rights 'Guidelines for National Periodic Reports' (1989). Available at http://www.achpr.org/files/instruments/guidelines_national_periodic_reports/achpr_guide_periodic_reporting_1989_eng.pdf (accessed 19 April 2017).

³¹ African Charter n 2 above art 60 provides: The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provision of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation 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 specified agencies of the United Nations of which the parties to the present Charter are members.

agency and are therefore entitled to special protection.³² Such a protectionist approach perpetuates the dominance and subjugation of women.³³ While the vulnerability of women is conceded, it is now largely an accepted view that this vulnerability has little to do with sex-based characteristics, and more to do with socially constructed roles, conceivably the result of historical injustices coupled with the existing inequalities that deny women equal access to rights and opportunities.³⁴ In her treatise on gender stereotyping, Rebecca Cook notes that

[i]nternational law has perpetuated sex stereotypes of women as weak, vulnerable, and fragile, and as a result, has a strong protective streak that has produced a subjugated category of persons in need of protection.³⁵

In recognition of this fallacy, '[i]nternational and domestic courts are beginning to dismantle sex stereotypes of women as weak, vulnerable, and fragile as justifications for protective laws and policies.'³⁶ Aside from the protectionist challenge, the categorisation of women and children also perpetuates the stereotype of women as caregivers. While seemingly innocuous, this stereotype has been instrumental in denying women equal access to economic opportunities and political participation. This stereotype is concurrently disadvantageous to women as well as men who play the caregiver role.³⁷ Generally, the categorisation of women and children in article 18(3) while aiming to offer

³² MB Berna 'The cultural factor and women's rights within the African Charter on Human and Peoples' Rights and its Protocol' (2015) 14 *Law Annals Titu Maiorescu University* 16. Notes that categorising women and children fails to 'recognise women's status of accomplished and evolved human individuals; on the contrary, women are acknowledged as *junior male (children)* who may exercise authority exclusively in the absence of the husband or of male children.' (emphasis in original). Viljoen also criticises this categorisation where he states that: 'One may easily form the impression that women... are deserving of special protective measures, in the same sense as are children, the aged, and the disabled.' *International human rights law in Africa* n 1 above 252.

³³ Protective laws erode a women's right to choose what they can or cannot do and in so doing reinforces derogatory stereotypes. See M Chen 'Protective laws and the Convention on the Elimination of All Forms of Discrimination against Women' (1993) 15 *Women's Rights Law Reporter* 2. The protection as protectionist argument and discourse and the resultant multi-layered relations with dominance and power are also discussed in Z Pathak & RS Rajan "'Shahbano'" in EA Castelli (ed) *Women, gender, religion: A reader* (2001) 200-203.

³⁴ Chen n 33 above 2.

³⁵ RJ Cook & S Cusack *Gender stereotyping: Transnational legal perspectives* (2010) 25 University of Pennsylvania Press: Pennsylvania.

³⁶ As above 26.

³⁷ For instance, men may be denied benefits that a female caregiver automatically qualifies for. See also the South African constitutional case *President of the Republic of South Africa v Hugo* 1996 11 (CCT) A presidential pardon was issued targeting among others female prisoners with minor children. The respondent, a male prisoner and sole caregiver of a minor child challenged the pardon on the grounds that it was discriminatory on the basis of sex. The petition was not successful, in that, the discrimination was found to be constitutionally justifiable. Nonetheless, the opinion of Mokgoro J in that case supports the present argument where he stated: '[O]ur Constitution gives us the opportunity to move away from gender stereotyping. Society should no longer be bound by the notions that a woman's place is in the home, (and conversely, not in the public sphere)... Those notions have for too long deprived women of a fair opportunity to participate in public life, and deprived society of the valuable contribution women can make. Women have been prevented from gaining economic self-sufficiency, or forging identities for themselves independent of their roles as wives and mothers. By the same token, society has denied fathers the opportunity to participate in child rearing, which is detrimental both to fathers and their children.' para 93.

protective measures to women does so in a disempowering manner that perpetuates patriarchy and potentially creates a cycle of discrimination on account of the reasons given.

The second criticism of article 18(3) draws from its positioning within the African Charter. In spite of its paramount significance, it is not a stand-alone article but a sub-article within a broader provision on the family. Article 18(1) and (2), which precede it, provide:³⁸

1. The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health.
2. The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.

From a contextual interpretation³⁹ and understanding, the inference is that women's rights concerns fall in the private realm, as "family" and "community" matters where women's subjugation is often justified under the guise of "morals and traditional values". Henry Onoria for instance finds difficulty with the "contextualisation" of women deriving from article 18 where he notes:⁴⁰

There may seem manifest a conflict in the perceived role of the state in this regard which is to protect the 'family as the custodian of traditional values' at the same time as ensuring the protection of 'rights of the woman'...[especially] given the fact that the major violations of rights of women occur within the private realm of family relations... Further, the suppression of women's rights often occurs under the cloud of tradition, custom and cultural values.

Similarly, Makau Mutua sceptical of the Charter's philosophy towards women and particularly of article 18 asserts:⁴¹

The Charter tolerates, confirms and supports repressive structures of social and political ordering. A particular problematic issue concerns its 'family' provisions, especially their gender implications... Among other things, this language seeks to entrench the oppressive family structure, complete with its exploitation and marginalisation of women in the public and so-called private spheres.

³⁸ African Charter n 7 above art 18(1)&(2).

³⁹ The textual approach together with the context of the text receive priority in the hierarchy of the general rules of interpretation of treaties as provided for by the Vienna Convention on the Law of Treaties art 31.

⁴⁰ H Onoria 'Introduction to the African system of protection of human rights and the draft protocol' in W Benedek, EM Kisaakye & G Oberleitner (eds) *The human rights of women: International instruments and African experiences* (2002) 231-232.

⁴¹ M Mutua 'The African human rights systems in a comparative perspective: the need for urgent reformulation' (1992) 44 *Nairobi Law Monthly* 27.

While this thesis in chapter 2 warned against perpetuating the dissonance between “culture” and “rights”, the claims by Onoria and Mutua cannot be disputed. While allowing room for the cultural legitimization of rights, one cannot help but question the drafter’s intentions in articulating only women’s rights within the context of family while other rights in the African Charter are not preceded by an affirmation of the place of the family, morals and traditional values. Thandabantu Nhlapo for instance queries: ‘How is the injunction to “ensure the elimination of every discrimination against women” reconcilable with the duty to be conscious of “the values of African civilisation”?’⁴² Evelyn Ankumah likewise poses:⁴³

The question must be answered whether Article 18(3) can be used as an effective tool to protect the rights of women in view of the role of women in the traditional African family.

Nhlapo himself concedes that the answer to such a question and the consequence of such a provision ‘will depend on how the African Commission elects to interpret the article.’⁴⁴ As if on cue, Ankumah also fittingly concludes:⁴⁵

[T]he efficacy of women’s rights as provided for under the Charter would largely depend on the role of the African Commission. If the Commission adopts a progressive dynamic approach, it could enhance the status and rights of women in Africa. On the other hand, a conservative and/or chauvinistic interpretation of the Charter would undermine realisation of the rights of women.

Accordingly, the concerns that scholars have raised can be settled by utilisation of the gender responsive model, which recognises culture as fluid and capable of cultural transformation as discussed in chapter 2.

The concerns raised in the foregoing discussion necessitate the need for a brief examination of the Charter’s other autochthonous provisions and their potential to enhance or threaten women’s rights protection. Concepts such as *peoples’ rights* and that of *duties* are some of the autochthonous features of the African Charter or put another way, those reflective of an African fingerprint.⁴⁶

⁴² Nhlapo ‘International protection of human rights and the family: African variations on a common theme’ n 11 above 14.

⁴³ EA Ankumah *The African Commission on Human and Peoples’ Rights: Practice and procedures* (1996) 153.

⁴⁴ As above 15.

⁴⁵ Ankumah n 43 above 155.

⁴⁶ See Mutua ‘The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties’ n 9 above 339-380.

In addition to the rights of individuals, the African Charter also recognises the rights of peoples and this concept is briefly explored here to assess whether it has any potential to enhance women's rights discourse.⁴⁷ The term "peoples" resists capture by a single meaning. The African Charter does not define it, Ouguergouz submits that it is a 'chameleon-like term... whose content is dependent on the function of the right concerned'⁴⁸ and for this reason Viljoen suggests that 'a search for a single meaning of "people" should be abandoned.'⁴⁹

'The term "peoples" (or 'a people') may also denote sub-state groups, or distinct minority groups, such as linguistic, ethnic, religious, or other groups sharing common characteristics'.⁵⁰ This concept of minorities as peoples may hold value for women's rights discourse. In one possible scenario, women who are members of a minority group may approach the Commission as a 'people' and therefore buttress their claim with the provisions in the Charter that grant peoples' rights. In this scenario, the advantage may be that women under a gender grouping may be able to agitate for a benefit that is woman-specific and that may not have attracted the consensus of or has been denied by the larger minority group. Several of the Charter's peoples' rights such as the right to economic, social and cultural development,⁵¹ to a general satisfactory environment favourable to their development,⁵² and a peoples' right to freely dispose of their wealth and natural resources,⁵³ can conceivably be the subject of a gender-specific claim as proposed here. This hypothetical scenario receives support from article 24(a) of the Maputo Protocol, which calls upon states to ensure the protection of certain vulnerable categories of women including women from marginalised population groups who are also envisaged as minorities.

The concept of duties is now considered for any potential threat to enhancing women's rights protection. Ankumah highlights a link between the notion of duties and the non-

⁴⁷ A comprehensive discussion of the concept of peoples is not attempted here. For such a discussion see: RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *The American Journal of International Law* 80-101, Ouguergouz n 13 above 204-375 and Viljoen *International human rights law in Africa* n 1 above 219-228.

⁴⁸ Ouguergouz n 13 above 211.

⁴⁹ Viljoen *International human rights law in Africa* n 1 above 219.

⁵⁰ Viljoen *International human rights law in Africa* n 1 above 222.

⁵¹ African Charter n 7 above art 22.

⁵² African Charter n 7 above art 24.

⁵³ African Charter n 7 above art 21.

discrimination provision in article 18(3) where she notes that article 18 on the family, 'ties up with Articles 27(1) and 29(1) which impose obligations on individuals towards the family.'⁵⁴ Accordingly, Mutua cautions that equality rights advocates should be concerned as such provisions for the protection of the family, which the Charter identifies as the 'custodian of morals and traditional values',⁵⁵ 'could be used to support the patriarchy and other repressive practices of pre-colonial social ordering.'⁵⁶ Mutua is however also quick to clarify that an interpretation of the duties to perpetuate the subjugation of women would amount to a cynical misinterpretation of the Charter, which unambiguously provides for the elimination of all forms of discrimination against women.⁵⁷ Some of the duties may pose more plausible threats to the realisation of women's rights particularly sexual minorities. For instance the formulation of the duty in article 27(2) to exercise rights with due regard to the rights of others and morality,⁵⁸ 'could be invoked as a basis for limiting the rights of gay and lesbian people.'⁵⁹ Another commentator adds that the duty to 'preserve and strengthen social and national solidarity'⁶⁰ and that to 'preserve and strengthen positive African cultural values in ... relations with other members of the society ... to contribute to the moral well-being of society',⁶¹ could similarly provide solace for African countries keen on disregarding sexual minority rights particularly in the quest to establish privacy rights and other legal protections for sexual minorities.⁶²

Some duties may however be relied on in a claim for women's rights protection. Article 28 provides for the duty to 'respect and consider his [sic] fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and

⁵⁴ Ankumah n 43 above 151.

⁵⁵ African Charter n 7 above art 18(2).

⁵⁶ Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' n 9 above 6.

⁵⁷ As above.

⁵⁸ African Charter n 7 above art 27(2) provides: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

⁵⁹ S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2011) 15 *Feminist Africa* 26. Murray & Viljoen n 15 above 92-96 also advance that article 27(2) could be used to limit the rights of gays and lesbians and in this regard proceed to unpack the concepts 'African value system' and 'majority morality'.

⁶⁰ African Charter n 7 above art 27(4).

⁶¹ African Charter n 7 above art 27(7).

⁶² JO Ambani 'The sexual minority rights conundrum in Africa: Contextualising the debate following the Coalition of African Lesbians' application for observer status before the African Commission' (2016) 2 *Strathmore Law Journal* 185.

reinforcing mutual respect and tolerance.⁶³ Beyani accordingly notes the following of this duty:⁶⁴

With special reference to protecting the rights of women, this duty is binding upon male individuals not to discriminate against women, as human beings, and for men to conduct themselves with a sense of mutual respect toward women.

He adds that, '[w]hen portrayed positively, this duty may be seen as providing a basis for not subordinating women to men, as well as outlawing violence against women.'⁶⁵ Other noteworthy duties are such as article 29(1) which requires an individual to 'preserve the harmonious development of the family and ... to maintain them in case of need'⁶⁶ could form a basis for women's child maintenance claims.⁶⁷ Article 29(7), which highlights the duty to 'preserve and strengthen positive African cultural values ... dialogue and consultation'⁶⁸ is in perfect harmony with the concept of cross-cultural transformation discussed in chapter 2, section 2.4.4.2 as a tool for the cultural legitimation of human rights. Beyani also holds of this duty, that positive values 'indicates an awareness of the necessity, if not the willingness, to discard aspects of culture or tradition that are deemed negative and retrogressive in Africa.'⁶⁹ A prima facie or automatic correlation of culture and harm ignores culture's ability to be transformed. Beyani likewise asserts that '[t]here is implicit recognition in the Charter of the fact that cultural values in Africa cannot remain static.'⁷⁰ This is in line with the hypothesis previously advanced in developing the gender responsiveness concept.

Lastly, scholars hold that the African Charter 'gave little express attention to the position of women, with Article 2 providing only a general non-discrimination clause and Article 18(3) requiring states to eliminate ... discrimination against women'.⁷¹ Nevertheless, other general rights within the Charter may hold potential normative value for women's rights claims. In this regard the most significant right is the right to dignity and the prohibition of torture, cruel, inhuman or degrading treatment found in article 5 of the

⁶³ African Charter n 7 above art 28.

⁶⁴ Beyani n 6 above 296-297.

⁶⁵ As above.

⁶⁶ African Charter n 7 above art 29(1).

⁶⁷ See for instance: *Okpeitcha v Okpeitcha* (2002) AHRLR 33 (BnCC 2001).

⁶⁸ African Charter n 7 above art 29(7).

⁶⁹ Beyani n 6 above 297.

⁷⁰ Beyani n 6 above 297.

⁷¹ Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' n 11 above 258. See also Ankumah n 43 above 152 where she asserts that 'commentators are concerned that the rights of women are not adequately addressed under the African Charter.'

Charter.⁷² As was established in chapter 2, dignity has been utilised as an approach to substantive equality in jurisdictions such as Canada and South Africa. In that discussion, it was also noted that the use of dignity as an approach to substantive equality in practice is open to different interpretations and even opposite results and this is ascribed as one of its main challenges.⁷³ For instance, an approach that reduces equality to the single notion of dignity complicates the complainant's submission requiring them to prove both disadvantage and disrespect. This difficulty is well articulated by the Canadian Supreme Court where it finds:⁷⁴

[P]roof of disadvantage on grounds of an enumerated characteristic would not in itself be discriminatory if the claimant could not prove in addition that this disadvantage signified that society regarded her of less value than others.

Barring an approach that reduces equality to a single dignity approach, the right to dignity has immense value in discrimination cases. Sandra Fredman proposes that the difficulties associated with the reduction of equality to a single notion of dignity can be overcome if dignity is utilised as one of many aspects of equality. In fact, the second dimension of substantive equality in redressing stigma, stereotypes and humiliation as proposed in this thesis is aimed at promoting dignity. The prohibition of torture, cruel, inhuman or degrading treatment is similarly in sync with this second dimension. Article 5 is therefore pivotal towards building a non-discrimination cause of action.

Overall, in applying the test developed in this thesis, one hesitates to classify the African Charter as gender responsive on account of the minimal attention it expressly allocates to women's concerns. The gender responsiveness model among other things calls for a contextualised African response that recognises the lived realities of women in Africa. In this regard, the African Charter at best, provides for only one woman-centric provision within a general "family" based provision, and at worst fails to address in a meaningful manner the challenges facing women in Africa. For instance, compared to other treaties in existence at the time of its drafting such as CEDAW, the African Charter could have gone further in its articulation of women's rights as opposed to vaguely guiding states to ensure non-discrimination as stipulated in international declarations and conventions.

⁷² African Charter n 7 above art 5.

⁷³ S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 725 and S Fredman *Discrimination law* (2002) 23.

⁷⁴ *Law v Canada* (1999) 1 SCR 497 and *Gosselin v Quebec* (2002) SCC 84 as cited in Fredman *Discrimination law* n 71 above 24.

Overall, with regards to the African Charter's normative value for women's rights protection, Ankumah makes the conclusion that '[t]he protection of women under the Charter is ambiguous.'⁷⁵ She states that the solution lies in an 'additional protocol addressing issues peculiar to the status of women'.⁷⁶ This sentiment and many others like it led to the drafting and adoption of the Maputo Protocol, which is discussed later.

Nonetheless, it must be emphasised that the challenge presented by ineffective norms can be cured by gender responsive interpretations by the African Commission. In fact, some scholars argue that preceding the Maputo Protocol, the challenge related less to a lack of norms and more to a lack of implementation. Fareda Banda notes that despite the non-discrimination provision in the Charter, women's rights were not being enforced and they were therefore still experiencing violations.⁷⁷ In a related manner, Viljoen points out that the '[t]he 'mischief' that the Protocol seeks to correct is not the normative deficiency of international human rights law dealing with women's rights, but its lack of implementation.'⁷⁸ In fact, Banda in an earlier work went as far as squarely allocating this blame where she stated that

[d]espite the existence of the African Charter and the extensive ratification of CEDAW by African states, it had over time been clear that the issue of gender was not being seriously considered at the institutional level, with little being done by the *African Commission*.⁷⁹

This claim reiterates the sentiment that non-implementation of norms accounts for a greater challenge than the inadequacy of norms. All the foregoing commentary of the African Charter accordingly lays a foundation for the evaluation of the African Commission's protective activities later in this chapter in sections 3.3 – 3.5.

3.2.2 The Maputo Protocol and women's rights protection

The Maputo Protocol is an instrument of the African human rights system dedicated to women's rights protection and has been the subject of much analytical scholarly

⁷⁵ Ankumah n 43 above 158.

⁷⁶ As above.

⁷⁷ F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72.

⁷⁸ Viljoen *International human rights law in Africa* n 1 above 251.

⁷⁹ F Banda *Women, law and human rights* (2005) 66-67 (emphasis mine).

attention.⁸⁰ This thesis utilises the gender responsive model to assess the normative value of the Protocol to women's rights in Africa.

Notably, a gender responsive evaluation of the Maputo Protocol is as much one of the African Commission which is the subject of this thesis. This is for the reason that '[t]he genesis of the Maputo Protocol can be traced back to a joint NGO/Africa Commission initiative in 1995.'⁸¹ At the time, women's rights advocates were not satisfied with the African Charter as an adequate instrument for women's rights protection and promotion. They were particularly discontented that the Charter had a single woman-specific clause, which had been located under the umbrella of family.⁸² More so, there was apparent consensus that in spite of existing norms for women's rights protection such as CEDAW, these norms had not greatly improved the lives of women in Africa. And they still suffered from *de jure* and *de facto* discrimination.⁸³ The preamble of the Protocol reflects this sentiment as it recalls various instruments and agreements designed to eliminate discrimination but expresses concern that despite these commitments, women in Africa were still victims of discrimination and harmful practices.⁸⁴ The Protocol therefore sets out to ensure that the protection and promotion of women's rights actually alters their lived realities. In reiteration, gender responsiveness will be tested against the model's four sub-elements developed in chapter 2 which are: substantive equality, inclusion, recognition of intersectional identities and a contextualised African response.

⁸⁰ For a brief historical overview and a thematic discussion of the provisions see: Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 77 above 72-84. Banda also undertakes a feminist analysis of human rights in Africa including the Maputo Protocol in: Banda *Women, law and human rights* n 79 above 66-82. For a detailed discussion situating the Maputo Protocol by way of a comparative analysis with existing regional and international women's rights norms as well as how the Protocol enhances the domestic and regional implementation mechanisms see: 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 and Social Justice* 11-46. For a critical analysis of its main features advancing merits and demerits see: DM Chirwa 'Reclaiming (wo)manity: The merits and demerits of the African Protocol on Women's Rights' (2006) 53 *Netherlands International Law Review* 63-96. For a criticism of the Protocol as needless holding that the various mechanisms of the AU would have sufficed if fully utilised and a further criticism of the Protocol's failure to consolidate existing standards see: Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' n 11 above 253-272.

⁸¹ Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 77 above 72.

⁸² R Mayanja 'The Protocol on the Rights of Women in Africa' in AA Yusuf & F Ouguerouz (eds) *The African Union: Legal and institutional framework: A manual on the Pan-African Organization* 458.

⁸³ As above 456, Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 81 above 72 and Banda *Women, law and human rights* n 79 above 66-67.

⁸⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) preamble paras 5-12.

3.2.2.1 Extent to which the Maputo Protocol can achieve substantive equality

A gender responsive norm or procedure results in substantive equality, which will be assessed using Fredman's four-dimensional approach to equality, introduced in the previous chapter in section 2.4.1.⁸⁵ It is a multi-dimensional principle meaning that the dimensions are related and interactive as opposed to stand-alone elements. The first dimension seeks to redress disadvantage. The Maputo Protocol in its preamble⁸⁶ highlights the prevalence of discrimination and harmful practices against women in spite of state commitment to the contrary and this is addressed varyingly in the substantive provisions. Article 1(f) defines discrimination against women as follows:⁸⁷

"Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

The first dimension aims to redress disadvantage by avoiding gender neutrality and targeting the group that has experienced disadvantage. The definition of discrimination does exactly that and is an expression of substantive equality as it focuses specifically on women. Banda notes that this definition goes beyond that of CEDAW, which provides that 'the enjoyment of rights is to be "on a basis of equality of men and women"'.⁸⁸ This aspect of the discrimination definition in CEDAW has similarly been criticised as being gender-neutral an approach which among many other things does not allow for woman-centred solutions without reference to male action.⁸⁹

The second dimension addresses stigma, stereotyping, prejudice and violence. A formal equality approach views women as a biological group and thereby fails to address indirect discrimination, which manifests in the mentioned ills. The second dimension enables a substantive equality approach that recognises women as a social group bound by inequality and is therefore capable of addressing the ills that result from social

⁸⁵ Sandra Fredman's four-dimensional principle to substantive equality aims: (i) to redress disadvantage; (ii) to address stigma, stereotyping, prejudice and violence; (iii) to enhance voice and participation; and (iv) to accommodate difference and achieve structural change.

⁸⁶ Maputo Protocol n 84 above para 12.

⁸⁷ As above art 1(f).

⁸⁸ Banda *Women, law and human rights* n 79 above 80.

⁸⁹ NH Kaufman & SA Lindquist 'Critiquing gender-neutral treaty language: The Convention on Elimination of All Forms of Discrimination against Women' in J Peters & A Wolper *Women's rights, human rights: International feminist perspectives* (1995) 114-115.

structures. In this light, article 2(2) of the Maputo Protocol undoubtedly inculcates the second dimension and provides an avenue to address status-based prejudices and social consequences of gender where it provides:⁹⁰

2. States Parties shall commit themselves to *modify the social and cultural patterns of conduct of women and men* through public education, information, education and communication strategies, *with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.*

In her evaluation of the Maputo Protocol, Banda also notes the importance of this provision in that it recognises ‘that women experience discrimination not only as a result of law but also social practice.’⁹¹ Related, the first dimension of substantive equality is further expressed by the requirement for states to ‘take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist’⁹² in order to combat all forms of discrimination.

The third dimension of substantive equality concerns participation, social inclusion and overall women’s ability to speak in their own voices. Accordingly, the Maputo Protocol specifically provides for women’s right to participation and these instances are elaborated on in the next section on inclusion, which has one of its elements as participation.

Further, to effectively redress disadvantage, there needs to be structural changes in order to accommodate differences, which is the fourth dimension. This synergy between the two dimensions is well captured in article 2(1)(c), which requires states to ‘integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life’.⁹³ This state obligation is tantamount to effecting structural change in order to eliminate discrimination against women and thereby redress disadvantage. Other relevant structural measures include ‘the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone on the rights to women’.⁹⁴ Structural

⁹⁰ Maputo Protocol n 84 above art 2(2) (emphasis mine).

⁹¹ Banda ‘Blazing a trail: The African Protocol on Women’s Rights comes into force’ n 77 above 75.

⁹² Maputo Protocol n 84 above art 2(1)(d).

⁹³ Maputo Protocol n 84 above art 2(1)(c).

⁹⁴ Maputo Protocol n 84 above art 8(c).

changes or efforts that enable structural change (the fourth dimension) bolster the other dimensions of equality by challenging systems of dominance and changing them to those that accommodate differences specific to women. These changes go towards redressing disadvantage (the first dimension), addressing stigma (the second dimension), and enhancing voice and participation (the third dimension) all towards attaining substantive equality.

Structural changes necessitating expenditure and the resource implications necessary to achieve equality are underscored as state obligations in the Maputo Protocol. In protecting the right to life, integrity and security of the person, states are called upon to ‘provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women’.⁹⁵ In a treatise on gender budgeting, one commentator suggests that states should prioritise allocation of resources towards programmes, plans of action and policies aimed at eradicating violence against women. Accordingly, the transformation needed to combat violence against women is not possible to achieve without sufficient budgetary resource.⁹⁶ In an innovative move, states are also required to ‘take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.’⁹⁷ In addition, the Maputo Protocol in its overall implementation provision calls on states to ‘undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.’⁹⁸ All these provisions indisputably facilitate structural change that is integral to achieving substantive equality. In light of all the foregoing illustrations, the Maputo Protocol satisfies the four-dimensional approach to equality and accordingly implementation of its norms can result in substantive equality.

⁹⁵ Maputo Protocol n 84 above art 4(2)(i).

⁹⁶ A Budoo ‘The role of gender budgeting in implementing the obligation to provide resources to realise women’s human rights in Africa’ unpublished PhD thesis, University of Pretoria, 2016 73-74.

⁹⁷ Maputo Protocol n 84 above art 10(3).

⁹⁸ Maputo Protocol n 84 above art 26.

3.2.2.2 Extent to which the Maputo Protocol is inclusive

This aspect of gender responsiveness is concerned with the inclusion of women which can be assessed by evaluating women's access, participation and the outcomes of such inclusion. This thesis in the previous chapter suggested the hypothesis that exclusion of women in the formulation of a human rights document almost certainly resulted in the exclusion of women's concerns in the resultant norms. In this regard and contrasted to the drafting of the African Charter, the Maputo Protocol's drafting history is inclusive and was in fact significantly driven by women's rights organisations in the continent.⁹⁹ Rachel Murray records that NGOs on recognising the inadequacies of the African Charter with regards to women rights decided to drive for the adoption of a legally binding document that would make the African Commission pay more attention to women's rights.¹⁰⁰ In light of the exclusion of women in the drafting of the African Charter, '[t]here was also a perception that women, and African women, needed to create a sense of ownership over these rights.'¹⁰¹ Women's participation and inclusion is noted from conceptualisation through to the drafting stages, where the first draft of the Protocol was developed by a gathering of experts drawn from the African Commission and NGOs representing women's interests. Thereafter these NGOs were also part of the working group together with Commissioners tasked with presenting a final draft of the Protocol. Once the Protocol was adopted, NGOs were similarly at the frontline in advocating for its ratification.¹⁰²

The substantive provisions of the Protocol itself in article 9 provide for women's right to participation in politics and decision-making processes. Access and participation are facilitated by the requirement of states to take positive measures including affirmative action to ensure the equal representation of women.¹⁰³ The requirement for states to ensure not only increased but 'effective representation and participation of women at all levels of decision-making'¹⁰⁴ has a bearing on the outcome of inclusion. For instance, an increase in numbers that is not accompanied by women occupying leadership positions

⁹⁹ Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 77 above 72-73.

¹⁰⁰ Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' n 11 above 262.

¹⁰¹ As above.

¹⁰² Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' n 11 above 262-263.

¹⁰³ Maputo Protocol n 84 above art 9(1).

¹⁰⁴ Maputo Protocol n 84 above art 9(2).

within institutions is merely superficial and will not have meaningful impact. Similarly, where inclusion is not accompanied by institutional transformation, the women representatives may nonetheless encounter prejudices that hinder and minimise their impact. In addition to article 9, the Protocol also calls for the participation of women in various spheres including: equal representation in judiciary and law enforcement organs,¹⁰⁵ women's participation in peace processes,¹⁰⁶ and women's participation in the determination of cultural policies.¹⁰⁷

3.2.2.3 The Maputo Protocol and intersectional identities

As elaborated in the previous chapter, women in Africa have intersectional identities that often interact to result in multiple levels of oppression. The Maputo Protocol is thus assessed as to whether its provisions can respond to these vulnerabilities and remedy intersectional discrimination. In this regard the first area of examination is the definition of discrimination, which, 'instead of itemising all the contexts in which discrimination can occur ... settles on the catch-all "in all spheres of life".'¹⁰⁸ In doing so, this definition covers all potential grounds of discrimination against women without giving a sense of prominence on any one ground.

The Maputo Protocol highlights a number of intersectional identities by addressing some of their specific areas of vulnerability and calling for their enhanced protection. Rural women face particular problems on account of their sex and gender coupled with their rural context. Noting their disproportionately hampered access to health and reproductive rights, credit, training and skills development the Protocol lists these vulnerabilities in order to enhance their quality of life and alleviate their levels of poverty.¹⁰⁹ Widows bear certain vulnerabilities based on their sex, gender and marital status. The Protocol addresses these vulnerabilities, which include a propensity to inhuman and degrading treatment, occasioned by harmful practices as well as their hindered access to inheritance and matrimonial property.¹¹⁰ The Protocol also calls for special protection for elderly women, noting their freedom from violence, including

¹⁰⁵ Maputo Protocol n 84 above art 8(e).

¹⁰⁶ Maputo Protocol n 84 above art 10.

¹⁰⁷ Maputo Protocol n 84 above art 17.

¹⁰⁸ Banda *Women, law and human rights* n 79 above 80.

¹⁰⁹ Maputo Protocol n 84 above art 14(2)(a) & art 19(d).

¹¹⁰ Maputo Protocol n 84 above art 20 & art 21.

sexual abuse and discrimination based on age.¹¹¹ Women with disabilities also receive special protection highlighting their freedom from violence, including sexual abuse and discrimination based on disability.¹¹² The Protocol calls for special measures for women it categorises as *women in distress* such as poor women, women heads of households, and women from marginalised groups who have special physical, economic and social needs. Pregnant women, nursing women and women in detention are also classified as women in distress and they are to be provided with an environment that is suitable to their condition and treated with dignity.¹¹³ In light of the foregoing, the Maputo Protocol can be seen to be cognisant of intersectional identities and normative inadequacies towards addressing intersectional discrimination claims are not detected.

3.2.2.4 The Maputo Protocol as a contextualised African response

A gender responsive approach calls for a contextualised African response that envisions a two-pronged approach consisting of the recognition of the lived realities of women in Africa and enhancing the cultural legitimacy of human rights.

In regard to recognition of the lived realities of women in Africa, the illustrations in the previous section on intersectional identities are relevant. In addition, a depiction of women's lived realities in chapter 2 highlighted some of the most pervasive women's rights abuses in Africa to include: violence against women (VAW), violation of sexual and reproductive health rights and harmful practices. The Maputo Protocol is accordingly assessed on these three themes. On VAW, the Maputo Protocol is comprehensive and innovative. It defines VAW as:¹¹⁴

[A]ll acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

Banda notes that this definition 'covers all the spheres in which women experience violence: the family, community and at the hands of the state.'¹¹⁵ In addition to this expansive definition, the Protocol commendably situates VAW in the dignity discourse

¹¹¹ Maputo Protocol n 84 above art 22.

¹¹² Maputo Protocol n 84 above art 23.

¹¹³ Maputo Protocol n 84 above art 24.

¹¹⁴ Maputo Protocol n 84 above art 1(j).

¹¹⁵ Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 81 above 79.

where in article 3 on the right to dignity it calls upon states to protect ‘every woman’s right respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.’¹¹⁶ Verbal violence on its part represents an innovation and it ‘may well be the first time that verbal violence against women has been recognised in an international human rights instrument.’¹¹⁷ This is significant for instance for the reason that the use of verbal abuse by way of insults, hurtful propaganda and smear campaigns are some of the most significant challenges that discourage women’s candidature for elective offices.¹¹⁸

The other substantive provisions on VAW are situated within the right to life, integrity and security of the person where the Protocol expansively articulates explicit state obligations towards addressing violence against women including: enactment of laws as well as other administrative, social and economic measures; an obligation to identify and address the causes and consequences of VAW; and punishment of perpetrators and rehabilitation of victims among many other unambiguously expressed obligations.¹¹⁹ Noteworthy is that state obligation for VAW is required ‘whether the violence takes place in private or public’¹²⁰ and in doing so addresses the problematic public/private divide in international human rights law that impedes state accountability for the actions of non-state actors.¹²¹ The Protocol also provides protection of women from sexual violence during armed conflict.¹²² The definition of VAW considers acts perpetrated against women ‘in peace time and during situations of armed conflict.’¹²³ Further in articulating protection of women in armed conflicts, the Protocol specifies states’ obligation to ‘protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of exploitation’.¹²⁴ Finally, as already discussed, the Protocol notes the vulnerability of certain categories of women to VAW

¹¹⁶ Maputo Protocol n 84 above art 3(4).

¹¹⁷ Banda ‘Blazing a trail: The African Protocol on Women’s Rights comes into force’ n 77 above 79.

¹¹⁸ Federation of Women Lawyers (FIDA) Kenya *Key gains and challenges: A gender audit of Kenya’s 2013 election process* (2013) 61-64.

¹¹⁹ Maputo Protocol n 84 above art 4(2).

¹²⁰ Maputo Protocol n 84 above art 4(2)(a).

¹²¹ See a discussion on the public/private divide from a feminist perspective in: R Murray ‘A feminist perspective on reform of the African human rights system’ (2001) 2 *African Human Rights Law Journal* 211-212. See also a more general discussion of the public/private dichotomy with regards to the African Commission in: R Murray *The African Commission on Human and Peoples’ Rights and International Law* (2000) 36-45.

¹²² For a comprehensive discussion see: N Dyani ‘Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict’ (2006) 6 *African Human Rights Law Journal* 166-187.

¹²³ Maputo Protocol n 84 above art 1(j).

¹²⁴ Maputo Protocol n 84 above art 11(3).

owing to their intersectional identities including elderly women, women with disabilities and women in situations of armed conflict.

Violations of sexual and reproductive health rights depict women's lived realities as was demonstrated in chapter 2 and evidenced by high maternal mortality rates, hampered access to reproductive health care services including safe abortions and women's disproportionate vulnerability to HIV. The Maputo Protocol in article 14 comprehensively addresses these concerns by articulating key sexual and reproductive health rights including the right: to control fertility, to choose any method of contraception and the right to self-protection and to be protected from HIV.¹²⁵ In addition, the Protocol provides the right to a medical abortion in specified instances,¹²⁶ a measure obviously designed to counter the wanton loss of lives and injuries to unsafe abortions. In this regard, the Protocol is lauded as the first international human rights treaty to provide for the right to an abortion.¹²⁷

Harmful practices are also depictive of women's lived realities in Africa. In this regard, the Maputo Protocol expressly prohibits harmful practices, which it defines as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.¹²⁸ In article 5 states are required to take legislative and other measures towards the elimination of all forms of harmful practices.¹²⁹ The Protocol also expressly categorises harmful practices as a form of discrimination that endangers the health and general well-being of women.¹³⁰ With these three provisions, the Maputo Protocol sets a strong normative foundation for protective and promotional measures towards the elimination of harmful practices. In addition, the Protocol specifically prohibits FGM,¹³¹ and is the first international human rights law treaty to do so. It also prohibits child marriages by providing for the non-negotiable minimum age of marriage as 18 years.¹³² In this way, the Protocol responds to lived realities by providing specific guidance on two

¹²⁵ Maputo Protocol n 84 above art 14(1).

¹²⁶ Maputo Protocol n 84 above art 14(2)(c).

¹²⁷ Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 77 above 82.

¹²⁸ Maputo Protocol n 84 above art 1(g).

¹²⁹ Maputo Protocol n 84 above art 5.

¹³⁰ Maputo Protocol n 84 above art 2(1)(b).

¹³¹ Maputo Protocol n 84 above art 5(b).

¹³² Maputo Protocol n 84 above art 6(b).

scourges that have a disproportionate impact on women and girls in Africa compared to developed countries as was elaborated in the previous chapter.

To conclude, Banda aptly captures the comprehensive provisions of the Protocol in response to the lived realities of women in Africa as follows:¹³³

The strength of the African Protocol is in its recognition that violence against women, including the elimination of harmful practices, requires an [sic] holistic approach which goes beyond law and punishment to embrace the totality of the person whose rights have been violated.

Secondly, a contextualised African response also calls for the cultural legitimisation of human rights. In this regard, the Maputo Protocol accurately provides for the right to a positive cultural context as follows:¹³⁴

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.
2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

This provision supports the cultural transformation approach that enables cultures to be positively transformed from the inside through internal discourse. It rightfully recognises and requires women as change agents in the reconciliation of human rights and culture. Further, in prohibiting and calling for the elimination of harmful practices,¹³⁵ the Maputo Protocol demonstrates cognisance of the guise under which culture has been deployed in Africa to circumvent women's rights. The Protocol's nomenclature such as the use of the term "harmful practices" as opposed to "harmful cultural practices" is progressive. This way it circumvents the oft assumed association of "culture" with "harm" that may be evidenced for instance by western literature where African culture is often presented as being at odds with human rights values as was elaborated in the previous chapter. The term "harmful practice" and not "harmful cultural practice" also expresses the dynamic and transformational nature of culture. For example, with regards to FGM, some communities have adopted symbolic rituals in place of the mutilation procedure and this way they preserve the underlying rationale of the practice, which is to celebrate the rite

¹³³ Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 77 above 80-81.

¹³⁴ Maputo Protocol n 84 above art 17.

¹³⁵ Maputo Protocol n 84 above art 5.

of passage into adulthood thereby retaining their cultural identity while ridding the initiation practice of its harmful aspect.¹³⁶

On traditional roles, the African Charter has been criticised for its silence on the question of marriage and its failure to provide for a change in the traditional role of men and women in the family,¹³⁷ with Ankumah suggesting that such omissions 'are indicative of the drafters' intention not to deviate from customary practices relating to women in general and with respect to marriage in particular.'¹³⁸ Perhaps testament to the evolutionary nature of culture over the passage of time,¹³⁹ the Maputo Protocol remedies this omission and provides that 'women and men shall enjoy equal rights and are regarded as equal partners in marriage.'¹⁴⁰ The provision on marriage demonstrates the Protocol's dexterity in matters culture and rights. For instance, article 6(c) encourages monogamy as the preferred form of marriage while simultaneously asserting that the rights of women in polygamous marital relationships should be promoted and protected.¹⁴¹ This formulation reconciles women's rights and the cultural practice of polygamy, which is deeply entrenched in Africa. To corroborate this view, one commentator¹⁴² argues that a formal equality approach would insist on abolition of polygamy or an equivalent right for women to contract multiple marriages. She however contends that such an approach would not result in real equality, as abolishing polygamy is not as simple as it sounds.¹⁴³ She propositions that a substantive equality approach is therefore preferred which focuses on using the law to protect women in polygamous

¹³⁶ S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 63.

¹³⁷ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) preamble para 14 for instance provides: 'Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.'

¹³⁸ Ankumah n 43 above 156.

¹³⁹ The Charter's drafting process began circa 1979 with adoption in 1981 and that of the Maputo Protocol almost two decades later in the late 90s with adoption in 2003.

¹⁴⁰ Maputo Protocol n 84 above art 6.

¹⁴¹ Maputo Protocol n 84 above art 6(c).

¹⁴² EA Archampong 'Reconciliation of women's rights and cultural practices: Polygamy in Ghana' (2010) 36 *Commonwealth Law Bulletin* 325-332.

¹⁴³ For instance JB Ojwang 'Polygamy as a legal and social institution in Kenya' (1974) 10 *East African Law Journal* 63-92 seems to allude to this difficulty where he suggests that in Kenya outright abolition of polygamy was resisted for three basic reasons: 'that polygamy was going to die anyway due to the strains and stresses of the modern economic revolution; that considering the current tempo of the practice an abolishing law might not be observed, and this would have the undesirable effect of encouraging disrespect for the law; and, finally, that in the present circumstances the social equipoise would be disturbed by a prohibiting law.'

marriages. While others have viewed this dexterity as a clash between legal provision and practice,¹⁴⁴ it is no doubt a pragmatic response to the lived realities of women in Africa.

Generally, in regard to a contextualised African response, Murray observes that the Protocol gives ‘an underlying sense that the African organs and NGOs are trying to achieve an ‘African’ approach to women’s rights; yet what this ‘African’ vision is, has not been clearly developed.’¹⁴⁵ This thesis is a response to such queries and accordingly attempts to develop an “African” gender responsive approach. Overall, and in light of the foregoing assessment, the Maputo Protocol is indisputably gender responsive and provides immense normative potential for the promotion and protection of women’s rights.

3.2.2.5 Implementation, monitoring and interpretation of the Maputo Protocol

The Maputo Protocol makes provision for its implementation and oversight mechanisms. The primary duty of implementation of course falls to states, which are explicitly required to undertake and adopt ‘all necessary measures, and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.’¹⁴⁶ This overarching provision, as earlier discussed, is firmly in line with gender responsiveness and in particular the structural changes that are required in order for the Protocol to truly result in substantive equality for women in Africa. The drafters recognised that redressing the system of patriarchy, like redressing any other well-entrenched system of discrimination such as racism for instance, calls for more than mere rhetoric and accordingly obliges governments to take fiscal action towards realising their commitments under the Protocol.

Monitoring of the Maputo Protocol falls to the African Commission. States are called upon to submit periodic reports in accordance with article 62 of the African Charter,¹⁴⁷ which provision calls upon states to submit reports to the Commission on their implementation

¹⁴⁴ Banda ‘Blazing a trail: The African Protocol on Women’s Rights comes into force’ n 77 above 76.

¹⁴⁵ Murray ‘Women’s rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa’ n 11 above 271.

¹⁴⁶ Maputo Protocol n 84 above art 26(2).

¹⁴⁷ Maputo Protocol n 84 above art 26(1).

of the Charter. Similarly, the Maputo Protocol requires states to indicate measures that they have taken towards ensuring that the rights guaranteed in the Protocol are fully realised by women. State reporting under the Maputo Protocol is discussed further in chapter 4 of this thesis.

Interpretation of the Maputo Protocol falls to both the African Commission and the African Court on Human and Peoples' Rights. The Protocol in article 27 provides that the African Court 'shall be seized with matters of interpretation arising from the application or implementation of this Protocol.' The formulation of this provision has led some to suggest that *only* the African Court can interpret the Maputo Protocol to the exclusion of the African Commission.¹⁴⁸ These claims are further fuelled by the Protocol's transitional provision in article 32, which indicated that the Commission would be seized with interpretation pending the establishment of the African Court.¹⁴⁹ Viljoen provides useful historical context, noting that at the time the Maputo Protocol was adopted (in 2003), the Protocol that established the Court had not yet entered into force (which occurred in 2004). The transitional provision was therefore intended at providing clarity as it related to a Court that was not yet operational.¹⁵⁰ Now that the Court has been established, this provision is no longer relevant, and should not serve to restrict the substantive effects of the Maputo Protocol.

Granted, going by a literalist interpretation, the drafting is indeed clumsy and as Viljoen frames it elsewhere, '[u]fortunately the Maputo Protocol is not a model of clarity on this issue.'¹⁵¹ That said, the interpretation that article 27, read together with article 32, establishes the Court's exclusive jurisdiction and excludes the Commission must be rejected for various reasons, two of which are canvassed here. One reason derives from the very nomenclature of the Maputo Protocol, it is a Protocol *to the African Charter*, and therefore being a supplement to the Charter, it 'leaves unaffected the institutional landscape, and merely extends the scope of the African Commission's mandate to cover

¹⁴⁸ See for example: A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 327. Rudman discusses the African Court as the primary institution to be seized in enforcing the Maputo Protocol with no reference to the African Commission.

¹⁴⁹ Maputo Protocol n 84 above art 32.

¹⁵⁰ Viljoen *International human rights law in Africa* n 1 above 313.

¹⁵¹ 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 and Lee Journal of Civil Rights and Social Justice* 39.

the specific rights of women.¹⁵² Such a supplementary arrangement and indeed this reasoning are in fact envisaged in the Charter itself where it provides: 'Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.'¹⁵³ In other words, the Maputo Protocol extends the substantive scope of rights, but leaves intact the protective mandate of the African Commission.

A second reason to reject the contention on the Court's exclusive jurisdiction is because it leads to an absurd consequence. It is trite law that the literal rule of interpretation should not be used if it results in an absurdity. The absurdity that would be occasioned is that a provision in a human rights treaty would have the effect of curtailing access to remedies for human rights violations. This is Viljoen's argument, where he asserts that '[s]uch an interpretation would fly in the face of the purpose of the Protocol, which is to ensure greater protection to women against a background of concern for the failure'¹⁵⁴ of existing treaties to have any impact on their lives. I have also argued elsewhere, that the contention that the Court retains exclusive jurisdiction of the Maputo Protocol creates an inconceivable jurisprudential lacuna in the event that a state has ratified the Court's Protocol but has not granted individuals and NGOs direct access or, worse still, where a state has not ratified the Court's Protocol at all.¹⁵⁵ The following absurdity presents itself: Only states that have ratified the Maputo Protocol *and have accepted direct access to the Court* would be held accountable for violations of the Protocol, because cases can be submitted to the Court directly against those states.¹⁵⁶ Other state parties to the Maputo Protocol cannot be held accountable, even if they have ratified the Court's Protocol, because in those instances, communications have to be submitted first to the Commission. If the Commission lacks jurisdiction to decide cases alleging violations of the Maputo Protocol, as some contend, the Commission cannot even become a gateway for such cases to be referred to the Court. In any event, such reasoning similarly flies in the face of the Court's very *raison d'être*, which is to *complement* and not replace the

¹⁵² Viljoen *International human rights law in Africa* n 1 above 312-313.

¹⁵³ African Charter n 7 above art 66.

¹⁵⁴ Viljoen *International human rights law in Africa* n 1 above 313.

¹⁵⁵ S Rajab-Leteipan & M Kamunyu *Litigating before the African Commission on Human and Peoples' Rights: A practice manual* (2017) 7.

¹⁵⁶ Viljoen *International human rights law in Africa* n 1 above 313.

Commission's protective mandate.¹⁵⁷ Further on absurdity, seeing as even sub-regional mechanisms such as the ECOWAS Community Court of Justice have gone on to adjudicate cases based on a violation of the Protocol,¹⁵⁸ a suggestion that the Commission, the continent's key human rights oversight organ, lacks a similar ability is quite simply bizarre.

As a final note, and in line with gender responsiveness, the Maputo Protocol like all other treaties is deemed to be a living document. It is therefore to be interpreted and utilised contextually for the advancement of the purpose for which it was developed, which is to advance women's rights protection in Africa.

3.3 Evaluating the gender responsiveness of the African Commission's individual communications procedure in interpreting human rights norms

The African Commission's individual communications procedure is one of the ways in which the Commission implements its protective mandate. The 'communications procedure provides the clearest possibility of holding states accountable to their commitments'¹⁵⁹ and is therefore critical to the protection of women's rights. Unfortunately, in spite of the available procedure to bring cases, 'little jurisprudence on the rights of women has emerged from the Commission.'¹⁶⁰ The possible reasons for this dearth of cases will be explored later in this thesis in section 5.4.1.2. Even worse, aside from the scarcity of cases specifically relating to women's rights, in the other general cases there are 'only very few in which the violation of the rights of women has been even a secondary or indirect issue.'¹⁶¹ In light of the foregoing, the present section analyses the

¹⁵⁷ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court's Protocol) preamble '*Firmly convinced* that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights'.

¹⁵⁸ ECW/CCJ/JUD/08/17, *Dorothy Chioma Njemanze & 3 others v The Federal Republic of Nigeria*, ECOWAS Court and ECW/CCJ/APP/35/17 *Aminata Diantou Diane (represented by APDF & IHRDA) v Mali* ECOWAS Court.

¹⁵⁹ Viljoen *International human rights law in Africa* n 1 above 300.

¹⁶⁰ Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' n 11 above 259.

¹⁶¹ Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' n 11 above 259. See for example: Communications 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98, *Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Inter africaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, 13th Activity Report.

women's rights cases that have been litigated in two categories. The first category focuses on cases that had as their core focus, women's rights violations. The second category evaluates cases that portend an implication for women's rights jurisprudence.

3.3.1 Analysis of cases focused on women's rights violations

As of the time of writing, the African Commission had not received any cases grounded on the interpretation of the Maputo Protocol. The analysis will therefore focus on the two cases that have alleged a violation of article 18(3) of the African Charter that calls for the elimination of discrimination against women.

3.3.1.1 *Egyptian Initiative for Personal Rights and Interights v Egypt*¹⁶²

This communication is of paramount significance as it is 'the first time [the Commission] decided on the merits in a case concerning the violation of women's rights'.¹⁶³ The case was brought by two NGOs on behalf of four complainants who alleged sexual violence amongst other violations against the government of Egypt. According to the summary of the complaint, the Egyptian Movement for Change (*Kefaya*) organised a political protest against the government. Riot police and supporters of the ruling party, National Democratic Party (NDP), accosted the protesters and journalists, resulting in incidents of insults and assaults.

All the women in the complaint were subjected to sexual harassment and violence, three were participating in the protest, and one happened to be passing by. Identified members of NDP pushed the first victim, a female journalist, to the ground and fondled her private parts. Despite her vigilance in reporting on the same day, the investigators refused to record statements from witnesses. Her persistent refusal to withdraw the complaint led to the receipt of threats from State Security Intelligence (SSI) officers, and later to her dismissal from her job at a newspaper and divorce from her husband.¹⁶⁴ The second and third victims, also female journalists, were attending the protest as citizens exercising their right to protest and also covering the event in their capacity as journalists. They were hit repeatedly in the face and stomach and had managed to enter into a taxi to

¹⁶² Communication 323/06, *Egyptian Initiative for Personal Rights & Interights v Egypt*, ACHPR.

¹⁶³ M Killander & B Nkrumah 'Human rights developments in the African Union during 2012 and 2013' (2014) 14 *African Human Rights Law Journal* 281.

¹⁶⁴ Communication 323/06 n 162 above paras 6-9.

escape when an identified senior police officer and SSI officer pulled them out. They were then subjected to more hitting, beating, biting, slapping, tearing of clothes, sexual assault and called abusive names such as 'whore' and 'slut'. Investigators similarly refused to pursue their complaints or record statements from their witnesses. They thereafter received numerous threats to withdraw the complaint.¹⁶⁵ The fourth victim, a female journalist, was attending the protest as a member of the *Kefaya* movement and also in her capacity as a journalist covering the event. Unidentified men severely beat her, kicked her in the pubic area and attempted to tear off her clothes. All the while law enforcement officers watched and actually prevented her from escaping or seeking assistance. Her complaint suffered a similar fate to that of the other victims and she was also subjected to threats.¹⁶⁶ All the victims' cases were classified as misdemeanours and after allegedly undertaking investigations, the Public Prosecution Office later took a decision not to prosecute the cases. The victims' appeal of this decision was also dismissed.¹⁶⁷

In light of the foregoing events, the complainants alleged that Egypt had violated articles 1, 2, 3, 5, 7(1)(a), 9(2), 16, 18(3) and 26 of the African Charter. In summary, in what has been described as a 'landmark decision',¹⁶⁸ 'the African Commission denounced acts of violence against women in all its ramifications [asserting that] sexual violence is a gross violation of women's rights for which states must be held accountable.'¹⁶⁹ The Commission's adjudication of this case is now assessed for its gender responsiveness. The first area of assessment relates to the African Commission's appreciation of a substantive equality approach to discrimination.¹⁷⁰ In analysing the alleged violation of the right to non-discrimination article 2 and 18(3) of the Charter, the Commission posed the following questions:¹⁷¹

Whether the women and male protesters had similar treatment; and whether the treatment was 'fair and just', given that all women and men in the scene were under the same circumstances, that is, exercising their political rights.

¹⁶⁵ Communication 323/06 n 162 above paras 10-16.

¹⁶⁶ Communication 323/06 n 162 above paras 17-20.

¹⁶⁷ Communication 323/06 n 162 above paras 21-22.

¹⁶⁸ E Durojaye & O Oluduro 'The African Commission on Human and Peoples' Rights and the woman question' (2016) 24 *Female Legal Studies* 330.

¹⁶⁹ As above 330.

¹⁷⁰ In the gender responsive model, an assessment of substantive equality is made using Fredman's four-dimensional approach to equality where the aim is: (i) to redress disadvantage; (ii) to address stigma, stereotyping, prejudice and violence; (iii) to enhance voice and participation; and (iv) to accommodate difference and achieve structural change.

¹⁷¹ Communication 323/06 n 162 above para 129.

In answering the first question on similar or different treatment, and in articulating their basis for finding a violation of discrimination, the Commission noted that it is apparent that the violations were perpetrated on the victims because of their gender. Further, that the respondent state had not provided any evidence to the contrary to prove that there was 'no differential treatment given to both male and female protesters on the scene.'¹⁷² In answering the second question, that is, where there is different treatment, is it justified? The Commission held that 'the treatment was neither legitimate, nor justifiable because there is no reasonable cause behind the discrimination that was inflicted by the victims.'¹⁷³ In analysing this second question they were guided by the substantive equality jurisprudence of the Inter-American Court and the UN Human Rights Committee who have variously held that not all differential treatment amounts to discrimination if it is undertaken for a reasonable or legitimate purpose.¹⁷⁴

In finding a violation of article 18(3) on the elimination of discrimination against women, the commission began by analysing the nature of the violations. The verbal assaults such as 'slut' and 'whore' were found to be gender-specific as they were not usually used against men and they were designed to 'degrade and rip off the integrity of women who refuse to abide by traditional, religious, and even social norms.'¹⁷⁵ Regarding the physical assaults, the Commission noted that the acts were of a sexual nature, gender-specific and more so, that it was indisputable that the victims were targeted because of their gender. Further, the Commission observed that the sexual violence took on a systemic nature in the way it was specifically targeted at women. The Commission concluded that 'the violence was gender-specific and discriminatory by extension.'¹⁷⁶ Overall, in light of the respondent state's inability to prove that the male and female protesters were not treated differently, that the different treatment was justifiable and that the sexual violence was gender-specific, the Commission found a violation of article 2, which prohibits discrimination on various grounds including sex, and article 18(3).

¹⁷² Communication 323/06 n 162 above paras 138.

¹⁷³ Communication 323/06 n 162 above para 149.

¹⁷⁴ Advisory Opinion Oc-4/84, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, IACHR (19 January 1984) Ser. A No. 4 para 57 and UN Human Rights Committee (HRC), General Comment No. 18 Non-discrimination, 10 November 1989, UN Doc HRI/GEN/1/Rev.1 para 13 as cited in Communication 323/06 n 162 above para 146.

¹⁷⁵ Communication 323/06 n 162 above para 143.

¹⁷⁶ Communication 323/06 n 162 above para 153.

Nonetheless, criticism can be levelled at the Commission's use of the *sameness/difference* model in reaching its finding of discrimination in that it necessarily involves the utilisation of a *male comparator* or *male standard* in order to find that a woman has been discriminated. In her book chapter challenging this model to equality,¹⁷⁷ Kathleen Mahoney asserts that when equality is defined in this way, the assumption is that equality is the norm and discrimination the exception. In doing so, the systemic and persistent discrimination that women endure is obscured and can therefore not be addressed. Another challenge with the use of a male comparator is that 'it does not permit effective implementation of equality rights when their infringement arises from female-specific circumstances.'¹⁷⁸ This means that, relying on this model in future, the Commission will likely and unjustly fail to make a finding of discrimination whenever there is no male comparator. In fact, the Commission has already fallen into this jurisprudential trap, as will be expounded upon in the analysis of the next case in section 3.3.1.2. In fact, it is perhaps with such an unjust outcome in mind, that Mahoney questions whether international human rights law can deliver substantive equality. She answers that this can only be achieved if the discrimination test that is utilised is based on powerlessness, exclusion and disadvantage, rather than sameness and difference.¹⁷⁹

Whereas the Commission made a finding of discrimination, the likelihood of this decision resulting in substantive equality is debatable. Substantive equality in the gender responsive model utilises Fredman's four-dimensional approach to equality where the aim is: (i) to redress disadvantage; (ii) to address stigma, stereotyping, humiliation, prejudice and violence; (iii) to enhance voice and participation; and (iv) to accommodate difference and achieve structural change. The Commission applies a male comparator standard to test for discrimination, as opposed to a test based on the complainants' disadvantage which would have recognised and addressed the systemic way in which women have been subjected to sexual violence particularly in Egypt as will be discussed shortly. Consequently, this decision fails to satisfy the first dimension that requires disadvantage to be recognised and redressed. Conversely, the Commission's attention to the verbal assaults, sexual violence and threats issued against the victims satisfies the

¹⁷⁷ KE Mahoney 'Canadian approaches to equality rights and gender equity in the courts' in RJ Cook (ed) *Human rights of women: National and international perspectives* (2012).

¹⁷⁸ As above 442.

¹⁷⁹ Mahoney n 177 above 442.

second dimension as it finds the epithets and violence to be gender-specific and intended to be humiliating.

In addition to redressing disadvantage and stigma, the four-dimensional approach to substantive equality calls for the enhancement of participation and the making of structural changes to accommodate difference, in this regard it is instructive to look at the remedies. For instance, 'redressing disadvantage needs to be allied with the fourth dimension, which requires structural change.'¹⁸⁰ Fulfilling the fourth dimension would have required the Commission to give effective remedies tailored towards structural changes that would address the systemic nature of the disadvantage suffered by the female protestors through suggested legal and institutional reform. Instead, the Commission gave a vague recommendation requesting the respondent state to amend its laws 'to bring them in line with the African Charter'.¹⁸¹

While the need for an international adjudication body not to be overly prescriptive is conceded, such a remedy is utterly unhelpful and unlikely to result in effective change. In illustration of a useful remedy that is also not overly prescriptive, Human Rights Watch identifies the following measures towards resolving Egypt's epidemic of sexual violence:¹⁸²

What is needed are concerted efforts to improve law enforcement's practice in protecting victims and effectively investigating and prosecuting the attackers, as well as a comprehensive national strategy on the part of the government.

The vagueness of the remedy in question is also depictive of the Commission's deferential attitude towards states. The root of this deference can be traced to the establishment of the African Charter and the African Commission. Gina Bekker submits that this establishment was imposed on African governments through external pressure to respond to human rights violations in the continent and on account of this,

[t]he Commission was made subservient to the Assembly of the Heads of State of the OAU, ensuring maintenance of the principle of sovereignty and non-interference. This subservience is also manifest in the manner in which the Commission has dealt with the issue of remedies.¹⁸³

¹⁸⁰ Fredman 'Substantive equality revisited' n 73 above 735.

¹⁸¹ Communication 323/06 n 162 above para 275.

¹⁸² Human Rights Watch 'Egypt: Epidemic of sexual violence' available at <https://www.hrw.org/news/2013/07/03/egypt-epidemic-sexual-violence> (accessed 24 April 2017).

¹⁸³ G Bekker 'The African Commission on Human and Peoples' Rights and remedies for human rights violations' (2013) 13 *Human Rights Law Review* 506.

Other commentators also decry the remedies in this case. Ebenezer Durojaye and Olubayo Oluduro assert that ‘the remedy provided by the Commission ... falls short of asking the woman question.’¹⁸⁴ The woman question is comparable to the gender responsiveness question in this thesis, and they make this assertion for among other reasons that the Commission fails to request for the reparation and rehabilitation of the victims of sexual abuse. A remedy calling for rehabilitation would also have been consistent with the third dimension of substantive equality that seeks to enhance participation and particularly social inclusion. Overall, in pointing out a pattern in giving ineffective remedies, Bekker concludes that ‘the African Commission has by and large failed to provide genuine redress to victims of human rights violations.’¹⁸⁵

A gender responsive approach also calls for the recognition of intersectional identities and the resultant intersectional discrimination. In their submissions on the merits of the case, the complainants make a claim of intersectional discrimination when they submit that ‘the main reason why the victims were assaulted by the authorities is due to the fact that they hold *particular political views, are women and journalists*.’¹⁸⁶ In fact, the Commission itself acknowledges this submission and sets its task as establishing whether the violence ‘is discriminatory based on sex and political view in violation of Article 2 of the African Charter.’¹⁸⁷ However, the Commission in its reasoning does not pursue this intersectionality further proceeding to find that the discrimination on the basis of being gender-specific only. In doing so, the Commission misses a crucial opportunity to develop its jurisprudence on intersectional discrimination and particularly on the use of politically motivated violence against women. Notably, one commentator cautions that ‘[i]t is imperative not to confuse social violence with politically motivated violence in the Egyptian context’.¹⁸⁸ He succinctly captures why it would have been worth addressing the discrimination based on political view where he asserts:¹⁸⁹

In contrast to social violence, political forces who resort to sexual violence usually plan their crime, and synchronise its use with other political initiatives and strategies that aim to eliminate the

¹⁸⁴ Durojaye & Oluduro n 168 above 333.

¹⁸⁵ Bekker n 183 above 503.

¹⁸⁶ Communication 323/06 n 162 above para 77 (emphasis mine).

¹⁸⁷ Communication 323/06 n 162 above para 128.

¹⁸⁸ M Tadros *Politically motivated sexual assault and the law in violent transitions: A case study from Egypt* (2013) 7. Available at <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/2950/ER8%20final%20online.pdf?sequence=1&isAllowed=y> (accessed 24 April 2017).

¹⁸⁹ Tadros n 188 above 7.

opposition... where sexual assault is politically motivated by a regime in power, it is much more difficult to seek law enforcement from the police and from the government when they are suspected of being complicit in the acts themselves.

The foregoing quotation perfectly represents the facts of the present case. Other commentators similarly corroborate the politically instigated nature of the violence that was meted out against the complainants. Diane Singerman and Paul Amar record how the assailants 'beat demonstrators as the police looked on, doing nothing. Unlike the typical violent attacks on demonstrators by armed and uniformed security forces in Cairo, plain-clothed thugs targeted female demonstrators, conspicuously tearing their clothes and stripping them as they attacked them.'¹⁹⁰ Singerman and Amar allude to the political motivation of the sexual harassment where they observe that the government merely changed tactics whereby 'plain-clothed police officers and paid thugs ... rather than uniformed security troops did the dirty work.'¹⁹¹ In light of this, it was clear that the violence was meted on the complainants not simply because of their gender but equally because of their political affiliation, a fact that was also submitted by the complainants.

Arguably, the African Commission's failure to substantively address intersectional discrimination may be ascribed to the reason that, at the time, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) did not also display meaningful engagement with the discourse. The African Commission's deference to the CEDAW Committee is apparent in this decision. For instance, its basis for making the finding that violence against women is a form of discrimination is based expressly on a similar view by the CEDAW Committee.¹⁹² Of CEDAW Committee's similar shortfall, Dianne Otto criticised that '[t]he approach taken by CEDAW has some limitations ... its continuing reliance on a comparison with men ... and the very limited acknowledgement of multiple and intersectional forms of discrimination.'¹⁹³ The CEDAW Committee has since then subsequently taken normative steps to improve their approach to intersectional discrimination. In light of this progress in the intersectionality discourse,

¹⁹⁰ D Singerman & P Amar 'Contesting myths, critiquing cosmopolitanism, and creating the new Cairo School of Urban Studies' in D Singerman & P Amar (eds) *Cairo cosmopolitan: Politics, culture, and urban space in the new globalised Middle East* (2006) 7.

¹⁹¹ As above 7-8.

¹⁹² Communication 323/06 n 162 above para 165.

¹⁹³ D Otto 'Women's rights' in D Moeckli, S Shah, S Sivakumaran & D Harris (eds) *International human rights law* (2010) 354-355.

the Commission's advancement in effectively addressing intersectional discrimination in more recent cases will similarly be reviewed in analysis of the next case in section 3.3.1.2.

A gender responsive model also calls for the recognition of the lived realities of women and responding to those experiences. In the instant case, the pervasive nature of sexual violence against women in Egypt was crucial towards contextualising the violations and subsequently the remedies. 'Sexual violence ... and harassment has been a persistent problem in Egypt for many years.'¹⁹⁴ A study on sexual harassment ranging from verbal abuse to rape 'found high rates of exposure to sexual harassment' and that '83% of Egyptian women reported exposure to harassment, while 98% of foreign women stated they had been sexually harassed while in Egypt.'¹⁹⁵ In Cairo, which was the site of the facts of the instant case, the situation is particularly troubling. 'Cairo has an internal reputation as a city where the harassment of women is limitless and exerted regardless of the woman's age, nationality, class, race, or religious affiliation.'¹⁹⁶ The problem of sexual violence in protests was also not unique to this case and was in fact a trend, 'Human Rights Watch has long documented the problem of sexual assault in Cairo's streets and particularly at protests.'¹⁹⁷ Even worse, the dominance of this sexual violence is inversely proportional to the response from the justice system. Human Rights Watch assert that

[i]mpunity for sexual violence against women in the public sphere in Egypt is the norm ... Women in Egypt rarely report to the police when they have been sexually assaulted because they have no reason to believe that there will be a serious investigation.¹⁹⁸

The problem is therefore manifold, pervasive sexual violence and with impunity which no doubt creates a cyclical discriminative effect. Another commentator writing on sexual harassment in Egypt and the disconcerting and inadequate legal responses highlights the cyclical nature of the problem:¹⁹⁹

With a culture that condones sexual harassment and a justice system that marginalises it, women's legal battles with sexual violence in Egypt is predominantly met with apathy, if not more violence.

¹⁹⁴ Tadros n 188 above 7.

¹⁹⁵ RM Hassan "'Clouds in Egypt's sky" Sexual harassment: from verbal harassment to rape: A sociological study' 8 available at http://www.endvawnow.org/uploads/browser/files/ecrw_sexual_harassment_study_english.pdf (accessed 24 April 2017).

¹⁹⁶ FM Peoples 'Street harassment in Cairo: A symptom of disintegrating social structures' (2008) 15 *The African Anthropologist* 2-3.

¹⁹⁷ Human Rights Watch n 182 above.

¹⁹⁸ Human Rights Watch n 182 above.

¹⁹⁹ M Kirolos 'The daughters of Egypt are a red line: The impact of sexual harassment on Egypt's legal culture' (2016) 13 *International Journal on Human Rights* 141.

In light of the ubiquitous nature of violence against women in Egypt, a gender responsive approach would have required the Commission to issue its decision in cognisance of this struggle. The Commission demonstrates its understanding of the context of the violence in Egypt is when it makes the finding that

[A] State may be in violation of the African Charter, for acts of non-state actors, if it [is] complicit in the violations alleged, has sufficient control over those actors, or fails to investigate those violations.²⁰⁰

In making this finding, the Commission is appropriately responding to the manifestation of sexual violence in Egypt. The government had changed tactics and taken to using plain-clothed police officers and paid thugs²⁰¹ as perpetrators of sexual violence ostensibly with the reasoning that they will evade culpability for actions of non-state actors. In the analysis of the state's obligation for actions of non-state actors in this case, the Commission really comes into its own. It unambiguously asserts a government's obligation to protect its citizens from actions perpetrated by private parties. Influenced by jurisprudence of the Inter-American Commission, it also makes the link between 'impunity concerning acts of violence and ... [that] failure to prevent, protect, and prosecute creates a climate that is conducive to such acts.'²⁰² In the end, it finds that Egypt's failure to investigate and prosecute the perpetrators made it culpable and in violation of articles 2 and 18(3). This progressive analysis sets an excellent precedent and sends a critical reminder to states of the extent of their obligation to protect their citizens.

The weaknesses of the remedies in this case have already been articulated but demand emphasis from a different perspective. Responding to the lived reality of women in Egypt would have required the Commission to deliver more targeted and effective remedies that would address the systemic nature of sexual violence in Egypt. By way of illustration, the Commission's counterpart, the Inter-American Commission in the *Maria da Penha v Brazil* case²⁰³ issued remedies that are indisputably gender responsive as they target the systemic nature of domestic violence and require structural change. An analysis of the remedies of the case notes that the Inter-American Commission requested Brazil to

²⁰⁰ Communication 323/06 n 162 above para 156.

²⁰¹ Singerman & Amar n 190 above 7-8.

²⁰² *Maria da Penha v Brazil* IACHR (16 April 2001) Report No. 54/01, OEA/Ser.L./III.111, doc.20 para 56 as cited in Communication 323/06 n 162 above para 158.

²⁰³ *Maria da Penha v Brazil* as above.

adopt measures to put an end to the State's condoning of domestic VAW. Recommended measures in [this] category included: taking steps to raise the awareness of officials of the judiciary and specialized police; simplifying and streamlining criminal proceedings; establishing alternatives to judicial mechanisms; increasing the number of special police stations; teaching police units about how to handle domestic conflict, the importance of respecting women, and rights recognized in the Convention of Belem do Para; and reporting on the State's progress in implementing these goals.

204

Remedies formulated in such a manner respond to the actual challenges those complainants and the women they represent experience, and therefore result in tangible protection and promotion of women's rights. One commentator notes that the Inter-American Commission in that case demonstrated 'the importance of international mechanisms to pressure national governments to ensure the prevention and reparation of human rights violations in the national sphere.'²⁰⁵ This was on account of the reforms that Brazil implemented to prevent violence against women specifically as a result of the recommendations given in that case.²⁰⁶

One of the tools that was at the Commission's disposal that would have enabled it to better address the concerns raised in this case and fashion better remedies was the Maputo Protocol. Apart from restating the Protocol's definition of violence against women, the Commission failed to rely on it in its substantive arguments. While Egypt is not a party to the Protocol, nothing prevented the Commission from relying on it, in fact article 18(3) of the Charter read together with article 60 necessitates the Commission to draw inspiration from existing international human rights law 'particularly from the provision of various African instruments on human and peoples' rights'²⁰⁷ Durojaye and Oluduro similarly lament that the Commission's reliance on the Protocol 'would have provided the Commission an opportunity to emphasise the importance of the Protocol and the need for all African governments to uphold the spirit and intents of its provisions.'²⁰⁸ They capture the criticism perfectly where they assert:²⁰⁹

²⁰⁴ P Spieler 'The Maria da Penha case and the Inter-American Commission on Human Rights: Contributions to the debate on domestic violence against women in Brazil' (2011) 18 *Indiana Journal of Global Legal Studies* 134 and *Maria da Penha v. Brazil* n 202 above para 61.

²⁰⁵ As above 143.

²⁰⁶ In fact there is no doubt that the resultant reforms were as a result of the case. For instance, Brazil's first domestic violence law enacted to combat domestic violence against women from a gender perspective is named after the complainant and known as the Maria da Penha Law. See Spieler n 204 above 137-140.

²⁰⁷ African Charter n 7 above art 60.

²⁰⁸ Durojaye & Oluduro n 168 above 333.

²⁰⁹ Durojaye & Oluduro n 168 above 333.

Article 4 of the Protocol is one of the strongest provisions protecting women from all forms of violence and detailing steps States must take to ensure that women are fully protected from violence, whether during peace or conflict ... [The Commission] ought to have made the link.

Overall, while this case is celebrated for returning a favourable decision and in the moments it established useful jurisprudence, it fails the gender responsive test on account of its failure to address the issues in a manner that would effectively respond to the context and bring about meaningful structural change that would aid in preventing future incidents of sexual violence.

3.3.1.2 *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia*²¹⁰

This communication represents the second time that the Commission decided on the merits of a case based exclusively on the violation of women's rights. Equality Now and Ethiopian Women Lawyers Association (EWLA), organisations engaged in women's rights advocacy, brought the case and are referred to as the complainants in the case.²¹¹ The complaint was brought on behalf of the victim, Woineshet Zebene Negash (Woineshet or Ms Negash) and is premised on the various violations meted against Woineshet including abduction, repeated rapes and marriage by abduction exacerbated by hampered access to justice in seeking redress. According to the summary of the complaint, Woineshet who was aged 13 at the time, was abducted from her home and raped by Aberew Jemma Negussie (Aberew) together with several other accomplices. When the abduction was reported to the police, she was rescued and the rape confirmed through a medical report. Aberew was arrested and when released on bail he once again abducted Woineshet, hid her and held her for a month and forced her to sign a marriage contract. After a month, she managed to escape, report the matter to a police station following which Aberew and his fellow accomplices were prosecuted for abduction and sentenced to 10 years and 8 years, respectively, without parole. Following this, Aberew and his accomplices launched an appeal, which was dubiously allowed on the basis that the rape was consensual. This dubious finding was arrived at in spite of Aberew's

²¹⁰ Communication 341/2007, *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, ACHPR.

²¹¹ The victim was initially represented by Ethiopian Women Lawyers Association then later informed the Commission that she wished to be represented by Equality Now who carried the case to its finality.

admission and testimony at the lower court to have abducted Woineshet and the medical report proving rape had occurred. Even worse, neither Woineshet nor EWLA were present at the appeal or even informed of it. The complainants proceeded to make several appeals that were all dismissed until there was no further avenue for domestic recourse.²¹²

On the basis of the foregoing facts, the complainants submitted that Ethiopia had violated its obligations under the African Charter and specifically articles 2, 3, 4, 5, 6 and 18(3). Article 2 is the Charter's general non-discrimination clause, article 3 provides that every individual shall be equal before the law and entitled to equal protection of the law, article 4 provides for the right to life and integrity of the person, article 5 provides for the right to dignity and prohibits all forms of cruel, inhuman, degrading treatment, article 6 provides for the right to liberty and security of the person and article 18(3) provides for the elimination of every discrimination against women.²¹³ In its decision, the Commission found that there had been violations of articles 3, 4, 5, 6 and 7(1)(a) of the African Charter and did not find a violation on the basis of discrimination for reasons that will be examined in greater depth below. The Commission's adjudication of the case is now assessed for its gender responsiveness.

The first area of assessment is an analysis of the Commission's appreciation of a substantive equality approach to discrimination, which is alleged in claiming a violation of articles 2, 3 and 18(3). In this thesis, substantive equality is understood using Fredman's four-dimensional approach²¹⁴ and taking into account the recognition of difference. The first dimension to substantive equality aims to redress disadvantage. In the instant case, disadvantage is represented by the systemic harmful practice of abduction, rape and forced marriage in Ethiopia. This fact is pleaded by the complainants,²¹⁵ and also recognised by the Commission where they note that 'the practice of abduction and rape was widespread and considered a normal way of

²¹² Communication 341/2007 n 210 above paras 1-9.

²¹³ African Charter n 7 above.

²¹⁴ Sandra Fredman's four-dimensional principle to substantive equality aims: (i) to redress disadvantage; (ii) to address stigma, stereotyping, prejudice and violence; (iii) to enhance voice and participation; and (iv) to accommodate difference and achieve structural change.

²¹⁵ Communication 341/2007 n 210 above para 93.

procuring a bride among the victim's society.'²¹⁶ Accordingly, the Commission rightly surmised that the respondent state must be deemed aware or ought to have been aware of the prevalence of the harmful practice and this knowledge 'required *escalated measures* beyond the criminalisation of abduction and rape'.²¹⁷ In further analysis of the prevalence and the required measures, the Commission seemed to achieve the perfect balance between prescription and the margin of appreciation owed to a state where it proposed that

without prejudice to that margin of appreciation, such measures could have included immediately launching sensitisation campaigns in the area about the illegality of the practice of forced marriage by abduction and rape and the attendant penal consequences; providing direct security at the residences of girls attending school; conducting random patrols of the areas where the practice was rampant; or indeed requiring the owners of properties accommodating school-attending girls, such as Ms Negash's dormitory, to adequately secure the premises.²¹⁸

The foregoing measures are similarly captured in the Commission's final recommendations where it requested the respondent state to put in place escalated measures and also undertake 'training [of] judicial officers on specific human rights themes including on handling cases of violence against women.'²¹⁹

The preceding analysis similarly demonstrates its appreciation of substantive equality in light of the second dimension that seeks to address stigma and violence as well as the fourth dimension that seeks to accommodate difference and achieve structural change. In regard to the third dimension that seeks to enhance voice and participation and reintegration to the society, the Commission made a monetary award of US\$150,000 as compensation and as a form of reparation to the victim. In explanation, the Commission noted that this remedy takes into account

the physical, psychological, and emotional trauma that Ms Negash suffered as a result of primary violations by the private individuals, as well as the denial of justice by the Respondent State's failures.²²⁰

In so doing, the Commission is recognising the harm done and attempting to alleviate Woineshet's status and consequently enhance her voice, participation and reintegration to society. This approach is in line with international human rights practice where

²¹⁶ Communication 341/2007 n 210 above para 109.

²¹⁷ Communication 341/2007 n 210 above para 126 (emphasis mine).

²¹⁸ Communication 341/2007 n 210 above para 128.

²¹⁹ Communication 341/2007 n 210 above para 160 (d).

²²⁰ Communication 341/2007 n 210 above para 158.

monetary compensation can be awarded for pecuniary and non-pecuniary losses. These moral damages are awarded in instances where a violated right cannot be restored but nonetheless the adjudicating body feels the need to make a monetary award for punitive, deterrent or similar ends. The form and amount of compensation is largely discretionary and the Inter-American and European Courts of Human Rights have similarly made such monetary awards in remedy for human rights violations.²²¹ The Commission must also be credited in this regard as it was previously accused of reluctance in making awards for monetary compensation.²²²

To be considered gender responsive, a substantive equality approach to discrimination must also call for the recognition of difference. The recognition of difference has earlier been articulated as being concerned with making a determination of equality with gender differences in mind and not basing such determination on male terms or standards. It is in this regard that the Commission takes several jurisprudential steps backwards by requiring a male comparator in order to establish that the violations towards Woineshet are discriminatory. Whereas the use of a male comparator had been utilised in the *Egyptian Initiative for Personal Rights & Interights v Egypt* case and led to a finding of discrimination, as noted in the previous section, such a model is inappropriate as it could in future lead the Commission to make a finding of no discrimination where there was no male comparator. In the instant case and in falling into their own jurisprudential trap, the Commission recalled their use of the male comparator in the afore mentioned case against Egypt and proceeded to affirm that in order to establish a violation of articles 3 as read together with article 2,²²³

the complainant must make out a *prima facie* case that the respondent state had not given the victim the same treatment it accorded to the others in analogous situations or that, the respondent state had accorded less favourable treatment to the victim than that accorded to others in relevantly analogous situation, or indeed that the state had imposed a disproportionate burden or restriction on the victim relative to that imposed on others in relevantly analogous situations. *The complainant must identify the comparator and show how the treatment complained of and that of the comparator are comparable.*²²⁴

²²¹ D Shelton *Remedies in international human rights law* (2015) 321-376.

²²² Bekker n 183 above 509.

²²³ Communication 341/2007 n 210 above para 150. Article 18(3) is also implied in this rationale as the Commission holds that it does not 'find it necessary to separately examine the alleged violation of article 18(3)'.

²²⁴ Communication 341/2007 n 210 above para 147 (emphasis mine).

As previously argued, the use of a male comparator interferes with the implementation of equality where the violation arises from female-specific circumstances.²²⁵ The violations in the present case, rape, abduction and forced marriage were particularly female-specific as the prevalence of the harmful practice only or disproportionately affected girls and not boys. Other commentators also criticise the comparator approach making the observation that

the Commission applied a relatively narrow consideration of discrimination in situations of violence against women, where there will often be no obvious ‘comparator’. As such, the finding is not as progressive as certain comparative jurisprudence in which courts have adopted a broader approach in analysing indirect discrimination through a consideration of, among other factors, relevant statistical information, evidence outlining the specific context of vulnerable or disadvantaged groups requiring special protection (such as children), and less strict evidential rules allowing for a shifting burden of proof (i.e. where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent state, which must then show that the difference in treatment is not discriminatory).²²⁶

The recognition of difference approach prescribed in the gender responsive model would have provided the Commission with an alternative model to use in assessing discrimination, wherein it is recognised that substantive equality, is not about sameness of treatment rather adopting measures that legitimise the differences between men and women.

A gender responsive approach also calls for the recognition of the intersectional identity of women and the ways in which this may sometimes result in multiple levels of oppression. With regard to *Egyptian Initiative for Personal Rights & Interights v Egypt* case, I criticised the Commission for failing to explore the intersectional nature of the discrimination that had been meted out on the victims based on their gender and equally on the basis of their political views. In the analysis of that case in this thesis, it was conceded that perhaps the Commission’s lack of appreciation was reflective of the time, as at that time there was a less vibrant discourse on intersectional discrimination, which

²²⁵ Mahoney n 177 above 442.

²²⁶ International Network for Economic, Social and Cultural Rights (ESCR-Net) ‘*Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, Communication 341/2007’ available at <https://www.escr-net.org/caselaw/2016/equality-now-and-ethiopian-women-lawyers-association-ewla-v-federal-republic-ethiopia> (accessed 24 May 2017).

was displayed even at the CEDAW Committee level. However, almost a decade later,²²⁷ such a justification cannot be relied on and the Commission's failure in the instant case to develop its intersectional discrimination discourse is a missed opportunity. The victim's vulnerability to the violations in the present case (abduction, rape and forced marriage) is obviously exacerbated by her gender and her age (she was thirteen at the time of the violations).

Bearing in mind the multiple levels of vulnerability, the resultant compounded levels of harm along with state inaction and complacency which the Commission notes, where it mentions that the respondent state failed to take escalated measures in response to the prevalence, the Commission would no doubt have found a violation of discrimination. For instance, the CEDAW Committee has subsequently, in 2010, recognised the inextricable intersectional nature of discrimination where it provides in its General Recommendation No. 28 as follows:²²⁸

Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25.

In addition to the foregoing, the Commission had within its reach a wide normative framework to undertake the intersectional discrimination discourse on the basis of sex, gender and age. While Ethiopia has not ratified the Maputo Protocol, it has signed it and signature attracts with it the obligation not to undermine or defeat the object and

²²⁷ The *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia* decision was adopted by the African Commission during the 19th Extra-Ordinary Session from 16 to 25 February 2016, Banjul, The Gambia.

²²⁸ CEDAW General Recommendation No. 28 on the core obligations of states parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, UN Doc CEDAW/C/GC/28. For a comprehensive discussion on the Committee's approach to intersectional discrimination see M Campbell 'CEDAW and women's intersecting identities: A pioneering new approach to intersectional discrimination' (2015) 11 *DIREITO GV Law Review* 479-504.

purpose of a treaty.²²⁹ The Maputo Protocol provides an extensive catalogue and articulation of the vulnerabilities that Woineshet faced on account of her gender and age, including violence against women, harmful practices and child marriages all of which are prohibited in the Protocol and were violated in this instance. In fact, the complainants canvassed this point to the Commission.²³⁰ In addition Ethiopia is a party to the African Charter on the Rights and Welfare of the Child (African Children's Charter), which provides the clearest avenue for accountability to make a case for intersectional discrimination on the basis of sex as well as age. Article 3 of the African Children's Charter prohibits the discrimination of children on the basis of sex and more explicitly article 21 provides as follows:²³¹

1. State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
 - a those customs and practices prejudicial to the health or life of the child; and
 - b *those customs and practices discriminatory to the child on the grounds of sex or other status.*
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

In fact, relying on the mentioned provisions from the Maputo Protocol and African Children's Charter to make a finding of discrimination from the various intersectional grounds would have been well within the Commission's interpretive mandate. Article 18(3) provides as follows:²³²

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.

Accordingly, the African Charter itself sanctions a clear avenue for the utilisation of other human rights treaties such as the Maputo Protocol and the African Children's Charter to establish the violation of discrimination. Far from utilising this normative ingenuity, the African Commission declined to engage in any examination on the alleged violation of article 18(3) of the African Charter on the basis that 'it was invoked respect of

²²⁹ Vienna Convention on the Law of Treaties art 18.

²³⁰ Communication 341/2007 n 210 above para 94.

²³¹ African Charter on the Rights and Welfare of the Child art 21 (emphasis mine).

²³² African Charter n 7 above art 18(3) (emphasis mine).

discrimination and other rights which have already been confirmed to have been violated.’ This approach is unsatisfactory for various reasons two of which will be canvassed. First, it is arguably inaccurate for the African Commission to indicate that article 18(3) was invoked as reliant on other rights and not on its own merit. In fact, earlier in this chapter an exact opposite position was submitted. It was argued and substantiated that unlike article 2,²³³ article 18(3) is a stand-alone provision that covers any type of discrimination as opposed to discrimination based only on a right within the African Charter. It should therefore have warranted its own independent examination irrespective of the eventual finding. Second, even if the first reason given here is debatable, what is not in question is the dearth of women’s rights cases that make their way to the Commission. For this reason only, the Commission was remiss to not take the opportunity to develop its lean women’s rights jurisprudence. Article 18(3) in particular is the only women-rights specific provision of the African Charter and so its omission from examination defies reason. It is perhaps for reasons such as this that led one commentator to make the following rather scathing observation:²³⁴

I want to suggest that, in the case of Africa, the story we encounter is one in which women are silenced and gender is erased *even when it screams to be employed as a central analytical category*. If we examine the first narratives emerging from the rulings of the African Commission on Human and Peoples’ Rights ... there is no attempt to articulate in a meaningful way the specific abuses of which women are victims.

From the foregoing arguments, one can easily conclude that an appreciation of intersectional discrimination coupled with an examination of article 18(3) might have possibly led the Commission to make a finding of discrimination.

The Commission’s decision is further tested against one final parameter of gender responsiveness. A gender responsive approach calls for a contextualised African response that entails further sub-elements including the recognition of women’s lived realities. This examination then relates to the extent to which the Commission recognised the lived realities of women and girls in Ethiopia and thereby adopted a contextualised African response. In this regard, the Commission demonstrates that it was aware of lived

²³³ Article 2 ‘is a non-autonomous provision, as it can only be invoked in relation to the implementation of a right protected by the African Charter.’ Ouguerouz n 13 above 80.

²³⁴ MP Assis ‘Women in the rulings of the African Commission on Human and Peoples’ Rights’ available at <http://www.publicseminar.org/2015/05/women-in-the-rulings-of-the-african-commission-on-human-and-peoples-rights/> (accessed 17 June 2017) (emphasis mine).

realities of girls in Woineshet's area where it castigates the respondent state for failing to respond to the prevalence of abduction, rape and forced marriage by taking escalated measures.²³⁵ This prevalence at the time is well corroborated where one author notes that:²³⁶

Although abduction of women and girls as a form of marriage in Ethiopia has been outlawed, the practice still goes on due to *non-enforcement of the prohibition* (Equality Now, 2002; United Nations, 2003b; Women's Action Network, 2005).

In response to the non-enforcement of the prohibition, the Commission was therefore on target where in its final recommendations it requested the State to put in place measures to ensure diligent prosecution and punishment of offenders. In achieving this, it recommended the training of judicial officers on specific human rights themes including on handling cases of violence against women.²³⁷ In this regard, the Commission recognised and responded to the experiences of women and girls in Ethiopia.

In conclusion, whereas the Commission found in favour of the complainants, this decision cannot be said to be gender responsive to a large extent. Whereas the Commission seemed to recognise and take into account Woineshet's circumstances, its failure to reach a finding of discrimination is hardly justifiable. This is in light of its inability to deploy the substantive equality approach effectively (by requiring a male comparator) and failing to recognise the intersectional nature of the discrimination that was meted against Woineshet.

3.3.2 Analysis of cases that have an implication for women's rights jurisprudence

The previous section analysed the cases that have been brought before the African Commission exclusively premised on women's rights violations and specifically on violation of article 18(3) of the African Charter. This section will now focus on cases, which while they were not brought on a violation of article 18(3), bear an implication for women's rights protection and jurisprudence. These cases were brought on violation of article 5 on cruel, inhuman and degrading treatment. In any event, it is immaterial

²³⁵ Communication 341/2007 n 210 above para 126, 128.

²³⁶ GO Okereke 'Violence against women in Africa' (2006) 2 *African Journal of Criminology & Justice Studies* 5 (emphasis mine).

²³⁷ Communication 341/2007 n 210 above para 160 (d).

whether the complainants allege a violation of article 18(3) or not as the Commission has the mandate to find a violation even where it is not alleged. This is in fact the Commission's view where it has asserted as follows:²³⁸

The African Commission would like to state that the failure by the Complainant to indicate the particular articles or the rights of the African Charter alleged to have been violated is not fatal, to the extent of regarding the communication inadmissible or unmeritorious. He or she does not need to indicate the remedy sought. *It is for the African Commission, after consideration of all the facts at its disposal, to make a pronouncement on the rights violated and recommend the appropriate remedy to reinstate the Complainant to his or her right.*

The Commission therefore has the discretion to analyse a case from a women's rights view and the following analysis will be undertaken with this in mind.

3.3.2.1 *Malawi African Association, Amnesty International & others v Mauritania*²³⁹

The decision in this case covers several joined communications relating to the situation in Mauritania between 1986 and 1992, related to conditions in which the black population was subjected to massive atrocities. The complainants allege various gross and systemic human rights violations including slavery, unlawful and arbitrary detention, unfair trial, denial of appeal, extra-judicial executions, violations of principles of natural justice and various appalling instances of cruel, inhuman and degrading treatment and punishment including torture and harsh beatings.

This case is highlighted here for the reason that rape is included as one of the human rights violations complained of. In their summary of facts, the Commission in describing the various forms of torture inflicted states that, '[a]s for the women, they were simply raped.'²⁴⁰ Reference to sexual violence in such a callous manner is undesirable, but that aside, on further probing the analysis of the rape violations is also unfortunate. The Commission notes that the respondent state only denied the slavery allegations and in essence acquiesced to all the others, finding a violation of article 18(3) was therefore easily within reach. In spite of this, the Commission fails to employ a gender responsive or even a rudimentary women's rights specific analysis of the case, instead finding that

²³⁸ Communication 245/2002, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, ACHPR para 167 (emphasis mine).

²³⁹ Communication 54/1991-61/1991-96/1993-98/1993-164/1997-196/1997-210/1998, *Malawi African Association, Amnesty International & others v Mauritania*, ACHPR.

²⁴⁰ Communication 54/1991-61/1991-96/1993-98/1993-164/1997-196/1997-210/1998 n 239 above para 20.

the rapes 'are proof of widespread utilisation of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of article 5.'²⁴¹ As I have argued elsewhere while analysing the instant case:²⁴²

This illustration depicts several critical losses from a women's rights perspective in terms of a missed opportunity to demand accountability for sexual violence as well as a failure to establish crucial jurisprudence in a straightforward case (straightforward because the alleged rapes were not denied).

The Commission's treatment of the sexual violence in this case fails to satisfy any of the parameters of a gender responsive approach.

3.3.2.2 Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan²⁴³

This case concerned allegations of gross, massive and systemic human rights violations by the respondent state against the indigenous black African tribes in the Darfur region. The violations included 'large-scale killings, the forced displacement of populations, the destruction of public facilities, properties and disruption of life through bombing by military fighter jets in densely populated areas.'²⁴⁴ The respondent state 'launched a succession of human rights violations against suspected insurgents, using methods such as extra-judicial executions, torture, rape of women and girls, arbitrary arrests and detentions.'²⁴⁵ The allegations of rape were made by the complainants and in addition featured as major violations from the Commission's own fact-finding report to the Darfur region of Sudan, which they relied on in reaching a determination in this case. The Commission made the following findings in part:²⁴⁶

The women furthermore stated that during the attacks, a number of cases of rape were committed, some of the raped women became pregnant. Complaints were lodged at the police but were yet to be investigated.

The systemic nature of the rapes coupled with inaction from the respondent state was apparent in this case. However, similar to the previous case against Mauritania, the

²⁴¹ Communication 54/1991-61/1991-96/1993-98/1993-164/1997_196/1997-210/1998 n 239 above para 118.

²⁴² S Rajab-Leteipan & M Kamunyu *Litigating before the African Commission on Human and Peoples' Rights: A practice manual* (2017) 4.

²⁴³ Communication 279/2003-296/2005, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan*, ACHPR.

²⁴⁴ As above para 2-3.

²⁴⁵ Communication 279/2003-296/2005 n 243 above para 6.

²⁴⁶ Communication 279/2003-296/2005 n 243 above para 151.

Commission failed to adopt a gender responsive approach or even utilise discrimination or any other women's rights centric approach as an analytical category. In conclusion, as I have argued elsewhere:²⁴⁷

Admittedly, the complainants did not allege a violation of article 18(3) on discrimination against women. However, as the Commission made several findings of rape it could have made a determination of a violation under article 18(3) and expounded on the gross and systemic incidences of sexual violence that were evident in this case. This approach would have been consistent with their protective mandate and failing to do so amounts to a missed opportunity in expanding jurisprudence on women's rights violations.

3.3.2.3 *Curtis Francis Doebller v Sudan*²⁴⁸

This case challenged the court ordered flogging of female students for their alleged violation of article 152 of the respondent state's Criminal Law of 1991. They were accused and convicted of having violated public order for being improperly dressed and acting in a manner considered immoral. Specifically, 'the acts constituting these offences comprised of girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and sitting and talking with boys.'²⁴⁹ In light of these facts, the complainants alleged a violation of article 5 of the African Charter that prohibits cruel, inhuman and degrading treatment. They alleged that the public lashing of the female students was

disproportionate and humiliating because they require a girl to submit to baring her back in public and to the infliction of physical harm which is contrary to the high degree of respect accorded to females in Sudanese society.²⁵⁰

The respondent state on its part did not dispute any of the facts but argued that the public lashings were justified and did not amount to cruel, inhuman and degrading treatment. In a very succinct decision, the Commission found a violation of article 5 based on its prior jurisprudence²⁵¹ that 'the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible

²⁴⁷ Rajab-Leteipan & Kamunyu n 242 above 4.

²⁴⁸ Communication 236/2000, *Curtis Francis Doebller v Sudan*, ACHPR.

²⁴⁹ As above para 3.

²⁵⁰ Communication 236/2000 n 248 above para 32.

²⁵¹ Communication 225/1998, *Huri-Laws v Nigeria*, ACHPR.

array of physical and mental abuses.²⁵² Durojaye and Oluduro laud the Commission's approach in this regard, noting the following:²⁵³

From this broad explanation of the nature of the right to dignity by the Commission, it would appear that the provision of article 5 of the African Charter can be interpreted to apply to the adoption of cultural practices that are discriminatory against women and that deny them their fundamental rights and freedoms.

While agreeing with this view, it must be noted that Durojaye and Oluduro's observations are inferences and not derived from an express articulation by the Commission. Yet again the Commission fails to expressly articulate women's rights issues and utilise discrimination as an analytical category even where it is easy to do so. Durojaye and Oluduro for instance in noting a shortcoming of the decision make the following observation:²⁵⁴

One noticeable shortcoming of this decision is the failure of the Commission, in line with article 61 of the African Charter, to draw inspiration from international human rights principles and standards to elucidate this point. Given that the CEDAW Committee has issued important General Recommendations on women's rights, particularly General Recommendation 19 on violence against women, one would have expected the Commission to apply the useful document and other relevant human rights norms as interpretive guides.

In this case, the Commission also failed to utilise a substantive approach to equality, which would have led it to address the discriminatory application of the contested public order law. Of the impugned provision, Amnesty International noted the following:²⁵⁵

Article 152 is part of a broader set of laws and practices, known as the public order regime, which allow the imposition of corporal punishment for what is seen as immoral behaviour in public or private sometimes, affecting a wide range of men and particularly women throughout Sudan.

Hence, while the law was essentially gender neutral, it had largely been used to women's detriment and was therefore discriminatory in practice. The Commission equally failed to appreciate women's circumstances in Sudan in relation to the impugned law. In substantiation of this claim, Amnesty International went on to note:²⁵⁶

Large numbers of women are regularly arrested under these laws, but many remain silent because of the trauma of their arrest and punishment and/ or out of fear of the social stigma they would suffer from if people heard of their arrest.

²⁵² Communication 236/2000 n 248 above para 37.

²⁵³ Durojaye & Oluduro n 168 above 327.

²⁵⁴ Durojaye & Oluduro n 168 above 328.

²⁵⁵ Amnesty International *Sudan: Abolish the flogging of women* (2010) 4.

²⁵⁶ As above 4.

Accordingly, the importance of failing to address the discriminatory nuances in this case is that the Commission's decision only benefits the complainants but may not necessarily result in substantive equality. As established in this thesis, achieving substantive equality calls for: redressing of historical or systemic disadvantage; redressing stigma, stereotyping, humiliation and violence; enhancing participation and social inclusion; and accommodating structural changes. For these shortcomings therefore, this decision cannot be said to be gender responsive.

3.3.2.4 Zimbabwe Human Rights NGO Forum v Zimbabwe²⁵⁷

This complaint concerned politically instigated violence and other human rights violations that occurred in the respondent state following a contentious constitutional referendum exercise where a majority of Zimbabweans voted against the government drafted Constitution.²⁵⁸ An exhaustive analysis in this regard will not be undertaken. This case is only highlighted here to point out an *obiter dictum* in the decision, of interest to sexual minority rights, and peripheral to the general theme of the case. In this case, while analysing the merits of the alleged violations of the African Charter and in particular article 2, which is the non-discrimination clause, the Commission averred:²⁵⁹

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights. As Shestack has observed, equality and non-discrimination "are central to the human rights movement." The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or *sexual orientation*. The African Commission has held in Communication 211/98 that the right protected in Article 2 is an important entitlement as the availability or lack thereof affects the capacity of one to enjoy many other rights.

Article 2 of the African Charter lists the various grounds on the basis of which one can be discriminated against and in order to indicate that the list is not exhaustive, it includes the ground "other status". In light of this, sexual minorities can claim discrimination on the basis of sexual orientation that is implicitly included in the ground other status. In spite of the possibility of doing so from a normative perspective, sexual minorities face a potential challenge in alleging discrimination based on sexual orientation. As was earlier argued in this chapter, the difficulty is in light of the homophobic upsurge in Africa

²⁵⁷ Communication 245/2002, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, ACHPR.

²⁵⁸ As above para 2-3.

²⁵⁹ Communication 245/2002 n 257 above para 169 (emphasis mine).

manifesting through criminalisation legislation and retrogressive rhetoric from governments.²⁶⁰

It is with the foregoing hardship in mind that the Commission's *obiter* has attracted attention²⁶¹ that surpasses its real but modest prospects. The *obiter* does not set an unequivocal precedent or clear fundamental basis that could be relied on to advance future claims on the discrimination on the basis of discrimination. What it achieves however is an opening and as one commentator notes, 'it can be used as a discursive tool in as long as the Commission is not given opportunities to explicitly reverse the implications of the pro-LGBT rights statements in that decision.'²⁶² Indeed, a decisive stance by the Commission, such as through a future communication, asserting the rights of sexual minorities not to be discriminated against on the basis of sexual orientation on the basis of article 2 of the African Charter could truly advance the rights of sexual minorities. This would be in line with the position of other international human rights bodies. The UN Human Rights Committee in *Toonen v Australia*²⁶³ interpreted the discriminatory ground *sex* in article 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR) to include sexual orientation.

Such an express articulation of sexual orientation as a distinct discriminatory ground can be relied upon to redress the disadvantage suffered by sexual minorities through *de jure* and *de facto* discrimination.²⁶⁴ It is also in line with gender responsiveness in that it

²⁶⁰ For a more comprehensive discussion on this see: AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263-281.

²⁶¹ See for instance: A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 8. Rudman asserts: 'In this decision, the Commission confirmed that article 2 of the African Charter safeguards 'equality of treatment for individuals irrespective of ... sexual orientation'.'

²⁶² AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 275.

²⁶³ Communication 488/92, *Toonen v Australia*, UNHR Committee (March 1994), UN Doc CCPR/C/50/D/488 (1992).

²⁶⁴ For an illustration of the utilisation of the African Commission's articulation of sexual orientation as a discriminatory ground to advance sexual minority rights see: Human Rights Watch 'Study on HIV, the law, and human rights in the African human rights system: Key challenges and opportunities for rights-based responses to HIV' available at <https://www.hrw.org/news/2016/10/03/human-rights-watch-submission-african-commission-human-and-peoples-rights> (accessed 19 June 2017), Kenya Human Rights Commission 'The outlawed amongst us' available at <http://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html> (accessed 19 June 2017), Advocates for Behavioural Change, African Men for Sexual Health and Rights and others 'Human rights violations based on sexual orientation and gender identity in Nigeria' A shadow report on Nigeria's compliance with the African Charter on Human and Peoples' Rights Submitted for consideration at the 56th Session of the African Commission on Human and Peoples' Rights 12-14 available at <http://www.whereloveisacrime.org/wp-content/uploads/2015/05/ACHPR-Shadow-Report-Nigeria-SOGI-2015.pdf> (accessed 19 June 2017).

demonstrates an appreciation of the lived realities of sexual minorities in Africa including lesbians and transgender women. A woman may experience discrimination based on several and intersecting identities. For instance, this thesis earlier highlighted the plight of black South African lesbians that encounter discrimination in an intersecting manner on the basis of their sex, gender, race and sexual orientation.

Overall as stated, the Commission's *obiter* in this case creates a useful jurisprudential opening. Its further normative development of the rights of sexual minorities is discussed in the next chapter while analysing its Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity.²⁶⁵

3.3.2.5 *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya*²⁶⁶

This case concerned the inequitable division of matrimonial property in Kenya to the detriment of women's property rights. Specifically, it sought to challenge a retrogressive court decision that had undone the equal division of property rule that had existed in the respondent state prior to the contested decision. The complainants alleged violation of articles 2, 3, 14, 18(3) and 19 of the African Charter and the case would therefore would have presented an opportunity for the Commission to pronounce itself on a classic women's rights case, the dearth of which has been established. Unfortunately, the case did not proceed beyond the admissibility stage and was found inadmissible due to the complainants' failure to comply with the provisions of article 56(6) of the African Charter which requires communications to be 'submitted within a *reasonable period* from the time local remedies are exhausted or from the date the Commission is seized with the matter'.²⁶⁷

²⁶⁵ Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, ACHPR/Res.275(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014.

²⁶⁶ Communication 375/2009, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya*, ACHPR.

²⁶⁷ African Charter n 7 above art 56(6) (emphasis mine).

The African Charter does not define what amounts to a reasonable period and in highlighting this fact the Commission noted the following:²⁶⁸

Unlike in the other regional human rights instruments, notably the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms which all consider the period of six months, as a reasonable period within which Complaints must be submitted after the exhaustion of local remedies, the African Charter has no such period. The African Commission by virtue of its mandate under Article 45 of the Charter therefore interprets this provision on a case by case basis taking cognizance of its duty to promote and protect human rights as laid down in the Charter.

In spite of recognising its normative discretion, in practice the Commission seemed to have already adopted the six-month rule utilised by the European and Inter-American bodies. In *Michael Majuru v Zimbabwe*,²⁶⁹ the Commission had held the communication inadmissible on account of the fact that it was submitted 22 months after the complainant fled the respondent state. In this case, the Commission relying on the *Majuru* decision noted as follows:²⁷⁰

Going by the practice of similar regional human rights institutions, such as the Inter-American Commission and Court and the European Court, *six months seem to be the usual standard*. This notwithstanding, each case must be treated on its own merit. Where there is good and compelling reason why a Complainant could not submit his/her complaint for consideration on time, the Commission may examine the complaint to ensure fairness and justice.

The Commission in an apparent *de facto* reliance of the six-month rule found the communication to be inadmissible for the reason that it was brought 31 months from the day local remedies were exhausted.

Issue is taken with this approach to determine a reasonable period for three reasons. First, the respondent state had not itself contested the complainant's satisfaction of the admissibility criterion that requires communications to be submitted within a reasonable period. Instead the respondent state had vehemently contested the exhaustion of local remedies requirement, which the Commission held the complainants had clearly satisfied. It is therefore curious that the Commission *suo motu* declined admissibility on an uncontested criterion. In supposition, anecdotal evidence suggests that at the time of making the decision to dismiss this case,²⁷¹ the Commission had come under heavy

²⁶⁸ Communication 375/2009 n 266 above para 59.

²⁶⁹ Communication 308/2005, *Michael Majuru v Zimbabwe*, ACHPR.

²⁷⁰ Communication 375/2009 n 266 above para 60 (emphasis mine).

²⁷¹ 5 November 2011 as dated in Communication 375/2009 n 266 above para 63.

criticism from NGOs on the huge backlog of cases that they were yet to determine.²⁷² What followed was a quick dispensation of cases including the decision in this case. The decision to dismiss an otherwise meritorious case might therefore be informed by the supposed rush to dispose of cases combined with the prior established lack of zeal to adjudicate women's rights issues.

The second reason that informs the criticism is that the apparent adoption of the rigid six-month rule is an inappropriate trajectory, given that it is neither required by the African Charter nor is it appropriate for the African context. In this regard, Viljoen makes the following argument:²⁷³

There are numerous reasons why the Charter's drafters deliberately deviated from the rigid six month-rule in the two other regional systems, both of which were in place when the Charter was adopted. Some of these reasons are the general low level of awareness of the Charter, even among lawyers on the continent, linked to the relative invisibility of the Commission with its seat in Banjul; the material conditions in which complainants may find themselves; and the slow pace of judicial proceedings in the domestic courts of most African countries.

In this way, the Commission's approach fails to satisfy the gender responsiveness test that calls for a contextualised African response.

The third reason that informs criticism of the finding of inadmissibility in this case is that, even if one were to concur with the utilisation of the six-month rule, further examination reveals that the Commission had not been consistent in the application of the rule. In *Shumba v Zimbabwe*, the Commission confirms this position where it states:²⁷⁴

²⁷² See for example: Centre for Human Rights 'Support to the African Human Rights System: Recent improvement of adjudication and litigation by the African Commission on Human and Peoples' Rights (2013-2015) available at <http://www.chr.up.ac.za/index.php/projects/support-to-the-african-human-rights-system.html> (accessed 20 June 2017) where the Centre for Human Rights makes the observation: 'Owing to the Secretariat's inadequate capacity in terms of numbers and technical expertise of staff, the Commission has not been able to discharge the two-fold mandate equally and effectively. As a result, a backlog of cases built up over the years. By 2013 some Communications had stalled at the admissibility stage for up to 8 years.' (emphasis mine) See also: Zimbabwe Human Rights NGO Forum 'Report to the African Commission on the situation of human rights defenders in Zimbabwe – 51st Ordinary Session of the African Commission on Human and Peoples' Rights, 18 April – 2 May 2012' available at <http://www.achpr.org/sessions/51st/ngo-statements/26/> (accessed 20 June 2017) where the Commission was requested 'to prioritise its protective mandate to deal with the backlog of pending communications and avail effective remedies to the victims who have sought protection as this is fundamental to the protection of hrds on the continent.' (emphasis mine) See further: P Purnell 'Case summary: Application 005/2011 *Daniel Amare & Mulugeta Amare v Mozambique Airlines & Mozambique*' 20 December 2011 available at <http://arcproject.co.uk/wp-content/uploads/2013/04/CSW-005-2011.pdf> (accessed 20 June 2017) where the writer concludes: 'The case is currently before the African Commission, which faces a serious backlog of issues requiring its attention. It is unlikely that the Commission will address this case in the near future.' (emphasis mine)

²⁷³ Viljoen *International human rights law in Africa* n 1 above 320.

²⁷⁴ Communication 288/2004, *Gabriel Shumba v Zimbabwe*, ACHPR para 44.

In several communications, the African Commission has admitted communications that have been brought before the African Commission more than 16 months after the violation is reported to have taken place or domestic remedies were exhausted.

This inconsistent jurisprudence is counter to the rule of law that calls for clear, stable and evenly applied rules towards the protection of fundamental rights.²⁷⁵

3.4 Evaluating the gender responsiveness of the African Commission's inter-state communications procedure in interpreting human rights norms

In addition to individual communications, the African Charter envisages the receipt of communications from states against other states alleging human rights violation. The Commission's jurisprudence in this regard is in its infancy compared to that of the individual communications procedure. Nonetheless, the Commission's first and for a long time only decision on an inter-state communication has women's rights implications and will therefore be examined briefly.

In *Democratic Republic of Congo (DRC) v Burundi, Rwanda, Uganda*,²⁷⁶ the DRC alleged that it was the victim of an armed aggression perpetrated by Burundi, Rwanda and Uganda. Accordingly, the aggression was characterised by several human rights violations including gross and numerous incidents of sexual violence against women including rapes with the intention of propagating the AIDS pandemic among targeted populations in the DRC.²⁷⁷ This decision is pivotal for the innovative manner in which the Commission relied on article 60 and 61 that direct it to draw inspiration from international law and take into consideration specialised international conventions and international customary law. Accordingly, the Commission found that the respondent states had violated specified provisions of the Geneva Conventions and Additional Protocols that regulate armed conflicts and which prohibit murder, torture, rape and outrages of personal dignity and other forms of indecent assault. Commentators have lauded this innovative approach noting that it allowed the Commission

²⁷⁵ World Justice Project 'What is the rule of law?' available at <https://worldjusticeproject.org/about-us/overview/what-rule-law> (accessed 21 June 2017).

²⁷⁶ Communication 227/1999, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, ACHPR.

²⁷⁷ As above paras 2-7.

to illustrate the extent to which the respondent states had acted inconsistently with their international law obligations (in this case the Geneva Conventions and Additional Protocols), even where no express violation of the Charter could be found on a particular set of facts.²⁷⁸

In line with the foregoing, the Commission found the following violations of the African Charter: article 2 on non-discrimination on varied grounds, article 4 on the rights to life and integrity of the person and article 5 on the inherent right to dignity and prohibition of torture, cruel, inhuman or degrading treatment. The Commission also found a violation of article 18(3) on non-discrimination and calls for the protection of women's rights. This is significant because the complainants had not claimed a violation of article 18(3). The Commission's approach in this regard and in the overall consideration of this communication must be applauded as it demonstrates innovation and proactivity on its part to fulfil its protective mandate. The finding of a violation even where one was not alleged also lends credence to the repeated criticism in the earlier analysis of individual communications where the Commission had failed to find a violation of discrimination even when it was apparent.

In terms of remedies, the Commission requested the armed forces of the respondent states to pay adequate reparations to the complainant state on behalf of the victims. This practice by the Commission has been criticised in this thesis and elsewhere as can be seen here following:²⁷⁹

In many situations, the Commission finds that a victim is entitled to compensation, but fails to determine what the compensation should be, thus leaving it to the state in question to configure the appropriate remedial measures. Such open-ended remedies do not make it clear to states what they are required to do, and that the lack of clarity would as well impede any follow-up or implementation as the form and nature of the remedy is bound to be contested.

The remedies should have been more prescriptive and guidance from international law is instructive. In order to remedy gross human rights violations such as those in this case, the UN General Assembly has adopted basic principles and guidelines²⁸⁰ that are recommended for use by government and intergovernmental organisations. The basic principles provide that full and effective reparations should include the following

²⁷⁸ W Kaguongo 'Commentary on communications decided by the African Commission on Human and Peoples' Rights in 2004' (2007) 11 *Law, Democracy and Development* 166.

²⁷⁹ GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 476 – 477.

²⁸⁰ United Nations General Assembly Resolution 60/147, Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, 16 December 2005.

forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²⁸¹ Overall, while the consideration of this communication must certainly be applauded, ineffective remedies pose the threat of rendering the decision moot and not impactful on the lived realities of the women on the ground.

3.5 Evaluating the gender responsiveness of the African Commission's investigative missions

As part of its protective mandate, the African Commission has developed the practice of undertaking investigative missions, which are sanctioned under article 46 of the African Charter, which provides that the 'Commission may resort to any appropriate method of investigation'.²⁸² Neither the African Charter nor the African Commission expressly define these types of investigative missions or set out their manner of undertaking. Clarity is provided by long-standing commentators of the African Commission such as Viljoen who distinguishes two types of missions under the Commission's protective mandate. The first are referred to as on-site investigative or protective missions, which are undertaken towards investigating allegations and facts around specific communications filed against the investigated state. The second are known as fact-finding or high-level missions, which are geared towards investigating general allegations of human rights violations in a state irrespective of whether a communication has been filed against the visited state.²⁸³ The African Commission on its part seems to title all of its investigative mission reports as fact-finding reports²⁸⁴ conflating the distinctions further. The missions that have been undertaken so far are very few owing to the requirement that states must consent to such visits. Of these few visits, this thesis will undertake a limited inquiry of one investigative mission based on its implications for women's rights concerns as well as its demonstration of the utilisation of mission reports in considering communications.

²⁸¹ For more details, as above paras 18 – 23.

²⁸² African Charter n 7 above art 46.

²⁸³ Viljoen *International human rights law in Africa* n 1 above 344-345.

²⁸⁴ African Commission on Human and Peoples' Rights 'Documents: Mission reports' available at <http://www.achpr.org/search/?t=834&q=fact-finding> (accessed 21 June 2017).

The Commission undertook an investigative mission to Sudan in July 2004.²⁸⁵ This mission was spurred by the human rights and humanitarian crisis in the Darfur region along with several reports from UN agencies and NGOs seeking to draw the Commission's attention to the matter. The objectives of the mission were largely to verify and investigate allegations of serious and massive human rights violations in the Darfur region as well as discuss the same with the Sudanese authorities.²⁸⁶ The report went into great detail into the nature of human rights violations and articulated the specific ways in which women were affected. The then Special Rapporteur on the Rights of Women in Africa is reported as having undertaken interviews with several women groups in various displacement camps where she unearthed several allegations of abduction and sexual violence by way of rape. The women further informed her that despite lodging complaints, investigations did not follow.²⁸⁷ In line with this, in its final recommendations to the government, the Commission asked the government to 'ensure that all reports on rape already lodged with the police should be immediately investigated by the police and the culprits are brought to justice.'²⁸⁸ The Commission also utilised its findings from this mission in reaching its decision in the *Sudan Human Rights Organisation and COHRE v Sudan*²⁸⁹ communication that was earlier analysed and found a violation of article 4 and 5 of the African Charter. As earlier considered, the only omission is that a violation of article 18(3) on discrimination against women was not found in that case.

This mission report and its utilisation to complement the communications procedure can be said to be gender responsive for various reasons. The Commission can be seen to adopt a contextualised African response in the way that it looked into and made recommendations to alleviate the lived realities of the women in the Darfur region on account of the sexual violations. The Commission is also cognisant of the women's intersectional identities and particularly the impact of their religion in impairing the reporting of sexual violence. They make the following observation: 'The culture of the Sudanese women in Darfur, who are Muslims, makes it even more difficult for the latter

²⁸⁵ Report of the African Commission on Human and Peoples' Rights Fact-finding mission to the Republic of the Sudan in the Darfur region, 8 – 18 July 2004 (Sudan: Fact-finding mission 2004).

²⁸⁶ As above para 11.

²⁸⁷ Sudan Fact-finding mission 2004 n 285 above.

²⁸⁸ As above para 146.

²⁸⁹ Communication 279/2003-296/2005 n 243 above.

to talk in public about sexual violence they underwent.²⁹⁰ The Commission also included in its recommendations a request for urgent provisional measures and classified sexual and gender-based violence as part of the issues that needed to be redressed immediately.

3.6 Conclusion

This chapter's focus is the assessment of the gender responsiveness of the African Commission in interpreting norms of the African human rights system through its protective mandate. A gender responsive interpretation of norms can be aided by a gender responsive normative framework. A strong normative framework makes the task of interpretation easier while interestingly, a weak framework far from depriving a treaty body of an opportunity to be gender responsive calls on the Commission to apply more creativity in its interpretation to re-characterise the existing provisions towards women's rights protection. Accordingly, the chapter begins with an extensive foray into the investigation of the norms themselves such that the latter assessment of the Commission can be informed by the state and normative strength of the instruments they rely on.

The African Charter is not deemed to be gender responsive on account of its minimal attention to women's rights issues. Whereas it lacks an attention to women's rights concerns, the Charter however contains a number of provisions that allow the Commission to bolster its provisions with sources of international human rights law. It is also noted that the challenge presented by ineffective norms can always be cured by gender responsive interpretations by the African Commission. The Maputo Protocol on its part is deemed gender responsive particularly in the manner in which it is inclusive in its development, cognisant of substantive equality, recognition of intersectional identities of women and its contextualised African response to women's lived realities in Africa. With this background in mind, the chapter then delves into a thorough examination of the African Commission's individual and interstate communications procedure with a focus on classic women's rights cases as well as those that have implications for women's rights jurisprudence. In this regard the Commission is gender

²⁹⁰ Sudan Fact-finding mission 2004 n 285 above.

responsive in some respects but falters in many others and several missed opportunities are recorded. Mainly, the Commission repeatedly fails to address women's rights concerns holistically even where there exist clear opportunities to do so. The Commission's investigative missions mandate is also discussed briefly in relation to women's rights violations.

Overall, the analysis reveals that while several gains have been made, the Commission has not fully utilised its protective mandate towards enhancing women's rights protection. Far from simple criticism, this thesis endeavours to illustrate and suggest various ways in which the Commission can be more gender responsive in utilising its mandate and the expansive normative framework available to it. A more gender responsive protective mandate will raise the standards of accountability for violations and enhance women's rights protection. Having assessed one limb of the Commission's twin mandate, the next chapter undertakes an analysis of the Commission's promotional mandate.

4 The gender responsiveness of the African Commission in the execution of its promotional mandate

4.1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) is vested with twin mandates. The previous chapter assessed the gender responsiveness of the African Commission as far as it concerns its protective mandate and specifically its interpretation of norms of the African human rights system through its decisions on communications. This chapter seeks to explore the Commission's promotional mandate and consider the question whether it has been and is being implemented in a gender responsive manner. In discharging its promotional mandate, the Commission has access to a wide array of mechanisms that draw their legitimacy either from legal texts or are based on evolving practices. These mechanisms include: (i) special mechanisms; (ii) the development and adoption of soft law instruments such as resolutions, general comments and guidelines; and (iii) state reporting. Promotional visits are discussed under special mechanisms as undertaken by special rapporteurs. These mechanisms are assessed in this chapter for their potential and usage in practice for women's rights promotion from a gender responsive perspective. The relationship between the African Commission and non-governmental organisations (NGOs) will not be explored here. While civil society plays an important part in the Commission's promotional mandate, its contributions extend beyond the promotional part of the mandate. This interaction will be assessed in the next chapter, in the context of examining the Commission's external relationships with intergovernmental and non-governmental bodies.

4.2 Evaluating the gender responsiveness of the special mechanisms of the African Commission

One of the ways in which the African Commission executes its promotional mandate is through special mechanisms, which comprise special rapporteurs, committees and working groups. The mechanisms are categorised according to various thematic areas that fall within the ambit of the African Charter on Human and Peoples' Rights (African

Charter). As of 2017, the Commission had in place five special rapporteurs,¹ and ten working groups and committees.²

The analysis begins with an exposition of the normative grounding of this aspect of the Commission's promotional mandate. Although the special mechanisms procedure is not expressly provided for in the African Charter its legitimacy can possibly arguably be inferred from article 45 of the African Charter that lists as part of the Commission's promotional mandate undertaking studies and research, organising seminars, dissemination of information, encouraging national and local institutions and making recommendations to governments.³ An equivalent source of treaty-based legitimacy can be drawn from article 66 of the Charter, which envisages special protocols or agreements to supplement the provisions of the African Charter, thus clearly allowing the mechanisms to be established.⁴ Ostensibly on account of this purposive reading and interpretation of the African Charter, commentators laud the Commission's practice of appointing special rapporteurs as a bold innovation.⁵ The Rules of Procedure of the African Commission on Human and Peoples' Rights later made provision for the creation of these special mechanisms.⁶

The special mechanisms further draw their legitimacy from international good practice and are in fact not unique to the African human rights system. The United Nations (UN) system also has in place a long-standing and elaborate special procedures mechanism

¹ These are: Special Rapporteur on the Rights of Women in Africa, Special Rapporteur on Freedom of Expression and Access to Information, Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, Special Rapporteur on Human Rights Defenders and the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons. Detailed information for each is available at African Commission on Human and Peoples' Rights 'Special mechanisms' available at <http://www.achpr.org/mechanisms/> (accessed 5 September 2017).

² These include: Committee for the Prevention of Torture, Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV, Advisory Committee on Budget and Staff Matters, Working Group on Economic, Social and Cultural Rights, Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa, Working Group on Indigenous Populations/ Communities in Africa, Working Group on Rights of Older Persons and People with Disabilities, Working Group on Extractive Industries, Environment and Human Rights Violations, Working Group on Communications and a Working Group on Specific Issues Related to the work of the African Commission. Detailed information for each mechanism is available on the African Commission website as above.

³ African Charter on Human and Peoples' Rights art 45(1)(a).

⁴ As above article 66.

⁵ J Harrington 'Special rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 2 *African Human Rights Law Journal* 247 - 249.

⁶ Rules of Procedure of the African Commission on Human and Peoples' Rights (2010) rule 23.

whose special rapporteurs have a protective and promotional mandate.⁷ One of the distinctions between the two systems is that in the UN system, special rapporteurs consist of independent experts whereas at the Commission rapporteurs serve concurrently as members of the Commission. The UN special rapporteurs play an indispensable role and have famously been described as the ‘crown jewel’⁸ of the system by the former UN Secretary General Kofi Annan. The special mechanisms of the African Commission equally hold great potential in the promotion of human rights. This thesis will assess those mechanisms that have a direct or close correlation to women’s rights issues for their gender responsiveness.

4.2.1 The Special Rapporteur on the Rights of Women in Africa

The mandate of the Special Rapporteur on the Rights of Women in Africa (SRRWA) provides a dedicated mechanism and focal point for the promotion and protection of women’s rights in Africa. The exposition of this mandate begins with a brief historical overview followed by a detailed review of the SRRWA’s portfolio of activities in order to assess their potential and whether they can be deemed to be gender responsive in their execution so far. The roles discussed are: the SRRWA’s role in the development and adoption of the Maputo Protocol, promotional missions on the rights of women and studies on the situation of women’s rights in Africa. The mandate has also been involved in the development of normative soft law instruments such as resolutions, general comments and guidelines. The involvement of the SRRWA in this latter regard is briefly highlighted while the instruments themselves are analysed later in this chapter when assessing the African Commission’s exercise of its promotional mandate in developing normative standards. The collaborative initiatives of the SRRWA with other actors are not discussed in this chapter, as it is inaccurate to delineate these relationships as exclusive to the SRRWA. In practice, intergovernmental and non-governmental organisations interact simultaneously with the SRRWA and other mechanisms of the

⁷ For more on the mandate and workings of the UN special procedures see: SP Subedi ‘Protection of human rights through the mechanism of UN Special Rapporteurs’ (2011) 33 *Human Rights Quarterly* 201-228, B Rudolf ‘The thematic rapporteurs and working groups of the United Nations Commission on Human Rights’ (2000) 4 *Max Planck Yearbook of United Nations Law* 289-330 and Office of the United Nations High Commissioner for Human Rights ‘Special Procedures of the Human Rights Council’ available at <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (accessed 5 September 2017).

⁸ Remarks by Kofi Annan 7th Secretary-General of the United Nations December 2006. Available at <http://www.un.org/press/en/2006/sgsm10788.doc.htm> (accessed 5 September 2017) (emphasis mine).

African Commission. Accordingly, these relationships are discussed in the next chapter that focuses on the Commission's external relations.

4.2.1.1 Establishment of the mandate

'In 1998, the Commission appointed one of its female Commissioners, Julienne Ondziel-Gnelenga, to the position of Special Rapporteur on the Rights of Women.⁹ The appointment was as a result of lobbying from NGOs such as WILDAF (Women and Law in Development in Africa), the International Commission of Jurists (ICJ) and African Centre for Democracy and Human Rights Studies.¹⁰ Following this, the African Commission adopted a resolution¹¹ to formalise the appointment and in doing so highlighted the 'need to place particular emphasis on the problems and rights specific to women in Africa'.¹² The initial mandate of the SRRWA was set out through draft terms of reference¹³ developed prior to the appointment of the first mandate-holder. In the terms thereof, the scope of the mandate included the development of reports and studies; assisting governments in the implementation of women's rights and a call to collaborate with other intergovernmental and non-governmental actors. The terms also included the development of state reporting guidelines in the context of women rights. There have since then been a number of additions to this initial mandate with the most notable one relating to the obligation to assist states in implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) as well as follow up on its reporting. Other additions include the mandate to

⁹ R Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' in D Buss & A Manji (eds) *International law: Modern feminist approaches* (2005) 260.

¹⁰ As above.

¹¹ Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa, ACHPR/Res.38(XXV)99 adopted at the 25th Ordinary Session, Bujumbura, Burundi, 26 April – 5 May 1999.

¹² As above.

¹³ R Murray & M Evans *Documents of the African Commission on Human and Peoples' Rights* (2001) Draft Terms of Reference for the Special Rapporteur on the Rights of Women in Africa 490 – 491. (a) To carry out a study on the situation of the human rights of women in Africa. (b) To draw up guidelines on the drafting and examination of States Parties' reports on the rights of women in Africa. (c) Ensure or make a follow up on the implementation of the Charter by States Parties. In this vein, the Special Rapporteur will prepare a report on the situation of violations of women's rights and propose recommendations to the Commission. (d) The Special Rapporteur will assist African Governments in the development and implementation of their policies of promoting and protecting women's rights in Africa. (e) He or she will encourage and work with NGOs in the field of promotion and protection of women's rights. (f) He or she will serve as a link between the Commission and intergovernmental and non-governmental organisations at regional and international levels in order to harmonise the initiatives on the rights of women. (g) In this regard, the Special Rapporteur will collaborate with Special Rapporteurs from the UN and other regional systems.

undertake promotional and fact-finding missions on the situation of women's rights in Africa as well as to issue resolutions as appropriate.¹⁴

4.2.1.2 The role of the SRRWA in the development and adoption of the Maputo Protocol

The initial development and adoption of the Maputo Protocol also fell within the purview of the SRRWA.¹⁵ In several of the initial reports on the activities of the SRRWA, the mandate's involvement in the preparation, adoption and entry into force of the Maputo Protocol was consistently reported.¹⁶ Various commentators also credit the SRRWA with the adoption and speedy ratification of the Maputo Protocol.¹⁷ The Maputo Protocol was in the previous chapter scrutinised and found to be gender responsive in as far as the extent to which it can achieve substantive equality and inclusion, recognises intersectional identities of women as well as adopts a contextualised African response. Consequently, the interventions of the SRRWA in the development of the Maputo Protocol can also be deemed to be gender responsive in light of the gender responsive output. Even if specific attribution to development of content is not entirely possible, the active involvement coupled with the absence of criticism of the mandate's role in this regard is indicative and permits this inference.¹⁸ The foregoing notwithstanding, an effort at more tangible attribution to the SRRWA can be made by way of two illustrations. In the first illustration, Fareda Banda documents that a small working group, which was

¹⁴ African Commission on Human and Peoples' Rights 'Special Rapporteur on Rights of Women: Mandate and biographical notes' available at <http://www.achpr.org/mechanisms/rights-of-women/about/> (accessed 6 September 2017).

¹⁵ In fact the first SRRWA was purposefully drawn from a 3-member working group comprised of commissioners that had been appointed to work on a draft Protocol on the Rights of Women. For the appointment of the working group see: Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1996 – 1997 para 20. For the selection of the SRRWA see: R Murray 'The Special Rapporteurs in the African System' in R Murray & M Evans (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986 – 2006* (2008) 361.

¹⁶ See: Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999 - 2000 para 30, Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2000 – 2001 para 24, Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2001 - 2002 para 33 - 34, Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2002 - 2003 para 30, Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2003 – 2004 para 29, Eighteenth Activity Report of the African Commission on Human and Peoples' Rights 2004 - 2005 para 25 and Nineteenth Activity Report of the African Commission on Human and Peoples' Rights July - December 2005 para 35.

¹⁷ F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 73 and F Viljoen *International human rights law in Africa* (2012) 375.

¹⁸ This assertion can perhaps be backed by evidence of criticism touching on other areas of the SRRWA's mandate. See for instance: R Murray 'The Special Rapporteurs in the African System' n 15 above 364 in criticising the SRRWA's scanty reports and limited attention to other roles such as development of studies contrast is made with her focus on the successful development, ratification and coming into force of the Maputo Protocol.

constituted by the Special Rapporteur, developed the first draft of the Maputo Protocol.¹⁹

On the contents of the draft itself, Banda goes on to record that the draft

highlighted the importance of eliminating *de jure* and *de facto* discrimination against women and identified different kinds of violence against women [indicative of substantive equality], including trafficking and traditional and cultural practices harmful to women [indicative of the recognition of the intersectional identities of women and a contextualised African response]. The draft also contained family law provisions including the provision that marriage should be entered into willingly and guaranteeing women and men equal rights within marriage and at its dissolution [indicative of substantive equality].²⁰

It is therefore apparent that the first draft already had the markings of a gender responsive document and the SRRWA's leadership and small nature of the group goes towards illustrating the mandate-holder's influence on the contents of the draft. The second illustration in extrapolating the gender responsiveness of the SRRWA in regard to the preparation of the Maputo Protocol is evidenced by the inclusion and participation of civil society and NGOs particularly those working on women's rights. The participation of NGOs in the development of the draft initially by agitating for the idea of the Maputo Protocol and later through its development and ratification is well documented.²¹ This participation is in fact acknowledged by the mandate, which in a reflective and extensive report on the occasion of the African Commission's 25th anniversary avers that

[t]he document [Maputo Protocol] was adopted thanks to the relentless and concerted efforts of the Mechanism's pioneer chairperson, African civil society organisations, government representatives and technical and financial partners involved in the promotion of women's rights.²²

Inclusion is one of the parameters of a gender responsive approach and is in this case directly attributable to the SRRWA. All the foregoing therefore puts the SRRWA in good stead in satisfaction of gender responsiveness in regard to the entrance of the Maputo Protocol.

¹⁹ Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 17 above 73 (emphasis mine).

²⁰ As above.

²¹ R Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' n 9 above 262, Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 17 above 72 – 73, Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2001 - 2002 para 33, Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2002 - 2003 para 30 and Nineteenth Activity Report of the African Commission on Human and Peoples' Rights July - December 2005 para 50.

²² Intersession report of the mechanism of the Special Rapporteur on the Rights of Women in Africa since its establishment, 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire, 9 -22 October 2012 para 10.

4.2.1.3 Women's rights promotional missions of the SRRWA

The SRRWA is mandated to undertake promotional missions to African Union (AU) countries. The overarching goal of these missions is to disseminate human rights instruments of the African human rights system as well as establish the situation of women's rights in the country visited.²³ The SRRWA has undertaken a few promotional missions specific to the rights of women and these were all done in the initial years, as far as is ascertainable from available records. These visits have been made to Angola (2002),²⁴ Côte d'Ivoire (2001),²⁵ Djibouti (2002),²⁶ Nigeria (2001)²⁷ and Sudan (2003).²⁸ The mandate of the SRRWA is now assessed for its gender responsiveness in light of these missions and their consequent reports with a focus on the recommendations made in the reports. This focus is selected for the reason that making recommendations is ostensibly the very *raison d'être* for undertaking these promotional missions. Victor Dankwa agrees where he notes that work undertaken by special rapporteurs that is followed by recommendations to governments meets the desideratum of article 45(1)(a) of the African Charter.²⁹ This Charter provision is the foothold of the Commission's promotional mandate and special mechanisms and mandates the African Commission to 'give its views or make recommendations to governments'.³⁰ A minor determinant for focusing on recommendations is also for the reason that it guarantees a uniform mode of analysis, as while the full detailed accounts of the promotional visits are not always available, the recommendations themselves are almost always available.³¹

²³ African Commission n 14 above.

²⁴ Reported in the Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2002 - 2003 para 28. Report available at <http://www.achpr.org/states/angola/missions/women-2002/> (accessed 12 September 2017).

²⁵ Reported in the Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2000 - 2001 para 24. Report available at <http://www.achpr.org/states/cote-d'ivoire/missions/women-2001/> (accessed 12 September 2017).

²⁶ Reported in the Nineteenth Activity Report of the African Commission on Human and Peoples' Rights July - December 2005 para 19(c). Report available at <http://www.achpr.org/fr/states/djibouti/missions/women-2002/> (accessed 12 September 2017).

²⁷ Reported in the Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2000 - 2001 para 24. Report available at <http://www.achpr.org/states/nigeria/missions/women-2001/> (accessed 12 September 2017).

²⁸ Reported in the Nineteenth Activity Report of the African Commission on Human and Peoples' Rights July - December 2005 para 19(c). Report available at <http://www.achpr.org/states/sudan/missions/women-2003/> (accessed 12 September 2017).

²⁹ V Dankwa 'The promotional role of the African Commission on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986 - 2000* (2002) 347.

³⁰ African Charter n 3 above art 45(1)(a).

³¹ Victor Dankwa also shares in this frustration where he observes: 'It is a pity that written accounts of all promotional visits by Commissioners cannot be obtained at the Secretariat.' n 29 above 342.

The initial reports from Nigeria and Côte d'Ivoire are characterised by short mission reports that have few recommendations. Observably attributable to a change of mandate-holder, there is a marked difference in the reports on Angola, Djibouti and Sudan, which are more detailed in describing the mission and in making recommendations. The recommendations will now be assessed against the various parameters of gender responsiveness. The ability of the recommendations to result in substantive equality and inclusiveness or recognise intersectional identities or adopt a contextualised African response are the imperative markers. In this thesis substantive equality is understood as redressing disadvantage; addressing stigma, stereotyping, prejudice and violence; enhancing voice and participation; and achieving structural change.

The SRRWA visited Côte d'Ivoire at the height of its post electoral crisis that resulted in massive human rights violations including widespread rape of women during the socio-political events of December 2000. The recommendations were targeted at the international community, the African Commission and the government. The call to the international community was to assist the government to set up an independent inquiry to look into the killings, a mass grave and rapes citing the rationale that the police themselves were suspected as perpetrators and could therefore not be entrusted with investigations. In this way the SRRWA can be credited in attempting to redress disadvantage by recognising that while *de jure* there were structures in place, *de facto* those structures were compromised. The structural recommendation to set up an independent inquiry was also made to the government with an addition to take appropriate measures for the protection of victims, survivors and witnesses. Overall, the SRRWA can be seen to attempt to offer remedies that will both pursue accountability as well as care for the victims and survivors.

In the mission to Nigeria, the SRRWA interrogated the legal status of women and the report paints a poor picture including: the existence of several discriminatory laws and administrative measures, low literacy levels, forced and early marriages, harmful practices, women's discrimination in employment and in representation, high maternal mortality rates, restricted abortions and endemic violence against women. Several other women's rights violations carried out in apparent pursuance of Sharia law are also

listed.³² In fact all these violations entail the bulk of the report. In contrast the recommendations are few and too broad for purpose in response to the catalogue of issues raised. The first recommendation calls upon the government to take all necessary measures to protect women against violence and harmful practices³³ and no other recommendation speaks to the specific issues raised in the report. Further without articulating how, she requests the government to ensure that its application of Sharia law does not cause an impediment to women's rights. Such a general recommendation is unlikely to change the status quo on such a nuanced issue. Stronger recommendations on the overhaul of the constitutional and legislative regime would have sufficed with emphasis on laws proscribing violence against women and measures to be taken for survivors. Other structural recommendations could have included: budgetary and other administrative measures as well as affirmative action in light of the poor representation of women. In fact, expecting these types of recommendations is not unreasonable, as early as 1998, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) had made similar recommendations to Nigeria in their concluding observations.³⁴ For failing to make more precise recommendations to remedy the lack of substantive equality evidenced by the rampant instances of *de facto* and *de jure* discrimination against women, the report fails to respond to the lived realities of women in Nigeria and cannot be said to be gender responsive.

The mission to Angola is captured in a well-detailed report. The interactions with the various informants for instance are enumerated in a manner to illustrate the information that was sought along with the various responses received. The recommendations of the SRRWA are extensive and responsive to the issues raised. Poverty, violence against women and women's hampered access to health facilities were unearthed as some of the major challenges affecting women along with the poor management of HIV/AIDS that was alleged to affect at least 8% of the population at the time.³⁵ The recommendations by the SRRWA were addressed to the government, civil society and the international community. The recommendations to the government, thirty-four in total range from

³² Nigeria: Mission on Rights of Women, 2001 n 27 above 2-6.

³³ Nigeria: Mission on Rights of Women, 2001 n 27 above 6.

³⁴ Report of the Committee on the Elimination of Discrimination against Women: Eighteenth and nineteenth sessions, UN Doc A/53/38/Rev.1 paras 150 – 174. The CEDAW Committee expressed its concern about religious and customary laws and practices that violate women's rights and recommended changes in law among other specific measures.

³⁵ Angola: Mission on Rights of Women, 2002 n 24 above para 58.

compliance with the African Charter through submission of pending periodic reports, enactment of laws to combat violence against women and reform of the family and succession code, creation of national policies on poverty eradication and HIV/AIDS with a pro-gender approach, preparation of pro-gender national budgets, setting up a national data system on violence against women among many others. Recommendations targeting structural changes are also made where the SRRWA calls for the creation of a permanent framework for dialogue between the Ministry of Justice and the Ministry of Family and Promotion of Women's Affairs as well as the establishment of a national human rights institution.³⁶ These recommendations are on these accounts gender responsive for their potential to achieve substantive equality and change the lived realities of women should they be implemented. They are further inclusive as the role of the civil society is emphasised both in recommendations to government as well as in separate recommendations.

The mission to Djibouti was undertaken in a period of socio-political fragility owing to previous civil conflict. The recommendations of the SRRWA to the government and civil society accordingly seem to be focused on enhancing the marginal space for the protection and promotion of women's rights. The government is requested to facilitate the establishment of NGOs that work on democracy and women's rights. Following this is a recommendation to government to ease and facilitate access to information to civil society on the laws and measures taken on women's rights. Aside from recommendations on law reform to put in place a Family Code, the recommendations are more notable for their structural prescriptions which are some of the key parameters for assessing the potential to achieve substantive equality and in turn gender responsiveness. For instance, there is a recommendation to set up a systematic working group that will include the Ministry of the Promotion of Women and other relevant ministries such as that of health and NGOs in the recognition of the holistic approach required in implementation of women's rights activities that intersect with several other issues. The government is further requested to budget with women's rights in mind in the areas of health, food security, education and training. The SRRWA also calls for the development of a national plan to combat FGM and HIV/AIDS which will involve traditional institutions and keeping

³⁶ Angola: Mission on Rights of Women, 2002 n 24 above paras 109 – 110.

of statistical data. In recognition of women's lived realities and the cultural structures that they cannot escape in their context, this measure takes on a contextualised African response.³⁷

The 2003 SRRWA mission to Sudan is significant. Whereas the Commission had undertaken promotional missions to Sudan before, this was the first ever mission to be undertaken by a special rapporteur. The report is well detailed and includes extensive recommendations. The recommendations target the *de jure* situation for instance by calling for the laws especially the Family Law to be in conformity with international human rights. They also target the *de facto* situation of women when they seek to tackle the inequality of men and women in practice and in accessing opportunities. Further in this regard, there is a request to establish a specific national programme to disseminate and raise awareness on women's rights in Sudan. From a structural perspective, the recommendations call for the establishment of systems to cater for: the coordination of government activities in relation to women's rights and the monitoring and evaluation of the action plan for the promotion of women's affairs. The report is inclusive in articulating the role of civil society and women's rights NGOs in various measures to government such as in the development of policies, strategies and monitoring of women's rights affairs. Specific recommendations are also addressed to women rights NGOs where the SRRWA highlights various possibilities such as the communications procedure in the event of violations as well as lobbying the state to sign on to the Maputo Protocol once it is adopted as it was not at the time. Accordingly, these recommendations are significantly gender responsive on several accounts.

Various innovations are also observed in the making of the recommendations. In the Djibouti mission, the SRRWA uses the report to highlight challenges faced in undertaking missions. In recommendations to the Commission itself, the SRRWA requests the Commission to facilitate a system of credible sources of information within state parties, to provide adequate equipment and to allocate sufficient funds for undertaking missions.³⁸ In the Côte d'Ivoire mission report, the SRRWA requested the Commission to

³⁷ Djibouti: Mission on Rights of Women, 2002 n 26 above recommendations to government paras 1 – 11.

³⁸ Djibouti: Mission on Rights of Women, 2002 n 26 above recommendations to the African Commission paras 1 – 3.

draw the attention of the Conference of Heads of State and Government so that it conducted a comprehensive study or an independent investigation into the mass grave of Yopougon and the rape of women during the socio-political events in December 2000, pursuant to section 58 of the Charter.³⁹

This recommendation by the SRRWA is the perfect demonstration of the inextricable and desired link between the promotional and protective mandate of the Commission. The relationship between the African Commission and the AU Assembly of Heads of State that materialises from the lattermost recommendation discussed will be examined in greater detail in the next chapter, which will focus on the organs of the AU.

It appears that these women's rights missions have not been undertaken since the coming into force of the Maputo Protocol. Ostensibly because states have not given authorisation for these visits to occur. Perhaps in trying to overcome this obstacle, mandate holders sometimes refer to their presence within a country related to women's rights advocacy as a promotional visit, for instance on the invitation of an NGO. This reference is however not precise in the sense that they do not deploy a careful methodology to interview varied state officials and other stakeholders and present back a report to the state. Arguably, women's rights concerns are possibly raised during other general promotional missions of the African Commission as will be assessed later in this chapter. However, in these instances the likelihood of women's rights concerns being side-lined is very high. In a book chapter reflecting on women's rights in Africa over the three decades since the adoption of the African Charter, Rashida Manjoo who also cites other feminist authors confirms that women's rights issues do not comprise the dominant discourse and are generally marginalised within the African human rights system.⁴⁰ In light of this trend, good practice would dictate that specific women's rights missions are likely to be more effective and impactful than general missions.

4.2.1.4 Studies on the situation of women's rights in Africa

The SRRWA also has a clear mandate to undertake studies on the situation of women's rights in Africa. This mandate is derived directly from article 45(1)(a) of the African Charter that requires the African Commission to 'collect, documents, undertake studies

³⁹ Cote d'Ivoire: Mission on Rights of Women, 2001 n 25 above recommendations at the regional level para 1.

⁴⁰ R Manjoo 'Women's human rights in Africa' in M Ssenyonjo *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012) 142.

and research on African problems in the field of human and peoples' rights'.⁴¹ While the scope of the term of what is entailed by a "study" might be unduly broad, this thesis considers those studies and resulting reports that have been adopted by the African Commission. Surprisingly, the SRRWA has only undertaken one study on child marriage in Africa in collaboration with the Centre for Human Rights, University of Pretoria. This study was undertaken pursuant to a resolution of the African Commission.⁴² According to this resolution, the goal of the study was to support an AU campaign to end child marriage by identifying the root causes, prevalence and practices that perpetuate child marriage.⁴³ The study resulted in a report, *A Report on Child Marriage in Africa*,⁴⁴ which has since been adopted by the African Commission.⁴⁵ The SRRWA's report is now assessed for gender responsiveness. In considering substantive equality, the report aptly identifies gender inequality as 'a cause, a result and an exacerbating factor of child marriage.'⁴⁶ In articulating disadvantage, it goes further to locate discrimination in laws, social norms and practices as central to heightening the disproportionality of girls being affected by child marriage. In its recommendations, the report identifies the addressing of gender inequalities and discrimination as being pivotal to tackling child marriage. The recommendations are also structural in nature, including: states should engage in adequate and disaggregated data collection on births, marriages, school attendance, health indicators among others in order to inform their programmatic intervention on child marriage as well as state reporting.⁴⁷ Other structural recommendations include the setting up of monitoring and evaluation mechanisms as well as hotlines to assist in detection and prevention. These measures are laudable as structural changes are a key determinant to achieving substantive equality and consequently gender responsiveness.

Child marriage is a manifestation of discrimination based on sex, gender and age among others. It is therefore critical to address child marriage in a holistic manner with these

⁴¹ African Charter n 3 above art 45(1)(a).

⁴² Resolution on the Need to Conduct a Study on Child Marriage in Africa, ACHPR/Res.292(XVI)14 adopted at the 16th Extraordinary Session, Kigali, Rwanda, 20 – 29 July 2014.

⁴³ As above paras 7 – 8.

⁴⁴ African Commission on Human and Peoples' Rights 'A Report on Child Marriage in Africa'. Report on file with the African Commission on Human and Peoples' Rights and the Centre for Human Rights that was tasked by the African Commission to undertake the study.

⁴⁵ Adopted at the 58th Ordinary Session, Banjul, The Gambia, 4 – 20 April 2016 as reported in the 40th Activity Report of the African Commission on Human and Peoples' Rights December 2015 – April 2016 para 10.

⁴⁶ 'A Report on Child Marriage in Africa' n 44 above.

⁴⁷ 'A Report on Child Marriage in Africa' n 44 above.

factors in mind. In articulating the impact of child marriage, the report focuses on how child marriage affects girl's education and sexual and reproductive health rights. Whereas child marriage has varied negative impacts, this focus is ideal as it relates to areas where girls are most vulnerable on account of their gender and age. Low levels of education interestingly are both a cause and consequence of child marriage and the report elaborates on this nuance by way of statistics. Owing to their young age, girls also experience negative health consequences owing to their physical, physiological and psychological ill preparedness for marriage. The report illustrates this nexus by use of statistics from across various African countries.

The high prevalence of child marriage in Africa demands a contextualised African response. The report delves into harmful practices, poverty and armed conflict in discussing the causes of child marriage. These are indeed key challenges in Africa particularly from a human rights perspective. The elaboration of these issues is nuanced through the whole report in discussing these factors as consequences as well as for instance how the vicious cycle of poverty both causes and results from child marriage. Overall, the report is gender responsive and meets its intended goals.

Notably, the mandate has failed to undertake a study on the impact of armed conflicts on the rights of women and children in Africa. The SRRWA together with the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons were jointly mandated by the African Commission to conduct the study, the report of which was due at the 57th Ordinary Session of the Commission in 2014.⁴⁸ No reasons are given for this lapse in the SRRWA's subsequent reports to the Commission.

4.2.1.5 Involvement in the development of resolutions and other soft law instruments

One aspect of the mandates of the SRRWA is the drafting of resolutions on the situation of women's rights in Africa. It is important to begin by noting that not all resolutions with a women's rights focus have emanated from the mandate of the SRRWA. In fact, it would appear that there are only two resolutions attributable to the SRRWA. The first concerns

⁴⁸ Resolution on the Situation of Women and Children in Armed Conflict, ACHPR/Res.283(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014 para 2.

the situation of women and children in armed conflict and the second sets out the collaborative relationship between the African Commission and the African Committee of Experts on the Rights and Welfare of the Child. This latter resolution is administrative or procedural in nature and does not delve into substantive issues on the situation of women's rights in Africa.⁴⁹ It would therefore appear that the mandate of the SRRWA has only sponsored one thematic resolution on the situation of women's rights in Africa. Since this is one of the SRRWA's unequivocal mandates, this amounts to an under-utilisation of the mechanism of resolutions. Yet resolutions present a breadth of near unmatched utility that includes: formulation of principles, interpretation of treaty provisions, giving views and recommendations to states as well as simultaneous promotion and protection of rights.⁵⁰ The SRRWA should therefore increase her utilisation of this mechanism. The resolutions themselves will be analysed in detail later in this chapter in assessing the Commission's utilisation of resolutions.

In addition to resolutions, there is a range of soft law normative instruments such as guidelines, principles and guidelines, model laws, general comments, declarations and plans of action.⁵¹ The SRRWA is involved in the development of soft law instruments in relation to the core mandate to assist African governments to implement women's rights commitments in line with the African Charter and the Maputo Protocol. In this regard, the SRRWA has led in the development of guidelines on state reporting, guidelines on combatting sexual violence and its consequences and three general comments on women and HIV/AIDS, reproductive health rights and child marriages. In fact the mandate of the SRRWA pioneered in developing the African human rights system's first General Comment and can be credited for being centrally involved in three out of five of the continent's general comments. The SRRWA was also tasked in the initial terms of reference to develop guidelines to assist states in the endeavour of state reporting and this has since been achieved. All these endeavours have also been done with the involvement and participation of women in Africa predominantly through NGOs as was

⁴⁹ JK Biegon 'The impact of the resolutions of the African Commission on Human and Peoples' Rights' unpublished PhD thesis, University of Pretoria, 2016 46. Biegon defines administrative resolutions as those largely serving two functions: the first is to create or renew special mechanisms of the African Commission, the second is to define and regulate the Commission's relationship and collaboration with other actors such as the resolution in discussion.

⁵⁰ As above 48 - 51.

⁵¹ African Commission on Human and Peoples' Rights 'Legal instruments: Soft law' available at <http://www.achpr.org/instruments/> (accessed 17 September 2017).

illustrated. The efforts of the SRRWA in this regard are therefore gender responsive in the development of norms to respond to critical women's rights challenges in Africa. The guidelines and general comments themselves will be assessed later in this chapter in sections 4.3.2 and 4.3.3, in discussing the Commission's development of these norms as part of their promotional mandate.

4.2.2 Other special rapporteurs

Aside from the SRRWA, other special mechanisms also have a role to play in the promotion of women's rights. One of the ways this thesis defines gender responsiveness is in the recognition of the intersectional identity of women and how various factors and circumstances interact to exacerbate their vulnerability to inequality. In this regard, a consideration of other special mechanisms is essential in order to examine the practice and potential these mandates hold for women's rights promotion.

4.2.2.1 The Special Rapporteur on Human Rights Defenders

The mandate of the Special Rapporteur on Human Rights Defenders (SRHRD) will be examined purely from its consideration of women human rights defenders (WHRDs) who play an indispensable role in the promotion of women's rights in Africa. WHRDs face all the risks that other defenders face but however face additional pressures and are exposed to

gender-specific risks and threats due to their human rights work ... WHRDs are subject to systematic violence and discrimination due to their identities and unyielding struggles for rights, equality and justice.⁵²

The challenges that WHRDs face therefore call for a broader analysis and understanding than those confronting men.⁵³ It is with this understanding that the SRHRD undertook a study on WHRDs resulting in a Report of the Study on the Situation of Women Human Rights Defenders in Africa,⁵⁴ which will be the focus of the mandate's assessment. The

⁵² Association for Women's Rights in Development 'Women human rights defenders' available at <https://www.awid.org/priority-areas/women-human-rights-defenders> (accessed 11 November 2017).

⁵³ Office of the United Nations High Commissioner for Human Rights 'Human rights defenders: Protecting the right to defend human rights' 15 available at <http://www.ohchr.org/Documents/Publications/FactSheet29en.pdf> (accessed 12 November 2017).

⁵⁴ African Commission on Human and Peoples' Rights 'Report of the study on the situation of women human rights defenders in Africa' available at http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_on_the_situation_of_women_human_rights_defenders_in_africa.pdf (accessed 12 November 2017).

report highlights the work of WHRDs, the abuses they suffer as well as recommendations to ensure protections and promotion of the work of WHRDs. Various elements of the report will be highlighted towards establishing their gender responsiveness. Of particular concern with regard to WHRDs is whether the report was inclusive in its development, whether it takes cognisance of the intersectional identity of women and whether it adopts a contextualised African response thereby responding to the lived realities of WHRDs.

On inclusion, the report's methodology describes that an advisory committee comprising WHRDs 'was at the heart of the research for the preparation of this report. As WHRDs, they are the most capable of assessing the risks they and their families face.'⁵⁵ The key sources of data collection included a questionnaire that elicited responses from WHRDs from across 17 African countries, communications and urgent appeals sent to the SRHRD regarding WHRDs as well as research reports produced by WHRDs in Africa.⁵⁶ In light of all the foregoing, the study and report development is deemed inclusive. The recognition of the intersectional identity of women also has an impact on the work of WHRDs. This thesis has already made the case that identities such as those of sexual minorities, sex workers and persons living with HIV often exacerbate a women's experience of discrimination and stigma particularly. This intersectionality and the resultant prejudice have an impact on the work of WHRDs addressing these issues and who may themselves be facing discrimination. The report recognises this liability where it calls upon national human rights institutions to pay special attention to WHRDs 'working on issues and contexts of criminalized identities, such as the rights of sex workers, women living with HIV accused of deliberate transmission and sexual orientation and gender identity.'⁵⁷ Issues related to WHRDs working on sexual orientation and gender identity, regardless of their orientation, are featured prominently in the report.⁵⁸ Moreover, heteronormativity is included as one of the contextual factors that contribute to

⁵⁵ As above 17 para 19.

⁵⁶ African Commission 'Report of the study on the situation of women human rights defenders in Africa' n 54 above 18-19 paras 22-24.

⁵⁷ African Commission 'Report of the study on the situation of women human rights defenders in Africa' n 54 above 76-77 paras 210-211.

⁵⁸ African Commission 'Report of the study on the situation of women human rights defenders in Africa' n 54 above 7, 33 paras 60-61, 37 para 73, 48 para 104, 50 para 113, 76 para 5 and 81.

violations of the rights of WHRDs.⁵⁹ Through this report, the SRHRD demonstrates a clear understanding on the intersectional identities of women and resultant impact on WHRDS.

Finally, it is worth investigating whether the SRHRD presents a report that adopts a contextualised African response. Put simply, does this report respond to the specific context and challenges of WHRDs working in Africa? This question echoes a similar concern raised by Joe Oloka-Onyango and Sylvia Tamale in discussing the backlash waged against the women's rights movement in its formative years, where they note that,

for African women the question [whether women's rights are human rights] is particularly important given the incipient nature of the women's human rights movement on the continent and the intricately linked and multistructured layers of oppression by which the movement is confronted.⁶⁰

For WHRDs, these oppressions often present as dominating discourses and ideologies, such as patriarchy, heteronormativity and fundamentalism, that inflect the environment in which they work resulting in risks and constraints that significantly impact their work and personal lives.⁶¹ In response to these realities, the report dedicates a whole section to discuss contextual factors that contribute to violations of the rights of WHRDs.⁶² Specifically, it addresses patriarchy, heteronormativity, militarisation, fundamentalism and globalisation and how these contexts facilitate an understanding of the risks and types of violations against WHRDs.⁶³ Patriarchy steeped in culture and often entrenched in law serves to deny women ownership and control of land resources.⁶⁴ The report finds that this structural gender inequality and resultant sexual division of labour combine to undermine the work of WHRDs.⁶⁵ On fundamentalism, WHRDs in Africa with feminist perspectives often face backlash with the major accusation relating to the dissemination

⁵⁹ African Commission 'Report of the study on the situation of women human rights defenders in Africa' n 54 above 42 paras 86-87.

⁶⁰ J 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* 695

⁶¹ Women Human Rights Defenders International Coalition 'Global report on the situation of women human rights defenders' January 2012 1-8 available at http://defendingwomen-defendingrights.org/wp-content/uploads/2014/03/WHRD_IC_Global-Report_2012.pdf (accessed 13 November 2017).

⁶² African Commission 'Report of the study on the situation of women human rights defenders in Africa' n 54 above 42 paras 86-87.

⁶³ African Commission 'Report of the study on the situation of women human rights defenders in Africa' n 54 above 41-45 paras 82-97.

⁶⁴ African Union 'Framework and guidelines on land policy in Africa' available at https://www.uneca.org/sites/default/files/PublicationFiles/fg_on_land_policy_eng.pdf (accessed 13 November 2018) 8.

⁶⁵ African Commission 'Report of the study on the situation of women human rights defenders in Africa' n 54 above 42 paras 85.

of a western agenda.⁶⁶ Particularly in countries where Sharia law applies, the report notes that this context exacerbates the high levels of violence and stigma that WHRDs face.⁶⁷ From all the foregoing, it is clear that the report responds to the lived realities of WHRDs in Africa and is overall gender responsive.

While the featured report of the SRHRD is gender responsive and a good first step, it needs to be followed up with the development of normative standards on the protection and promotion of the work of WHRDs. These can be in the form of guidelines, principles general comments or any other category of soft law instruments utilised by the African Commission. The envisaged soft law instrument on WHRDs can form an important basis for the African Commission's engagement with states for instance serving as the basis of promotional or protective visits and dialogue on state reports, it can guide development of national laws, policies and practices related to WHRDs and it can also provide utility for WHRDs who can rely it for legal action as well as advocacy to advance their protection. This view receives support from the declaration⁶⁸ adopted by representatives of civil society organisations, national human rights institutions and governments from across Africa on strengthening protection for human rights defenders. In the declaration, they make a recommendation to the African Commission to

[d]evelop guidelines on the protection of women human rights defenders as a follow-up to the study on women human rights defenders, with indicators for tracking and monitoring actions taken by States.⁶⁹

Such an action is well within the mandate of the SRHRD and would enhance its gender responsiveness by demonstrating a move from mere rhetoric where the challenges of WHRDs are well articulated without offering a means to alleviate them.

⁶⁶ For an example of fundamentalist rhetoric against gender discourse see for instance D Mills & R Ssewakiryanga "That Beijing thing': Challenging transnational feminisms in Kampala' (2002) 9 *Gender, Place & Culture* 385-398.

⁶⁷ African Commission 'Report of the study on the situation of women human rights defenders in Africa' n 54 above 43-44 paras 90-92.

⁶⁸ 'Cotonou Declaration on strengthening and expanding the protection of all human rights defenders in Africa' adopted at the 2nd International Symposium on Human Rights Defenders in Africa – Johannesburg + 18 27 March – 1 April 2017 Cotonou, Benin.

⁶⁹ As above.

4.2.2.2 The Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa

As established, the Maputo Protocol responds to the lived realities of women in Africa by paying close attention to their vulnerabilities. Article 24 of the Maputo Protocol affords special protection to women in distress who are defined to include among others 'pregnant or nursing women or women in detention'.⁷⁰ Women in detention who are pregnant or nursing are also spared from death sentences in those countries where the death penalty exists.⁷¹ Accordingly, the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa (SRP) has a role to play to ensure that women who find themselves in conflict with the law are accorded 'with an environment which is suitable to their condition and the right to be treated with dignity'.⁷² This inter-linkage is in harmony with the SRP's terms of reference where the mandate holder is called to 'conduct studies into conditions or situations contributing to human rights violations of prisons deprived of their liberty and recommend preventive measures'⁷³ and to do so in coordination with other relevant special rapporteurs.⁷⁴ This call for collaboration is in recognition of the fact that there could be intersecting issues such as those to do with women.

In terms of the activities of the mandate, the SRP led the development of the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines).⁷⁵ These Guidelines have since been adopted and form part of the soft law of the African Commission, and will be discussed later in assessing the Commission's gender responsiveness in that regard. That said, the Luanda Guidelines are undeniably gender responsive for reasons that will be elaborated later and the mandate of the SRP can be in some ways credited for this. Further, since the adoption of the Guidelines, the SRP has

⁷⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 24(b).

⁷¹ Maputo Protocol n 70 above art 4(2)(j).

⁷² Maputo Protocol n 70 above art 24(b).

⁷³ Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1996 – 1997, Annex VII 'Terms of Reference for the Special Rapporteur on Prisons and Conditions of Detention in Africa' 21 para 4. Report available at http://www.achpr.org/files/activity-reports/10/achpr20and21_actrep10_19961997_eng.pdf (accessed 10 November 2017).

⁷⁴ As above.

⁷⁵ African Commission on Human and Peoples' Rights 'Guidelines on the conditions of arrest, police custody and pre-trial detention in Africa'. Available at http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf (accessed 10 November 2017). The guidelines include safeguards in the areas of: arrests, police custody, pre-trial detention, procedures in the event of serious violations of human rights while in custody or detention, conditions of detention in police custody and pre-trial detention, vulnerable groups, accountability, remedies and implementation.

been involved in some measures towards their implementation. For instance, the SRP held a consultation⁷⁶ to discuss police compliance with women's rights under the Luanda Guidelines where principles and challenges in this regard were highlighted. This kind of dialogue with duty bearers and stakeholders serves to disseminate the guidelines further and collectively identify solutions to challenges.

The SRP shows consistency in infusing women's rights perspectives in interventions. In a report to commemorate the 25th anniversary of the African Commission, the SRP variously highlights the plight of women in particular while addressing issues.⁷⁷ Further, the report has a whole section addressing the failure to protect vulnerable groups in places of detention in Africa, which includes a detailed exposition of the problems that female prisoners face.⁷⁸ The SRP has also developed a periodic Police and Human Rights Newsletter that has been produced bi-annually since 2012.⁷⁹ The eighth Newsletter focused exclusively on police and human rights from a women's rights perspective.⁸⁰ The Newsletter includes: the role of female police officers and their added value in promoting women's rights, challenges that female police officers face and protection of the rights of female offenders and the challenges police women face in this regard. Recommendations to improve the working conditions of female police officers as well as the treatment of women who are arrested or in custody are also made.⁸¹ The Newsletter is gender responsive for adopting a highly nuanced approach in the way it discusses the identities of various women such as female police officers and female offenders and their inter-linkages. The recommendations made include structural adjustments and are likely to result in substantive equality should they be implemented. Finally, the Newsletter is highly inclusive as the articles are themselves written by female police officers that are best placed to articulate their lived realities. The subsequent ninth Newsletter focuses on

⁷⁶ African Commission on Human and Peoples' Rights 'Police compliance with the rights of women under the Luanda Guidelines: Principles and challenges' 24 October 2016 Banjul, The Gambia.

⁷⁷ Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa presented at the 52nd Ordinary Session of the African commission on Human and Peoples' Rights, Yamoussoukro, Cote d'Ivoire 9 - 22 October 2012.

⁷⁸ As above.

⁷⁹ The newsletters are available at <http://www.achpr.org/mechanisms/prisons-and-conditions-of-detention/> (accessed 11 November 2017).

⁸⁰ African Commission on Human and Peoples' Rights (2016) 8 *Police and Human Rights in Africa* 3-19. Available at http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/newsletter_8.pdf (accessed 11 November 2017). The focus on women's rights was in commemoration of the African Union's 2016 Year of Human Rights with particular Focus on the Rights of Women.

⁸¹ As above.

vulnerable groups in the context of policing and human rights.⁸² Here women's rights concerns are inferred through the prism of other intersectional vulnerabilities they may have such as tender years, disability, refugee status and the heightened vulnerabilities of women human rights defenders to sexual violence.⁸³

Overall, it is no wonder the SRP is considered as one of the more successful mandates owing to various reasons ranging from the choice and calibre of the mandate holders,⁸⁴ to its extensive coverage since the mandate has undertaken over 20 country missions since its establishment.⁸⁵ In addition to these reasons, the SRP clearly takes on a gender responsive approach in implementation of the mandate.

4.2.2.3 The Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons

Refugees, asylum seekers, migrants and internally displaced persons (IDPs) can be said to have a precarious identity, with their circumstances such as displacement often a result of human rights violations and at the same time facing several other harms and deprivations that amount to human rights violations.⁸⁶ The plight of female members of this group is even more precarious, as they have to contend with the vulnerabilities inherent to the group as well as their vulnerabilities on the basis of sex, gender and sexual orientation among other factors. They are more prone to sexual violence and sexual discriminatory practices related to the distribution of food, goods and services.⁸⁷ In addition to these injustices in practice, even the law itself further marginalises them.

⁸² African Commission on Human and Peoples' Rights (2017) 9 *Police and Human Rights in Africa* 3-33. Available at [http://www.achpr.org/files/news/2017/05/d289/police and hr newsletter no 9 eng fre ara.pdf](http://www.achpr.org/files/news/2017/05/d289/police%20and%20hr%20newsletter%20no%209%20eng%20fre%20ara.pdf) (accessed 11 November 2017).

⁸³ As above.

⁸⁴ J Harrington 'Special rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 2 *African Human Rights Law Journal* 264 and F Viljoen 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' (2005) 27 *Human Rights Quarterly* 135. Harrington and Viljoen note that the initial mandate holder in particular, Victor Dankwa, was 'committed' and 'highly qualified' respectively. Viljoen adds that the 'choice of personalities has been fortunate.' R Murray 'The Special Rapporteurs in the African System' n 15 above 359, Murray similarly observes of the SRP's mandate: 'Clearly, there are concrete positive results, and these are enhanced considerably by the dynamism and commitment of the Special Rapporteurs themselves.' African Commission on Human and Peoples' Rights 'The Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa' available at <http://www.achpr.org/mechanisms/prisons-and-conditions-of-detention/> (accessed 11 November 2017) the Commission itself also notes that the special rapporteurs for this mandate 'have been quite active'.

⁸⁵ African Commission as above.

⁸⁶ J Fitzpatrick 'The human rights of refugees, asylum-seekers, and internally displaced persons: A basic introduction' in J Fitzpatrick (ed) *Human rights protection for refugees, asylum-seekers, and internally displaced persons: A guide to international mechanisms and procedures* (2002) 6-15.

⁸⁷ I Westendorp 'Housing rights and related facilities for female refugees and internally displaced women' (2001) 19 *Netherlands Quarterly of Human Rights* 403-416.

Critics have long established the gender blindness of refugee law in the way that motives for flight specific to women are marginalised in legal practice.⁸⁸

Within the African Commission, addressing these concerns of falls within the purview of the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons (Special Rapporteur on Refugees). The Special Rapporteur on Refugees has at their disposal an expansive normative canvas within the African human rights system including: the African Charter, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (AU IDP Convention), the Maputo Protocol and the African Charter on the Rights and Welfare of the Child (African Children's Charter). At the UN level, the UN Convention Relating to the Status of Refugees (UN Refugee Convention) is also significant. Of these, only the IDP Convention⁸⁹ and the Maputo Protocol⁹⁰ address the specific vulnerabilities of women who are refugees, asylum seekers, migrants or internally displaced persons.

In spite of this rich normative framework, in practice, the Special Rapporteur on Refugees seems to have done little in the past to provide guidance to states and to address the gendered concerns of women. Notably, the mandate has failed to undertake a study on the impact of armed conflicts on the rights of women and children in Africa. The Special Rapporteur on Refugees together with the Special Rapporteur on the Rights of Women in Africa were mandated by the African Commission to conduct the study, the report of which was due at the 57th Ordinary Session of the Commission.⁹¹ No reasons are given for this lapse in the Special Rapporteur's subsequent reports to the Commission. On the

⁸⁸ T Spijkerboer *Gender and refugee status* (2016) section 1.1. Highlights the marginalisation of women in refugee law and also gives examples of motives specific to women that are disregarded in law and in practice such as: social rules relating to dress (e.g. in Iran), specific forms of political activism (e.g. cooking for resistance fighters) or sexual violence.

⁸⁹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. Prohibits sexual slavery and trafficking of women (art 7(5)(f)), calls upon states to take special measures to protect and provide for the reproductive and sexual health of internally displaced women as well as appropriate psycho-social support for victims of sexual and other related abuses (art 9(2)(d)), asserts the equal right of women to obtain identity documents and to have them issued in their name (art 13(4)), defines women as persons of the female gender including girls (art 1(p)) and in doing so extends protection to transgendered women and female children.

⁹⁰ Maputo Protocol n 70 above. Requires states parties to undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

⁹¹ Resolution on the Situation of Women and Children in Armed Conflict, ACHPR/Res.283(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014 para 2.

initial lethargy displayed by this mechanism, one commentator similarly makes the observation that, '[a]ctivities undertaken by the Special Rapporteur in fulfilment of this mandate to date have been limited, with budgetary constraints frequently cited as a reason for this.'⁹² The mandate is also on record, albeit impliedly, on its limited activities. Listing the mechanism's achievements in a reflective report to commemorate the 25th anniversary of the African Commission, the Special Rapporteur on Refugees lists its most significant achievement as 'the implication of the mechanism in the drafting and adoption of the [AU IDP Convention]'.⁹³ In fact this is the only achievement listed. Indeed, aside from resolutions and required reports, the mandate has only produced one study on 'The Right to Nationality in Africa'.⁹⁴ The study itself responds to women's concerns emphasising variously the equal right of women to nationality and decrying states that still do not recognise and enforce this right.

Significantly, the study on nationality seems to have informed the development of a Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa.⁹⁵ The development of the Draft Protocol is led by the Special Rapporteur on Refugees.⁹⁶ The Draft Protocol takes into consideration women's rights on matters of statelessness. Over and above a standard non-discrimination provision, the Draft Protocol requires states to 'grant women and men equal rights to acquire, change or retain their nationality and with respect to the nationality of their children'⁹⁷ and further specifically accords women and men equal rights to obtain nationality documents in their own names.⁹⁸ An explanatory memorandum indicates that the study on nationality informs the preparation of the Draft Protocol and further that the women's rights provisions are informed by CEDAW and the

⁹² G Bekker 'The protection of asylum seekers and refugees within the African regional human rights system' (2013) 13 *African Human Rights Law Journal* 24.

⁹³ Report of the Mechanism of The Special Rapporteur on The Rights of Refugees, Asylum Seekers, and Internally Displaced and Migrants in Africa since its creation, presented at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Cote d'Ivoire 9 - 22 October 2012 para 24.

⁹⁴ African Commission on Human and Peoples' Rights 'The right to nationality in Africa' available at http://www.achpr.org/files/special-mechanisms/refugees-and-internally-displaced-persons/the_right_to_nationality_in_africa.pdf (accessed 14 November 2017).

⁹⁵ Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa. Available at <http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/Protocol-nationality-statelessness/> (accessed 29 July 2018).

⁹⁶ Resolution on the Drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa, ACHPR/Res.277(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April - 12 May 2014 para 6.

⁹⁷ Draft Protocol on Nationality and Statelessness n 95 above art 4(2).

⁹⁸ Draft Protocol on Nationality and Statelessness n 95 above art 13(3).

Maputo Protocol.⁹⁹ In the study, the Special Rapporteur on Refugees identifies that the right to nationality does not apply equally to women in Africa and the Draft Protocol responds by unequivocally asserting women's rights in this regard. This dual intervention (study and protocol) by the Special Rapporteur on Refugees is accordingly highly gender responsive. Not only does it envisage a substantive approach to equality, but it also considers and responds to the observed circumstances of women on the ground. In fact, in a measure that will enhance women's rights protection and potential to attain substantive equality, the provisions in the Draft Protocol provide stronger protection for women compared to its Maputo Protocol equivalent. The Maputo Protocol provision does not unequivocally grant women access to nationality as it provides:¹⁰⁰

[A] woman and a man shall have equal rights, with respect to the nationality of their children *except where this is contrary to a provision in national legislation or is contrary to national security interests.*

On account of the foregoing developments, the Special Rapporteur on Refugees seems to demonstrate an increased attention to promotional activities generally and to women's rights concerns.

Still, much remains to be done, especially in light of the varied treaties espousing diverse standards on matters refugees, asylum seekers, migrants and IDPs. There is a need for normative standard setting to synchronise and clearly articulate rights and corresponding state obligations for these groups.¹⁰¹ Comparatively, for instance, the CEDAW Committee has taken cognisance of the gendered dimensions of refugee status, nationality and statelessness of women through General Recommendation No. 32.¹⁰² Through this General Recommendation, the CEDAW Committee

provide[s] authoritative guidance to states parties on legislative, policy and other appropriate measures to ensure the implementation of their obligations... regarding non-discrimination and gender equality relating to refugee status, asylum, nationality and statelessness of women.¹⁰³

⁹⁹ 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa: Explanatory memorandum' 1-23. Available at <http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/Protocol-nationality-statelessness/> (accessed 29 July 2018).

¹⁰⁰ Maputo Protocol n 70 above art 6(h) (emphasis mine).

¹⁰¹ R Murray 'The Special Rapporteurs in the African System' n 15 above 368 Murray also observes that the Special Rapporteur on refugees has not been involved in standard-setting and elaboration of guidelines on these issues.

¹⁰² CEDAW General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and the statelessness of women, 14 November 2014, CEDAW/C/GC/32.

¹⁰³ As above para 1.

This measure is desirable for the African context. It is also worth noting that not all states have ratified all the regional instruments and in light of the cross-border nature of these issues, uniform continental guidelines would enhance protection and promotion activities.

4.2.2.4 The Special Rapporteur on Freedom of Expression and Access to Information

The Special Rapporteur on Freedom of Expression and Access to Information (Special Rapporteur on FOE and ATI) is credited in steering the African Commission to develop its first model law, the Model Law on Access to Information in Africa.¹⁰⁴ Owing to this Model Law and the advocacy of the Special Rapporteur on FOE and ATI, an ATI expert notes that ‘in 2010, when the process of the development of the Model Law began, only 5 AU Member States had adopted access to information laws. By 2015, 17 had adopted laws.’¹⁰⁵ While this success in standard setting is lauded, the Special Rapporteur on FOE and ATI has not paid any attention to gendered concerns on issues of FOE and ATI and therefore fails to respond to the lived realities of women in Africa. One contemporary issue in FOE and ATI is highlighted in illustration.

The African Commission recognises the important role of the media ‘in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy’.¹⁰⁶ Within the media, women journalists have to endure additional struggles owing to their sex or gender. The International Declaration on the Protection of Journalists notes the following:¹⁰⁷

In addition to the safety hazards affecting all journalists, women journalists are confronted with gender-specific safety concerns, which require dedicated attention and appropriate measures.

¹⁰⁴ African Commission on Human and Peoples’ Rights ‘Model Law on Access to Information in Africa’ available at http://www.achpr.org/files/news/2013/04/d84/model_law.pdf (accessed 15 November 2017).

¹⁰⁵ Remarks by Professor Frans Viljoen during a Centre for Human Rights, University of Pretoria Conference on Soft Law and Human Rights: The Impact of the Model Law on Access to Information 9 December 2015. Available at <http://www.chr.up.ac.za/index.php/ati-news.html> (accessed 15 November 2017).

¹⁰⁶ African Commission on Human and Peoples’ Rights ‘Declaration of Principles on Freedom of Expression in Africa’ done in Banjul, The Gambia 23 October 2002 preamble para 7 available at <http://www.achpr.org/mechanisms/freedom-of-expression/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression%20in%20Africa/> (accessed 15 November 2017).

¹⁰⁷ International Press Institute ‘International Declaration on the Protection of Journalists’ item 12 available at <https://ipi.media/international-declaration-on-the-protection-of-journalists/> (accessed 15 November 2017).

In fact, a global study on violence against women in news media found that: nearly two-thirds of respondents had experienced intimidation, threats and abuse in relation to their work, 14.3% had experienced sexual violence, and nearly half had experienced sexual harassment, all in relation to their work.¹⁰⁸ The Commission should in fact be aware of these gender-specific concerns by virtue of the *Egyptian Initiative for Personal Rights and Interights v Egypt* case,¹⁰⁹ earlier discussed in section 3.3.1.1, that concerned the sexual violation of female journalists, which conduct it found to be discriminatory. In light of the foregoing, the Special Rapporteur on FOE and ATI fails to be gender responsive by developing a Resolution on the Safety of Journalists and Media Practitioners in Africa,¹¹⁰ which omits to address the gendered concerns of women journalists. Such an omission particularly in regard to safety is crucial, as the safety of women journalists has been established as one of the key areas of concern. Overall, similar to the foregoing illustration, most if not all of the outputs of the Special Rapporteur on FOE and ATI take on a gender neutral or arguably blind approach.

4.2.3 Committees and working groups

As part of its special mechanisms, the African Commission has established working groups and committees¹¹¹ to take on certain thematic and operational issues. The membership of the working groups is derived from commissioners as well as expert members.¹¹² This analysis briefly highlights the thematic subsidiary mechanisms with a view to establishing the gender responsiveness of their practice as well as potential.

4.2.3.1 Committee for the Prevention of Torture in Africa

The Committee for the Prevention of Torture in Africa (CPTA) has a core mandate is to oversee the implementation of the Guidelines and Measures for the Prohibition and

¹⁰⁸ International Women's Media Foundation 'Violence and harassment against women in the news media' 7-9 available at <http://www.iwmf.org/our-research/journalist-safety/violence-and-harassment-against-women-in-the-news-media-a-global-picture/> (accessed 15 November 2017).

¹⁰⁹ Communication 323/06, *Egyptian Initiative for Personal Rights & Interights v Egypt*, ACHPR.

¹¹⁰ Resolution on the Safety of Journalists and Media Practitioners in Africa, ACHPR/Res.185(XLIX)11 adopted at the 49th Ordinary Session, Banjul, The Gambia, 28 April – 12 May 2011.

¹¹¹ Rules of Procedure n 6 above rule 23 provides that the Commission may create subsidiary mechanisms such as special rapporteurs, committees and working groups and take a decision on the creation, membership and mandate of such subsidiary mechanisms.

¹¹² On working groups and committees generally see: Nyanduga, B 'Working groups of the African Commission and their role in the development of the African Charter on Human and Peoples' Rights' in Evans, M & Murray, R (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 379-405.

Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines/ RIGs).¹¹³ In fact the Committee was initially referred to as the Follow-up Committee on the Robben Island Guidelines.¹¹⁴ The RIGs themselves will not be the subject of thorough analysis as they pre-date the existence of the present Committee and can therefore not be utilised as a yardstick to measure the gender responsiveness of the Committee or lack thereof.¹¹⁵ Although it must be noted that the RIGs are gender blind in their articulation of the prohibition and prevention of torture as well as the needs of victims, this assertion is made for the reason that the RIGs do not address forms of torture and needs of victims specific to women. In fact, this gap is surprising because as early as the 1990s, the Commission itself had long since made the connection for instance between sexual violence as a violation of article 5 of the African Charter on torture.¹¹⁶ Instead, focus is paid to the Committee's foremost and recent contribution by way of General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5).¹¹⁷ This Comment is the subject of analysis later in this chapter in section 4.3.2.4, as the comments are attributable to the Commission as a whole and therefore discussed in line with the Commission's mandate to develop soft law. The Comment is deemed gender responsive for reasons that will be articulated. The role of the Committee in the development of the Comment is lauded, as the Comment succeeds in delineating the gendered impact of sexual violence on women.

¹¹³ Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, ACHPR/Res.61(XXXII)02 adopted at the 32nd Ordinary Session, Banjul, The Gambia, 17 – 23 October 2002. The guidelines themselves are available at <http://www.achpr.org/mechanisms/cpta/robben-island-guidelines/> (accessed 16 November 2017).

¹¹⁴ Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa as above.

¹¹⁵ For an analysis of the Robben Island Guidelines see: JB Niyizurugero & G Lessène, 'The Robben Island Guidelines: An essential tool for the prevention of torture in Africa' (2010) 6(2) *Essex Human Rights Review* 91-114 and D Long & R Murray 'Ten years of the Robben Island Guidelines and prevention of torture in Africa: For what purpose?' (2012) 2 *African Human Rights Law Journal* 311-347. On the prohibition of torture generally within the African human rights system see F Viljoen & C Odinkalu *The prohibition of torture and ill-treatment in the African human rights system: A handbook for victims and their advocates* (2006).

¹¹⁶ See for instance Communication 54/1991-61/1991-96/1993-98/1993-164/1997_196/1997-210/1998, *Malawi African Association, Amnesty International & others v Mauritania*, ACHPR.

¹¹⁷ General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia 23 February - 4 March 2017. Available at http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr_general_comment_no.4_english.pdf (accessed 16 November 2017).

Aside from the foregoing development of normative standards, the Committee in recent years has recorded a visible shift in its approach with an increased attention to women's rights in carrying out its mandate.¹¹⁸ In pursuing its mandate to implement the RIGs, the Committee developed a thematic report on the denial of abortion and post-abortion care as torture and other cruel, inhuman or degrading punishment or treatment.¹¹⁹ Taking its cue from the Human Rights Committee's decision in *K.L. v Peru*,¹²⁰ the report lays an elaborate human rights basis as to how a deprivation of women's reproductive rights can constitute a violation of the right to be free from torture and other ill-treatment. It does so through a normative tapestry of the African Charter, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the General Comment No. 4 to article 5 of the Charter and General Comment No. 2 to article 14(2) of the Maputo Protocol that focuses on reproductive rights.¹²¹ Another of the Committee's thematic reports presented to the Commission addresses 'Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of Persons with Disabilities in Africa, with Special Focus on Women with Disabilities.'¹²² The report outlines various forms of torture prevalent to women and girls with disabilities in Africa including: attacks against persons with albinism, forces sterilisation, institutionalisation and sexual violence.¹²³ It concludes with recommendations to state parties and to the AU with regard to fast tracking the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.¹²⁴

¹¹⁸ Comparatively for instance, before the tenure of the immediate former CPTA Chairperson (2014-2017, the previous Chairperson completely excludes any women's rights angle in the CPTA's work as may be claimed from a review of the CPTA's comprehensive report from its establishment up until 2012 during the Commission's 25th anniversary celebrations. See: Intersession activity report of the Committee for the Prevention of Torture in Africa, 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Cote d'Ivoire, 9-22 October 2012.

¹¹⁹ Intersession activity report of the Chairperson, Committee on the Prevention of Torture in Africa 'Thematic report on the denial of abortion and post-abortion care as torture and other cruel, inhuman or degrading punishment or treatment', 61st Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 1 - 15 November 2017 part III.

¹²⁰ Communication No. 1153/2003, *K.L. v Peru*, CCPR/C/85/D/1153/2003, where the Human Rights Committee found the Peruvian government in violation of several rights including torture on the basis of failing to ensure the petitioner's access to legal abortion services.

¹²¹ Intersession activity report of the Chairperson CPTA 'Thematic report on the denial of abortion and post-abortion care as torture and other cruel, inhuman or degrading punishment or treatment' n 119 above paras 10-13.

¹²² Intersession activity report of the Chairperson, Committee on the Prevention of Torture in Africa 'Annual situation of torture and ill-treatment in Africa report', 59th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21 October - 4 November 2016 part III.

¹²³ As above paras 17-22.

¹²⁴ Intersession activity report of the CPTA 'Annual situation of torture and ill-treatment in Africa report' n 122 above para 23.

In commemoration of the AU's 2016 theme: African year of human rights with particular focus on the rights of women, the Committee themed its annual Africa Torture Watch Newsletter on the right of women to be free from torture and ill-treatment.¹²⁵ The Committee also organised a panel during an ordinary session of the Commission to showcase 'the human rights situation of women in Africa as seen from the prism of CPTA's mandate of preventing and eradicating torture and other ill-treatment.'¹²⁶ The Committee's Chairperson is also credited with shepherding¹²⁷ the Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity,¹²⁸ which is analysed later in this chapter in section 4.3.1.1. In light of all its recent normative developments and promotional interventions, the Committee demonstrates an exceptional dexterity in incorporating women's rights concerns in its work. In exploring the torture from various intersectional grounds beyond gender including age, disability and sexual orientation, the Committee demonstrates exceptional gender responsiveness and its interventions are likely to result in substantive equality.

4.2.3.2 Committee on the Protection of the Rights of People Living with HIV

The Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV (HIV Committee) seeks to develop effective strategies to better protect the rights of their target populations by engaging states on their responsibilities to respect, protect and fulfil the rights of these populations. The Committee can also undertake fact-finding missions regarding human rights violations.¹²⁹ In all its work it is specifically called to 'integrate a gender perspective and give special attention to persons belonging to vulnerable groups, including women,

¹²⁵ African Union '2016: African year of human rights with particular focus on the rights of women' available at <https://au.int/en/pressreleases/19615/2016-african-year-human-rights-particular-focus-rights-women> (accessed 18 November 2017) and Annex to Intersession activity report of the Chairperson, Committee on the Prevention of Torture in Africa n 119 above 'Detailed activity report of the period 2014-2017' para 9.

¹²⁶ As above paras 17-18.

¹²⁷ Annex to Intersession activity report n 125 above para 63.

¹²⁸ Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, ACHPR/Res.275(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014.

¹²⁹ Resolution on the Establishment of a Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV, ACHPR/Res.163(XLVII)10 adopted at the 47th Ordinary Session, Banjul, The Gambia, 12 – 26 May 2010.

children, sex workers, migrants, men having sex with men, intravenous drugs users and prisoners'.¹³⁰

In fulfilling its mandate to develop effective strategies, the HIV Committee undertook a study and developed a report, HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-based Responses.¹³¹ While it is styled as a report, in that it presents violations, legal trends, good practices and challenges, the HIV Committee also accomplishes standard setting in its elaborate description of global and African regional human rights norms related to HIV. In highlighting key human rights concerns and good practices, the HIV Committee focuses on various vulnerable groups such as women and girls, children and adolescents, persons with disabilities, indigenous persons, migrants, refugees and internally displaced persons and key populations (gay men and other men who have sex with men, sex workers, transgender people and people who inject drugs).¹³²

For women and girls, the HIV Committee notes the disturbing feminisation of HIV in Africa and links this to: gender inequality in family and personal law, violence against women, hampered sexual and reproductive health rights and harmful cultural practices and beliefs.¹³³ In so doing the HIV Committee responds to the experiences of women in Africa. The good practices identified with regard to each issue lay the groundwork for achieving substantive equality should they be realised. The HIV Committee also demonstrates an excellent understanding of intersectional identities and resulting discrimination in their delineation of concerns that have gender implications for women regarding persons with disabilities, children and adolescents, transgender women and sex workers.¹³⁴ In this regard, the HIV Committee demonstrates a keen awareness and implementation of gender responsiveness. It is however worth noting that by its own admission, the Committee is indicated as utilising its mandate in a limited manner, such as in its role in investigation violations with regard to affected populations and

¹³⁰ As above.

¹³¹ Report on the study of the African Commission on Human and Peoples' Rights 'HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-based Responses' available at http://www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf (accessed 17 November 2017).

¹³² As above part V paras 61-150.

¹³³ African Commission HIV study report n 131 above paras 66-86.

¹³⁴ African Commission HIV study report n 131 above paras 87-139.

developing guidelines. Its reasons for this range from resource constraints to limited visibility and inaccessibility of the mechanisms.¹³⁵ Such constraints undoubtedly affect women's rights concerns by limiting their participation with the HIV Committee, which would further enhance the promotion of their rights and alleviate protection responses.

4.2.3.3 Working groups

This section undertakes a brief examination of the African Commission's thematic working groups. A broad desk review of the documents of the working groups reveals the limited attention to women's rights in the working groups and therefore this section majorly serves to briefly introduce the mechanisms.

The Working Group on Indigenous Populations/Communities in Africa was established with an initial mandate to examine the concept of indigenous peoples and communities in Africa, the implication of the African Charter on these peoples' and to consider appropriate recommendations for the monitoring of their rights.¹³⁶ A review of its documents reveals that the working group pays limited attention to the specific situation of indigenous women.¹³⁷ This is despite normative guidance from the Maputo Protocol highlighting the vulnerabilities of women in indigenous groups and categorising them as women in distress to whom special attention should be paid.¹³⁸ The Protocol also calls for the promotion of women's indigenous knowledge systems.¹³⁹ The Working Group by its own admission recognises that it needs to do more work on the rights of indigenous women in Africa.¹⁴⁰ Drawing from this admission, the Working Group announced plans to hold a regional workshop in Africa '[c]ognisant of the fact that indigenous women in Africa face double discrimination on the basis of their identity and their gender, and that little attention is given to their plight'.¹⁴¹ Unfortunately, a review of subsequent activity reports reveals that the workshop was not conducted. The Working Group therefore

¹³⁵ African Commission HIV study report n 131 above paras 58-62.

¹³⁶ Resolution on the Rights of Indigenous Peoples' Communities in Africa, ACHPR/Res.51(XXIII)00 adopted at the 28th Ordinary Session, Cotonou, Benin, 23 October - 6 November 2000.

¹³⁷ See generally: African Commission on Human and Peoples' Rights, Special mechanisms, Working Group on Indigenous Populations/ Communities in Africa <http://www.achpr.org/mechanisms/indigenous-populations/> (accessed 20 November 2017).

¹³⁸ Maputo Protocol n 70 above art 24(a).

¹³⁹ Maputo Protocol n 70 above art 18(2)(c).

¹⁴⁰ Intersession activity report of the Working Group on Indigenous Populations/Communities, 58th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 6 - 20 April 2016 29.

¹⁴¹ As above.

while recognising the intersectional discrimination that indigenous women face, fails to take measures towards alleviation and is therefore not gender responsive.

The Working Group on Rights of Older Persons and People with Disabilities has a mandate to articulate and identify good practices for states on the rights of older persons and those with disabilities.¹⁴² A review of its documents reveals that the working group pays limited attention to the specific situation of older women and women with disabilities in its work.¹⁴³ Normative protections for older women indicate that the focus on older women and those with disabilities should be more substantive. The Maputo Protocol in articles 22 and 23 requires states to put in place special protection measures for elderly women and those with disabilities respectively.¹⁴⁴ The Working Group in fact demonstrates knowledge of the vulnerability where it notes the following in a report:¹⁴⁵

Gender is at the heart of many violations of the rights of older persons in Africa. Illiteracy rate is known to be high in many African countries, in particular among women in rural areas.

More recently, from a development of norms perspectives, the Committee led the Commission in the development of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (Protocol on Older Persons).¹⁴⁶ The Protocol elaborates on the specific protection of older women.¹⁴⁷ The Committee also led in the development of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa¹⁴⁸ which caters to the rights of women with disabilities. From this normative perspective at least, the Committee demonstrates a recognition of the intersectional identities of older and disabled women.

The Working Group on Economic, Social and Cultural Rights (ESCR) was established with a specific mandate to develop and propose to the Commission draft Principles and Guidelines on Economic, Social and Cultural Rights and to elaborate draft revised

¹⁴² African Commission on Human and Peoples' Rights, Special mechanisms, Working Group on Rights of Older Persons and People with Disabilities <http://www.achpr.org/mechanisms/older-disabled/> (accessed 20 November 2017).

¹⁴³ As above.

¹⁴⁴ Maputo Protocol n 70 above arts 22 & 23.

¹⁴⁵ Report of the Chairperson of the Working Group on the Rights of Older Persons and People with Disabilities in Africa, 52nd Ordinary Session of the African Commission on Human and Peoples', Yamoussoukro, Cote d'Ivoire, 9 -22 October 2012, para 13.

¹⁴⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons.

¹⁴⁷ As above arts 8 & 9.

¹⁴⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018).

guidelines pertaining to economic, social and cultural rights, for State reporting.¹⁴⁹ The Working Group has since developed both instruments and they are analysed later in this chapter. To the extent that both of these instruments are deemed gender responsive reflects positively on the working group's attention to women's rights.

The Working Group on Extractive Industries, Environment and Human Rights Violations and the Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa will not be examined owing to a need to balance breadth against most relevance.

4.3 Evaluating the gender responsiveness of the African Commission's soft law instruments

As earlier established, the African Commission draws part of its promotional mandate from article 45 of the Africa Charter. Here the Commission is mandated to undertake research and offer its views and make recommendations to governments in the field of human and peoples' rights,¹⁵⁰ and to formulate and lay down principles and rules aimed at resolving legal problems, which principles may guide governments to develop their own legislation relating to human and peoples' rights.¹⁵¹ From this, a clear mandate to elaborate existing norms while developing new principles can be deduced. It is in this regard that the Commission has engaged in norm creation, standard setting and elaboration of rights through a wide array of soft law instruments. The types of soft law instruments utilised by the African Commission include: resolutions, guidelines, guidelines and principles, general comments and model laws.¹⁵² The African Commission's gender responsiveness through this limb of its promotional mandate will therefore be assessed through the gender responsiveness of these normative texts. As already seen, the Commission largely relies on its special mechanisms to steer the development of principles and guidelines, this section therefore reconciles certain deferred discussions from the instant previous section.

¹⁴⁹ Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04 adopted at the 36th Ordinary Session, Dakar, Senegal, 23 November – 7 December 2004.

¹⁵⁰ African Charter n 3 above art 45(1)(a).

¹⁵¹ African Charter n 3 above art 45(1)(b).

¹⁵² African Commission on Human and Peoples' Rights 'Soft law' available at <http://www.achpr.org/instruments/> (accessed 20 November 2017).

4.3.1 Resolutions

The African Commission recognises the important role of resolutions in ‘formulating guidance and recommendations on the promotion and protection of human rights’ in line with its mandate under article 45 of the African Charter.¹⁵³ The Commission issues various types of resolutions including thematic, country-specific and administrative resolutions.¹⁵⁴ This analysis will focus on thematic and country-specific resolutions to the extent that they relate to women’s rights.

4.3.1.1 Thematic resolutions with an implication on women’s rights

Thematic resolutions are utilised by the African Commission to clarify the normative contents of rights that are already guaranteed. Research shows that in addition to this utility, the Commission has also utilised thematic resolutions ‘to address new developments that were not envisioned at the time of adopting the Charter’¹⁵⁵ and by necessary implication any other instrument under its purview such as the Maputo Protocol. Following is an analysis of selected resolutions of the African Commission. The selection targets those resolutions attributable to the SRRWA as well as any other resolution made on a women’s rights theme as well as those that clearly ought to have incorporated a gender responsive approach.

*Resolution on the Situation of Women and Children in Armed Conflict*¹⁵⁶

This resolution is sponsored by the SRRWA and it is in fact the only thematic resolution attributable to the mandate. For this resolution to be deemed gender responsive, it needs to be assessed for the extent to which it effectively addresses the situation of women and girls during armed conflict. The various parameters of gender responsiveness in this instance translate to assessing: the recognition of the scale and manifestation of the problem and the various *de facto* and *de jure* equality concerns (substantive equality), the recognition of the intersectional nature of the problem (intersectionality) and in making

¹⁵³ Resolution on the Establishment of a Resolutions Committee, ACHPR/Res. 338(LVIII)16 adopted at the 58th Ordinary Session, Banjul, The Gambia, 6-20 April 2016 preamble.

¹⁵⁴ For more on the typology of resolutions see Biegon ‘The impact of the resolutions of the African Commission on Human and Peoples’ Rights’ n 49 above 30-46.

¹⁵⁵ Biegon ‘The impact of the resolutions of the African Commission on Human and Peoples’ Rights’ n 49 above 32.

¹⁵⁶ Resolution on the Situation of Women and Children in Armed Conflict, ACHPR/Res.283(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014.

recommendations adopting a contextualised African response and articulating the role of women (inclusion).

In articulating the situation of women and children in armed conflict, the African Commission focuses on the problem of sexual violence. It recalls its own as well as UN Security Council Resolutions that aim to address sexual violence in armed conflict and is deeply concerned that various forms of sexual violence are being used as a tactic of war in Africa.¹⁵⁷ This focus is apt and responsive as sexual violence is arguably the greatest concern for women and girls in present day armed conflict in African and indeed across the world.¹⁵⁸ In this way, the resolution adopts a contextualised African response. In delineating the issue further, the Commission is

[c]oncerned that crimes of sexual violence are often defined as “crimes against morality or honour”, rather than against the victim’s bodily integrity and that perpetrators may receive more lenient penalties if they are perceived to act to protect “honour”, and sometimes go unpunished.¹⁵⁹

Similarly, one commentator bemoans that in the past sexual violence in armed conflict went unrecognised, as it was simply believed to be a crime against morality as opposed to humanity.¹⁶⁰ The Commission’s recognition of a victim’s individual suffering in this regard is therefore in harmony with recent views¹⁶¹ on sexual violence in the context of armed conflict. In addition to recognising the individuality of sexual violence in armed conflict, the Commission should have gone further to indicate that sexual violence in armed conflict is classified as crimes against humanity.¹⁶² This classification is useful as

¹⁵⁷ As above preamble paras 2, 5 and 7.

¹⁵⁸ See: N Dyani ‘Sexual violence, armed conflict and international law in Africa’ (2007) 15 *African Journal of International and Comparative Law* 230 – 253 for a comprehensive discussion of the issue in Africa along with the status of international law on the issue and the role of the various organs of the African human rights system including the African Commission. See also: SN Sackellares ‘From Bosnia to Sudan: Sexual violence in modern armed conflict’ (2005) 20 *Wisconsin Women’s Law Journal* 137 - 166 for a comprehensive discussion on sexual violence in modern day conflict including an examination of the motivations behind the use of sexual violence in conflict and how international has attempted to remedy this problem.

¹⁵⁹ Resolution 283 n 156 above preamble para 8.

¹⁶⁰ Sackellares n 158 above 149 - 150.

¹⁶¹ Recent here refers to the period after the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda have revolutionised accountability for sexual violence in armed conflicts. See: Sackellares n 158 above 150. ‘The Yugoslav Tribunal and Rwanda Tribunal and their respective statutes both recognize the impact of crimes involving sexual violence on individual victims.’

¹⁶² See: Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) art 11(3). Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) art 5, Statute of the International Criminal Tribunal for Rwanda (ICTR) art 3, Rome Statute of the International Criminal Court art 7. In fact, the latter statute of the ICTR considers sexual violence as crimes against humanity as capable of being undertaken even in peacetime as the statute in speaking to crimes against humanity does not allude or refer to armed conflict.

it gives rise to a higher level of state accountability and options for redress.¹⁶³ As crimes against humanity have acquired the status of *jus cogens* and customary law,¹⁶⁴ it follows that protection from sexual violence is an obligation that a state should never derogate from and in the event of a breach, a state can be held accountable irrespective of its ratification of instruments prohibiting sexual violence. Similarly, on this account, a state cannot provide amnesty for sexual violations and has a responsibility to ensure that criminal accountability follows such violations.¹⁶⁵ Since the resolutions are predominantly directed at states, the Commission would have done well in highlighting the state's heightened obligation in regard to sexual violence.

It is in addressing itself to the *de jure* situation of sexual violence in armed conflict that the Commission conceivably misdirects itself where it avers

that laws aimed at protecting women and children from violence are insufficient, discriminatory or non-existent and that legal definitions of crimes of sexual and gender-based violence are inadequate, especially in conflict situations.¹⁶⁶

It is a most curious misdirection coming particularly from a resolution sponsored by the SRRWA who has a mandate to oversee the implementation of the Maputo Protocol. The Maputo Protocol is in fact celebrated¹⁶⁷ for its breadth in defining violence against women that envisions situations of armed conflict.¹⁶⁸ In addition, the Protocol also elaborates substantively on the protection of women in armed conflicts including from sexual violence.¹⁶⁹ The Maputo Protocol is further credited for being the only international treaty that classifies sexual violence during armed conflict as genocide.¹⁷⁰

¹⁶³ For a comprehensive discussion on sexual violence during armed conflict in Africa and the requisite international state obligations including under the Maputo Protocol see: N Dyani 'Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict' (2006) 6 *African Human Rights Law Journal* 166 – 187.

¹⁶⁴ T Meron 'International criminalization of internal atrocities' (1995) 89 *American Journal of International Law* 558.

¹⁶⁵ Dyani 'Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict' n 163 above 182.

¹⁶⁶ Resolution 283 n 156 above preamble para 10.

¹⁶⁷ See for instance, Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 17 above 79. 'It is in its consideration of violence against women that the Protocol comes into its own. With the exception of article 6 on trafficking and exploitation of prostitution of women, CEDAW does not have any provisions pertaining to violence against women.'

¹⁶⁸ Maputo Protocol n 70 above art 1(j) defines violence against women as 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and *during situations of armed conflicts or of war* (emphasis mine).

¹⁶⁹ Maputo Protocol n 70 above art 11.

¹⁷⁰ Maputo Protocol n 70 above art 11(3), Dyani 'Sexual violence, armed conflict and international law in Africa' n 158 above 246 and Dyani 'Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict' n 163 above 179.

In light of all the foregoing, contrary to the Commission's view, there is strong normative basis for the protection of women from sexual violence during armed conflict.

Gender responsiveness also calls for the recognition of the intersectional identity of women taking note of the various factors that compound the inequalities that they face. In addition to contending with sex and gender-based vulnerability, population movement or displacement is another factor that compounds sexual violence in situations of armed conflict. Refugee women and girls are especially vulnerable to sexual violence while in transit or during resettlement.¹⁷¹ In recognising this, the Maputo Protocol enjoins state parties to 'undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation'.¹⁷² The Commission should accordingly have elucidated on more specific measures and obligations in this regard. At worst, the resolution should have restated the obligation in the Maputo Protocol in order to bring it to the attention of states. This intersectionality is however not completely lost on the Commission as the resolution concludes with a decision to initiate a study on the impact of armed conflicts on the rights of women and children in Africa.¹⁷³

Finally, women have a right to participate in alleviating situations of armed conflict particularly where women's rights issues are concerned. The Maputo Protocol for instance provides for women's right to peace and articulates their right to participate in the promotion of peace through various measures including government programmes, structures and processes.¹⁷⁴ The resolution is accordingly inclusive in its call to states to ensure that women are involved 'throughout the post-conflict peace-building and consolidation processes'.¹⁷⁵ In addition to the foregoing, the resolution makes a call to states to harmonise their laws with international and regional standards. Several structural and process recommendations are also made with specific guidance on how to

¹⁷¹ S McKay 'The effects of armed conflict on girls and women' (1998) 4 *Peace and Conflict: Journal of Peace Psychology* 389.

¹⁷² Maputo Protocol n 70 above art 11(3).

¹⁷³ The study was assigned to the Special Rapporteur on the Rights of Women in Africa and the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa to conduct the study and submit the report at the 57th Ordinary Session of the Commission. The study is yet to be undertaken, as it does not feature as an on-going activity in the reports of the mandate holders or the commission itself as is practice.

¹⁷⁴ Maputo Protocol n 70 above art 10.

¹⁷⁵ Resolution 283 n 156 above preamble para 16.

ensure justice and rehabilitation for victims. The recommendations are overall significantly victim focused thereby responding to women's lived realities. Overall, the Resolution makes one too many critical lapses to be deemed gender responsive. This is particularly in the way that it fails to utilise existing norms to elaborate on women and girls' rights, which is ideally the very motive for a resolution.

On a separate note, through this Resolution on the Situation of Women and Children in Armed Conflict, the Commission indicates that it reaffirms its previous Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence.¹⁷⁶ This latter resolution will not be discussed as the Commission has since issued more recent and definitive normative instruments on the subject through its Guidelines on Combatting Sexual Violence and its Consequences in Africa as well as General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, both of which are discussed later in this chapter in sections 4.3.3.1 and 4.3.2.4 respectively.

*Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity*¹⁷⁷

In 2014, the African Commission adopted this resolution that is described as historic, important and timely. It earns these accolades for representing the first time that the African Commission clearly pronounced itself on the rights of lesbian, gay, bisexual and transgender (LGBT) rights and it did so at a critical time when a wave of homophobia was sweeping the continent for instance manifesting itself through anti-homosexuality laws.¹⁷⁸ Conversely, some commentators while welcoming the Resolution hesitate to consider it as trail blazing and depict the Commission's approach as restrained for

¹⁷⁶ Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, ACHPR/Res.111(XXXII)07 adopted at the 42nd Ordinary Session, Brazzaville, Republic of Congo, 15 - 28 November 2007.

¹⁷⁷ Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, ACHPR/Res.275(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April - 12 May 2014.

¹⁷⁸ International Service for Human Rights 'African Commission adopts landmark decision on LGBT rights' available at <http://www.ishr.ch/news/african-commission-adopts-landmark-resolution-lgbt-rights> (accessed 25 November 2017).

instance in the way that the issue of decriminalisation of homosexual behaviour is not dealt with.¹⁷⁹

In its preamble, the Resolution begins by recalling key provisions on which it is based. These provisions include articles 2, 3, 4 and 5 of the African Charter on the rights to non-discrimination, equal protection of the law, respect for life and integrity and prohibition of torture.¹⁸⁰ Missing from this list is the Maputo Protocol, which provides expansive protection for lesbian and transgender women. The Maputo Protocol defines women as ‘persons of female gender, including girls’.¹⁸¹ The utilisation of the term gender in this definition expands the application of the Protocol to those born female as well as transgendered persons. Interestingly, the Maputo Protocol could possibly offer protection to transwomen on account of their gender as well as transmen who may require its protection in the event their new identity is discredited from a legal perspective. The Maputo Protocol, as has been described before, has broad and progressive provisions particularly on protection against violence, which is the subject matter of the present Resolution. Even among the different categories of sexual minorities, discrimination and vulnerability manifests differently. For instance, lesbians and transgendered persons are disproportionately exposed to sexual violence such as corrective rape.¹⁸² Therefore by failing to include Maputo Protocol provisions, the African Commission fails to recognise the intersectional identity of sexual minorities particularly women and fails to utilise the full extent of its rich normative framework.

Nevertheless, the Resolution can result in substantive equality for LGBT persons. The African Commission calls for the enactment of appropriate laws related to prohibit and punish violence on the basis of imputed or real sexual orientation and gender identity, which is a measure towards achieving formal equality. It further calls for the effective

¹⁷⁹ AM Ibrahim ‘LGBT rights in Africa and the discursive role of international human rights law’ (2015) 15 *African Human Rights Law Journal* 277-278.

¹⁸⁰ As above preamble.

¹⁸¹ Maputo Protocol n 70 above art 2(k).

¹⁸² See further: Human Rights Watch “*We’ll show you you’re a woman*”: Violence and discrimination against black lesbians and transgender men in South Africa (2011) available at <https://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> (accessed 25 November 2017), Coalition of African Lesbians & African Men for Sexual Health and Rights *Violence based on perceived or real sexual orientation and gender identity in Africa* (2013) 18-24 available at <http://www.pulp.up.ac.za/other-publications/violence-based-on-perceived-or-real-sexual-orientation-and-gender-identity-in-africa> (accessed 25 November 2017), L Mwambene & M Wheel ‘Realisation or oversight of a constitutional mandate? Corrective rape of black African lesbians in South Africa’ (2015) 15 *African Human Rights Law Journal* 58-88.

application of laws related to violence, which is a measure that is targeted at achieving substantive equality.¹⁸³ Further, the African Commission identifies that state and non-state actors can be the perpetrators of violence and directs states to address both scenarios. Such a measure is in line with a state's due diligence obligation over the actions of non-state actors in the context of violence as previously established by the Commission in the *Egyptian Initiative for Personal Rights and Interights v Egypt* case.¹⁸⁴

In addition to the foregoing, the Resolution also calls for an enabling environment for human rights defenders that is 'free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities'.¹⁸⁵ Annika Rudman suggests that such measures could have utility beyond the scope of addressing violence where she advances:¹⁸⁶

This [enabling environment] could be understood as indicating a broader undertaking by state parties targeting other forms of discrimination based on sexual [orientation] outside the ambit of violent crimes as well as a further understanding of the effects of laws that discriminate on the basis of sexual orientation.

This is a strategic hypothesis that the Commission can certainly build on. What is clear moreover, is that such measures to address stigma are also very much in line with the notion of substantive equality utilised in this thesis. Overall, the Resolution breaks new ground and its timing was highly responsive to the lived realities of LGBT persons at the time. Used with other normative standards, its application can no doubt result in gender responsiveness in addressing violence against women on the basis of imputed or real sexual orientation and gender identity.

*Resolution on Maternal Mortality in Africa*¹⁸⁷

The African Commission adopted this Resolution concerned with the fact that Africa had the highest maternal mortality rates in the world yet states were not making any progress in this regard.¹⁸⁸ The African Commission makes a strong assertion that preventable

¹⁸³ Resolution 275 n 177 above para 4.

¹⁸⁴ Communication 323/06 n 162 above.

¹⁸⁵ Resolution 275 n 177 above para 3.

¹⁸⁶ A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 24.

¹⁸⁷ Resolution on Maternal Mortality in Africa, ACHPR/Res.135(XLIV)08 at the 44th Ordinary Session, Abuja, Nigeria, 10 – 24 November 2008. See a similar exposition of this resolution: V Balogun & E Durojaye 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights' (2011) 11 *African Human Rights Law Journal* 368-395.

¹⁸⁸ As above preamble.

maternal mortality is a violation of women's right to life, dignity, equality and other rights in the African Charter and Maputo Protocol.¹⁸⁹ In doing so, the African Commission commendably delineates maternal mortality not just as a public health issue, as states have traditionally viewed it, but firmly as a human-rights based concern. In fact, far from this inference, the Commission in its recommendations expressly calls out to states to adopt a human rights-based approach in the formulation of programmes and policies to redress maternal mortality.¹⁹⁰ The Commission specifies the kinds of measures envisaged which all involve redressing disadvantage and making structural changes which if implemented can result in substantive equality. Some of the measures required include: well-funded programmes, well-staffed and equipped maternity centres in rural and semi-urban areas, development of community led emergency initiatives and development of adaptive reproductive health training and school curricula for women and girls.¹⁹¹ Further, in the design of the aforementioned programmes and policies, the Commission requests states to ensure the participation of women and civil society in formulation, implementation, monitoring and evaluation. In this way, the Commission recognises that inclusive programmes have a higher chance of being effective and gender responsive.

Overall, the Resolution comes across as gender responsive with the only notable omission being the failure to address specific causes and redress measures of preventable causes of maternal mortality such as unsafe abortion. This gap has since been addressed through General Comment No. 2 on Sexual and Reproductive Health Rights, which is discussed later in this chapter in section 4.3.2.2. Notably, notwithstanding the adoption of General Comment No. 2, the Resolution on Maternal Mortality remains significant as General Comment No. 2 did not address itself to article 14(2)(b) of the Maputo Protocol which is the pivotal provision related to protection from preventable maternal mortality.¹⁹²

¹⁸⁹ Resolution 135 n 187 above preamble.

¹⁹⁰ Resolution 135 n 187 above para 2.

¹⁹¹ As above.

¹⁹² Maputo Protocol n 70 above art 14(2)(b) requires states parties to take all appropriate measures to 'establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding'.

Relatedly, the Commission has also issued a Resolution on the Health and Reproductive Rights of Women in Africa.¹⁹³ This Resolution is drafted in a manner that is too broad for purpose for instance in requesting states to ‘protect the health and reproductive rights of women as stipulated in the Protocol’.¹⁹⁴ Yet ideally soft law instruments should elaborate further on rights. Thankfully, this resolution has largely been rendered inessential by virtue of General Comment No. 2 on Sexual and Reproductive Health Rights that undertakes a more robust discussion of the issues.

*Resolution on the HIV/AIDS Pandemic*¹⁹⁵

In 2001, the Commission adopted a Resolution on the HIV/AIDS Pandemic and how the pandemic was a threat to human rights and humanity. In spite of setting out to address the pandemic from a human rights perspective, the Commission fails to do so completely. Even worse, the African Commission completely failed to address the gendered impacts of HIV in relation to women. A commentator similarly notes that the Resolution has ‘no specific mention of the plight of women in particular’.¹⁹⁶ Expecting the Commission to be aware of the gendered implications at the time is in fact quite reasonable. Comparatively, as early as 1990, the CEDAW Committee had taken note of women’s vulnerability in HIV/AIDS infection and management and developed General Recommendation No. 15 in response.¹⁹⁷ The African Commission has since remedied its initial gender blindness through the development of norms that recognise the gendered impact of HIV such as the Maputo Protocol a General Comment related to women and HIV and the establishment of mechanisms such as the HIV Committee, which have proven gender responsive.

4.3.1.2 Country-specific resolutions with implications for women’s rights

Like the name implies, country-specific resolutions target the human rights situation in a particular country. A research on the impact of resolutions of the African Commission

¹⁹³ Resolution on the Health and Reproductive Rights of Women in Africa, ACHPR/Res.110(XLI)07 adopted at the 41st Ordinary Session, Accra, Ghana, 16 – 30 May 2007.

¹⁹⁴ Resolution 110 n 193 above para 3.

¹⁹⁵ Resolution on the HIV/AIDS Pandemic: Threat Against Human Rights and Humanity, ACHPR/Res53(XXIX)01 adopted at the 29th Ordinary Session, Tripoli, Libya, 23 April – 7 May 2001.

¹⁹⁶ Murray ‘Women’s rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa’ n 9 above 267.

¹⁹⁷ CEDAW General Recommendation No. 15 on the Avoidance of Discrimination against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS), 1990, A/45/38.

concludes that the direct impact of country-specific resolutions is minimal. Their indirect impact is however more notable as these resolutions

have generated states' interest in the work and activities of the Commission. This has in turn fostered some dialogue between the Commission and states, on the one hand, and between states and NGOs, on the other.¹⁹⁸

Such utility can also be valuable towards advancing women's rights concerns which often find themselves excluded both at regional and national platforms.

Few country-specific resolutions have been issued in respect of women's rights specific concerns. The research reveals country-specific resolutions on the Democratic Republic of Congo (DRC) on matters of sexual violence,¹⁹⁹ on Egypt also on the subject of sexual violence,²⁰⁰ and on South Africa to curb trafficking during the 2010 World Cup.²⁰¹ Some of these are discussed here. The DRC resolutions are all made in the context of the protracted situation of armed conflict in the country. In all the resolutions, the African Commission takes cognisance of the widespread and systemic nature of the sexual violence in the DRC as well as the impunity enjoyed by the perpetrators contrary to national and regional laws.²⁰² At the time of issuing the first and second resolution, DRC had promulgated two national laws on sexual violence,²⁰³ whereas at the time the third resolution was issued, DRC had ratified the Maputo Protocol.²⁰⁴ The African Commission can accordingly be seen to urge effective implementation of the laws. In fact, in one of the resolutions, the Commission chastises the DRC in light of a court decision that led to the acquittal of '36 of the 39 members of the DRC armed forces accused of committing sexual violence.'²⁰⁵ In doing so the Commission essentially called out DRC for only providing formal equality through enactment of laws but failing to implement the same to result in real equality for women. Further, the Commission called upon the state to take necessary

¹⁹⁸ Biegon 'The impact of the resolutions of the African Commission on Human and Peoples' Rights' n 49 above 10-11.

¹⁹⁹ Resolution on the Situation of Women in the Democratic Republic of Congo ACHPR/Res.103(XXX)06 adopted at the 40th Ordinary Session, Banjul, The Gambia, 15 - 29 November 2006, Resolution on the Crimes Committed against Women in the Democratic Republic of Congo, ACHPR/Res.173(XLVIII)10 adopted at the 48th Ordinary Session, Banjul, The Gambia, 10 - 24 November 2010 and Resolution on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo, ACHPR/Res.284(LV)14 adopted at the 48th Ordinary Session, Luanda, Angola, 28 April - 12 May 2014.

²⁰⁰ Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt, ACHPR/Res.288(EXT.OS/XVI)14 adopted at the 16th Extraordinary Session, Kigali, Rwanda, 20 - 29 July 2014.

²⁰¹ Resolution on the Prevention of Women and Child Trafficking in South Africa during the 2010 World Cup Tournament, ACHPR/Res.165(XLVII)10 adopted at the 47th Ordinary Session, Banjul, The Gambia, 12 - 26 May 2010.

²⁰² Resolution 103, 173 & 284 n 199 above.

²⁰³ Resolution 103 & 173 n 199 above.

²⁰⁴ Resolution 284 n 199 above.

²⁰⁵ Resolution 284 n 199 above.

measures to guarantee the security of women and girls in the country and to ease access to justice for victims.²⁰⁶ The Commission can also be seen to make structural recommendations, which is one of the ways of redressing disadvantage and achieving substantive equality. These requests included: resourcing of the police force to enable it to prevent and control sexual violence, provision of medical and psychosocial assistance to victims, sensitization on the causes and consequences of HIV which was observed to rise with the increase in sexual violence and to accelerate establishment of a compensation fund for the victims of sexual abuse.²⁰⁷

The Resolution to Egypt was made against the background of ‘persistent and widespread sexual violence and other forms of gender-based violence committed since the 2011 uprising against women in general and in particular women exercising their right to demonstrate’.²⁰⁸ The Commission acknowledged the government’s efforts, through the adoption of a law to combat sexual harassment as well as the successful prosecution of sexual assault perpetrators during demonstrations.²⁰⁹ Noting that the formal law is no longer the issue, the Commission makes targeted and victim-focused recommendations urging the government to take measures towards enhancing protection of women protesters, enhancing access to courts for women victims of violence, and to guarantee their right to reparation and adequate compensation.²¹⁰ It further calls upon the state to ensure provision of medical and psychosocial support to victims.²¹¹ These recommendations can no doubt result in substantive equality if implemented. All the country-specific resolutions are therefore deemed gender responsive as they recognise and attempt to alleviate the lived reality of women in DRC and Egypt at the time.

Overall, despite acknowledging the gender responsiveness of most of the resolutions discussed here, research shows that ‘[b]etween 1989 and 2014, a period of 25 years, the Commission adopted a total of 99 thematic resolutions and 82 country-specific resolutions.’²¹² With only a handful of these dedicated to women’s rights issues, the

²⁰⁶ Resolutions 103, 173 & 284 n 199 above.

²⁰⁷ Resolutions 103, 173 & 284 n 199 above.

²⁰⁸ Resolution 288 n 200 above preamble.

²⁰⁹ As above.

²¹⁰ Resolution 288 n 200 above.

²¹¹ Resolution 288 n 200 above.

²¹² Biegon ‘The impact of the resolutions of the African Commission on Human and Peoples’ Rights’ n 49 above 246.

African Commission can hardly be said to be gender responsive owing to its under-utilisation of resolutions to advance women's rights.

4.3.2 General Comments

The utility of General Comments in interpreting treaty provisions and assisting states in implementation is well articulated by a former SRRWA mandate-holder, Commissioner Soyata Maiga, who notes the following:²¹³

General Comments respond to a need to articulate the specific measures to be taken by States Parties in order to fulfil their obligations by providing specific interpretative guidance on the scope of [provisions]. They also provide a set of international standards and best practices towards an effective implementation of the provisions ... In the absence of this guidance, there is a risk not only of non-compliance of the practices of States Parties with the relevant international standards, but also of violations of the human rights of women, through inaction and ignorance.

General Comments are in fact a well-evolved feature of the UN system where various treaty bodies use them to interpret treaty provisions.²¹⁴ The CEDAW Committee refers to these instruments as General Recommendations. The African Commission on its part has co-opted the term General Comments, sometimes General Comment and they form part of soft law instruments along with resolutions, declarations, guidelines and model laws.²¹⁵

4.3.2.1 General Comment on women and HIV

This General Comment relates to articles 14(1)(d) and (e) of the Maputo Protocol.²¹⁶ It is the African Commission's first general comment and its development was led by the SRRWA. Articles 14(1)(d) and (e) of the Protocol provide for women's rights to self-protection and to be protected against HIV/AIDS and the right to be informed on one's

²¹³ General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, preface para 4.

²¹⁴ See further: E Klein 'The UN Human Rights Committee: The General Comments – The evolution of an autonomous monitoring instrument' (2015) 58 *German Yearbook of International Law* 189-230 and P Alston 'The General Comments of the UN Committee on Economic, Social and Cultural Rights' (2010) 104 *American Society of International Law Proceedings* 4 - 7.

²¹⁵ African Commission on Human and Peoples' Rights 'Legal instruments' available at <http://www.achpr.org/instruments/> (accessed 6 September 2017).

²¹⁶ General Comments on Article 14(1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

health status and on the health status of one's partner especially if affected with HIV/AIDS in accordance with internationally recognised standards.

Whereas the Maputo Protocol is hailed for being the first internationally legally binding instrument to recognise the interaction between women's sexual and reproductive health rights and HIV/AIDS,²¹⁷ these provisions do not engender clear state obligations on the part of the state in order to bring them to fruition. Commentators have argued that articles 14(1)(d) and (e) of the Maputo Protocol are marred with confusion and ambiguities that can hinder their implementation and even lead to the very violations that aim to be prevented.²¹⁸ For instance, does the right to be informed on one's health status and the status of one's partner imply mandatory testing which is deemed unethical in international standards and practices?²¹⁹ This lack of clarity on the implications of the provisions and the requisite state obligations necessitated detailed interpretive guidance, which informed the development of the General Comments. As to the substantive content of the Comments, they contain an exhaustive elaboration of articles 14(1)(d) and (e) including a subset of other rights that are necessarily implied in those provisions as well as the respective state obligations.²²⁰ Specifically, the Commission asserts that the rights to self-protection and to be informed of one's health status includes: the right to access information, the right to access sexual and reproductive health services and the right to an enabling legal and policy framework.²²¹

Moreover, in line with this thesis' approach to substantive equality, the Commission focuses on redressing women's disadvantage with regard to HIV/AIDS by highlighting the barriers to sexual and reproductive health rights and calling for their redress.²²² Further, the Commission makes several recommendations in the way of structural change, which are essential to realising substantive equality. These include: sex

²¹⁷ For more on this discussion see: Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 17 above 72 – 84.

²¹⁸ M Geldenhuys, C Kaufulu-Kumwenda, S Nabaneh & K Stefiszyn 'The African Women's Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e) of the Protocol' (2014) 14 *African Human Rights Law Journal* 681 - 704.

²¹⁹ See for instance CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and health), 5 February 1999, UN Doc A/54/38/Rev.1, chap.1 para 22 which provides: 'States parties should not permit forms of coercion, such as non-consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy... that violate women's rights to informed consent and dignity.'

²²⁰ General Comments on Article 14(1) (d) and (e) n 216 above paras 10-24.

²²¹ General Comments on Article 14(1) (d) and (e) n 216 above paras 26-45.

²²² General Comments on Article 14 (1) (d) and (e) n 216 above paras 46-47.

educational programmes in line with the right to information; provision of services such as contraception, antiretroviral, prevention of mother-to-child transmission and post-exposure prophylaxis programmes; and comprehensive funding of public health authorities.²²³

Further, the Commission seems cognisant of the need to promote a positive cultural context where it goes beyond calling for the elimination of harmful practices. On more than one occasion it highlights that as part of a state's obligation to promote, the state should sensitise and collaborate with religious, traditional and political leaders on the rights in question.²²⁴ In doing so, the Commission recognises the lived realities of women in Africa. Finally, the Commission also recognises the intersectional identity of women where it affirms that

[t]he right to right to be informed on one's health status is applicable to all women irrespective of their marital status, including: young and adolescent women, older women, rural women, women who engage in sex work, women who use drugs, women living with HIV, migrant and refugee women, indigenous women, detained women, and women with physical and mental disabilities.²²⁵

However, some commentators argue that while the list is obviously non-exhaustive, sexual minorities are notably absent from the vulnerable groups listed and this amounts to a missed opportunity.²²⁶ Despite this gap, the Comments are overall deemed gender responsive.

4.3.2.2 General Comment No. 2 on sexual and reproductive health rights

This General Comment relates to women's sexual and reproductive rights as provided in articles 14(1)(a), (b), (c) and (f) and articles 14(2)(a) and (c) of the Maputo Protocol.²²⁷ The development of this General Comment was also led by the SRRWA and takes a similar structure to the first one. It elaborates on the normative content of each of the provisions, and then proceeds to outline the general and specific state obligations.

²²³ General Comments on Article 14 (1) (d) and (e) n 216 above paras 26-48.

²²⁴ General Comments on Article 14 (1) (d) and (e) n 216 above paras 23 & 46.

²²⁵ General Comments on Article 14 (1) (d) and (e) n 216 above para 15.

²²⁶ M Geldenhuys & others n 218 above 702.

²²⁷ General Comment No. 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Available at <http://www.achpr.org/instruments/general-comment-two-rights-women/> (accessed 22 October 2017).

In elaborating on the normative content of the various rights, the Commission notes the importance of the elimination of discrimination. For instance, the right to exercise control over one's fertility cannot be enjoyed if one is subjected to discrimination in accessing contraception services. The Commission notes that laws, policies, procedures and practices as well as socio-cultural attitudes that impede access to the rights in question violate women's rights to life, non-discrimination and health.²²⁸ Correspondingly, the Commission elaborates on specific obligations that states should take in order to create an enabling environment for women to exercise their sexual and reproductive rights. These obligations largely fall under the ambit of redressing disadvantage and achieving structural change. They include measures such as: ensuring access to information as well as services, the elimination of obstacles through policies and sensitisation measures and the allocation of financial resources.²²⁹

The Commission also pays attention to women's intersectional identities. It asserts that it is crucial to ensure the availability and accessibility (including financial and geographical) of 'women's sexual and reproductive health-care services, without any discrimination relating to age, health condition, disability, marital status or place of residence.'²³⁰ Here the Commission is cognisant and responding to pre-empt the denial of sexual and reproductive health services to those most susceptible such as girls, women with HIV, women with disabilities, married women and rural women.

Finally, the Commission calls upon states to take special measures 'to address gender disparities, patriarchal attitudes, harmful traditional practices [and] prejudices of healthcare providers'.²³¹ These are some of the most prevalent obstacles to accessing contraception and abortion care services in particular. In calling for their special attention, the Commission displays recognition of the context and barriers for women in Africa. In light of this and all the foregoing, this is yet another gender responsive normative undertaking by the Commission.

²²⁸ As above paras 23-27.

²²⁹ General Comment No. 2 n 227 above paras 51-62.

²³⁰ General Comment No. 2 n 227 above para 29.

²³¹ General Comment No. 2 n 227 above para 60.

4.3.2.3 Joint General Comment on child marriage

The Joint General Comment on Child Marriage is an initiative of the African Commission, led by the SRRWA in collaboration with the African Committee of Experts on the Rights and Welfare of the Child (African Committee of Experts).²³² The collaboration and the comment itself is as a result of the recognition by the two bodies of the intersectional nature of child marriage as it affects girls resulting in discrimination on the basis of sex, gender, age among other factors such as socio-economic and rural statuses. The Commission and the Committee are further cognisant of the vulnerabilities that come with intersectional identities and urge state parties to pay particular attention to ‘address poverty among vulnerable groups, including children in child headed households, children with disabilities and children affected by homelessness, internal displacement and conflict.’²³³ Additionally, in recommending institutional measures to promote access to justice to protect girls from child marriage, states recommend the use of toll-free helplines and free legal aid as a means of facilitating access to justice for vulnerable groups.²³⁴

A gender responsive approach further calls for measures that can result in substantive equality. In this regard, the Commission and the Committee begin by recognising that child marriage ‘is a manifestation of gender inequality’.²³⁵ Towards attaining substantive equality therefore, the Commission and Committee delineate a number of institutional measures that are critical towards redressing disadvantage and achieving structural changes. In particular, institutional measures proposed include: implementing age verification procedures through birth and marriage registration systems, ensuring full enforcement of laws, penalties and sanctions, measures around education such as incentives and school retention policies, access and uptake of health services, access to justice, redress and support measures for those already married, capacity building of relevant enforcement officials, data collection and resource allocation.²³⁶ The foregoing measures are critical in achieving structural change consistent with an enabling

²³²The Joint General Comment of the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage. Available at http://www.achpr.org/files/news/2018/01/d321/joint_gc_acerwc_achpr_ending_child_marriage_eng.pdf (accessed 23 October 2017).

²³³ As above para 47.

²³⁴ Joint General Comment on Child Marriage n 232 above para 39.

²³⁵ Joint General Comment on Child Marriage n 232 above para 11.

²³⁶ Joint General Comment on Child Marriage n 232 above paras 25-45.

environment for the elimination of child marriage and thereby resulting in substantive equality for women and girls.

Since child marriage is highly pervasive, in order to effectively redress the disadvantage and vulnerability faced by girls in this regard, the root causes equally need to be resolved. The Commission and the Committee identify the key root causes of child marriage and simultaneously recommend measures for their redress. These causes include: poverty, all forms of harmful practices and gender inequality and discrimination.²³⁷ This approach is in line with gender responsiveness as any measures that ignore root causes may not result in true and lasting equality.

Finally, the Commission and the Committee adopt a contextualised African response where they call for the involvement of ‘parents, particularly fathers, religious leaders and community leaders in ending child marriage.’²³⁸ This is recognition of the role these actors play as gatekeepers particularly within rural settings. In light of all the foregoing, the Joint General Comment is gender responsive and if implemented faithfully will no doubt lead to the elimination of child or at the very least significant decrease of child marriage in Africa.

4.3.2.4 General Comment No. 4 on the right to redress for victims of torture

General Comment No. 4 elaborates on article 5 of the African Charter, specifically with regard to the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment.²³⁹ Earlier in the thesis while examining the gender responsiveness of the African Charter, article 5 is identified as pivotal to women’s rights protection. This is particularly in addressing gender-based violence against women, which is comprised in the understanding of substantive equality adopted in this thesis.²⁴⁰

²³⁷ Joint General Comment on Child Marriage n 232 above paras 46-50.

²³⁸ Joint General Comment on Child Marriage n 232 above para 53.

²³⁹ General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul, The Gambia 23 February - 4 March 2017. Available at http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr_general_comment_no.4_english.pdf (accessed 16 November 2017).

²⁴⁰ S Fredman ‘Substantive equality revisited’ (2016) 14 *International Journal of Constitutional Law* 731. Sandra Fredman’s second dimension to substantive equality seeks to address stigma, stereotyping, humiliation and violence on the basis of gender among other factors.

For this reason this General Comment offers an avenue to enhance women's rights protection hence its analysis here. As to its substantive contents, the Commission begins by noting that specific instruments including the Maputo Protocol guide it in elaborating the Comments.²⁴¹ In addition, General Comment No. 4 has a section dedicated to sexual and gender-based violence.²⁴² The Commission begins by affirming that

[a]cts of sexual and gender-based violence, or the failure by States to prevent and respond to such acts, may amount to torture and other ill-treatment in violation of Article 5 of the African Charter.²⁴³

The Commission defines and illustrates gendered forms of sexual violence and in so doing, the influence of the Maputo Protocol in the provisions is palpable and desired as this approach can result in substantive equality.²⁴⁴ It also recognises the intersectional identity of women where it calls upon state parties to pay equal concern and effectively address violence meted out against persons with psychosocial disabilities, lesbian, gay, bisexual, transgender and intersex persons.²⁴⁵ If implemented, the Comment can certainly result in substantive equality as envisaged in this thesis.²⁴⁶ To achieve substantive equality, one must redress disadvantage as well as the associated stigma, stereotyping prejudice and violence. Fittingly, the Commission requires states to adopt specific measures to effectively redress '[s]tigma, feelings of guilt or shame, fear of retribution, and the unavailability of support or lack of information about available support, often prevent victims from coming forward.'²⁴⁷ Structural changes are also required in achieving substantive equality. In this regard, the Commission obligates states to take a range of measures to ensure that victims of sexual and gender-based violence obtain redress. These measures are tailored to ensure: documentation, accountability of perpetrators, support to victims, prevention and reparations.²⁴⁸ Finally, to realise substantive equality, the participation of women is critical such as in the way the Comment requires states to ensure 'participation of victims in the elaboration,

²⁴¹ General Comment No. 4 n 239 above para 4.

²⁴² General Comment No. 4 n 239 above paras 57-61.

²⁴³ General Comment No. 4 n 239 above para 57.

²⁴⁴ General Comment No. 4 n 239 above para 58.

²⁴⁵ General Comment No. 4 n 239 above para 59.

²⁴⁶ Fredman 'Substantive equality revisited' n 240 above 712 – 738. This thesis adopts Fredman's four-dimensional approach to substantive equality that includes: (i) to redress disadvantage; (ii) to address stigma, stereotyping, prejudice and violence; (iii) to enhance voice and participation; and (iv) to accommodate difference and achieve structural change.

²⁴⁷ General Comment No. 4 n 239 above para 60.

²⁴⁸ General Comment No. 4 n 239 above para 61.

adoption and implementation of the programmes'.²⁴⁹ Likewise, the inclusion of women is also one of the 4 elements of gender responsiveness. In light of all the foregoing, this General Comment is gender responsive and a notable illustration of how women's concerns should be infused while addressing general norms.

4.3.3 Guidelines

Guidelines are perhaps most like general comments as the Commission seems to utilise them for the elaboration of norms that have some level of permanence. This is in contrast with resolutions that may even relate to an incident or event, although resolutions could also be normative. Guidelines with a direct bearing on women's rights and those that should have a women's rights perspective are analysed in this section.

4.3.3.1 Guidelines on combatting sexual violence and its consequences in Africa

The SRRWA proposed to the African Commission the need to develop and adopt these guidelines in light of the prevalence of sexual violence in Africa during peacetime and wartime, coupled with the lack of adequate national laws for states to address sexual violence and its consequences.²⁵⁰ The Guidelines are a detailed exposition under the heads: regional and international legal framework and its implementation, preventing sexual violence and its consequences, protecting and supporting the victims of sexual violence, investigations and prosecution of sexual violence and the right to reparation.²⁵¹

Beyond legal provisions, the Commission outlines measures towards preventing sexual violence that are in line with accommodation of difference and achievement of structural change. These provisions are such as such as the provisions for states to carry out awareness-raising campaigns. Refreshingly, the target audience of the campaigns are men and boys calling for their accountability and involvement in combating sexual

²⁴⁹ As above.

²⁵⁰ Resolution on Developing Guidelines on Combatting Sexual Violence and its Consequences, ACHPR/Res.365(EXT.OS/XX1)17 adopted at the 21st Extraordinary Session, Banjul, The Gambia, 23 February – 4 March 2017.

²⁵¹ Guidelines on Combatting Sexual Violence and its Consequences in Africa, African Commission on Human and Peoples' Rights. Available at http://www.achpr.org/files/instruments/combating-sexual-violence/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf (accessed 18 November 2017).

violence.²⁵² While requiring states to train its officers such as police, the Commission also includes the need to train ‘traditional and religious leaders and other stakeholders in religious institutions; personnel in community, sports and cultural organisations; and the private sector.’²⁵³ Clearly the Commission recognises women’s contexts in Africa and the importance of involving traditional and other informal structures within communities cannot be gainsaid. Communities particularly in rural set ups can often act as obstacles to accessing justice and also contribute to the shunning and stigmatisation of victims.²⁵⁴ In order to enhance a survivor’s chances of obtaining effective redress and regaining their full participation in their community, the vernacularisation of norms and modalities to protect women is critical altogether leading towards women’s attainment of substantive equality. Substantive equality in this regard can be attained when women enjoy an environment free of sexual violence or when women are able to secure effective redress should it occur.

The Commission in defining victims engages in a discussion of intersectional identities and the resultant vulnerabilities to sexual violence. Women and girls are identified as being subject to double discrimination particularly where their sex or gender interacts with other factors including

race, colour, national origin, citizenship, ethnicity, profession, political opinions or other opinions, health including HIV status, disability, age, religion, culture, socio-economic or matrimonial status, refugee or migrant status, or any other status, sexual orientation, identity or gender expression.²⁵⁵

In a measure of inclusiveness, the Guidelines are generally very focused on the needs of the survivor. For instance, there’s a whole section on reparations that insists on holistic reparations and the participation of victims in reparation programs.²⁵⁶ Participation is in fact one of the elements of a gender responsive approach under the parameters of substantive equality and inclusion. Likewise, the Commission asks states to include and cooperate with local stakeholders and civil society organisations particularly in remote and marginalised areas.²⁵⁷

²⁵² As above 21.

²⁵³ Guidelines in Combatting Sexual Violence n 251 above 22.

²⁵⁴ See for instance: SP Tunamsifu ‘The right to justice: A challenge for survivors of conflict-related sexual violence in the Eastern Democratic Republic of the Congo’ (2015) 15 *African Human Rights Law Journal* 473-495.

²⁵⁵ Guidelines in Combatting Sexual Violence n 251 above 16-17.

²⁵⁶ Guidelines in Combatting Sexual Violence n 251 above 41-42.

²⁵⁷ Guidelines in Combatting Sexual Violence n 251 above 23.

The Guidelines conclude with a section on implementation that is so comprehensive in its scope yet simply articulated such that it is clear to a state exactly what steps it needs to take. In fact, a state could easily adopt wholesale the required measures as its own action plan on combatting sexual violence. The implementation measures include: legislation requirements, governmental measures, establishment of national gender and national human rights institutions, data requirements, gender responsive budgeting and a call to disseminate, train and report on the present guidelines.²⁵⁸

The Guidelines are not only gender responsive but succeed in being a holistic instrument that can guide not only states, but serve as the Commission's own blueprint in its protective and promotional interventions related to sexual violence.

4.3.3.2 Other Guidelines with implications for women's rights

This section discusses other guidelines that while are not on women rights centric issues have or ought to have a gender responsive approach.

*Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*²⁵⁹

These Guidelines have various features that allude to their gender responsiveness. The prohibited grounds of discrimination include sex, gender and sexual orientation among others²⁶⁰ and in so doing bear in mind how intersectional identities can hamper women's access to ESCR. Similarly, the Guidelines also define vulnerable and disadvantaged groups, those who face significant impediment to enjoy ESCR, as including women as well

²⁵⁸ Guidelines in Combatting Sexual Violence n 251 above 44-51.

²⁵⁹ African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' available at http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf (accessed 18 November 2017).

²⁶⁰ As above para 1(d).

as several other groups of which women and girls comprise to their disadvantage.²⁶¹ Further, the Guidelines outline general state obligations such as those to respect, protect, promote and fulfil.²⁶² In addition to these general obligations, it has others it terms as key obligations of which equality is the first and addressed in a manner that could result in substantive equality for instance by requesting states to put in place temporary special measures to accelerate the improvement of the position of vulnerable groups such as women. In fact, the Guidelines do specify the need to attain *de facto* or substantive equality.²⁶³

Further still, in delineating the norms for each socio-economic right found in the African Charter, the guidelines do so by outlining the state obligations, required national plans and policies as well as the specific needs of vulnerable groups and specific measures to ensure their equal enjoyment of ESCR without discrimination.²⁶⁴ This approach is truly gender responsive, as each right brings with it unique concerns and the need for specific measures as opposed to broad stroke calls for equality. A detailed exposition serves to illustrate the gender responsiveness of this approach. In discussing the right to property, equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing for women is highlighted including a state obligation to take measures to modify and prohibit harmful practices that bar women in this regard.²⁶⁵ On the right to work, injustices such as women's unequal pay and workplace harassment on the basis of sex, gender or sexual orientation are highlighted.²⁶⁶ On the right to health, states are called upon to include national action plans that have a gender perspective, and to criminalise violations that impede the right to health such as female genital mutilation,

²⁶¹ African Commission Guidelines on ESCR n 259 above para 1(e). The vulnerable groups identified include: women, linguistic, racial, religious minorities, children (particularly orphans, young girls, children of low-income groups, children in rural areas, children of immigrants and of migrant workers, children belonging to linguistic, racial, religious or other minorities, and children belonging to indigenous populations/communities), youth, the elderly, people living with, or affected by, HIV/AIDS, and other persons with terminal illnesses, persons with persistent medical problems, child and female-headed households and victims of natural disasters, indigenous populations/communities, persons with disabilities, victims of sexual and economic exploitation, detainees, lesbian, gay, bisexual, transgendered and intersex people, victims of natural disasters and armed conflict, refugees and asylum seekers, internally displaced populations, legal or illegal migrant workers, slum dwellers, landless and nomadic pastoralists, workers in the informal sector of the economy and subsistence agriculture, persons living in informal settlements and workers in irregular forms of employment such as home-based workers, casual and seasonal workers.

²⁶² African Commission Guidelines on ESCR n 259 above part II.

²⁶³ African Commission Guidelines on ESCR n 259 above paras 31-38.

²⁶⁴ African Commission Guidelines on ESCR n 259 above part IV.

²⁶⁵ African Commission Guidelines on ESCR n 259 above paras 55(f)-(h).

²⁶⁶ African Commission Guidelines on ESCR n 259 above paras 59(i)-(p).

rape, domestic violence and sexual assault.²⁶⁷ On sexual and reproductive health, the Guidelines take a cue from the Maputo Protocol and restate article 14 while elaborating the norms further by indicating specific measures and widening their scope of application for instance by delving into the sexual reproductive health rights of adolescents.²⁶⁸ On the right to education, states are required to take measures against sexual abuse in schools and the vulnerable position of the girl child is highlighted.²⁶⁹ On the right to culture, the elimination of harmful practices based on sex or gender discrimination is called for.²⁷⁰ On the right to housing, women's unequal access particularly as linked to marital status is highlighted.²⁷¹ Finally, on the right to protection of the family, the equality of spouses receives a detailed elaboration the influence of which is unmistakably derived from articles 6 and 7 of the Maputo Protocol on marriage rights.²⁷² On account of recommending measures towards achieving substantive equality and a thorough exposition on intersectional identities and the resultant impact on enjoying ESCR, the Guidelines clearly seek to respond to the lived realities of women in Africa and are highly gender responsive.

*The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines)*²⁷³

The Luanda Guidelines cover general matters related to detention from a rights-based approach, the guidelines have an entire section dedicated to vulnerable groups which category includes: children, women, persons with disabilities, and non-nationals such as refugees. This thesis in advancing an understanding of substantive equality, as one of the elements of gender responsiveness, notes that one of its key dimensions is that of redressing disadvantage. One of the ways through which the injustice against a historically disadvantaged group or one that enjoys a lower social hierarchy is redressed is through affirmative action or positive discrimination. The guidelines take on a substantive equality approach when they affirm that, special measures for women and

²⁶⁷ African Commission Guidelines on ESCR n 259 above paras 67(x)-(kk).

²⁶⁸ African Commission Guidelines on ESCR n 259 above paras 67(III)-(rrr).

²⁶⁹ African Commission Guidelines on ESCR n 259 above paras 71(p)-(y).

²⁷⁰ African Commission Guidelines on ESCR n 259 above paras 76(e)-(h).

²⁷¹ African Commission Guidelines on ESCR n 259 above paras 79(n)-(r).

²⁷² African Commission Guidelines on ESCR n 259 above paras 95(f)-(n).

²⁷³ African Commission on Human and Peoples' Rights 'Guidelines on the conditions of arrest, police custody and pre-trial detention in Africa'. Available at http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf (accessed 10 November 2017).

other vulnerable groups shall not be considered discriminatory.²⁷⁴ The guidelines also recognise the intersectional identity of women, which often result in multiple levels of oppression. For instance, in addition to women generally, the guidelines specifically highlight: pregnant women, nursing women, sex workers, sexual minorities, the elderly, persons with albinism, persons with HIV/AIDS, refugees and racial minorities which are all identities that give rise to specific needs or that can intersect with sex and gender to exacerbate vulnerability for women in prisons and detention. In addition to these foundational principles, the guidelines also provide for specific principles and safeguards related to women. On principles, states are called upon to develop laws, policies and practices that safeguard the special needs and rights of women subject to arrest and detention.²⁷⁵ Safeguards for arrest and detention are also made with the general principle that arrest, custody and pre-trial detention for women and girls should only be done when absolutely necessary. The safeguards seem to address concerns deriving from women's sex as well as gender related traits. They include: searching by female officials, being held separately from male detainees, facilitation to contact their families and attend to caretaking responsibilities for children including reasonable suspension of detention and facilities to meet specific hygiene and reproductive health care needs. These safeguards respond to women's circumstances by addressing the pertinent issues that relate to them from a physiological and social perspective. Further in other sections of the guidelines, an environment suitable to women is also considered. For instance, while issuing guidelines for persons in police custody and pre-trial detention, the state is required to ensure the appropriate separation of categories of detainees while providing for the special needs of vulnerable groups of which women are included. Overall, the guidelines are undeniably gender responsive.

Guidelines on policing assemblies in Africa

The Guidelines on Policing Assemblies in Africa stress the need for training all public officials that are involved in the facilitation of the management of assemblies. In response,

²⁷⁴ As above 23 para 30. 'Measures designed to protect the rights of persons with special needs, such as children, women (especially pregnant and breastfeeding women), persons with albinism, the elderly, persons with HIV/AIDS, refugees, sex workers, on the basis of gender identity, refugees and asylum seekers, non-citizens, stateless persons, racial or religious minorities, or other categories of persons with special needs shall not be considered discriminatory or applied in a manner that is discriminatory.

²⁷⁵ African Commission 'Guidelines on the conditions of arrest, police custody and pre-trial detention in Africa' n 273 above 25 para 32(a).

the African Commission has since developed a Training Manual based on these Guidelines.²⁷⁶ The manual utilises various case studies, which take into consideration the protection of women as a vulnerable group, safety of women and children among protesters and responding to sexual violation of women during protests.²⁷⁷ Further, in the various exercises, the manual asks participants to reflect on whether their actions (hypothetical police responses) fit the principles of non-violence, legality, equality before the law, proportionality, necessity and discrimination.²⁷⁸ In this way, the manual highlights to law enforcement officers how their response to protests and protesters should bear in mind various factors including gender responsiveness.

Guidelines and measures for the prohibition of torture (Robben Island guidelines)

A reading of the Robben Island Guidelines shows them to be gender blind²⁷⁹ but this lacuna has since been addressed by General Comment No. 4 on the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment discussed foregoing in section 4.3.2.4.

4.4 State reporting

Article 62 of the African Charter and article 26(1) of the Maputo Protocol require states to report on legislative and other measures taken to give effect to the rights contained in the respective instruments. As part of its promotional mandate, the African Commission receives and examines these state reports. In fact, one commentator considers the Commission's examination of state reports as the core of its promotional mandate.²⁸⁰ The

²⁷⁶ African Commission on Human and Peoples' Rights 'Training manual based on the Guidelines for Policing of Assemblies by Law Enforcement Officials in Africa' available at http://www.achpr.org/files/special-mechanisms/human-rights-defenders/policing_of_assemblies_training_manual.pdf (accessed 10 December 2017).

²⁷⁷ As above 29, 43-45.

²⁷⁸ African Commission Training Manual n 276 above 44.

²⁷⁹ African Commission on Human and Peoples' Rights 'Robben Island Guidelines for the prohibition and prevention of torture in Africa' available at <http://www.achpr.org/mechanisms/cpta/robben-island-guidelines/> (accessed 10 December 2017).

²⁸⁰ Viljoen *International human rights law in Africa* n 17 above 349.

discussion will focus on two limbs, the state reporting norms developed and the practice of the African Commission with a focus on women's rights.²⁸¹

4.4.1 State reporting guidelines

The African Commission has developed various normative guidelines to assist states in the development of state reports. These guidelines are developed in accordance with the Commission's mandate 'to formulate and lay down principles' as established in the African Charter.²⁸² The Commission has developed a wide array of guidelines for this purpose, but only the Guidelines related to the Maputo Protocol will be discussed in detail with the rest receiving a brief highlight.

In 1989, the African Commission developed the Guidelines for National Periodic Reports²⁸³ to guide states in reporting under the African Charter. These Guidelines have been described as 'too detailed, lengthy and in some areas repetitive and unnecessarily complex.'²⁸⁴ They also 'misguidedly' included guidelines for the Convention on the Elimination of All Forms of Racial Discrimination and CEDAW.²⁸⁵ Indeed it is quite peculiar that the Commission elaborates extensively on how states should submit a CEDAW conversant report²⁸⁶ as opposed to articulating a women's rights reporting regime out of the provisions of the Charter. At the time, whereas article 18(3) was by then the only women's rights-centric normative standard, it would still have been creatively utilised to craft a reporting regime on how women enjoy rights protected within the Charter. In its guidance to states on reporting under article 18, the Commission titles the section: 'Protection of the family, mothers and children' and requires states to report on measures taken only with regard to measures for maternity protection.²⁸⁷ Viewing

²⁸¹ For an elaborate discussion on state reporting at the African Commission see: Viljoen *International human rights law in Africa* n 17 above 349-369, Evans, M & Murray, R 'The state reporting mechanism of the African Charter' in Evans, M & Murray, R (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008), GW Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 268-284 and F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (2000) 44 *Journal of African Law* 110-118.

²⁸² African Charter n 3 above art 45(1)(b).

²⁸³ African Commission on Human and Peoples' Rights 'Guidelines for National Periodic Reports'. Available at http://www.achpr.org/files/instruments/guidelines_national_periodic_reports/achpr_guide_periodic_reporting_1989_eng.pdf (accessed 30 November 2017).

²⁸⁴ Mugwanya n 281 above 279.

²⁸⁵ Viljoen *International human rights law in Africa* n 17 above 353 and Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' n 281 above 113.

²⁸⁶ African Commission 'Guidelines for National Periodic Reports' n 283 above 22-23.

²⁸⁷ African Commission 'Guidelines for National Periodic Reports' n 283 above 7-8.

women only as mothers, the Commission completely ignores the intersectional identities of women. Rebecca Cook and Simone Cusack in their treatise on gender stereotyping demonstrate that the sex role stereotype of women ‘as a reproductive instrument for the human race’ is a harmful assumption.²⁸⁸ Writing about the elimination of gender stereotypes by governments, they conclude that ‘gender stereotypes discriminate against women and impede the realisation of their substantive equality.’²⁸⁹ The Guidelines undoubtedly fail the gender responsiveness test.

Frans Viljoen notes that for the many reasons, ranging from complexity to generally being misguided, the Guidelines have been supplemented, at first with a version known as the ‘Umozurike amendment’ that had only 11 points and was deemed too brief and vague for purpose.²⁹⁰ The second supplement came by way of the ‘Simplified Guidelines for State Reporting’²⁹¹ or the ‘Dankwa document’ as they were prepared by the then Commissioner Dankwa.²⁹² The Simplified Guidelines are a vast improvement, more concise, logical and Viljoen urges states to follow these guidelines in their reporting.²⁹³ Another commentator finds the Simplified Guidelines ‘precise in requiring states to report on actions they have taken to protect vulnerable groups. With regard to women, state parties should comprehensively report on the predicaments that afflict women’.²⁹⁴

The African Commission has also developed Guidelines pertaining to economic, social and cultural rights, for State reporting (Tunis Reporting Guidelines).²⁹⁵ The African Commission authorised the development of these Guidelines in cognisance of three key factors: the African Charter enshrines economic, social and cultural rights; all rights are indivisible and interdependent; despite the consensus on indivisibility, economic, social

²⁸⁸ RJ Cook & S Cusack *Gender stereotyping: Transnational legal perspectives* (2010) 89.

²⁸⁹ As above 85.

²⁹⁰ Viljoen *International human rights law in Africa* n 17 above 352.

²⁹¹ Reprinted in Viljoen ‘State reporting under the African Charter on Human and Peoples’ Rights: A boost from the south’ n 281 above 111-113 and Viljoen *International human rights law in Africa* n 17 above 352-353.

²⁹² Viljoen *International human rights law in Africa* n 17 above 352-353.

²⁹³ Viljoen ‘State reporting under the African Charter on Human and Peoples’ Rights: A boost from the south’ n 281 above 113.

²⁹⁴ Mugwanya n 281 above 279.

²⁹⁵ African Commission on Human and Peoples’ Rights ‘State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights’ available at http://www.achpr.org/files/instruments/economic-social-cultural-guidelines/achpr_instr_tunis_reporting_guidelines_esc_rights_2012_eng.pdf (accessed 30 November 2017).

and cultural rights remain marginalised.²⁹⁶ A state's reporting obligation under article 62 of the Charter therefore extends to the Tunis Reporting Guidelines. Drafted in similar fashion to and heavily referencing the earlier analysed Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, which were found to be gender responsive, the Tunis Reporting Guidelines are similarly gender responsive.

Focus is now turned to the Maputo Protocol Reporting Guidelines.²⁹⁷ The development of these Reporting Guidelines was led by the SRRWA and the mandate deems it as one of its achievements.²⁹⁸ Development of the Reporting Guidelines in fact formed part of the initial mandate of the SRRWA.²⁹⁹ The Maputo Protocol creates an additional reporting obligation in article 26(1) but in doing so links the obligation with article 62 of the African Charter.³⁰⁰ It has been observed that the effect of this provision is that 'the Protocol does not envisage an independent report under its ambit, but one that is subsumed in a periodic report under the African Charter.'³⁰¹ Accordingly, as to the reporting format, the Reporting Guidelines require as follows:³⁰²

A state party to the African Charter and the Protocol must submit its report in two parts: Part A, dealing with the rights in the African Charter, and Part B, dealing with the rights in the Protocol.

The Reporting Guidelines are structured in a logical thematic format and the themes consist of all of the substantive provisions in the Maputo Protocol. The eight themes are: equality/non-discrimination; protection of women from violence; rights relating to marriage; health and reproductive rights; economic, social and cultural rights; right to peace; protection of women in armed conflicts; and rights of specially protected women's

²⁹⁶ Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04 adopted at the 36th Ordinary Session, Dakar, Senegal, 23 November - 7 December 2004 preamble.

²⁹⁷ African Commission on Human and Peoples' Rights 'Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa'. Available at <http://www.chr.up.ac.za/index.php/gender-unit-documents/gender-african-union-documents.html#achpr> (accessed 30 November 2017).

²⁹⁸ Intersession report of the mechanism of the Special Rapporteur on the Rights of Women in Africa since its establishment n 22 above paras 14-16.

²⁹⁹ African Commission 'Special Rapporteur on Rights of Women: Mandate and biographical notes' n 14 above para 7.

³⁰⁰ Maputo Protocol n 70 above art 26(1) requires states parties to 'ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realization of the rights herein recognised.'

³⁰¹ J Biegon 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria gender expert meeting, 6-7 August 2009' (2009) 9 *African Human Rights Law Journal* 624.

³⁰² Maputo Protocol Reporting Guidelines n 297 above.

groups.³⁰³ This thematic approach was preferred as it emphasises the indivisibility of rights and enhances ‘the logical flow of the dialogue between the African Commission and representatives of state parties during the examination of state reports.’³⁰⁴ This approach is also in line with gender responsiveness. As has been established, in order to achieve substantive equality, a holistic approach is required and the African Commission demonstrates a deft understanding of this idea. In illustration, in outlining the theme on protection of women from violence, the Commission includes the following subset of rights:³⁰⁵

Bodily integrity and dignity, including sexual violence, trafficking of women and medical and scientific experimentation (article 3 & 4)

Practices harmful to women, including female genital mutilation (article 5)

Female stereotypes (article 4(2)(c))

Sexual harassment

Domestic violence (article 4(2)(a))

Support to victims of violence, including health services and psychological counselling (article 5(c))

In doing so, the Commission simply and effectively communicates to states and interested stakeholders the subset of rights entailed in protecting women from violence.

Further, in respect of each theme and the underlying provisions, states must report on the specific measures taken toward implementation. The Commission gives clear guidance on this by requiring states to indicate measures taken with regard to: legislation, administrative measures, institutions, policies and programmes, public education, remedies, challenges experienced, accessibility of rights for all and disaggregated statistics.³⁰⁶ These measures are wholly gender responsive, for instance intersectional discrimination is recognised where the in expanding on accessibility, the Commission requests information on whether ‘the particular rights [are] accessible to all women, especially rural/impoverished women’.³⁰⁷ Most of the measures also speak to substantive equality as understood in this thesis, which calls for disadvantage to be redressed which can be achieved through the legal and policy measures sought. It also

³⁰³ Maputo Protocol Reporting Guidelines n 297 above section iv.

³⁰⁴ J Biegon ‘Towards the adoption of guidelines for state reporting under the African Union Protocol on Women’s Rights: A review of the Pretoria gender expert meeting, 6 - 7 August 2009’ (2009) 9 *African Human Rights Law Journal* 631.

³⁰⁵ Maputo Protocol Reporting Guidelines n 297 above section iv (2).

³⁰⁶ Maputo Protocol Reporting Guidelines n 297 above section iii.

³⁰⁷ Maputo Protocol Reporting Guidelines n 297 above section iii (i).

calls for the redress of stigma, stereotyping and prejudice, which can be achieved through public education measures indicated. To achieve substantive equality, accommodating differences and making structural changes is essential and the Commission can be seen to seek a host of information in this regard. Further, the Commission can utilise the information obtained from disaggregated statistics to assess the inclusiveness of women. In light of the foregoing, the Maputo Protocol Reporting Guidelines are highly progressive and gender responsive.

4.4.2 The gender responsiveness of the state reporting practice of the African Commission

Since the thesis focuses on the African Commission and not states, the focus will be on any observable trends of the Commission during examination and as contained in concluding observations. The state reporting mechanism will be analysed separately under the African Charter and Maputo Protocol regimes for its gender responsiveness. A few states are selected as case studies in order not to analyse in the abstract.

4.4.2.1 State reporting under the African Charter regime

The African Charter mandates state parties to submit state reports every two years on the legislative and other measures that states have taken with a view to giving effect to the rights in the Charter.³⁰⁸ The state reporting process from the Commission's end entails receiving state reports, examination of the reports during its public sessions in a process of constructive dialogue with the states and thereafter the issuing of concluding observations.³⁰⁹ To guide its examination of state reports during sessions, the Commission utilises a questionnaire which it prepares in advance and shares with a state a month before the state is scheduled to report. This gives the states an opportunity to obtain additional information and enhance the constructiveness of the dialogue during the examination process. The questionnaire is of course a guide and does not restrict

³⁰⁸ African Charter n 3 above art 62.

³⁰⁹ For a detailed discussion of the state reporting process see: Viljoen *International human rights law in Africa* n 17 above 349-369, GM Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 268-284 and K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261-300.

Commissioners from asking further emerging questions. This methodology mirrors the state reporting practice in the UN system.³¹⁰

Selection of a case study for examination on reporting under the African Charter had to satisfy four criteria: availability of the Commission's questionnaire, availability of the state report, availability of the concluding observations and submission of the report before the coming into force of the Maputo Protocol in 2005. The reason for the last criterion is a desire to assess how the Commission evaluated women's rights concerns prior to the normative change in the women's rights landscape on the entering into force of the Maputo Protocol. Satisfying these simple criteria turned out to be more difficult than imagined owing largely to the unavailability of a record of the Commission's questionnaire or the concluding observations. On this latter challenge, Viljoen records that, initially, the Commission did not always adopt concluding observations and even when they did this did not always form a part of their official records before it was explicitly required by the Commission's 2010 Rules of Procedure.³¹¹

In light of the foregoing, the only country that met the criteria is Mauritania. Mauritania submitted its report before the coming into force of the Maputo Protocol and its reporting timeline falls exclusively under the African Charter regime. Mauritania's initial report was a combination of all the outstanding reports, a practice which Viljoen notes is more of a rule rather than the exception.³¹² The Commission's examination document contains a summary of the state's report and a questionnaire.³¹³ The general questions relate to Mauritania's obstacles in development of the report and whether there were contributions from other government ministries/ structures as well as human rights NGOs. Apart from one question seeking unemployment sex disaggregated data, the questions are otherwise gender blind and focus largely on civil and political rights.³¹⁴ The

³¹⁰ The CEDAW Committee for instance also supplies in advance a list of issues to states intended to clarify and complete information required. See: 'Reporting guidelines of the Committee on the Elimination of Discrimination against Women'. Available at <https://www2.ohchr.org/english/bodies/cedaw/docs/Annex1.pdf> (accessed 19 January 2018).

³¹¹ Viljoen *International human rights law in Africa* n 17 above 365-366.

³¹² Viljoen *International human rights law in Africa* n 17 above 355.

³¹³ Summary and draft questionnaire relating to the periodic report the Islamic Republic of Mauritania (on file with the author).

³¹⁴ As above.

concluding observations on their part are not very effective. For instance, in identifying factors that restrict enjoyment of the Charter, the Commission indicates as follows:³¹⁵

The entrenched and unhealthy look of the society on some aspects of human rights, including regarding minorities and women, stands in the way to extensively and effectively implement the African Charter in Mauritania.

The drafting of the above issue is too broad for purpose as ideally states should rely on concluding observations to improve in rights protection and promotion. In noting areas of concern the Commission observes that the 'perception of women in Mauritania remains to hamper their equal enjoyment of their human rights. Of particular concern is the potentially discriminatory application of repudiation in marriages'.³¹⁶ While this concern does not suffer from vagueness, it lacks a subsequent recommendation. In the recommendations section, the Commission offers solutions on a focus on women with regard to education and eradication of poverty,³¹⁷ yet these had not even been raised as issues.

Other concluding observations during the unitary African Charter regime are similarly drafted. In the concluding observations to Niger's initial report,³¹⁸ the Commission identifies areas of concern as including: 'exercise by women of their rights remains very limited despite the existence of a national legal framework that puts men and women on the same footing';³¹⁹ and the rights of women, children, minorities and other vulnerable groups are not adequately protected'.³²⁰ The framing of the issues does not rise above rhetoric neither are they accompanied with specific recommendations. The women's rights specific recommendations themselves include a recommendation to incorporate the gender dimension in all programmes, to take measures to ensure women's increased role in government and to ratify the Maputo Protocol,³²¹ which had by then been adopted but had not yet come into force. The main challenge with these recommendations is that they are generic, not considering any contextual specificities provided by Niger and thereby defeating the objective of state reporting.

³¹⁵ Concluding observations and recommendations on the initial report of the Islamic Republic of Mauritania, 31st Ordinary Session, Pretoria South Africa, 2 - 16 May 2002 para 10.

³¹⁶ As above para 12.

³¹⁷ Mauritania Concluding observations n 315 above paras 16-17.

³¹⁸ Concluding observations and recommendations on the initial report of the Republic of Niger, 35th Ordinary Session, Banjul, The Gambia, 21 May - 4 June 2004.

³¹⁹ As above para 13.

³²⁰ Niger Concluding observations n 318 above para 15.

³²¹ Niger Concluding observations n 318 above paras 23, 28 & 30.

Clearly, the Commission's initial state reporting practice ranges from gender blind to tokenism. In the few instances where women's issues are considered, it is not in a manner that addresses any of the parameters envisaged in gender responsiveness.

4.4.2.2 State reporting under the Maputo Protocol regime

To ensure implementation of the Maputo Protocol, states are called upon to submit periodic reports in line with article 62 of the African Charter.³²² This means that a state party to both the Charter and the Protocol submits its report in two parts: Part A, dealing with the rights in the African Charter, and Part B, dealing with the rights in the Protocol.³²³

Reporting under the Maputo Protocol has been limited, especially in the initial years. The first report on the Maputo Protocol was received in 2013 from Malawi,³²⁴ a period of no less than eight years after 2005 when the Protocol had come into force. In trying to figure out this initial dearth in reporting, the most relevant factor is that the Commission only adopted the Maputo Protocol Reporting Guidelines in 2009, even though the Protocol had been adopted six years earlier in 2003. The Commission is thus partly to blame for the initial non-reporting by states. One commentator observes that during examination of state reports during this initial period (2005-2009), Commissioners fielded questions on women's rights issues while not basing them on the Maputo Protocol. The commentator offers the explanation that this trend suggests that the African Commission, perhaps taking blame for not developing reporting guidelines, did not expect states to comply with their reporting obligation under the Protocol.³²⁵

Since Malawi's pioneering report, another seven states have reported under the Maputo Protocol: Nigeria, South Africa, Burkina Faso, Namibia, Rwanda, Mauritania and the Democratic Republic of Congo.³²⁶ Of these, only Nigeria has reported twice with the

³²² Maputo Protocol n 70 above art 26(1).

³²³ Maputo Protocol Reporting Guidelines n 297 above.

³²⁴ African Commission on Human and Peoples' Rights, States, 'Malawi: Initial and combined reports, 1995 -2013' <http://www.achpr.org/states/malawi/reports/1-1995-2013/> (accessed 21 January 2018).

³²⁵ Biegon 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria gender expert meeting, 6-7 August 2009' 624.

³²⁶ Information sourced from: African Commission on Human and Peoples' Rights, States, 'State reports and concluding observations' <http://www.achpr.org/states/reports-and-concluding-observations/#> (accessed 21 January 2018).

remaining states having reported just once.³²⁷ These states have followed the prescribed Maputo Protocol Reporting Guidelines with varied levels of compliance. Still, eight state reports out of a possible 39 state parties to the Protocol in one and a half decades of the Protocol's existence is worrying.³²⁸ In assessing the Protocol's enforcement, Rudman makes a comparative assessment of reporting under the Maputo Protocol and the African Children's Charter and finds that 'of the 48 member states to the African Children's Charter, 33 states have submitted their initial reports, and seven have subsequently submitted periodic reports.'³²⁹ Rudman concludes that states do not consider reporting under the Protocol a priority,³³⁰ especially when you consider that the reports are more or less coming from the same states.

In assessing the Commission's role, there could possibly be another explanation for non-reporting. Far from a lack of will on the part of the states, it could be a lack of information. To support this claim, there is an undisputed correlation between the first states that reported and contact with state reporting trainings by the Centre for Human Rights, University of Pretoria, in collaboration with the SRRWA. In fact, most of the reports prepared in conformance with the Guidelines are from states whose officials have attended the state reporting trainings.³³¹ This shows that if the Commission, particularly the SRRWA, puts in more concerted effort towards popularisation of state reporting obligations and modalities, reporting is likely to increase.

In terms of the Commission's gender responsiveness in the state reporting procedure, a few countries are now assessed. An attempt is made to evaluate those countries where the Commission's questionnaire, the state report and the concluding observations are available. In light of the criteria, Malawi, South Africa and Namibia are examined.

³²⁷ As above.

³²⁸ This is the number of states that has ratified the Protocol as at August 2018. African Union 'List of countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' <https://au.int/sites/default/files/treaties/7783-sl-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa.pdf> (accessed 21 August 2018).

³²⁹ A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 330.

³³⁰ As above.

³³¹ A Budoo 'Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union' (2018) 18 *African Human Rights Law Journal* 66-67.

Malawi's initial report follows the prescribed reporting format and was examined by the Commission in 2015.³³² The questionnaire did not have a separate section dedicated to questions under the Maputo Protocol and the Commission instead fielded its women's rights related questions during consideration of article 18 of the Charter, which includes the non-discrimination of women clause.³³³ Being the first Maputo Protocol report, it appears that the Commission had not yet formulated the distinct consideration of the Maputo Protocol report that characterises its later sessions. That notwithstanding, the questions are more thorough than those under the African Charter regime presumably because the Commission had more information to work with from a women's rights perspective.

Illustrating the Commission's process with Malawi by way of a thematic snapshot, the Commission made a concerted effort to follow up on prevalent harmful practices not contained in the report but nonetheless affecting women and girls in Malawi. The Commission for instance asked about girls' initiation rites such as the practice of *Kupimbira* where girls as young as 12 are forced to have sex with older men.³³⁴ Similarly, whereas Malawi has one of the highest child marriage rates in the world,³³⁵ its own report made no mention of this only briefly citing early marriage in the context of school dropouts.³³⁶ The Commission however in its questionnaire asked what Malawi is doing about the challenges of child marriage and related issues such as poverty especially for girls in the rural areas.³³⁷ More so, in its concluding observations, the Commission directed Malawi to adopt measures to effectively end child marriage.³³⁸ All the foregoing measures by the Commission demonstrate recognition of intersectional identities and resultant vulnerabilities as well as the lived realities of women in Malawi. In a significant

³³² African Commission on Human and Peoples' Rights, States, Malawi <http://www.achpr.org/states/malawi/reports/1-1995-2013/> (accessed 23 January 2018).

³³³ Observations and Questions on the Initial and Combined Report of the Republic of Malawi to the African Commission on Human and Peoples' Rights (on file with author).

³³⁴ As above para 57.

³³⁵ Malawi has one of the highest rates of child marriage in the world, with approximately 1 in 2 girls married by the age of 18 see further: Girls not brides 'Child marriage around the world: Malawi' <https://www.girlsnotbrides.org/child-marriage/malawi/> (accessed 23 January 2018).

³³⁶ Republic of Malawi, Report to the African Commission on Human and Peoples' Rights, Implementation of the African Charter on Human and Peoples' Rights 1995-2013 and the Protocol to the African Charter on the Rights of Women 2005 – 2013 para 172.

³³⁷ Questions on Malawi n 333 above para 59.

³³⁸ Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995 – 2013), 57th Ordinary Session, Banjul, The Gambia, 4 – 18 November 2015 para 112.

twist, Malawi later amended its Constitution setting a strict 18 years plateau as the minimum age of marriage, whereas it previously allowed children between ages of 15 and 18 to marry with parental consent.³³⁹ This amendment is largely attributed to an amicable settlement process by the African Committee of Experts,³⁴⁰ and this twofold state accountability process is desirable for the strengthening of the rights of girls who face multiple vulnerabilities.

South Africa's initial report on the Maputo Protocol was considered in 2016.³⁴¹ The state report was quite extensive³⁴² and the Commission developed an equally detailed questionnaire.³⁴³ Apart from general observations and questions, the questionnaire also included thematic questions from other special mechanisms. Under the Maputo Protocol section, the Commission asked questions on: the possibility and steps towards legislation domesticating the Protocol, institutional steps taken to redress sexual violence, the inclusion of corrective rape in its criminal laws, programmes targeting child marriage practices such as *Ukuthwala*,³⁴⁴ efforts to harmonise the age of marriage to 18 with no exception among many other questions.³⁴⁵ These questions are in line with the Protocol's requirements for states to put in place legislative and other measures to realise women's rights. The questions also demonstrate the Commission's recognition of intersectional grounds of discrimination. For instance, for girls, being subjected to *Ukuthwala* and for lesbians and trans persons, being subjected to corrective rape. Commendably, the Commission also asked questions in line with substantive equality as understood in this thesis where it seeks to know how women are encouraged to break their silence to report

³³⁹ Human Rights Watch 'Malawi Amends Constitution to Remove Child Marriage Loophole' available at <https://www.hrw.org/news/2017/02/23/malawi-amends-constitution-remove-child-marriage-loophole> (accessed 25 January 2018).

³⁴⁰ Communication No. 4/Com/001/2014, *Institute for Human Rights and Development in Africa (IHRDA) v Malawi*, African Committee of Experts on the Rights and Welfare of the Child. See also: BD Mezmur 'Happy 18th birthday to the African Children's Charter: not counting its days but making its days count' (2017) 1 *African Human Rights Yearbook* 145-146.

³⁴¹ African Commission on Human and Peoples' Rights, States, South Africa <http://www.achpr.org/states/south-africa/reports/2nd-2003-2014/> (accessed 25 January 2018).

³⁴² As above.

³⁴³ Questionnaire, The Combined Second (2nd) Periodic Report of the Republic of South Africa to the African Commission on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, 58th Ordinary Session, Banjul, The Gambia, 6 – 20 April 2016 (on file with author).

³⁴⁴ *Ukuthwala* is a practice whereby, as a preliminary procedure to a customary marriage, a young man forcibly takes a girl to his home. See further: L Mwambene & J Sloth-Nielsen 'Benign accommodation? *Ukuthwala*, 'forced marriage' and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 1-22.

³⁴⁵ Questionnaire on South Africa n 343 above paras 102-123.

harmful practices and how shelters for trafficked victims accommodate women and girls.³⁴⁶

Illustrating an understanding of substantive equality further, when asking the state questions on redressing domestic violence, the Commission asked about the complaints system (legal measures), comprehensive budgets (fiscal measures) as well as steps taken to address poverty and stereotypes together with traditional and religious leaders (root causes).³⁴⁷ Gender responsiveness in this thesis and indeed the Maputo Protocol calls for just such a holistic approach in the redress of violence and other violations.

In the concluding observations, the Commission dedicates an equal amount of attention to commending the state on positive developments on the one hand and expressing areas of concern and recommendations on the other.³⁴⁸ In articulating its concerns on women's rights, the Commission displays specificity. For instance, it cites the 'lack of a provision in the *Sexual Offences and Related Matters Act* specifying corrective rape as a sexual offence'.³⁴⁹ The recommendations made include legal and other measures and are clearly in response to the areas of concern raised,³⁵⁰ unlike under the initial African Charter regime, where the recommendations appeared to be random and not related to issues raised. In fact, a correlation is evident from the state report, to the examination through the questionnaire and finally to the concluding observations. This makes the state reporting process responsive and effective. Overall, the questionnaire and the concluding observations are extremely detailed and gender responsive.

Namibia's initial report under the Protocol was examined in 2016.³⁵¹ The questionnaire on the Maputo Protocol contains detailed questions that seem to be informed by the state report as well as further research into the country's situation. Where the question is informed by the report, the Commission notes as such, including a reference to the

³⁴⁶ Questionnaire on South Africa n 343 above paras 108 & 110.

³⁴⁷ Questionnaire on South Africa n 343 above para 118.

³⁴⁸ Concluding observations and recommendations on the Combined second periodic report under the African Charter on Human and Peoples' Rights and the Initial report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa.

³⁴⁹ As above para 33.

³⁵⁰ South Africa concluding observations n 348 above para 49.

³⁵¹ African Commission on Human and Peoples' Rights, States, Namibia <http://www.achpr.org/states/namibia/reports/6th-2011-2014/> (accessed 28 January 2018).

respective section within the state report.³⁵² This is a good approach as it shows that the Commission does not restrict itself to information contained in the state report only but rather all women's rights concerns within its knowledge.

Using one thematic line of investigation for illustration, the Commission began by commending Namibia for various equality and non-discrimination constitutional provisions, laws and policies.³⁵³ It then illustrated by use of statistics how the situation in practice differed from the law and from affirmative action clauses with regard to women's representation and queried: 'The Commission would therefore like to know whether really this constitutes equality in the real sense?'³⁵⁴ This line of questioning is clearly in line with gender responsiveness as it illustrated an understanding of the dissonance between formal and substantive equality. Still on this line of investigation, the Commission clearly demonstrated its understanding of inclusion being beyond numbers where it queried as follows:³⁵⁵

Are there any programmes which target female candidates for inclusion in Parliament? Does the State have any training and skill development measures aimed at improving the quality of female Parliamentarians that will improve their visibility, effectiveness and impact in national issues?

This is in line with the type of inclusion and participation of women envisaged under the gender responsiveness model, inclusion that is likely to be impactful. Further still, on women's participation in the public sphere, the Commission was keen to hear on the measures that are being implemented to ensure that rural and indigenous women also benefit.³⁵⁶ Clearly a recognition of intersectional identities and the heightened disadvantages of some women. Finally, the Commission asked for gender disaggregated statistics on influential positions within government ministries and department.³⁵⁷ Impressively, the foregoing line of inquiry satisfies all parameters of a gender responsive approach. Other questions are similarly holistic.

The Commission's concluding observations to Namibia begin with commendations and then proceed to areas of concern and recommendations in what appears to be a

³⁵² Questions on the sixth periodic report of the Republic of Namibia paras 55-68 (on file with the author).

³⁵³ As above para 56.

³⁵⁴ Questions on Namibia n 352 above para 57.

³⁵⁵ Questions on Namibia n 352 above para 58.

³⁵⁶ Questions on Namibia n 352 above para 59.

³⁵⁷ Questions on Namibia n 352 above para 60.

pattern.³⁵⁸ An interesting issue raised by the Commission is that Namibia's low representation of women in parliament and other decision-making positions is contrary to the 50/50 standard envisaged under the SADC Protocol on Gender and Development.³⁵⁹ This normative dexterity on the part of the Commission is highly strategic and significant towards strengthening state accountability under varied standards. It is also a good example of cooperation within the African human rights system. The recommendations mirror the questionnaire and the areas of concern. Echoing its concern for different categories of women, the Commission directs Namibia to provide 'statistical data on indigenous women who have served in Government structures and those who are chiefs and queens of their communities'.³⁶⁰ In doing so, the Commission adopts a contextualised African response as required in gender responsiveness. The rationale is that women have a right to a positive cultural context as guaranteed by the Protocol and this includes the right to participate in the determination of cultural policies,³⁶¹ which ostensibly they can only do through leadership positions within informal and traditional systems.

Unfortunately, due to the unavailability of concluding observations corresponding with available questionnaires, the assessments of Burkina Faso, Rwanda, Mauritania and Nigeria were not made. It is unfortunate that the Commission still has not regularised its adoption and publication of concluding observations. While they are primarily addressed to the state, concluding observations are of great utility to other stakeholders such as women's rights NGOs. NGOs can rely on the observations to hold states accountable while also informing their own advocacy interventions.

Despite this latter challenge, the Commission's state reporting process under the Maputo Protocol regime demonstrates great progress since the initial years and it is clearly gender responsive.

³⁵⁸ Concluding Observations and Recommendations on Sixth Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011 – 2013), 58th Ordinary Session, Banjul, The Gambia, 6 – 20 April 2016.

³⁵⁹ As above para 33.

³⁶⁰ Namibia concluding observations n 358 above para 51 (ix).

³⁶¹ Maputo Protocol n 70 above art 17.

4.5 Conclusion

As is evident from the breadth of the analysis, the Commission has an extensive promotional mandate. Like the special rapporteurs of the UN system, that have been likened to crown jewels, the special mechanisms of the African Commission have greatly gained in significance. Their influence and leadership are noted particularly in shepherding the Commission's development of normative instruments. This is however a strength and weakness. The special mechanisms seem to be focused on the development of documents with far less focus displayed towards interventions for the popularisation and implementation of all the formulated standards. Aside from the SRRWA, the inculcation of a gender responsive approach is varied among the mechanisms with some displaying an exceptionally nuanced approach while others completely ignore women's rights concerns.

From a development of normative standards perspective, as already noted above, the Commission has engaged in a fervent norms-setting spree. Most of the norms, particularly the more recent instruments such as general comments, are without a doubt gender responsive. It is clear that women in Africa have now obtained *de facto* equality by virtue of the elaborate normative landscape in their favour. For this, the Commission can be said to have laid the foundation towards, but does not fully satisfy the gender responsiveness quotient which places strong emphasis on substantive equality.

Perhaps it is the state reporting process that fully displays the Commission's coming of age. Initially, particularly under the African Charter reporting regime, the Commission ranges from gender blind to a superficial display of women's rights concerns. Under the Maputo Protocol regime, the Commission demonstrates a greater understanding of gender responsiveness. Its line of inquiry is holistic and its concluding observations are well thought out. Overall, it is clear that the Commission has made great strides to formulate its promotional mandate. At the same time, it is apparent that the Commission's full potential is still untapped. The conclusion chapter endeavours to craft a few recommendations in this regard. The next chapter explores the Commission's gender responsiveness in its dealings with external actors touching on both its protective and promotional mandates.

5 Assessing the gender responsiveness of the African Commission in its external relations with other actors

5.1 Introduction

This thesis is preoccupied with the examination of the gender responsiveness of the African Commission on Human and Peoples' Rights (African Commission). So far, the Commission's protective and promotional mandates have been analysed for their gender responsiveness in what has largely comprised an in-house assessment. This chapter now explores the responsiveness of the African Commission in its external relations. External relations are just as important as the internal mechanisms because the African Commission exists within a regional human rights system that has varied related and complimentary organs.

This examination has two overarching limbs consisting of the Commission's relationship with intergovernmental and non-governmental organs in regard to its women's rights protection as they relate either to its protective or promotional endeavours. In the case of intergovernmental organs of the African Union (AU), the study focuses on the direct relationships that are necessitated in the legal and operational workings of the African Commission. In terms of the executive arm of the AU, the AU Assembly, the AU Executive Council, the Permanent Representatives Committee and the AU Commission are the focus of the analysis.

From a treaty monitoring perspective, the complementary relationship between the African Court on Human and Peoples' Rights and the African Commission is assessed for its utility and potential in women's rights protection. The African Committee of Experts on the Rights and Welfare of the Child is also analysed in light of its overlapping mandate with the Commission in monitoring the rights of girls. Regional Economic Communities also offer avenues for treaty implementation and adjudication and are accordingly analysed.

Finally, in terms of the non-governmental perspective, attention is turned to examine the gender responsiveness of the Commission in its dealings with NGO actors. These dealings are assessed across the Commission's protective and promotional mandates. The views

are supplemented with relevant perspectives obtained from interviewing a few NGO actors.

5.2 Evaluating the African Commission's relationship with other African treaty monitoring bodies

The African Commission exists within a regional human rights framework that has other treaty monitoring bodies at the regional and sub-regional levels. These bodies include the African Court on Human and Peoples' Rights (African Court), the African Committee of Experts on the Rights and Welfare of the Child and the judicial organs of regional economic communities. These bodies are discussed for the reason that their functioning includes the mandate to interpret the African Charter on Human and Peoples' Rights (African Charter) and other human rights instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) which have a bearing on women's rights protection. Accordingly, the mandate of these bodies is introduced briefly and the African Commission's practice and potential in interacting with the body is explored.

5.2.1 Examining the African Commission's relationship with the African Court for complementarity and gender responsiveness

The African Commission's quasi-judicial status is on the one hand its strength and on the other its bane. One of the core obstacles that springs from the Commission's quasi-judicial status is the persistent contestation as to the binding or non-binding nature of its decisions.¹ This contestation over time undermined the Commission's protective mandate particularly as regards its individual communications procedure prompting

¹ F Viljoen *International human rights law in Africa* (2012) 339 notes that '[t]here is some debate about the binding nature of the Commission's findings (or 'decisions')'. See also: F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1-22 and G Bekker 'The African Commission on Human and Peoples' Rights and remedies for human rights violations' (2013) 13 *Human Rights Law Review* 503 who ascribes the African Commission's modest approach to reparations to the fact that the Commission is a quasi-judicial body that's simply empowered to make recommendations as opposed to binding decisions.

calls for a stronger enforcement mechanism by way of an African Court.² Resultantly, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court's Protocol) was adopted and the African Court established to complement the protective mandate of the African Commission.³ Accordingly, what follows is a discussion on the accessibility of the African Court towards human rights protection as well as the practice and prospects for the Commission in utilising this space.

5.2.1.1 Pathways of access to the African Court for women's rights protection

The African Court presents a stronger enforcement mechanism for human rights protection, as its decisions are irrefutably binding and not subject to appeal or political confirmation unlike those of the African Commission.⁴ The African Court also has unfettered jurisdiction to interpret the African Charter, the Maputo Protocol as well as any other relevant human rights instrument ratified by a state such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁵ This therefore makes the Court a potentially strong platform to remedy women's rights violations and advance the protection agenda for women in Africa. Access to the Court is either direct or indirect through specified organs such as the African Commission.⁶ Unfortunately, direct access to the court for individuals and non-governmental organisations (NGOs) is significantly curtailed. The prerequisite for direct access is that in addition to ratifying

² GJ Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 432 who in making a strong claim then for the establishment of an African Court asserted that the African Commission 'has relatively weak powers of implementation and investigation. It has no powers of enforcement. Its decisions either have declaratory effect or are merely recommendatory.' M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342-363 in articulating the rationale for an African Court regards the African Commission as weak and ineffectual and considers its decisions non-binding, lacking in enforcement mechanisms and attracting little attention from governments. NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 45 *Yale Human Rights and Development Law Journal* 98 who in identifying the potential effectiveness of the African Court points to the need to avoid the structural and normative deficiencies that have plagued the African Commission throughout its existence and which maladies are centred around the non-binding nature of the Commission's decisions. F Viljoen 'A human rights court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 13 in an article introducing the African Court observes that the need for political confirmation of the African Commission's recommendations before they become final has weakened the Commission's findings and resultantly inhibited state compliance.

³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court's Protocol) preamble '*Firmly convinced* that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights'.

⁴ Court's Protocol as above art 28.

⁵ Court's Protocol n 3 above art 3.

⁶ Court's Protocol n 3 above art 5.

the Court's Protocol, a potential litigant's state must also have entered a declaration under article 34(6) of the Court's Protocol, accepting the Court's competence to receive petitions against that state from individuals and NGOs.⁷ At the time of writing, only eight states have made a declaration under article 34(6) of the Court's Protocol.⁸ The women's rights implication here is that particularly, for the enforcement of the Maputo Protocol, direct access is significantly limited since only a small fraction of African states (7 out of a possible 55) can be brought to justice before the African Court by individuals and NGOs for violations of the Maputo Protocol.⁹

In light of the restrained direct access to the Court, indirect access represents one of the critical pathways to the Court. This is in fact the predominant way in which the Court complements the Commission's protective mandate through the latter's referral of cases. The Commission can refer cases in four possible scenarios as envisaged in article 118 of its Rules of Procedure. These scenarios are: where a state has not complied or is unwilling to comply with the Commission's recommendations in respect of a concluded communication; where a state has not complied with provisional measures issued by the Commission; where a situation or communication concerns serious or massive violations; and at any stage of the examination of a communication if it deems it necessary.¹⁰ These scenarios apparently portray unlimited pathways for the Commission to refer situations and cases to the Court. However, one more obstacle arises, namely, that the Commission can only refer cases or situations of states that are party to the

⁷ Court's Protocol n 3 above art 5(3) and art 34(6).

⁸ African Union 'List of countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 13 April 2018) which lists the 7 countries as: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali and Tanzania. Rwanda which had previously signed formerly withdrew its declaration. Whereas the African Court announces news of Tunisia becoming the latest country to sign the article 34(6) declaration. See: African Court on Human and Peoples' Rights 'Republic of Tunisia signs African Court Declaration to allow NGOs and individuals to access the Human and Peoples' Rights Court directly' <http://en.african-court.org/index.php/news/press-releases/item/145-republic-of-tunisia-signs-african-court-declaration-to-allow-ngos-and-individuals-to-access-the-human-and-peoples-rights-court-directly> (accessed 13 April 2018).

⁹ 7 of the 8 countries that have entered an article 34(6) declaration under the Court's Protocol are also signatories to the Maputo Protocol. See: African Union 'List of countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' https://au.int/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa.pdf (accessed 13 April 2018).

¹⁰ Rules of Procedure of the African Commission on Human and Peoples' Rights (2010) rule 118. For an elaborate discussion of these referral scenarios see: F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 63-98.

Court's Protocol. 30 states have ratified the Court's Protocol as at the time of writing and the Commission can therefore refer cases only against these states.¹¹ In addition, one commentator identifies further possibilities of the Court's material jurisdiction from a women's rights perspective:¹²

Of the 30 states that have ratified the African Court Protocol, 25 have also ratified the African Women's Protocol, substantiating the material jurisdiction of the Court... Of the five states that have not ratified the African Women's Protocol, four have ratified the CEDAW.

The above deduction is relevant in identifying the available pathways for women's rights protection including by way of a referral from the Commission or through direct access as is applicable.

5.2.1.2 Examining the Commission's referral practice for gender responsiveness

Bearing the foregoing access prerequisites in mind, it is worth interrogating whether the Commission has utilised the available pathways to complement its protective mandate. In light of the severely hampered direct access to the African Court earlier illustrated, the significance of the African Commission's referral mechanism is heightened as it then becomes the main means of access for all incapable of direct access. So far, the African Commission has only referred three cases to the African Court.¹³ By any standard, these are very few cases and Frans Viljoen accounts the dearth of referrals to various factors including: a fear that a *de novo* hearing by the Court would result in an overturning of the Commission's decision thereby undermining the Commission (and ostensibly the system), a lack of clarity on the referral criteria, inability to clearly establish state non-compliance with the Commission's decisions, and a general reticence on the part of the Commission that can possibly be resolved through development of clear referral

¹¹ African Union 'List of countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' <https://au.int/sites/default/files/treaties/7783-sl-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa.pdf> (accessed 13 April 2018) which lists the 30 countries as: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, The Comoros, Congo, Côte d'Ivoire, Gabon, The Gambia, Ghana, Kenya, Lesotho, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, SADR, Senegal, South Africa, Tanzania, Togo, Tunisia and Uganda.

¹² A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 327.

¹³ Application 004/2011, *The African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*, African Court on Human and Peoples' Rights which was struck out, Application 002/2013, *The African Commission on Human and Peoples' Rights v Libya*, African Court on Human and Peoples' Rights whose judgment was issued on 3 June 2016 and Application 006/2012, *The African Commission on Human and Peoples' Rights v Republic of Kenya*, African Court on Human and Peoples' Rights whose judgment was issued on 26 May 2017.

criteria.¹⁴

Notably, none the referred cases concern women's rights violations and an examination of the referral possibilities in this regard is then necessary. As shown, the African Commission has four potential pathways to refer cases to the Court. In the first pathway, the Commission can make a referral where a state has failed to comply with its recommendations in respect of a concluded communication.¹⁵ In chapter 3 of this thesis, it was established that the Commission has only considered two women's rights-centric individual communications premised on the violation of article 18(3) of the African Charter on non-discrimination, *Egyptian Initiative for Personal Rights and Interights v Egypt*¹⁶ and *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia*.¹⁷ Both of these cases have suffered state non-compliance with the recommendations of the Commission and are therefore, potentially capable of a referral.¹⁸ However, this referral pathway is blocked on account of the fact that Egypt and Ethiopia have not ratified the Court's Protocol, and the Court therefore lacks jurisdiction. An assessment of the Commission's gender responsiveness in this regard is thus not possible. However, an inference can perhaps be made in light of the fact that the Commission is yet to refer any communication under this criterion,¹⁹ despite there being a clear challenge to the timely and full compliance to the Commission's recommendations by states in at least some cases.²⁰ Such reticence generally is likely to disproportionately affect redress of women's rights violations that already suffer from neglect within the African human right's system's radar as established in chapter 3.

The second referral pathway arises where a state has not complied with the Commission's provisional measures.²¹ To date the Commission has not issued provisional

¹⁴ Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' n 10 above 63-98.

¹⁵ Rules of Procedure n 10 above rule 118(1).

¹⁶ Communication 323/2006, *Egyptian Initiative for Personal Rights & Interights v Egypt*, ACHPR.

¹⁷ Communication 341/2007, *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, ACHPR.

¹⁸ As established from interviews with the respective litigants: Sibongile Ndashe, lawyer formerly at Interights, now Executive Director, Initiative for Strategic Litigation in Africa on 9 May 2018 and Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018.

¹⁹ Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' n 10 above 77.

²⁰ See for instance F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *The American Journal of International Law* 1-34.

²¹ Rules of Procedure n 10 above rule 118(2).

measures in a women's rights case and can therefore not be assessed in this regard. The Commission has to date relied on this pathway twice, referring a case against Libya and against Kenya.²²

In the third possibility for referral, the prevailing view is that the Commission makes a referral to the Court where a case submitted to it reveals serious or massive human rights violations.²³ The Commission is yet to make a referral on the basis of serious and massive violations of women's rights. The Commission has made two referrals, one against Libya, which was dismissed for want of prosecution on the part of the Commission,²⁴ and the other against Kenya.²⁵ The case against Kenya traverses two referral criteria as there was an order for provisional measures as per the second referral pathway, and the Commission also attributes the serious and massive nature of the violations as its reason for seizing the Court.²⁶ In addition to the foregoing prevailing view on referral under this criterion, a more progressive view is propositioned. Owing to the use of the term *situation* in the Commission's Rules of Procedure, one possible interpretation is that referrals envisioned here are not limited to communications only. The Commission could for instance come across a situation of serious or massive human rights violations during an investigative or promotional visit to a state or through any other means. This latter approach is not without its complexities. For instance, whether the Commission has the ability to build a case of serious and massive violations on its own motion is questionable. Noting that under this very pathway one of its cases was dismissed owing to non-prosecution on the Commission's part. The foregoing challenge notwithstanding, bearing in mind the massive women's rights violations in Africa on the one hand, and the current dearth of women's rights cases on the other, this alternative approach compels pursuit. It is exactly for the fact that there is a dearth of women's rights cases that increases the need for this kind of alternative approach.

Ultimately, the Commission has no doubt underutilised the third referral pathway, yet the continent is awash with serious and massive human rights violations including

²² Application 002/2013 and Application 006/2012 respectively n 13 above.

²³ Rules of Procedure n 10 above rule 118(3).

²⁴ Application 004/2011 n 13 above.

²⁵ Application 006/2012, n 13 above. The case concerns the rights of indigenous persons in Kenya.

²⁶ Application 006/2012, n 13 above para 87.

against women. In justification of this indictment, the Commission itself has on a number of occasions through its reports, statements and resolutions acknowledged situations of serious and massive human rights violations against women in Africa.²⁷ In one illustration, the African Commission, in response to a decision by the AU Peace and Security Council, undertook a fact-finding mission to Mali to investigate and gather information on the situation of human rights particularly regarding the conflict in Northern Mali.²⁸ In classifying the human rights violations unearthed, the Commission dedicates a section to rape and gender-based violence where it notes that some of the rapes were even committed by the Malian military.²⁹ Of all the violations, the Commission itself charges that

[c]onsidering the length of the period during which human rights violations were committed and the number of victims, there is no doubt that there were *serious and massive human rights violations*.³⁰

The Commission also goes further and unequivocally attributes the human rights crisis to the weakness and laxity of the Malian government.³¹ Considering that Mali had at the time ratified the Court's Protocol, one of the possible avenues open to the Commission was to refer a case against Mali to the African Court. It is therefore baffling in light of the evidence that the Commission's only recourse was to make recommendations to a state that was *prima facie* directly and indirectly culpable of the very atrocities observed. Indisputably, there are a number of other situations that have been brought to the attention of the Commission that could arguably form the subject of a referral under the presently discussed criterion. The failure to attempt protective measures via the African Court in situations of serious and massive human rights violations against women is therefore inconsistent with the gender responsive approach.

In the fourth referral pathway, the African Commission may make a referral to the African Court at any stage of the examination of a communication, as it deems it necessary.³² Viljoen submits that *any stage* here refers to 'any stage before a decision on the merits

²⁷ Available by searching the African Commission's database at <http://www.achpr.org/> (accessed 15 April 2018).

²⁸ African Commission on Human and Peoples' Rights 'Report of the fact-finding mission to the Republic of Mali' 3-7 June 2013. Available at http://www.achpr.org/files/sessions/53rd/mission-reports/mali-fact-finding-2013/misrep_factfinding_mali_2013_eng.pdf (accessed 16 April 2018).

²⁹ As above paras 44-50.

³⁰ Mali: Fact-finding mission, 2013 n 28 above para 90 (emphasis mine).

³¹ Mali: Fact-finding mission, 2013 n 28 above paras 86-87.

³² Rules of Procedure n 10 above rule 118(4).

has been reached, and before the expiry of the 180-days implementation period granted to the violating state.³³ This is so as to distinguish this criterion from the first criterion where the Commission makes a referral in the event of state non-compliance. The Commission has not yet referred any women's rights case or any case for that matter explicitly on this basis. This referral pathway presents the widest opportunity to complement the Commission's protective mandate. It offers reprieve from the Court's restrictive direct access criteria particularly for individuals and NGOs whose countries have not entered an article 34(6) declaration. For instance, nothing precludes such individuals and NGOs from filing a communication at the Commission only to request for a referral particularly where it is perceived that better redress may be obtained from the Court, if the Commission were to be so obliging as to make the referral.

It remains to be seen how the African Commission will treat and accommodate such potential pathways. The Court may possibly provide enhanced women's protection particularly in light of its structural advantages over the Commission in terms of its binding decisions that are not subject to political confirmation or interference. However, as Annika Rudman concludes, the Court has in built structural hurdles, referring to its hampered direct access, that pose serious challenges to its ability to protect women's rights.³⁴ Subsequently, considering the Court's potential in light of its limitations is a zero-sum game.

5.2.2 The Commission's relationship with the African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts on the Rights and Welfare of the Child (Committee of Experts) is one of the three key human rights treaty bodies of the AU in addition to the Commission and the Court. From a women's rights perspective, the African Commission's relationship with the Committee of Experts derives from an overlapping mandate. On its part, the Committee of Experts oversees the protection and promotion of the rights contained in the African Charter on the Rights and Welfare of the Child (African Children's

³³ Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' n 10 above 77.

³⁴ Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' n 12 above 343.

Charter), which includes a mandate on the rights of girls. Likewise, the African Commission has a mandate over all human rights issues, which includes women and girls' rights. More specifically, the Maputo Protocol defines women to include girls in a bid to include their protection in its provisions.³⁵

Unlike the relationship with the Court that is expressly established in treaty, the relationship between the Commission and the Committee has grown more organically. For instance, as early as 2006, the following observation was made:³⁶

The relationship between the African Commission and the African Children's Committee has been discussed at a number of previous meetings, including the 5th meeting. However, during the 7th meeting, the relationship was stressed when the Chairperson of the African Commission made a presentation to the participants of the meeting... the Chairperson emphasised that both institutions are waging the same struggle and should develop a strategic partnership that would comprise the exchange of information and experiences on human rights promotion and protection. It was recommended that the scope of such a partnership, as well as the financial implications thereof, be studied by both institutions.

In addition to the foregoing, subsequent discussions among organs of the AU with a human rights mandate eventually led to the Commission adopting a Resolution on Cooperation between the African Commission and the Committee of Experts.³⁷ The resolution itself speaks to the need to promote and protect the rights of the child through enhanced cooperation between the two organs and through the resolution, the Commission declares to have established a formal relationship with the Committee.³⁸ Significantly, the Commission appoints its Special Rapporteur on the Rights of Women in Africa to lead in the cooperation with the Committee and other relevant stakeholders, which is emblematic of the collaboration's key focus on girls' rights.³⁹ In this regard the Commission can be deemed to be gender responsive particularly in its recognition of intersectional identity. Girls suffer multiple levels of oppression on account of their age,

³⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) art 1(k).

³⁶ BD Mezmur 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 6 *African Human Rights Law Journal* 568.

³⁷ Resolution on Cooperation between the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child in Africa, ACHPR/Res.144(XLV)09 adopted at the 45th Ordinary Session, Banjul, The Gambia, 13 – 27 May 2009. In the resolution's preamble, the African Commission recalls the Brainstorming session between organs of the African Union with a human rights mandate, held in Ouagadougou, Burkina Faso, from 28 to 30 September 2008, which resolved to enhance cooperation between those organs.

³⁸ As above.

³⁹ Resolution 144 n 37 above.

sex and gender. In collaborating with the Committee, the Commission is accordingly expressing an understanding of the intersectional approach required to promote and protect girls' rights in Africa.

Following the establishment of this formal relationship, the most visible collaboration germane to the present discussion is the development of the Joint General Comment on Child Marriage discussed in chapter 4.⁴⁰ At the onset, the Commission passed a resolution tasking the Special Rapporteur on the Rights of Women in Africa (SRRWA) to undertake a study on child marriage in Africa.⁴¹ The Commission further requested the Committee of Experts and the Centre for Human Rights of the University of Pretoria to contribute to the study with their support and expertise. While the Committee was not involved, the SRRWA with the support of the Centre for Human Rights eventually undertook the study as discussed in chapter 4, section 4.2.1.4.⁴² The study formed the basis for the development of a General Comment on child marriage by the African Commission led by the SRRWA in collaboration with the Committee of Experts thereby making it the first General Comment to be jointly developed by two treaty bodies of the African human rights system. The adoption of the Joint General Comment is a much-needed harmonious development of normative standards on an issue that falls under the purview of both the Commission and the Committee. For taking lead in this initiative, the African Commission demonstrates gender responsiveness in recognising a prevalent harmful and discriminatory practice affecting women and girls in Africa and seeking to address in a manner that is cognisant of its intersectional nature. Another potential joint venture is such as derives from a resolution by the Commission to undertake a study on the impact of armed conflicts on the rights of women and children in Africa with the support of the Committee of Experts.⁴³ Here again the Commission demonstrates recognition of the value of a multispectral approach. Unfortunately, while the Commission made this

⁴⁰The Joint General Comment is available at http://www.achpr.org/files/news/2018/01/d321/joint_gc_acerwc_achpr_ending_child_marriage_eng.pdf (accessed 23 April 2018).

⁴¹ Resolution on the Need to Conduct a Study on Child Marriage in Africa, ACHPR/Res.292(XVI)14 adopted at the 16th Extraordinary Session, Kigali, Rwanda, 20 – 29 July 2014.

⁴² The study is available at http://www.chr.up.ac.za/images/files/news/news_2018/Child%20Marriage%20Report%20ENGLISH%20web.pdf (accessed 23 April 2018).

⁴³ Resolution on the Situation of Women and Children in Armed Conflict, ACHPR/Res.283(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014.

resolution in 2014, there have been no steps in this regard but the intention and potential is recognised.

Another collaborative effort by the Commission and the Committee relevant to the discussion, is such as when the Commission's Commissioner on the Human Rights Situation in the United Republic of Tanzania and the Special Rapporteur on the Rights of Women in Africa, together with the Chairperson of the African Committee of Experts on the Rights and Welfare of the Child, transmitted a joint letter of appeal to Tanzania. The statement was regarding an assertion by Tanzania's president to the effect that pregnant girls and teen mothers would not be allowed to attend school. The joint letter highlighted how such executive proclamations ran the risk of undermining the right to education and equality for girls. The Commission and the Committee further recalled and urged Tanzania to fulfil its obligations under the Maputo Protocol and the African Children's Charter.⁴⁴ Such a joint approach may perhaps have possibly greater impact on a state's response having attracted the censure of two continental bodies.

Other shows of goodwill and cooperation by the African Commission towards the Committee are such as varying statements by the African Commission urging states to ratify the African Children's Charter. For instance, before the coming into force of the African Children's Charter for instance, the Commission issued a resolution to call on urgent state ratification.⁴⁵ Similarly during the day of the African Child, the Commission urged states to ratify and implement the African Children's Charter and support the work of the Committee.⁴⁶ Further, the Commission also acknowledges a close relationship with

⁴⁴ News item available at the African Commission's website <http://www.achpr.org/news/2017/08/d296/> (accessed 23 April 2018).

⁴⁵ Resolution on the Ratification of the African Charter on the Rights and Welfare of the Child, ACHPR/Res.36(XXV)99 adopted at the 25th Ordinary Session, Bujumbura, Burundi, 26 April – 5 May 1999.

⁴⁶ Press statement by the African Commission on Human and Peoples' Rights in commemoration of the Day of the African Child, 16 June 2008 available at <http://www.achpr.org/press/2008/06/d63/> (accessed 25 April 2018).

the Committee⁴⁷ and invites them to their sessions⁴⁸ once even holding a joint session.⁴⁹ Overall, the Commission has adopted a gender responsive approach in its relationship with the Committee of Experts predominantly in its recognition of the intersectional approach required to promote women and particularly girls' rights.

5.2.3 Examining the African Commission's relations with Regional Economic Communities from a rights perspective

States in Africa have organised themselves into sub-regional groupings known as Regional Economic Communities (RECs) primarily to facilitate regional economic integration.⁵⁰ To allow for a proper contextualisation of any relations between the African Commission and RECs, the discussion begins with an examination of what these sub-regional institutions offer from a rights perspective as it may not be immediately apparent. Following this is an illustration of the actual practice and relationship between the African Commission and RECs from a women's rights perspective.

5.2.3.1 Regional Economic Communities as avenues for women's rights protection

Whereas RECs were established with a predominant concern for economic cooperation, their utilisation as avenues for women's rights protection and promotion is possible. This may be illustrated by the RECs' human rights, gender equality and inclusion provisions in their founding treaties. For the East African Community (EAC) for instance, in addition to its treaty avowing equal opportunities, gender equalities and human rights as some of

⁴⁷ Opening statement by the Chairperson of the African Commission on Human and Peoples' Rights, Honourable Kayitesi Zainabo Sylvie. The chairperson acknowledges: "The Commission has also worked closely together with its sister AU Organs with human rights related mandates, namely, the African Court and the African Committee of Experts on the Rights and Welfare of the Child. Close cooperation and synergy are crucial for the effective protection of the rights of African citizens." Available at http://www.achpr.org/sessions/56th/speeches/chair_opening-statement/ (accessed 25 April 2018).

⁴⁸ See for instance: African Commission on Human and Peoples' Rights 'Media alert' available at <http://www.achpr.org/news/2016/10/d263/> (accessed 25 April 2018).

⁴⁹ See for instance: African Commission on Human and Peoples' Rights 'Press Release: 2016: Africa Year of Human Rights with Particular Focus on the Rights of Women' available at <http://www.achpr.org/press/2016/10/d322/> (accessed 25 April 2018).

⁵⁰ The African Union recognises eight RECs being the Arab Maghreb Union (UMA), Common Market for Easter and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC). Information available at African Union 'Regional Economic Communities' <https://au.int/en/organs/recs> (accessed 27 April 2018).

its fundamental principles,⁵¹ it further requires the EAC to mainstream gender in all its endeavours.⁵² The treaty further provides for the enhancement of the role of women in socio-economic development including through: full participation in decision-making; abolishing and discouraging discriminatory laws and customs; awareness towards changing negative attitudes towards women; eliminating prejudices against women and promoting equality in every respect.⁵³ The treaty that established the Economic Community of West African States (ECOWAS) similarly has fundamental principles that include the recognition and protection of human and peoples' rights in accordance with the African Charter.⁵⁴ The treaty further has a provision on women and development that requires its member states to enhance the economic, social and cultural conditions of women through various measures.⁵⁵ Likewise, the Southern African Development Community (SADC) includes human rights as one of its principles in its treaty⁵⁶ and contains a non-discrimination clause prohibiting discrimination including on the basis of gender.⁵⁷

In addition to their establishing treaties, most of the RECs have gone further in the development of a legal or policy framework catering to women's rights. SADC for instance has a Protocol on Gender and Development,⁵⁸ ECOWAS has a Supplementary Act on Equality of Rights between Women and Men,⁵⁹ EAC has a Gender Policy⁶⁰ and a Gender Equality, Equity and Development Bill,⁶¹ IGAD has a Gender Policy Framework,⁶² and the Common Market for Eastern and Southern Africa (COMESA) also has a Gender Policy.⁶³

⁵¹ The East Africa Community Treaty (1999) art 6(2).

⁵² As above art 5(3)(e).

⁵³ EAC Treaty n 51 above art 121.

⁵⁴ The Treaty of the Economic Community of West African States (1993) art 4(g).

⁵⁵ As above art 63.

⁵⁶ The Treaty of the Southern African Development Community (1992) art 4(c).

⁵⁷ As above art 6(2).

⁵⁸ SADC Protocol on Gender and Development (2008: revised 2016).

⁵⁹ Supplementary Act Relating to Equality of Rights between Women and Men for Sustainable Development in the ECOWAS Region (2015).

⁶⁰ EAC Gender Policy (2018-2022).

⁶¹ EAC Gender Equality, Equity and Development Bill (2016). The Bill was passed by the East African Legislative Assembly (EALA) on 8 March 2017 and awaits assent by the EAC Heads of States. See further EALA 'EALA passes key Gender Bill on International Women's Day' <http://www.eala.org/media/view/eala-passes-key-gender-bill-on-international-womens-day> (accessed 27 April 2018).

⁶² IGAD Gender Policy Framework (2012-2020).

⁶³ COMESA Gender Policy (2016).

Some of the RECs also have judicial organs which, while they may have initially been envisaged for resolution of economic or trade related disputes, have nonetheless evolved into theatres of human rights adjudication in varied fashion and with varied jurisdiction.⁶⁴ For instance, the EAC's East Africa Court of Justice's (EACJ) jurisdiction to entertain human rights matters was initially questioned and clarified through a brave act of judicial activism.⁶⁵ Though it must be noted that this jurisdiction is restricted, as the potential matter must be based on the EAC Treaty, which is hardly a comprehensive human rights instrument.⁶⁶ The SADC Tribunal's fate is worse. While it had initially displayed promise, the Tribunal was suspended in 2011 by SADC's Heads of State following its issuing of a perceived contentious decision against Zimbabwe and the Tribunal's insistence on state compliance with its decision despite political backlash.⁶⁷ Ultimately, after a politically controlled review process, the SADC Summit adopted a new and revised Protocol,⁶⁸ that omits individual access to the Tribunal.⁶⁹

ECOWAS on its part has the ECOWAS Community Court of Justice (ECCJ), which has express jurisdiction to determine cases of human rights violations.⁷⁰ On account of this, it is noted that the ECCJ has decided more human rights cases than the other sub-regional courts.⁷¹ In fact, the ECCJ has adjudicated two women's rights cases based on a violation of the Maputo Protocol,⁷² becoming the first to do so, even before the African Commission and the African Court.

⁶⁴ For a detailed discussion on sub-regional courts and human rights related adjudication see Viljoen *International human rights law in Africa* n 1 above 489-494.

⁶⁵ Reference 1/2007, *James Katabazi and 21 others v Secretary General of the EAC and Attorney General of the Republic of Uganda*, EACJ and J Gathii 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2013) 24 *Duke Journal of Comparative & International Law* 249-296.

⁶⁶ On challenges and possibilities with regard to the EAC's human rights adjudication see: A Possi 'Striking a balance between community norms and human rights: The continuing struggle of the East Africa Court of Justice' (2015) 15 *African Human Rights Law Journal* 192-213.

⁶⁷ See further: M Hansungule 'The suspension of the SADC Tribunal' (2013) 35 *Strategic Review for Southern Africa* 135-145, L Nathan 'The disbanding of the SADC Tribunal: A cautionary tale' (2013) 35 *Human Rights Quarterly* 870-892 and F Cowell 'The death of the Southern African Development Community Tribunal's human rights jurisdiction' (2013) 13 *Human Rights Law Review* 153-165.

⁶⁸ Protocol on the Tribunal in the Southern African Development Community (2014).

⁶⁹ See further: G Erasmus 'The new Protocol for the SADC Tribunal: Jurisdictional changes and implications for SADC community law' (2015) US15WP01 *Trade Law Centre* 1-20.

⁷⁰ Supplementary Protocol Amending the Protocol relating to the Community Court of Justice (2005) art 3 which amends art 9 of the Protocol on the Community Court of Justice on the competence of the Court.

⁷¹ Viljoen *International human rights law in Africa* n 1 above 490.

⁷² ECW/CCJ/JUD/08/17, *Dorothy Chioma Njemanze & 3 others v The Federal Republic of Nigeria*, ECOWAS Court and ECW/CCJ/APP/35/17 *Aminata Diantou Diane (represented by APDF & IHRDA) v Mali* ECOWAS Court.

5.2.3.2 The Commission's practice and prospects concerning RECs

In light of all of the foregoing, it is clear that RECs hold avenues for women's rights protection and promotion. They have developed women's rights norms which are intended for implementation by the same states overseen by the African Commission. Further, there is a clear overlap between the mandate of the African Commission and that of the judicial organs of RECs particularly ECOWAS in the interpretation of the African Charter and the Maputo Protocol. These areas of overlap make a relationship between the regional and sub-regional desirable nay necessary.

There is no statutory or formally established relationship between the African Commission and RECs. Despite this, there is evidence of *ad hoc* areas of cooperation and goodwill between the African Commission and the RECs as will be illustrated. In issuing country specific resolutions or general human rights statements, the Commission frequently acknowledges⁷³ or requests the intervention⁷⁴ of the respective REC towards alleviating deteriorated human rights situations and security conditions. From a more women's rights perspective, the Commission particularly through its special mechanisms can be seen to work together with various organs of RECs towards human rights promotion or norm development. For instance, in a report detailing the mechanism's activities since its establishment, the SRRWA includes the ECOWAS Gender Development Centre (EGDC)⁷⁵ as one of the partners it collaborates with to promote and protect women's rights.⁷⁶ Specifically, the mechanism has in the past been tasked by the EGDC to

⁷³ See for instance: Resolution on the Human Rights Situation in Togo, ACHPR/Res.397(LXII)18 adopted at the 62nd Ordinary Session, Nouakchott, Islamic Republic of Mauritania, 25 April - 9 May 2018 where the Commission welcomes the designation by ECOWAS Heads of State at their extraordinary meeting held in Lomé, Togo, on 14 April 2018 of the Ghanaian and Guinean Presidents, H.E. Nana Addo Dankwa Akuffo-Addo and H.E. Professor Alpha Condé, as facilitators in the Togolese crisis.

⁷⁴ See for instance: African Commission on Human and Peoples' Rights 'Press Release of the African Commission on Human and Peoples' Rights on the socio-political and security situation in Mali' available at <http://www.achpr.org/press/2018/07/d408/> (accessed 2 May 2018) where the Commission urges ECOWAS to increase their efforts towards ensuring the smooth holding of elections, and to support the regional initiative to combat terrorism and violent extremist groups.

⁷⁵ The ECOWAS Gender Development Centre (EGDC) was set up in January 2003 through Decision A/DEC 16/1/03 of the Conference of ECOWAS Heads of State and Government to provide ECOWAS with a specialized agency on gender and development. See further: ECOWAS Gender Development Centre <http://www.ccdg.ecowas.int/?lang=en> (accessed 3 May 2018).

⁷⁶ Intersession report of the mechanism of the Special Rapporteur on the Rights of Women in Africa since its establishment, 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Cote d'Ivoire, 9 -22 October 2012 paras 24.

coordinate a survey of ECOWAS countries towards identifying discriminatory laws and practices affecting women and making recommendations with a view to harmonising domestic laws with the Maputo Protocol and CEDAW. Further, the SRRWA reports that the mechanism ‘also played an important role in 2010 in the drafting and adoption of the ECOWAS regional action plan for implementing UN Resolution 1325 on women’s participation in armed conflicts.’⁷⁷ Another Commissioner also reports of engagements with the EGDC in particular providing expertise for a validation session for reports on gender discriminatory laws in ECOWAS countries.⁷⁸ Other mechanisms can also be seen to engage with RECs in regard to their themes.⁷⁹

A critical area of cooperation between the African Commission and the RECs relates to normative standards for human rights protection and promotion. The regional and sub-regional levels are consistently developing laws and principles whose realisation is dependent on and targeted at similar state parties thereby heightening the need for coherence and cooperation. The Commission can be seen to recognise the human rights norms developed by the RECs. For instance, when addressing electoral justice or unconstitutional changes of government, the Commission often references the ECOWAS Protocol on Democracy and Good Governance⁸⁰ and the SADC Principles on Elections.⁸¹

In the development of normative standards for women’s rights protection, there is evidence of mutual cross-referencing between the regional and the sub-regional level. The SADC Protocol on Gender and Development is clearly influenced by the Maputo

⁷⁷ As above paras 25-26.

⁷⁸ Reported in the Twenty Sixth Activity Report of the African Commission on Human and Peoples’ Rights December 2008 – May 2009 para 52.

⁷⁹ See: Activity report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, 56th Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul, The Gambia, 21 April – 7 May 2015 paras 11-15. The Special Rapporteur reports paying a visit to the SADC Secretariat towards proposing SADC’s adoption of the Commission’s Model Law on Access to Information. The meeting is successful as SADC commits to set up a technical committee to work on the same. See also: Intersession report of the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, 56th Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul, The Gambia, 21 April – 7 May 2015 paras 25-26. Here the Special Rapporteur reports participating and providing expertise in ECOWAS activities on nationality and statelessness.

⁸⁰ Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security (2001). See references for instance: Resolution on the Unconstitutional Change of Governments, ACHPR/Res.213(LI)12 adopted at the 51st Ordinary Session, Banjul, The Gambia, 18 April – 2 May 2012 and Resolution on the Human Rights Situation in the Republic of The Gambia, ACHPR/Res.299 (XVII)15 adopted at the 17th Extra-Ordinary Session, Banjul, The Gambia, 19 – 28 February 2015.

⁸¹ SADC Principles and Guidelines Governing Democratic Elections (2004). See references for instance: African Commission on Human and Peoples’ Rights ‘Press release of the African Commission on the electoral impasse in the Republic of Zimbabwe’ available at <http://www.achpr.org/press/2008/04/d62/> (accessed 2 May 2018).

Protocol with the observation that '[a]lthough the SADC Gender Protocol was inspired by the Women's Protocol, the sub-regional treaty surpasses its regional predecessor in specificity.'⁸² This scenario is indeed ideal as 'greater normative coherence among a small group of relatively homogeneous states can give rise to a more concrete formulation of rights and more targeted obligations on states.'⁸³

The African Commission has also taken cognisance of sub-regional standards in development of its own norms. The Commission's General Comment to the Maputo Protocol on Women and HIV in articulating the circumstances under which disclosure of HIV status should be made⁸⁴ relies on existing international standards including an adoption of provisions in the SADC Model Law on HIV.⁸⁵ Interestingly, the EAC HIV and AIDS Act⁸⁶ also contains similar provisions on disclosure to those of the SADC Model Law on HIV showing that normative influence is vertical as well as horizontal. In another example, the Commission's Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV (HIV Committee) undertook a study and developed a report, HIV, the law and human rights in the African human rights system: Key challenges and opportunities for rights-based responses⁸⁷ which was discussed in chapter 4. As noted in chapter 4, the style of the report is such that it manages to present trends and good practices in a manner that accomplishes standard setting. The report liberally references and relies on international standards developed by SADC and EAC including the SADC Model Law on HIV, the EAC HIV and AIDS Act and the SADC HIV Cross-Border Initiative. It also mentions the Dakar Declaration on Key Populations in the Response to HIV and AIDS in ECOWAS Member States.⁸⁸ The foregoing examples illustrate an essential budding and mutual relationship between the African Commission and RECs in development of norms that can only strengthen women's rights protection.

⁸² 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 and Lee Journal of Civil Rights and Social Justice* 28.

⁸³ As above.

⁸⁴ General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa para 19.

⁸⁵ Model Law on HIV in Southern Africa (2008) sec 15(3), (4) & (5).

⁸⁶ East African Community HIV and AIDS Prevention and Management Act (2012) sec 23.

⁸⁷ Report on the study of the African Commission on Human and Peoples' Rights 'HIV, the law and human rights in the African human rights system: Key challenges and opportunities for rights-based responses' available at http://www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf (accessed 17 November 2017).

⁸⁸ Dakar Declaration on Key Populations in the Response to HIV and AIDS in ECOWAS Member States (2015).

With regard to human rights adjudication, an overlap exists between the African Commission and the judicial organs of the RECs particularly with the ECCJ which has clear jurisdiction over human rights violations and for the EACJ so long as a human rights matter can be framed as a violation of the EAC Treaty. This overlap in jurisdiction is beneficial to women's rights litigants who are presented with a wider array of avenues to redress violations. In fact, since these sub-regional courts do not require exhaustion of remedies as an admissibility criterion,⁸⁹ they are more accessible than the Commission in that regard.

Areas of cooperation between the Commission and the sub-regional courts are limited as each organ is autonomous. For instance, whereas an appellate relationship may be assumed between the sub-regional and regional adjudication levels, this is not the case. The African Commission provides for the *res judicata* principle and does not admit cases that have already been settled⁹⁰ and would therefore not entertain an appeal as it were from a sub-regional court. Interestingly, the reverse is perhaps possible as none of the sub-regional courts specifically provide for the *res judicata* principle.⁹¹ This means that it is possible, perhaps not necessarily desirable, for a sub-regional court to listen to a matter that has been dealt with by the African Commission. All in all, what is important is that there seems to be an increasing number of forums for litigating women's rights violations. Unfortunately, with overlap there is also the potential of issuing contradictory interpretations of the African Charter and the Maputo Protocol. This can perhaps be avoided by holding regular, say annual, judicial colloquiums discussing relevant normative standards, judicial trends and approaches towards better human rights protection.⁹²

⁸⁹ See: A von Staden 'Subsidiarity, exhaustion of domestic remedies, and the margin of appreciation in the human rights jurisprudence of African sub-regional courts' (2016) 20 *The International Journal of Human Rights* 1113-1131 and ST Ebobrah 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* 1-25.

⁹⁰ African Charter on Human and Peoples' Rights art 56(7).

⁹¹ Viljoen *International human rights law in Africa* n 1 above 454.

⁹² Members of the African Court on Human and Peoples' Rights and the ECOWAS Community Court of Justice for instance held a similar convening. See African Court on Human and Peoples' Rights <http://www.african-court.org/en/index.php/news/press-releases/item/223-judges-of-ecowas-court-of-justice-to-visit-the-african-court> (accessed 4 May 2018) and Capital News <https://www.capitalfm.co.ke/news/2018/02/ecowas-court-judges-visit-african-court/> (accessed 4 May 2018).

Overall, the relationship between the African Commission and the RECs, though *ad hoc*, seems to comprise of mutual recognition that can only serve to solidify women's protection and promotion.

5.3 Assessing the gender responsiveness of the African Commission's relationship with select organs of the African Union

The African Commission is an autonomous treaty body working *within* the framework of the AU⁹³ and consequently enjoys a statutory and functional relationship with its parent organ. The present discussion focuses on those relationships that are legally required as well as those that are explicitly relevant to women's rights protection. Accordingly, the Commission's relationship with the highest executive organs of the AU as well as mechanisms of its secretariat concerned with women's rights is considered.

5.3.1 The relationship with the AU Assembly, the Executive Council and the Permanent Representatives Committee

The AU human rights architecture has in place various normative assurances for the protection and promotion of women's rights in Africa. The AU through its governing treaty the Constitutive Act of the African Union (Constitutive Act) lists promotion of gender equality as one of its principles.⁹⁴ Further, the AU's most supreme organ, the AU Assembly of Heads of State and Government (AU Assembly) in reaffirming its commitment to gender equality adopted the Solemn Declaration on Gender Equality in Africa (Solemn Declaration) in 2004. In the Solemn Declaration, the AU avers its 'commitment to continue, expand and accelerate efforts to promote gender equality at all levels'.⁹⁵ Article 9 of the Solemn Declaration included the member states' undertaking to sign and ratify the Maputo Protocol and supporting campaigns to ensure its entry to force by 2005⁹⁶ and this was subsequently achieved. Compared to its predecessor the OAU, the AU set off on a more progressive footing in its women's rights agenda. The OAU Charter for instance makes no provision for gender in any express or implied terms. In addition, women are noted as having been 'neglected in the drafting of the Charter and that this

⁹³ African Charter n 90 above art 30 and Rules of Procedure n 10 above rule 3.

⁹⁴ Constitutive Act of the African Union article 4(l).

⁹⁵ Solemn Declaration on Gender Equality in Africa preamble.

⁹⁶ Solemn Declaration (as above) article 9.

was one of the reasons for its downfall'.⁹⁷ Though the foregoing background foretells a positive picture, the actual practice of the AU in supporting the Commission is a more reliable measure and the analysis accordingly follows.

The AU Assembly is the AU's highest policy and decision-making organ and comprises of all the members' heads of state and government.⁹⁸ The Executive Council is responsible to the Assembly and considers matters referred to it and monitors implementation of policies formulated by the Assembly. It is composed of foreign ministers or such other ministries. It also coordinates and takes decisions on policies on matters of common interest to member states.⁹⁹ It is deemed 'in many ways more influential than the Assembly' as it meets more frequently and shapes the AU agenda.¹⁰⁰ The Permanent Representatives Committee (PRC) on its part is charged with acting on the instructions of and preparing the work of the Executive Council.¹⁰¹ 'Many decisions affecting human rights that are finally taken by the Executive Council or Assembly are initially debated by the PRC.'¹⁰²

Within the African Charter, the Assembly is designated a number of functions in relation to the Commission.¹⁰³ Germane to the present study is a role related to the Commission's protective activities. The Charter mandates the Commission not to publish its recommendations related to consideration of communications until the activity report containing such findings has been 'considered by the Assembly.'¹⁰⁴ The Assembly has since delegated its role to consider activity reports, to the Executive Council and which should thereafter submit a report to it.¹⁰⁵ 'In actual practice, the PRC considers the activity reports, then forwards them to the Executive Council for formal adoption.'¹⁰⁶

⁹⁷ R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 134. The quote references Commissioner Ondziel-Gnelenga, at the 29th session of the African Commission on Human and Peoples' Rights in Libya during a debate on the AU the transcript of which is on file with Murray.

⁹⁸ Constitutive Act of the African Union (2000) art 6 and African Union *African Union handbook 2018* (2018) 16.

⁹⁹ Constitutive Act as above art 13 and African Union as above 16.

¹⁰⁰ Viljoen *International human rights law in Africa* n 1 above 186.

¹⁰¹ Constitutive Act n 98 above art 21 and African Union n 98 above 16.

¹⁰² Viljoen *International human rights law in Africa* n 1 above 191.

¹⁰³ African Charter n 90 above art 33 & 37 (election of Commission members), art 44 (provision for emoluments and allowances for Commission members), art 54 (receipt of the Commission's activity reports).

¹⁰⁴ African Charter n 90 above art 59.

¹⁰⁵ AU Assembly, Decision on the Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights Doc.Assembly/AU/7(II), Assembly/AU/Dec.11 (II) para 5.

¹⁰⁶ J Biegon 'Diffusing tension, building trust: Proposals on guiding principles applicable during consideration of the activity reports of the African Commission on Human and Peoples' Rights' (2018) *Global Campus Policy Briefs* 6.

Unfortunately, the Executive Council has on a number of occasions used its political power to impede the work of the Commission by blocking publication of, expunging content in or deferring consideration of the Commission's activity reports.¹⁰⁷ In many of these instances, the Executive Council is driven in its decisions by objections from states unprocedurally challenging the Commission's decisions or resolutions against them.¹⁰⁸

In the latest incident, the African Commission granted observer status to the Coalition of African Lesbians (CAL) in 2015.¹⁰⁹ This was significant as it came after years of advocacy as CAL's application had previously been rejected by the Commission which had earlier seemed to evade a recognition of advocacy efforts for sexual minorities.¹¹⁰ To human rights defenders it was significant as it represented the first time an organisation working exclusively on sexual orientation and gender identities would be able to make a statement in its own name.¹¹¹ Following this, the Executive Council ensued to request the Commission to take into account 'fundamental African values, identity and good traditions' and to withdraw CAL's observer status in line with those African values as well as review its criteria for granting observer status.¹¹² This imposition on the African Commission's autonomy has been described as 'the most aggressive and intrusive form of interference to date as it openly usurps the power of the ACHPR to interpret and apply the African Charter.'¹¹³

The Commission initially responded by committing to undertake a detailed legal analysis on both matters (CAL status and observer status criteria) while also noting that the matter was the subject matter of an advisory opinion before the African Court.¹¹⁴ The

¹⁰⁷ As above 7.

¹⁰⁸ Biegon 'Diffusing tension, building trust: Proposals on guiding principles applicable during consideration of the activity reports of the African Commission on Human and Peoples' Rights' n 106 above 7.

¹⁰⁹ Final Communique of the 56th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21 April – 7 May 2015 para 25.

¹¹⁰ Association for Women's Rights in Development 'After years of activism CAL attains observer status at ACHPR' available at <https://www.awid.org/news-and-analysis/after-years-activism-cal-attains-observer-status-achpr> (accessed 6 May 2018).

¹¹¹ Pan Africa International Lesbian, Gay, Bisexual, Trans and Intersex Association 'NGO space under threat at the African Commission' available at <https://panafricailga.org/ngo-space-under-threat-at-the-african-commission/> (accessed 6 May 2018).

¹¹² Executive Council, Decision on the Thirty-eighth Activity Report of the African Commission on Human and Peoples' Rights Doc.EX.CL/921(XXVII), EX.CL/Dec.887(XXVII) para 7.

¹¹³ Biegon 'Diffusing tension, building trust: Proposals on guiding principles applicable during consideration of the activity reports of the African Commission on Human and Peoples' Rights' n 106 above 7.

¹¹⁴ Thirty-ninth Activity Report of the African Commission on Human and Peoples' Rights May – November 2015 paras 49-51.

African Court most unfortunately declined to entertain the matter on its substance instead finding that the NGOs before it lacked standing.¹¹⁵ Thereafter, the African Commission through its activity report informed the Executive Council that the decision to grant CAL observer status was properly taken.¹¹⁶ The Commission further justified as follows:¹¹⁷

The Commission is mandated to give effect to the African Charter under which everyone is entitled to the rights and subject to the its duties spelt out in the Charter, and it is the duty of the Commission to protect those rights in line with the mandate entrusted to it under Article 45 of the Charter, without any discrimination because of status or other circumstances.

In doing so, the Commission tacitly averred the right of lesbian women not to be discriminated against on the basis of their sexual orientation. The Commission also indicated that it would continue to scrutinise the notion of African values that had been raised by the Executive Council.

The Executive Council's and the PRC's response to the Commission's stance has been highhanded and overstated. First, the Executive Council disregarded the Commission's undoubtedly carefully considered decision to retain CAL's observer status and re-requested the Commission to withdraw CAL's observer status.¹¹⁸ Second, the Council called for an urgent convening by way of a joint retreat between the PRC and the African Commission to resolve seeming concerns expressed about the relationship between the Commission, the AU policy organs and member states.¹¹⁹ Rather than leading to the identification of modalities for enhanced coordination as posed, the retreat turned out to be an onslaught against the Commission's autonomy and mandate.¹²⁰ This is

¹¹⁵ University of Pretoria 'African Court rejects Centre for Human Rights and CAL request, leaving political tension within AU unresolved' available at https://www.up.ac.za/en/faculty-of-law/news/post_2573674--press-statement-african-court-rejects-centre-for-human-rights-and-cal-request-leaving-political-tension-within-au-unresolved (accessed 5 May 2018) and Coalition of African Lesbians 'The African Court denies civil society access to justice and fails to pronounce on the independence of the African Commission on Human and Peoples' Rights' available at <http://www.cal.org.za/2017/09/28/the-african-court-denies-civil-society-access-to-justice-and-fails-to-pronounce-on-the-independence-of-the-african-commission-on-human-and-peoples-rights/> (accessed 5 May 2018). For a critique of the African Court's approach in this regard see: A Jones 'Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17 *African Human Rights Law Journal* 321-329.

¹¹⁶ Forty-third Activity Report of the African Commission on Human and Peoples' Rights June – November 15 2017 para 51.

¹¹⁷ As above.

¹¹⁸ Executive Council, Decision on the African Commission on Human and Peoples' Rights Doc.EX.CL/1058(XXXII), EX.CL/Dec.995(XXII) para 3.

¹¹⁹ As above para 4.

¹²⁰ For a detailed analysis see: J Biegon 'The rise and rise of political backlash: African Union Executive Council's decision to review the mandate and working methods of the African Commission' (2018) *European Journal of International Law: Talk* available at <https://www.ejiltalk.org/the-rise-and-rise-of-political-backlash-african-union-executive-councils-decision-to-review-the-mandate-and-working-methods-of-the-african-commission/#more-16384> (accessed 7 May 2018).

demonstrable from the resulting recommendations, which have since been endorsed by the Executive Council.¹²¹ The worrying statements and recommendations include: an assertion that the independence enjoyed by the Commission 'is of a functional nature and not independence from the same organs that created the body';¹²² a request to 'conduct an analytical review of the interpretative mandate of the ACHPR in the light of a similar mandate exercised by the African Court and the potential for conflicting jurisprudence';¹²³ a request for the African Commission to submit revised criteria for granting and withdrawing observer status in line with the existing AU criteria;¹²⁴ and a further request to withdraw the accreditation granted to CAL by 31 December 2018.¹²⁵

Unfortunately, the Commission has acquiesced and withdrawn CAL's observer status.¹²⁶ This ceding of ground can be interpreted variously, on the one hand it could be capitulation while on the other hand it may imply agreement on the part of the Commission with the stance of the Executive Council and the long-held misconception that the rights of sexual minorities are incompatible with African values. The foregoing notwithstanding, the Commission's withdrawal of CAL's observer status also amounts to an abdication of duty, by refusing to recognise women in African in their intersectionality contrary to gender responsiveness. The advocacy for the rights of lesbians and women's rights generally at the Commission also stands compromised with a representative from CAL noting that

[t]he withdrawal of CAL's' observer status actively excludes African women's rights movements and defenders from the vital human rights spaces where decisions are made about us and for us, but ultimately without us.¹²⁷

CAL in fact undertakes critical advocacy at the Commission, as it is the 'only regional, membership based organisation that works specifically to advance the rights of lesbians and women's rights more broadly in their diversity in Africa.'¹²⁸ Despite this important

¹²¹ Executive Council, Decision on the Report of the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) Doc.EX.CL/1089(XXXIII), EX.CL/Dec.1015(XXXIII).

¹²² As above para 5.

¹²³ EX.CL/Dec.1015(XXXIII) n 121 above para 7(iii).

¹²⁴ EX.CL/Dec.1015(XXXIII) n 121 above para 8(iv).

¹²⁵ EX.CL/Dec.1015(XXXIII) n 121 above para 8(vii).

¹²⁶ Coalition of African Lesbians 'Women and sexual minorities denied a seat at the table by the African Commission on Human and Peoples' Rights'. Available at <https://www.cal.org.za/2018/08/17/women-and-sexual-minorities-denied-a-seat-at-the-table-by-the-african-commission-on-human-and-peoples-rights/> (accessed 18 August 2018).

¹²⁷ As above.

¹²⁸ Coalition of African Lesbians n 126 above.

advocacy for lesbians who often suffer multiple discrimination, the sense given by the Commission is that women's rights are dispensable at the altar of political expediency.

Therefore, in what appears to be the most significant confrontation between the African Commission and AU political organs, the Commission initially demonstrated a commitment to uphold women's rights and specifically those of sexual minorities but later caved in. The resultant backlash has been resounding and contrary to the role expected of AU's political organs. In outlining scenarios of concordance desirable to enhance human rights protection in Africa, one commentator avers that the Commission will require enhanced support from the AU's governmental bodies, particularly the Assembly, Executive Council, and Permanent Representatives Committee. These bodies must throw their political weight behind the work of the Commission by, for example, providing it with adequate financial support.¹²⁹

In fact, in addition to the illustrated political interference, the Commission also suffers a lack of adequate financial support. In a recent activity report for instance, the Commission has complained:¹³⁰

Members of the Commission undertake a lot of work, both during the Sessions of the Commission, and during the intersession period, as this is when most of the work to promote human rights with various stakeholders in the different State Parties takes place. This work goes largely unrecognized and unrecompensed.

Overall, rather than enhance the work of the Commission, it would appear that the political organs of the AU seem bent on impeding the African Commission's mandate. The Commission on its part initially held up well, but in light of unprecedented political pressure, it eventually ceded ground, fearing further existential threat. Such concession compromises human rights in the continent, with blame ultimately falling to the AU's political organs for creating such highly unfavourable conditions.

¹²⁹ CFJ Doebbler 'A complex ambiguity: The relationship between the African Commission on Human and Peoples' Rights and other African Union initiatives affecting respect for human rights' (2003) 13 *Transnational Law & Contemporary Problems* 29.

¹³⁰ Forty-third Activity Report of the African Commission n 116 above para 53.

5.3.2 The relationship with pertinent units and mechanisms of the AU

Commission concerned with women's rights

The AU Commission (AUC) is the AU's secretariat and it coordinates and ensures harmony of the AU's policies, strategies, programmes and projects.¹³¹ A relationship between the Commission and the AUC is therefore significant. As one commentator postulated, '[a]t its best, the African system will also see a high degree of concordance between the Commission and the other AU projects.'¹³² An interview with a Commissioner reveals that the Commission and the AUC enjoy 'a healthy relationship.'¹³³ In substantiation, the example given is that of the invitation extended to the AUC to sessions of the African Commission and the opportunity to make statements at the opening ceremony. So, at best it would appear that a collegial relationship exists but one that does not extend substantively into shared human rights projects.

More relevant to the study is the relationship between the Commission, through the SRRWA, and the AUC's Directorate of Women, Gender and Development (WGDD). The WGDD promotes gender equality within the AU through development, harmonisation and mainstreaming of gender-related policies, programmes and projects.¹³⁴ The relationship between the Commission and what was then the Women's Unit of the OAU has an interesting history as it began with both entities simultaneously drafting a treaty on women's rights. A commentator at the time notes the following:¹³⁵

At the same time that the Draft Women's Protocol was being drafted, the Women's Unit within the OAU together with the Inter-African Committee on Harmful Traditional Practices Affecting the Health of Women and Children (IAC) were working on the Draft OAU Convention on the Elimination of All Forms of Harmful Practices (HPs) Affecting the Fundamental Human Rights of Women and Girls (Draft OAU Convention). In order to avoid duplication, the OAU suggested that there should be closer collaboration between the African Commission and the Women's Unit.

Another commentator similarly notes that the SRRWA's first draft of the Maputo Protocol benefited from input from NGOs and the Women's Unit of the OAU.¹³⁶ The Maputo

¹³¹ African Union n 98 above 84.

¹³² Doebbler n 129 above 28.

¹³³ Interview with the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, on 22 September 2017.

¹³⁴ African Union n 98 above 88.

¹³⁵ MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 42.

¹³⁶ F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 73.

Protocol is therefore the first and possibly most significant collaborative effort between the Commission and the then Women's Unit.

Thereafter, it would appear that cooperation between the SRRWA and the WGDD faltered. In a report reflecting on the mechanism of the SRRWA since its establishment on the Commission's 25th anniversary, it was reported that there was insufficient collaboration between the mechanism and the WGDD.¹³⁷ The report noted further that

it would be expected to see the Mechanism and the AU Gender Directorate working in close collaboration, both in terms of constant information sharing and undertaking country missions and other activities in order to realize their common objectives.¹³⁸

More recently, it would appear that the situation has improved. A newsletter by the mechanism on the occasion of the Commission's 30th anniversary indicates that the mechanism has maintained an excellent working relationship with the WGDD through undertaking of joint activities aimed at enhancing women's rights on the continent.¹³⁹ An interview with the current mandate holder of the mechanism confirms this when she indicates that the mechanism enjoys a healthy relationship with the WGDD.¹⁴⁰ A few joint activities are also provided in corroboration. The SRRWA and the WGDD hold joint meetings and activities on the promotion of the Maputo Protocol. Further, three years running at the time of writing, the WGDD has organised a high-level panel on women's rights in Africa and the SRRWA is usually included.

The mandate holder also shared current plans with the WGDD to evaluate the Maputo Protocol by the year 2020, referring to its ratification and domestication. The mandate holder further reported that the mechanism similarly collaborates with the WGDD under the framework of the UN Commission on the Status of Women (CSW) to lobby ambassadors and Ministers of Gender present on women's rights concerns.¹⁴¹ Of note

¹³⁷ Intersession report of the mechanism of the Special Rapporteur on the Rights of Women in Africa since its establishment, 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire, 9 -22 October 2012 paras 44-45.

¹³⁸ As above para 44.

¹³⁹ Newsletter of the Special Rapporteur on the Rights of Women in Africa on the occasion of the 30th anniversary of the African Commission on Human and Peoples' Rights 7 available at http://www.achpr.org/files/news/2017/11/d313/achpr_srrwa_newsletter_30th_anniversary_eng.pdf (accessed 8 May 2018).

¹⁴⁰ Interview with the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, on 22 September 2017.

¹⁴¹ As above.

also is the AU's most recent and significant report on women's rights in Africa¹⁴² to mark the AU's 2016 theme: African year of human rights with particular focus on the rights of women.¹⁴³ In introducing the report, the WGDD Director notes that it 'is the result of a yearlong collaboration with the UN-OHCHR, the African Union Special Rapporteur on the Rights of Women and UN-Women.'¹⁴⁴ Indicative of this also is the SRRWA's forward in the said report.¹⁴⁵

The SRRWA mandate holder also indicated that the mechanism collaborates with the WGDD in various campaigns together with civil society organisations.¹⁴⁶ Examples of these include the SRRWA's campaign for the decriminalization of abortion in Africa with support from IPAS.¹⁴⁷ Notably also, this campaign relies normatively on the African Charter, the Maputo Protocol as well as the AU Campaign for the Accelerated Reduction of Maternal Mortality in Africa (CARMMA)¹⁴⁸ as a further sign of synergy. The SRRWA is also involved with the long-standing Gender is my Agenda Campaign (GIMAC) which meets on the margins of the African Union Heads of State Summit and issues recommendations to the Summit on women's rights priority issues.¹⁴⁹ While the campaign is CSO led, it is held under the patronage of the WGDD.¹⁵⁰

One more mechanism of the AUC related to women's rights that bears mention is that of the Special Envoy on Women, Peace and Security. The Special Envoy was appointed by the chairperson of the AUC in 2014 with a mandate to 'ensure that the voices of women and the vulnerable are heard much more clearly in peacebuilding and in conflict

¹⁴² African Union 'Women's rights in Africa' available at https://www.ohchr.org/Documents/Issues/Women/WRGS/WomensRightsinAfrica_singlepages.pdf (accessed 8 May 2018).

¹⁴³ African Union '2016: African year of human rights with particular focus on the rights of women' available at <https://au.int/en/pressreleases/19615/2016-african-year-human-rights-particular-focus-rights-women> (accessed 8 May 2018).

¹⁴⁴ African Union 'Women's rights in Africa' n 142 above 5.

¹⁴⁵ African Union 'Women's rights in Africa' n 142 above 4.

¹⁴⁶ Interview with the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, on 22 September 2017.

¹⁴⁷ African Commission on Human and Peoples' Rights 'Press Release: Launch Of The Campaign For The Decriminalization Of Abortion In Africa: Women And Girls In Africa Are Counting On Us To Save Their Lives!' Available at <http://www.achpr.org/press/2016/01/d287/> (accessed 8 May 2018) and IPAS 'The African Commission on Human and Peoples' Rights launches campaign to decriminalize abortion' available at <http://www.ipas.org/en/News/2016/January/ACHPR-decriminalization-campaign.aspx> (accessed 8 May 2018).

¹⁴⁸ Campaign for the Accelerated Reduction of Maternal Mortality in Africa (CARMMA) available at <https://au.int/en/sa/carmma> (accessed 8 May 2018).

¹⁴⁹ Intersession report of the mechanism of the Special Rapporteur on the Rights of Women in Africa since its establishment n 137 above paras 31-33.

¹⁵⁰ See: Gender is my agenda <http://www.genderismyagenda.com/> (accessed 8 May 2018).

resolution.’¹⁵¹ This includes protecting the rights of women and children affected by conflict as well as ensuring ‘gender mainstreaming and equal participation of women in peace processes, including in conflict prevention, management, resolution and peacebuilding.’¹⁵² The Commission through the SRRWA seems to have a relationship with the Special Envoy. The SRRWA notes in the earlier mentioned report commemorating the Commission’s 30th anniversary that the mechanism has maintained an excellent working relationship with the Special Envoy through the organisation of joint activities aimed at enhancing the rights of women on the continent.¹⁵³ In an interview,¹⁵⁴ the current mandate holder also mentions working together with the Special Envoy on her campaign to restore the dignity of and ensure accountability for women affected by conflict in South Sudan.¹⁵⁵ The SRRWA also issues a statement in support of the campaign and calling on the government of South Sudan to strengthen security for women and girls in the conflict and to take necessary measures that will lead to accountability and reparations for the victims.¹⁵⁶

Overall it would appear that on the part of the Commission, there are efforts particularly from the SRRWA to maintain collaborative working relations with the entities of the AUC concerned with women’s rights. While these efforts are lauded, a more structured engagement would be ideal to ensure meaningful and sustainable collaboration particularly in lobbying states towards ratification and domestication of the Maputo Protocol. This can for instance be done through the development of roadmaps or joint workplans.

¹⁵¹ African Union Peace and Security ‘Special Envoy on Women, Peace and Security’ available at <http://www.peaceau.org/en/page/40-5676-static-bineta-diop> (accessed 8 May 2018).

¹⁵² As above.

¹⁵³ Newsletter of the Special Rapporteur on the Rights of Women in Africa on the occasion of the 30th anniversary of the African Commission n 139 above 7.

¹⁵⁴ Interview with the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, on 22 September 2017.

¹⁵⁵ African Union Peace and Security ‘South Sudan: Restore the Dignity of Women, Ensure Accountability’ (2016) 0001 *AU Special Envoy Briefs on Women, Peace & Security*. Available at <http://www.peaceau.org/uploads/au-special-envoy-briefs-on-wps-issue-0001-final.pdf> (accessed 8 May 2018).

¹⁵⁶ African Commission on Human and Peoples’ Rights ‘Statement by the Special Rapporteur on the Rights of Women in Africa in support of the AU Campaign to: “Restore the Dignity of Women and ensure Accountability in South Sudan”’ available at <http://www.achpr.org/news/2016/12/d264/> (accessed 8 May 2018).

5.4 Evaluating the gender responsiveness of the African Commission in its dealings with NGOs

The African Commission is mandated to '[c]o-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.'¹⁵⁷ Accordingly, the Commission's engagement with NGOs is in fact not discretionary, but rather one of its explicit functions. In practice, the Commission has embraced working with NGOs, they form its 'most tangible constituency' and have been crucial to its growth and strengthening.¹⁵⁸ The participation and inclusion of NGOs concerned with women's rights is now examined and delineated on the basis of the Commission's protective and promotional mandates.

5.4.1 NGOs engagement with the Commission's protective mandate through the individual communications procedure

This section seeks to interrogate the experience of NGOs litigating women's rights before the Commission as well as explore the reasons for the scarcity of litigation in this regard.

5.4.1.1 Litigants' perspectives

As discussed in chapter 3, NGOs have made various attempts at litigating women's rights cases before the Commission and are generally the main users of the individual communications procedure. Two of the only classic women's rights cases¹⁵⁹ before the Commission *Egyptian Initiative for Personal Rights and Interights v Egypt*¹⁶⁰ and *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia*,¹⁶¹ were litigated by NGOs.

The satisfaction of the NGOs with the adjudication of their respective communications with the Commission is varied. Adjudication here refers to the entirety of the process excluding the decision, which is assessed separately. In the *Egyptian* case, the litigant expressed satisfaction with the adjudication by the Commission on account of the novelty

¹⁵⁷ African Charter on Human and Peoples' Rights art 45(1)(c).

¹⁵⁸ Viljoen *International human rights law in Africa* n 1 above 383.

¹⁵⁹ They are considered classic women's rights cases as they are the only cases alleging a violation of article 18(3) of the African Charter and are concerned with women's rights issues. The Commission has not to date adjudicated a matter alleging violation of the Maputo Protocol.

¹⁶⁰ Communication 323/2006 n 16 above.

¹⁶¹ Communication 341/2007 n 17 above.

of the case, being the first women's rights individual communication and noting that it was important that the Commission was able to recognise violence as a form of discrimination.¹⁶² Interestingly, the same litigant expressed extreme dissatisfaction with the adjudication of the *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya*,¹⁶³ which was dismissed at the admissibility stage for failing to be submitted within a reasonable time. In chapter 3 section 3.3.2.5, the Commission's approach in this regard was roundly criticised and the litigant agrees noting that in a context where access to justice and access to the Commission in particular remains a challenge, it was disappointing to see the Commission narrowing the possibility of obtaining recourse.¹⁶⁴

In the *Ethiopian* case, the litigant expressed dissatisfaction in the adjudication of the communication citing several challenges ranging from a frustration with the state's non-responsiveness through a lengthy disingenuous amicable settlement process to the Commission delaying the entirety of the process for up to almost a decade with the case having been filed in 2007 and a decision only being delivered in 2016.¹⁶⁵ The litigant in the *Egyptian* and *Kenyan* cases similarly expressed one of the challenges faced as an unexplained failure by the Commission to deliver timeous decisions.¹⁶⁶ This complaint is not unique, the Centre for Human Rights makes the observation that:¹⁶⁷

Owing to the Secretariat's inadequate capacity in terms of numbers and technical expertise of staff, the Commission has not been able to discharge the two-fold mandate equally and effectively. As a result, a backlog of cases built up over the years. By 2013 some Communications had stalled at the admissibility stage for up to 8 years.

¹⁶² Interview with Sibongile Ndashe, lawyer formerly at Interights, now Executive Director, Initiative for Strategic Litigation in Africa on 9 May 2018.

¹⁶³ Communication 375/2009, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya*, ACHPR.

¹⁶⁴ Interview with Sibongile Ndashe, lawyer formerly at Interights, now Executive Director, Initiative for Strategic Litigation in Africa on 9 May 2018.

¹⁶⁵ Interview with Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018.

¹⁶⁶ Interview with Sibongile Ndashe, lawyer formerly at Interights, now Executive Director, Initiative for Strategic Litigation in Africa on 9 May 2018.

¹⁶⁷ Centre for Human Rights 'Support to the African Human Rights System: Recent improvement of adjudication and litigation by the African Commission on Human and Peoples' Rights (2013-2015) available at <http://www.chr.up.ac.za/index.php/projects/support-to-the-african-human-rights-system.html> (accessed 20 June 2017) (emphasis mine).

More recently (2012 – 2016), the Commission seems to be releasing an average of six decisions on the merits per year.¹⁶⁸ While this figure may appear paltry, it disguises the actual effort that the Commission is putting in. For instance, in 2016 only, the Commission ‘considered 31 communications during its 19th extraordinary session, while 11 communications were considered at the 58th ordinary session.’¹⁶⁹ It would appear that despite this pace, the Commission still has to contend with a serious backlog as the decisions issued during the aforementioned sessions in 2016 respond to communications that were filed between 2007 and 2012.¹⁷⁰ Commendably, all four provisional measures issued in 2016 related to communications filed in 2016¹⁷¹ which indicates a purposeful prioritisation of and response to urgent human rights violations. With this background, it is apparent that the delay complained of by the litigants is of a systemic nature, though it undoubtedly also obstructs women’s access to justice in a broad sense.

Other challenges expressed with the Commission’s adjudication process have to do with a lack of effectiveness in case management particularly on the communication front. The litigant in the *Egyptian* case for instance expresses that access to information on the stage of the case and reliable communication with the secretariat could ease a litigant’s experience. This litigant also reported that a failure by the Commission to provide translation services also caused significant delays in the consideration of the communication.¹⁷² The litigant in the *Ethiopian* case also noted that the Commission needed to improve in efficiency and communication with litigants. For instance, she gives an example of how as litigants they only found out about the state’s submission of a review of the decision through their own probing in implementation.¹⁷³ These grievances are corroborated by other NGOs such as the Institute for Human Rights and Development in Africa (IHRDA), a frequent litigator, before the Commission. IHRDA report that the

¹⁶⁸ The average was obtained by calculating the mean of the total number of decisions on the merits released in five years from 2012 – 2016. See: MG Nyarko & AO Jegede ‘Human rights developments in the African Union during 2016’ (2017) 17 *African Human Rights Law Journal* 302-303 (7 merits decisions), M Killander ‘Human rights developments in the African Union during 2015’ (2016) 16 *African Human Rights Law Journal* 543-548 (6 merits decisions), M Killander ‘Human rights developments in the African Union during 2014’ (2015) 15 *African Human Rights Law Journal* 546-550 (5 merits decisions) and M Killander & B Nkrumah ‘Human rights developments in the African Union during 2012 and 2013’ (2014) 14 *African Human Rights Law Journal* 281-288 (4 and 7 merits decisions respectively).

¹⁶⁹ Nyarko and Jegede as above 302.

¹⁷⁰ Nyarko and Jegede n 168 above 302.

¹⁷¹ Nyarko and Jegede n 168 above 302.

¹⁷² Interview with Sibongile Ndashe, lawyer formerly at Interights, now Executive Director, Initiative for Strategic Litigation in Africa on 9 May 2018.

¹⁷³ Interview with Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018.

‘notification of status of communications remains irregular and unreliable, and even when notification letters are received, we note a lack of detail necessary to facilitate our work/appropriate reaction.’¹⁷⁴ They further complain of ‘great difficulties in accessing information that should be public like approved texts of decisions in all official AU languages’.¹⁷⁵

When asked about their satisfaction with the recommendations issued by the Commission, the litigant from the *Egyptian* case expressed satisfaction and was pleased with the approach to issue monetary compensation.¹⁷⁶ The litigant in the *Ethiopian* case was dissatisfied with the recommendations issued for two reasons. The first, was that the Commission did not issue the full compensation they had requested. The second and more substantial reason however, was that the Commission failed to make a finding of discrimination on account of their male comparator framework of analysis that was analysed in chapter 3.¹⁷⁷

The question of state compliance is also useful as it is an important measure of the success of gender responsiveness in impacting women’s lives on the ground. The litigants from the *Egyptian* and *Ethiopian* cases indicated that both states have not complied with or implemented the Commission’s decisions.¹⁷⁸ In the *Egyptian* case, the litigant indicated that compliance was undermined by the events that occurred once the decision was given. The decision was issued after the Egyptian uprising,¹⁷⁹ and Egypt was suspended from the AU on account of an unconstitutional change of government.¹⁸⁰ Thereafter, the human rights issues that the African Commission prioritised in Egypt were the arbitrary

¹⁷⁴ IHRDA ‘IHRDA statement on the protective mandate of the African Commission’ available at <https://www.ihrda.org/2012/04/3066/> (accessed 16 May 2018).

¹⁷⁵ As above.

¹⁷⁶ Interview with Sibongile Ndashe, lawyer formerly at Interights, now Executive Director, Initiative for Strategic Litigation in Africa on 9 May 2018.

¹⁷⁷ Interview with Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018.

¹⁷⁸ Interview with Sibongile Ndashe, lawyer formerly at Interights, now Executive Director, Initiative for Strategic Litigation in Africa on 9 May 2018 and Interview with Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018.

¹⁷⁹ See further: HA Hellyer ‘Revolution in the Arab World: Egypt and its challenges’ (2011) 3 *Middle East Law and Governance* 118-125 and SF Aziz ‘Bringing down an uprising: Egypt’s stillborn revolution’ (2014) 30 *Connecticut Journal of International Law* 1-28.

¹⁸⁰ See: Reuters ‘African Union suspends Egypt’ available at <https://www.reuters.com/article/us-egypt-protests-africa-idUSBRE9640EP20130705> (accessed 2 November 2018) and Aljazeera ‘African Union suspends Egypt’ available at <https://www.aljazeera.com/news/africa/2013/07/201375113557928109.html> (accessed 2 November 2018).

death sentences and other forms of gross human rights violations.¹⁸¹ The litigant organisation that had filed the matter also wound up therefore cancelling this avenue of follow up.¹⁸² These variety of factors notwithstanding, the Commission nonetheless has an unfulfilled role to play in pursuing state compliance, something it has failed to do.

State compliance in the *Ethiopian* case faces a different set of challenges. The litigant indicates that after the decision was rendered, the Commission requested both parties to report to it within 180 days on the status of implementation of the decision. Since that time, there has been no compliance on the part of the state accompanied with a failure to respond to any of the litigants' communication in this regard.¹⁸³ More recently, the Commission informed the litigant that the Ethiopian state had requested for a review of the decision.¹⁸⁴ While a review is allowed under certain circumstances, such a process should clearly be procedural. Yet the litigant is unaware of details such as timelines allocated to the review process and has not received further information despite various prompts to the Commission.¹⁸⁵ This scenario gives the impression that there is a lot of deference on the part of the Commission towards states at the expense of litigants. Worse still, these delays are at the expense of the complainant who is yet to receive justice, 17 years from when she was violated.¹⁸⁶

Clearly in two of the only classic women's rights cases, compliance is wanting. It is worth noting that compliance is a general and systemic problem plaguing the Commission, beyond its women's rights cases.¹⁸⁷ That said, in light of the disproportionate scale of

¹⁸¹ See for instance: M Killander 'Human rights developments in the African Union during 2014' (2015) 15 *African Human Rights Law Journal* 537-558 which highlights urgent appeals and other interventions by the special mechanisms of the African Commission and the UN in response to Egypt's imposition of hundreds of death sentences after trials that seriously violated human rights standards.

¹⁸² Interview with Sibongile Ndashe, lawyer formerly at Interights, now Executive Director, Initiative for Strategic Litigation in Africa on 9 May 2018.

¹⁸³ Interview with Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018. See also Rules of Procedure of the African Commission on Human and Peoples' Rights (2010) rule 112. Rule 112 makes provision for follow-up on the recommendations of the African Commission including the requirement for the parties to report back to the Commission within 180 days on measures taken by the state party to implement the decision of the Commission.

¹⁸⁴ Interview with Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018. See also Rules of Procedure above rule 111. Rule 111 permits the African Commission to review its decision on its own initiative or at the request of one of the parties. The rule also provides the criteria to be followed by the Commission in such instances.

¹⁸⁵ Interview with Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018.

¹⁸⁶ Communication 341/2007, *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, ACHPR. The communication was filed in 2007 after exhaustion of local remedies but the violations themselves had occurred in 2001.

¹⁸⁷ See generally: F Viljoen 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights' in MA Baderin & M Ssenyonjo (eds) *International human rights law: Six decades after the UDHR* (2010)

women's rights violations contrasted to minimal redress efforts of the same, clearly the Commission should prioritise follow-up activities of women's rights violations. In fact, one of the seminal studies on the Commission's state compliance concludes that, aside from political factors, the Commission's follow-up activities are a critical determinant in enhancing state compliance.¹⁸⁸ In the limited women's rights cases, it is apparent that the Commission is not proactive in pursuing state compliance. In failing to do so, its recommendations are not being implemented thereby not resulting in substantive equality for women on the ground. In light of this, the Commission fails to be gender responsive.

5.4.1.2 Exploring the dearth of women's rights litigation

Aside from the perspectives of the existing litigants, a significant concern is the overall shortage of women's rights cases at the Commission. It is surprising that NGOs are not submitting more women's rights cases for various reasons some of which are considered here.

The admissibility requirement to exhaust local remedies emerges as one of the hurdles. One respondent working on the rights of sexual minorities indicates that the process of case development is immense and moreover in several women's rights violations that the organisation could consider filing, local remedies have not been exhausted therefore barring litigation at the Commission.¹⁸⁹ A second respondent providing more clarity from a women's rights perspective indicates that the exhaustion of local remedies provides a formidable challenge for women. There are issues of access to justice that are more unique to women than those of others, yet the admissibility criteria are applied as if these challenges do not exist.¹⁹⁰ This respondent's views are in fact corroborated by the criticism in the previous sub-section and in chapter 3 where the Commission unreasonably fails to admit an otherwise meritorious women's rights case on the basis of

and F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1999 - 2004' (2007) 101 *American Journal of International Law* 1-34.

¹⁸⁸ Viljoen & Louw above 32.

¹⁸⁹ Interview with Adrian Jjuuko, Executive Director - Human Rights Awareness and Promotion Forum on 24 April 2018.

¹⁹⁰ Interview with Karen Stefiszyn, former Programme Manager - Gender Unit, Centre for Human Rights on 20 April 2018.

being brought out of time.¹⁹¹ What is more troubling is that the reviewed case is possibly one out of several others as the Commission had previously been accused of issuing unwritten decisions especially on withdrawals and non-seizures in several instances.¹⁹² Arguably, therefore, as anecdotally alleged by this respondent, there are probably several other women's rights cases that failed at the admissibility stage from a failure to apply a gender responsive approach. In a human rights system burgeoning with treaty bodies, this access challenge has led to forum shopping as illustrated by a respondent who indicated a preference to file a relevant case at the ECOWAS Community Court of Justice (ECCJ) where exhaustion of local remedies is not required.¹⁹³ The case the respondent refers to has since been decided and is actually the first ever adjudication of a violation of the Maputo Protocol by any human rights treaty body.¹⁹⁴ While the option of forum shopping is a positive factor from an access to justice perspective, this latter instance represents a missed opportunity for jurisprudence on the Protocol to be led from the regional as opposed to sub-regional level where the geographical breadth of impact is smaller.

The Commission's general ineffectiveness in managing its individual communications procedure has correspondingly had a bearing on the scarcity of women's rights cases. One NGO representative that has previously litigated before the Commission expresses the view that the frustrating process of pursuing a communication at the Commission is discouraging.¹⁹⁵ In what appears to be a growing trend, this respondent now expresses a preference to approach other forums such as the ECCJ where applicable, as the ECCJ is deemed more efficient.¹⁹⁶

An insider perspective provides further nuance to the discussion. When asked about some of the reasons for the very small number of women's rights cases, the SRRWA indicated that some victims write to the Commission complaining that the NGO that launched their case has since withdrawn and that they are unable to pursue the complaint

¹⁹¹ Communication 375/2009, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya*, ACHPR.

¹⁹² IHRDA 'IHRDA statement on the protective mandate of the African Commission' available at <https://www.ihrda.org/2012/04/3066/> (accessed 16 May 2018).

¹⁹³ Interview with Iheoma Obibi, Executive Director – Alliances for Africa, Nigeria on 30 May 2018.

¹⁹⁴ ECW/CCJ/JUD/08/17, *Dorothy Chioma Njemanze & 3 others v The Federal Republic of Nigeria*, ECOWAS Court.

¹⁹⁵ Interview with Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018.

¹⁹⁶ As above.

without representation, ostensibly from a resource, and also from an expertise perspective.¹⁹⁷ The NGO may have itself withdrawn for various reasons, resource constraints being one of them. Asked about what the Commission is doing to resolve this challenge to access to justice (resource constraints), the SRRWA indicated that the African Union would soon establish a legal fund.¹⁹⁸ This response by the Commission is hardly sufficient and certainly not responsive to the needs of a largely resource constrained continental citizenry where women are disproportionately affected by poverty.¹⁹⁹ Comparatively, the African Court, which has been in existence for a far less shorter time, is setting up a legal aid scheme. So far, the Court has in place a legal aid policy and 74 pro bono lawyers registered to represent indigent applicants.²⁰⁰ The Court has conducted two training sessions of the lawyers on its scheme to advise them of the Court's judicial aspects and enhance their ability to represent their clients.²⁰¹ The Court has indicated that the launch of the legal aid fund could happen by December 2018.²⁰² Yet the African Court is also envisaged under the continental legal fund that the African Commission is purportedly waiting for. Such reticence on the part of the Commission therefore fails to consider the hardships of women in Africa and contributes in part to the dearth of women's rights litigation.

One more reason that could have contributed to the dearth of women's rights cases is the mistaken apprehension that the Commission lacks jurisdiction to adjudicate on the Maputo Protocol as discussed in chapter 3, section 3.2.2.5. This remains an acceptably

¹⁹⁷ Interview with the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, on 22 September 2017.

¹⁹⁸ This in reference to the legal fund envisaged under the Statute on the Establishment of the Legal Aid Fund of Human Rights Organs of the African Union (2016).

¹⁹⁹ Resolution on the Situation of Women and Children in Africa, ACHPR/Res.66(XXXV)04 adopted at the 35th Ordinary Session, Banjul, The Gambia, 21 May – 4 June 2004. Here the Commission notes that there is more widespread poverty among women.

²⁰⁰ African Court on Human and Peoples' Rights 'Legal aid scheme' available at <http://en.african-court.org/index.php/component/k2/item/36-legal-aid-scheme> (accessed 17 August 2018).

²⁰¹ See: African Court on Human and Peoples' Rights 'African Court organises special training for lawyers to represent indigent applicants' available at <http://en.african-court.org/index.php/news/press-releases/item/171-african-court-organizes-special-training-for-lawyers-to-represent-indigent-applicants> (accessed 17 August 2018) and African Court on Human and Peoples' Rights 'Over 30 lawyers to attend African Court training next week' available at <http://en.african-court.org/index.php/news/press-releases/item/243-over-30-lawyers-to-attend-african-court-training-next-week> (accessed 17 August 2018).

²⁰² The Citizen 'AU Court to start legal aid fund' available at <http://www.thecitizen.co.tz/News/-AU-court-to-start-Legal-Aid-Fund/1840340-4655240-ofs32f/index.html> (accessed 17 August 2018).

held notion among some practitioners,²⁰³ and one that the Commission should have expressed itself on explicitly in order to minimise the risk resulting from this uncertainty.

Overall, it is apparent that a few NGOs have made attempts at litigating women's rights cases. Drawing from findings from the analysis of cases in chapter 3, the perspectives of litigants, and the Commission's failure to redress the dearth of women's rights, it is clear that the Commission has not fully utilised its protective mandate. This failure compromises the advancement of women's rights protection and in is in this regard not gender responsive.

5.4.2 NGOs participation in the Commission's promotional mandate

This section seeks to examine the Commission's gender responsiveness, with a focus on the element of inclusion, through the participation of NGOs in its promotional mandate. This is examined through NGOs ease of attaining observer status and their ease of participation in promotional activities at the Commission to advance women's rights.

5.4.2.1 Ease of granting observer status

NGOs working on women's rights qualify for observer status by virtue of the criterion that applicant NGOs must be working in the field of human rights²⁰⁴ in Africa and have objectives that are in consonance with the Maputo Protocol among others.²⁰⁵ Observer status allows NGOs to fully participate in the activities of the Commission such as allowing them to make statements and engage with Commissioners during formal sessions and

²⁰³ See for example: A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 327. Rudman discusses the African Court as the primary institution to be seized in enforcing the Maputo Protocol with no reference to the African Commission.

²⁰⁴ Rules of Procedure n 10 above rule 68 and Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa, ACHPR/Res.361(LIX)16 adopted at the 59th Ordinary Session, Banjul, The Gambia, 21 October - 4 November 2016 annex.

²⁰⁵ Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa as above.

proceedings.²⁰⁶ There are 517 NGOs with observer status before the Commission.²⁰⁷ Of those, at least 51 NGOs ‘specifically list women’s rights as part of their mandate.’²⁰⁸

Mostly, there is little grievance from women’s rights NGOs in obtaining observer status except for the case of the Coalition of African Lesbians (CAL), discussed earlier in this chapter in section 5.3.1. During its 47th Ordinary Session, the Commission decided not to grant CAL observer status and reported the following:²⁰⁹

The ACHPR decided, after a vote, not to grant Observer Status to the Coalition for African Lesbians (CAL), South Africa, whose application had been pending before it. The reason being that, the activities of the said Organisation do not promote and protect any of the rights enshrined in the African Charter.

In reaching this decision, clearly on the basis of CAL’s objectives to advance the rights of lesbian women, the Commission failed the gender responsive test by failing to be inclusive, to recognise the intersectional identities of women and to adopt a contextualised African response. In fact, the Commission seemed to contradict its own position in *Zimbabwe Human Rights NGO Forum v Zimbabwe*²¹⁰ where it recognises protection from discrimination on the basis of sexual orientation.²¹¹ The Commission’s decision has been the subject of significant comment and criticism indicating the Commission’s approach to engaging with the rights of sexual minorities ranging from reticent and exclusionary when backed into a corner.²¹² The Commission later granted CAL observer status in 2015, after ‘a concerted seven-year campaign by CAL, joined by many major human rights organisations in Africa, and a significant amount of resistance from the Commission.’²¹³ As discussed earlier in this chapter, the Commission has yet

²⁰⁶ As above.

²⁰⁷ African Commission on Human and Peoples’ Rights ‘NGOs with observer status’ available at <http://www.achpr.org/network/ngo/by-name/> (accessed 16 August 2018).

²⁰⁸ Information sourced from Rudman ‘Women’s access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women’s rights committee on the enforcement of the African Women’s Protocol’ n 12 above 331 and a subsequent updating of the source information from the African Commission as above.

²⁰⁹ Twenty-eighth Activity Report of the African Commission on Human and Peoples’ Rights November 2009 - May 2010 para 33.

²¹⁰ Communication 245/2002, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, ACHPR.

²¹¹ As above para 169.

²¹² A Rudman ‘The protection against discrimination based on sexual orientation under the African human rights system’ (2015) 15 *African Human Rights Law Journal* 23, AM Ibrahim ‘LGBT rights in Africa and the discursive role of international human rights law’ (2015) 15 *African Human Rights Law Journal* 273, V Balogun & E Durojaye ‘The African Commission on Human and Peoples’ Rights and the promotion and protection of sexual and reproductive rights’ (2011) 11 *African Human Rights Law Journal* 394-395, F Vilakazi & S Ndashe ‘The day the African Commission disavowed humanity’ available at Pambazuka News <https://www.pambazuka.org/governance/day-african-commission-disavowed-humanity> (accessed 16 May 2018) and Blacklooks ‘Outrage at denial of observer status to CAL by the African Commission on Human Rights’ available at <http://www.blacklooks.org/2010/11/outrage-at-denial-of-observer-status-to-cal-by-the-african-commission-on-human-rights/> (accessed 16 May 2018).

²¹³ Ibrahim as above 273.

again withdrawn CAL's accreditation, which is indicative either of a political survival strategy or of the Commission's poor resolve to defend the rights of and work with *all women* including sexual minorities.

5.4.2.2 Collaborative development of norms and joint campaigns with NGOs

NGOs are substantively involved in providing technical and administrative support in order to strengthen the Commission and 'some engage in elaborating norms and principles, and interpreting the African Charter',²¹⁴ the Maputo Protocol and other women's rights related instruments. Since the Commission's women's rights interventions are led by the SRRWA, it is this mechanism that is the focus of examination.

As noted in chapter 4, one of the SRRWA's first tasks was the development of the Maputo Protocol and thereafter lobbying for its adoption and ratification. Further, in introducing the Protocol in chapter 3, it is evident that the conceptualisation of the need for a women's protocol, its drafting as well as advocacy towards its adoption and ratification were significantly driven by women's rights NGOs in the continent.²¹⁵ Additionally, norms for the elaboration of the Protocol such as general comments and guidelines, discussed in chapter 4, by the Commission through the SRRWA were developed in collaboration with NGOs. The SRRWA reports that the Guidelines for State Reporting under the Maputo Protocol were developed with significant support from the Centre for Human Rights, University of Pretoria.²¹⁶ The Centre has also provided support in the development of General Comments on articles 14(1)(d) and (e) of the Maputo Protocol, the Joint General Comment on Child Marriage and the Study on Child Marriage in Africa.²¹⁷ The mechanism also notes the support of the International Federation for Human Rights (FIDH) in the

²¹⁴ N Mbelle 'The role of non-governmental organizations and national human rights institutions at the African Commission' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 290.

²¹⁵ Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' n 136 above 72-73 and R Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' in D Buss & A Manji (eds) *International law: Modern feminist approaches* (2005) 262-263.

²¹⁶ Intersession report of the mechanism of the Special Rapporteur on the Rights of Women in Africa since its establishment n 137 above para 37.

²¹⁷ Newsletter of the Special Rapporteur on the Rights of Women in Africa on the occasion of the 30th anniversary of the African Commission n 139 above 8.

development of the Guidelines for Combatting Sexual Violence and its Consequences in Africa.²¹⁸

These collaborations are fruitful as NGOs enrich and complement the work of the Commission particularly in areas where it has structural weaknesses.²¹⁹ The current mandate holder for instance indicates that the mechanism of the SRRWA benefits from technical expertise from NGOs such as the Centre for Human Rights and in the past, IHRDA.²²⁰ Support from NGOs should however not be used to overshadow the Commission's efforts to remedy its structural weaknesses.²²¹

In terms of campaigns, the SRRWA's campaign to decriminalise abortion is in collaboration with IPAS, which has also 'organised several Retreats for Members of the Commission and its Secretariat to enlighten them on issues relating to safe abortion and sexual reproductive rights.'²²² The campaign to end child marriage on its part was jointly implemented with the Centre for Human Rights.²²³ The SRRWA also reports on maintaining collaboration with the GIMAC campaign and platform that meets on the margins of AU Summits and 'has played an important role in the campaign for a continent-wide ratification of the Maputo Protocol and the assessment of the implementation of the Solemn Declaration on Gender Equality in Africa.'²²⁴ The current mandate holder also indicated that the mechanism often participates in side events related to women's rights advocacy by NGOs during Commission sessions.²²⁵ A respondent representing a continent-wide women's rights network supports this noting that it is easy to organise side events at Commission sessions and that commissioners are often helpful when approached.²²⁶

²¹⁸ As above.

²¹⁹ Mbelle n 214 above 290.

²²⁰ Interview with the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, on 22 September 2017.

²²¹ Mbelle n 214 above 290.

²²² Newsletter of the Special Rapporteur on the Rights of Women in Africa on the occasion of the 30th anniversary of the African Commission n 139 above 8.

²²³ As above.

²²⁴ Newsletter of the Special Rapporteur on the Rights of Women in Africa on the occasion of the 30th anniversary of the African Commission n 139 above 8.

²²⁵ Interview with the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, on 22 September 2017.

²²⁶ Interview with Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018.

Reflectively, a respondent who worked with the SRRWA for a number of years makes the overall assessment that the mandate holder was very receptive to new ideas and displayed a genuine commitment to women's rights.²²⁷ Overall, it is clear that the mechanism of the SRRWA is highly accessible and has maintained a close and collaborative relationship with NGOs from its establishment and to date.

5.4.2.3 Participation of NGOs in the proceedings of the Commission:

Shadow reports and statements

NGOs with observer status have various entitlements, such as the ability to present shadow reports on the human rights situation in their countries.²²⁸ Shadow reports impact the process and outcome of state reporting. On process, they facilitate the African Commission to hold a constructive dialogue with a state when its report is being considered.²²⁹ One respondent confirms that this is the case in practice as she had in various instances observed commissioners posing questions to a state that could only have been informed by submitted shadow reports.²³⁰ In this regard, it is positive to note that the Commission is receptive to women's rights NGOs input to the state reporting process. On outcome, shadow reports could also potentially influence the African Commission's concluding observations as discussed in chapter 4. Although, the platform exists, the Commission's weakness in communication affects even this aspect of their mandate. One respondent complains that it is not always clear which states will appear for reporting or the state reports may be availed to late too late to allow for an effective shadow reporting process.²³¹ This inefficiency impedes participation of NGOs and denies the Commission of a critical alternative voice in assessing a country's human rights situation thereby undermining state reporting objectives.

²²⁷ Interview with Karen Stefiszyn, former Programme Manager – Gender Unit, Centre for Human Rights on 20 April 2018.

²²⁸ Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission, ACHPR/Res.30(XXIX)98 adopted at the 24th Ordinary Session, Banjul, The Gambia, 22 – 31 October 1998 para 5.

²²⁹ Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission n 228 above para 5.

²³⁰ Interview with Karen Stefiszyn, former Programme Manager – Gender Unit, Centre for Human Rights on 20 April 2018.

²³¹ Interview with Faiza Mohammed, Director – Africa Office, Equality Now on 13 August 2018.

NGOs with observer status are also accorded the ability to make statements during the Commission's public sessions on issues that concern them.²³² An average of 49 NGOs with observer status made statements on the human rights situation in Africa in the five most recent Ordinary Sessions of the Commission.²³³ In reviewing a total 43 NGO statements submitted to the Commission during one session, 17 or 40%, were found to be exclusively on women's rights issues or dealing with other human rights issues while highlighting the plight of women.²³⁴ Women's rights issues are therefore well represented through this platform. These statements have significant impact as they are addressed not only to the Commission, but also to state representatives present as well as other NGOs. In this way, a rare opportunity to engage vertically with states as well as collaborate horizontally with like-minded NGOs is presented.

From a women's rights perspective, the benefit of a regional platform, to expose states for violations and omissions detrimental to women's rights cannot be gainsaid. In fact, a statistically backed study found that naming and shaming of governments is one of the single most effective advocacy strategies that a women's rights NGO can adopt towards pressuring enforcement of women's internationally recognised rights.²³⁵

5.4.2.4 The Commission's receptiveness to the NGO Forum

The NGO Forum is a convening of 'civil society organisations from across the continent and some international NGOs [to] discuss the issues that they want to raise with the Commission in the upcoming session.'²³⁶ 'Since 1991, each of the Commission's bi-annual sessions has been preceded by a forum of the non-governmental organisations' which are

²³² Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa n 204 above annex.

²³³ Average obtained by calculating the mean of the total number of NGOs that made statements from the 58th – 62nd Ordinary Sessions. See: Final Communiqué of the 62nd Ordinary Session of the African Commission on Human and People's Rights, Nouakchott, Mauritania, 25 April – 9 May 2018 para 21 (56 NGOs), Final Communiqué of the 61st Ordinary Session of the African Commission on Human and People's Rights, Banjul, The Gambia, 1 – 15 November 2017 para 38 (65 NGOs), Final Communiqué of the 60th Ordinary Session of the African Commission on Human and People's Rights, Niamey, Niger, 8 – 22 May 2017 para 29 (46 NGOs), Final Communiqué of the 59th Ordinary Session of the African Commission on Human and People's Rights, Banjul, The Gambia, 21 October – 4 November 2016 para 20 (35 NGOs) and Final Communiqué of the 58th Ordinary Session of the African Commission on Human and People's Rights, Banjul, The Gambia, 6 – 20 April 2016 para 17 (41 NGOs).

²³⁴ African Commission on Human and Peoples' Rights, Sessions, 56th Ordinary Session 'NGO statements' available at <http://www.achpr.org/sessions/56th/ngo-statements/33/> (accessed 17 May 2018).

²³⁵ A Murdie & D Peksen 'Women's rights INGO shaming and the government respect for women's rights' (2015) 10 *Review of International Organizations* 1-22.

²³⁶ M Killander 'The African Commission on Human and Peoples' Rights' in M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012) 244.

usually organised in collaboration with the Commission,²³⁷ which is a good show of receptiveness on the part of the Commission.

The opening and concluding sessions of these NGO forums are also routinely attended by Commissioners, where a statement on behalf of the participants is read and presented to the Commission.²³⁸ In these statements, NGOs communicate highlights of their deliberations and bring to the attention of the Commission pressing human rights concerns. These statements almost always include women's rights concerns that frequently feature in the agenda.²³⁹ Speaking on the SRRWA mechanism's relationship with NGOs, the current mandate holder indicated that the NGO forum links the Commission to CSOs and that the mechanism often participates in side events related to its mandate.²⁴⁰ This presents an unrivalled opportunity to NGOs to gain valuable face-to-face time with the SRRWA towards highlighting key women's rights concerns or collaborating in various interventions.

An important outcome of the NGO forums is resolutions. In fact, it has been fronted that '[r]esolutions submitted to the Commission are the most visible outcome of the Forum.'²⁴¹ As was established in chapter 4, there is a dearth of women's rights resolutions and arguably even fewer emanating from the NGO Forum. This research identified²⁴² only one resolution²⁴³ related to women's rights that is born out of the NGO Forum. Therefore, while the Forum appears to be an easy space through which women's rights organisations can bring critical resolutions to the attention of the Commission, in practice this is easier said than done. The whole process of adopting resolutions is quite political

²³⁷ CA Odinkalu 'The individual complaints procedure of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law & Contemporary Problems* 388.

²³⁸ See for instance: African Commission on Human and Peoples' Rights, Sessions, 55th Ordinary Session 'Opening statement on behalf of participants of the Forum of NGOs' available at <http://www.achpr.org/sessions/55th/speeches/ngo-opening-statement/> (accessed 20 May 2018) and African Commission on Human and Peoples' Rights, Sessions, 56th Ordinary Session 'Opening statement on behalf of participants of the Forum of NGOs' available at http://www.achpr.org/sessions/56th/speeches/ngos_statement/ (accessed 20 May 2018).

²³⁹ As above.

²⁴⁰ Interview with the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, on 22 September 2017.

²⁴¹ International Service for Human Rights '2010 NGO Forum (I): Inside perspectives' 2.

²⁴² As above 2.

²⁴³ Resolution on the Prevention of Women and Child Trafficking in South Africa during the 2010 World Cup Tournament, ACHPR/Res.165(XLVII)10 adopted at the 47th Ordinary Session, Banjul, The Gambia, 12 - 26 May 2010.

and involves a lot of direct lobbying with commissioners.²⁴⁴ From a women's rights perspective, women's rights issues fare even worse in this politically charged space with a commentator observing:²⁴⁵

Unfortunately, these types of resolutions [on women's rights] are difficult to secure due to the highly political nature of the African Commission, despite the independence of the commissioners.

So, while women's right concerns may not have fared much by way of resolutions at the NGO Forum, there are a few positive developments. As already mentioned, the Forum usually devotes its agenda to women's rights concerns. In a report assessing one such Forum, NGO delegates interviewed seemed to exude satisfaction with the platform with one remarking: 'We, Batwa women, are satisfied that our recommendations were heard by the Commission.'²⁴⁶ The NGO Forum is also lauded 'as the site of many successes for organisations advocating for LGBTI human rights.'²⁴⁷ An LGBTI rights advocate in fact credits the 'current acceptance of, and shared concerns about, LGBTI rights [as] the result of many years of sensitisation at the Forum and the African Commission.'²⁴⁸ To nuance this discussion a little further, a respondent agrees that LGBTI rights have indeed received greater attention from NGOs and the Commission but adds that it is not enough. He says that a focus on women (lesbians, bisexual and trans) is particularly absent with regards to violence and other issues and that patriarchy permeates even the LGBTI movement and resultantly the Commission's interventions.²⁴⁹

On the whole, all of the Commission's interactions with NGOs are marked with receptiveness and accessibility which is a great marker for inclusion. The collaborations have also resulted in the development of norms that are likely to result in substantive equality and in this regard the Commission is gender responsiveness. On the intersectionality front however, it is evident that lesbian, bisexual and trans women for instance have not enjoyed the same level of access and attention to their rights in light of

²⁴⁴ JK Biegon 'The impact of the resolutions of the African Commission on Human and Peoples' Rights' unpublished PhD thesis, University of Pretoria, 2016 61-63.

²⁴⁵ K Stefiszyn 'The African Union: Challenges and opportunities for women' (2005) 5 *African Human Rights Law Journal* 377.

²⁴⁶ Diane Nduwimona in n 241 above 7.

²⁴⁷ Monica Mbaru in n 241 above 3.

²⁴⁸ As above.

²⁴⁹ Interview with Adrian Jjuuko, Executive Director - Human Rights Awareness and Promotion Forum on 24 April 2018.

the observer status debacle, and the relative invisibility of response on any of their predominant concerns such as violence. In this regard the Commission fails to adopt an inclusive and intersectional approach to women's rights.

5.5 Conclusion

This chapter explores the gender responsiveness of the Commission's relations with its external actors ranging from intergovernmental to non-governmental within the African human rights system. Starting off is the analysis of the Commission's relationship with a shared mandate to implement and monitor women's rights normative instruments such as the Charter and the Protocol. In the case of the African Court, the complementary relationship is in fact established by treaty. In practice, however, the Court has many structural obstacles that impede its utility for women's rights protection. The Commission on its part is also reticent in exploring the complementary relationship. With the African Committee of Experts, the Commission enjoys a fruitful working relationship and demonstrates an understanding of the intersectional nature of their overlapping mandates, which is lauded as gender responsive. RECs have increasingly become spaces for women's rights protection and promotion. Overall, the relationship between the African Commission and the RECs, though *ad hoc*, seems to comprise of mutual recognition, which can only serve to solidify women's protection and promotion.

The Commission is bound to AU political organs not only for its budget like other AU organs, but also in its working methods. The Executive Council and PRC in particular are seen to be overbearing in a manner that has compromised the Commission's ability to promote women's rights. While the Commission initially displayed a commitment to women's rights in defying the Executive Council, backed into a corner it has abdicated its commitment to protect *all rights* for political expediency. The relationship with the AUC particularly its WGDD is more cordial. Numerous joint activities are illustrated but the lack of an overall plan or structured engagement impedes the Commission's gender responsiveness.

In assessing the Commission's gender responsiveness in its engagement with NGOs, two findings are evident. With regard to its protective mandate, it is clear that the Commission

has not done enough to fully utilise its protective mandate and therefore fails to be gender responsive. It is in its relationship with NGOs that the Commission is evidently gender responsive as deduced from its ease of granting observer status to its receptiveness to collaborative initiatives to advance women's rights. Unfortunately, the Commission's treatment of CAL undermines its gender responsiveness in disregard of women's intersectional identities.

Overall the Commission seems to exercise good will in its external relations but not enough structure surrounds its engagement. This limits its potential to engage in more conscious advocacy and collaboration that can synergise with its own mandate and that of other actors towards increased women's rights promotion.

The next chapter concludes the study.

6 Conclusion

6.1 Introduction

The African human rights system has an adequate normative framework for women's rights protection. In fact, some of the system's instruments, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), are considered to be ground-breaking, as discussed in chapter 2. In spite of this normative robustness, women in Africa suffer multiple human rights violations completely at odds with the rights to which they are entitled.

The African Commission on Human and Peoples' Rights (African Commission) has a broad mandate to ensure the promotion and protection of rights in Africa, including for women. While the African Commission is not expected to be a panacea for all the problems facing women in Africa, it appears that the Commission has, on the face of it, not effectively lived up to its mandate to respond to the concerns that women in Africa face. This thesis accordingly uses a gender responsiveness assessment in a bid to more clearly understand the practice and potential of the Commission from a women's rights perspective.

Following in this chapter is a discussion of the key findings, identification of proposals to the Commission and finally suggestions for future research.

6.2 Key findings

This thesis assesses the Commission's gender responsiveness. To do so, the gender responsiveness framework of analysis is developed and utilised against the Commission's mandate and relationships in order to respond to the research questions. Gender responsiveness is a feminist method of analysis designed to assess and guide an African human rights treaty body to recognise and effectively respond to gender inequalities. This thesis proposes that for a human rights treaty body to be gender responsive, it should consider four parameters: substantive equality, inclusion, recognition of intersectional identities and adoption of a contextualised African response. These

parameters are interactive in nature with women's circumstances and the context guiding the emphasis placed on a parameter. The findings are accordingly discussed in this section.

6.2.1 Do the Commission's interventions result in substantive equality?

The first gender responsiveness parameter is whether the interventions of the African Commission result in substantive equality for women. The meaning of substantive equality is contested and after an extensive literature review, this thesis adopts the understanding of substantive equality as developed by an African discrimination expert, Sandra Fredman. Fredman's approach to substantive equality is deemed suitable for an African context where inequality is often multifaceted owing for instance to intersectional identities and pluralistic legal systems. Rather than approach substantive equality as a single formula, Fredman's approach proposes a four-dimensional principle with the objectives: i) to redress disadvantage; (ii) to address stigma, stereotyping, prejudice and violence; (iii) to enhance voice and participation; and (iv) to accommodate difference and achieve structural change.

Critical to the Commission's work is the normative foundation that it has at its disposal in women's rights protection. A gender responsive normative foundation is an important prerequisite for achieving substantive equality. In chapter 3, the thesis accordingly assesses the gender responsiveness of this framework as it has a direct correlation to the Commission's carrying out of its mandate. The African Charter on Human and Peoples' Rights (African Charter) ranges from gender blind in all its provisions to paternalistic in its women's rights-centric provision. The Commission has demonstrated an inability to innovate, for re-characterisation of the existing provisions towards gender responsiveness is possible, as demonstrated in several instances. The Maputo Protocol, the Commission's first major women's rights intervention, is deemed extremely progressive in its protection of women and the Commission gender responsive for its role in its development and advocacy for its adoption.

Further, in looking at the Commission's development of soft law standards in chapter 4, the Commission has embarked on a fervent norm-setting spree. Most of the norms, particularly the more recent instruments such as General Comments, are without a doubt

gender responsive. There is no doubt that an elaborate normative landscape exists in favour of women's rights protection. While this landscape is needed, the Commission does not fully satisfy the gender responsiveness quotient, which places strong emphasis on substantive equality where real outcomes transforming women's lives are desired. Put another way, the Commission has laid the foundation towards attaining full gender responsiveness but has not always utilised this platform.

In assessing the Commission's protective mandate in chapter 3, this thesis finds that the Commission has not fully utilised its protective mandate towards enhancing the status of women in Africa. The Commission's women's rights jurisprudence in its two classic women's rights cases reveals the use of a male comparator standard in reaching a finding of discrimination, which undermines the recognition of female-specific circumstances. This non-recognition is contrary to a substantive equality approach, which includes redressing disadvantage as one of its imperatives. For instance, in *Ethiopian Women Lawyers Association & Equality Now v Ethiopia*, the Commission's use of a male comparator standard led the Commission to a finding that the survivor's rape and marriage by abduction did not amount to discriminatory treatment. The Commission's recommendations in its women's rights cases also frequently fall short of making provision for structural change that is critical to redressing disadvantage occasioned by patriarchy and regressive gender norms. By failing for instance to recognise the systemic nature of the violence alleged in the *Egyptian Rights Initiative & Interights v Egypt*, the Commission issued recommendations that are not structural in nature and cannot minimise repetition. In this way the recommendations fail to result in substantive equality as they do not redress the actual injustice, which is the actual complaint as well as the vulnerability that occasioned the complaint.

Key to alleviating the divide between the elaborate normative framework and substantive equality that still eludes women in Africa are the Commission's special mechanisms discussed in chapter 4. The Special Rapporteur on the Rights of Women in Africa (SRRWA), other special rapporteurs, committees and working groups are evaluated. A few of these mechanisms are gender neutral in their approach, thereby failing to factor women's particular circumstances. For those that display attention to women's rights concerns, the SRRWA included, the major trend is that the mechanisms

are largely engaged in generating soft law, reports, studies, newsletters and other documentation. While this is in fact a part of their mandate, what is observed is an enthusiastic development of norms and documents without an equally committed approach to the popularisation and implementation of these norms, standards and findings. Such an approach in isolation cannot lead to the attainment of substantive equality.

6.2.2 Is the African Commission inclusive in its approach?

Inclusion in this thesis is assessed from two angles. The first assesses inclusion of women's rights concerns in norms and in structures. The question here is: are women and their issues visible? The second assesses the levels of women's access and actual participation in the institution and its mechanisms.

With regard to the first, it is observed that women's rights concerns are increasingly visible in the African Commission. This is particularly so in its recent elaboration of norms as well as in its special mechanisms particularly through the SRRWA and other mechanisms that pay attention to women's rights issues. The Commission is itself inclusive in its composition, as it is, currently composed of a majority of six female commissioners out of a total eleven commissioners.¹ Despite noting a poor start in chapter 1, where the Commission did not initially have female commissioners for almost five years of its existence, this representation issue has now long been settled. Women commissioners are now well represented and this has been the case in the recent past including holding positions of Commission Chairperson and Vice-chairperson a number of times. For instance, the current and last four Chairpersons have all been women.² Although a direct causal relationship cannot be established, anecdotal evidence suggests that the demonstrated increase in the Commission's attention to women's rights concerns is in one way attributable to its inclusive membership. This trend is supported for instance by the increased number of normative standards such as a majority of General Comments being on women's rights issues. That said, this trend does not seem to tremendously influence the gender responsiveness of the Commission in the way that

¹ African Commission on Human and Peoples' Rights, About ACHPR. Available at <http://www.achpr.org/about/> (accessed 25 July 2018).

² African Commission on Human and Peoples' Rights, About ACHPR, Former commissioners <http://www.achpr.org/about/former-commissioners/> (accessed 25 July 2018).

would be expected of a body with such high gender representativeness. Clearly, over and above ensuring equal representation should be an equal concern as to the calibre and standing of the Commissioners themselves. In illustration, the Committee of the Prevention of Torture in Africa was noted as recording a sudden surge in gender responsiveness in chapter 4. Further scrutiny reveals that all the gender responsive interventions were undertaken during the leadership of a certain Commissioner Lawrence Mute from Kenya who is a celebrated and life-long human rights champion. The deduction is that inclusion of female commissioners should not be reductive in nature and the Commission as a whole should be composed of individuals of high human rights credentials.

The second aspect of inclusion is measured through women's access and participation at the Commission. This question of inclusiveness is answered predominantly by assessing the participation and perspectives of women's rights non-governmental organisations (NGOs) in relating with the Commission. With regard to NGOs engagement with the Commission's protective mandate, there are varied levels of satisfaction with the Commission's recommendations, some expressing satisfaction and others expressing dissatisfaction. There is however consensus in the narration of the challenges associated with the Commission's adjudication process particularly through extended delays, poor communication and an overall lack of effectiveness in case management. Together with other factors, this reputation of ineffectiveness contributes to the dearth of women's rights cases at the Commission.

As far as the Commission's promotional mandate is concerned, the perspectives of NGOs are more positive. The Commission's overall ease of granting NGOs observer status, its receptiveness to collaborations with NGOs, taking into consideration of NGO reports in its official processes and its patronage of the NGO forum are all good indicators of inclusion. Respondents indicate that Commissioners in their individual capacity and the SRRWA are approachable and receptive to collaboration. A cautionary note is sounded at this juncture. While the Commission is no doubt receptive, an obvious motivation for this receptiveness, discernible from the numerous collaborations with NGOs, is that the Commission overly relies on NGO actors. The Commission seems to have substituted reliance on NGO for efforts to grow its technical support and administrative architecture.

Also, too focused on propping up the Commission, NGO actors may perhaps pay less attention to their in-country constituents and their critical role in holding states accountable.

6.2.3 Does the African Commission recognise and respond to the intersectional identities of women in Africa?

A recurring narrative in this thesis relates to women's intersectional identities and the subsequent multiple levels of discrimination that they experience. In chapter 2, the Maputo Protocol's recognition of intersectional identities is exemplified and in this regard the Commission can be characterised as gender responsive. Its various soft law instruments and standards discussed in chapter 4 also exhibit a recognition of intersectional identity. From this normative perspective there is a significant extent of gender responsiveness. In examining its external relations in chapter 4, the Commission also pursues a relationship with the African Committee of Experts on the Rights and Welfare of the Child, for instance in recognition of their overlapping mandate over girls and the need to address child marriage from an intersectional perspective. The resultant Joint General Comment on Child Marriage reflects this understanding.

From a promotional mandate perspective, special mechanisms such as the SRRWA are credited in leading the development of three General Comments on prevalent women's rights concerns, guidelines on sexual violence, guidelines on state reporting as well as maintaining strong linkages with NGOs that have gender responsive results. The Committee on the Prevention of Torture in Africa is credited with several gender responsive interventions including: leading in the development of General Comment No. 4 on the right to redress for victims of torture which includes sexual violence and the development of a number of innovative reports linking torture with denial of abortion care, the vulnerability of women with disabilities to torture, and the overall right of women to be free from torture. The Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa in addition to being a generally successful and active mandate led in the development of the Luanda Guidelines that take into account the specific needs of women deprived of liberties and also addresses women's rights issues in some of its bi-annual newsletters. The Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV recently

undertook a study on HIV, the law and human which while styled as a report, accomplishes standard setting while articulating the vulnerabilities, needs and rights of women in their various intersectional identities including sex workers and transgendered women. The Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons (IDPs) has limited activities despite the evidence of a continent awash with challenges of refugees, migrants and IDPs and the particular vulnerabilities of women in these groups to sexual violence and impeded access to relief services and commodities. However, the mechanism's recent efforts in undertaking a continent-wide study and development of a Draft Protocol on Nationality that consider women's rights is a step in the right direction. Still, some mechanisms fail to recognise an intersectional nexus even when there is such apparent link. For instance, the mechanism of the Special Rapporteur on Freedom of Expression and Access to Information largely takes on a gender-neutral tone and fails to address for instance the gender-specific concerns of female journalists in Africa and their susceptibility to sexual harassment.

The previous section highlights the Commission's general inclusiveness in its interactions with NGOs. One clear exception to this general trend is revealed in chapter 5. The identity of sexual minorities such as lesbians, bisexual and trans women interacts with factors such as sex, gender, sexual orientation, socio-economic status, religion and race to result in various forms of oppression ranging from exclusion, stigma, harassment, sexual violence and even death. Ideally, based on these factors, sexual minorities and other minorities should be able to attract the Commission's particular attention. Instead, lesbians and other sexual minorities have experienced more hardship accessing the Commission as evidenced by the experiences of the Coalition of African Lesbians (CAL). CAL's initial request for observer status was rejected, after a number of years eventually accepted, but was recently withdrawn. While CAL's case is discussed in detail in chapter 5, it is merely reflective of the Commission's view towards sexual minorities, which is lackadaisical and when constrained like in the recent melee with the Executive Council, the Commission shows it is willing to dispense its commitment to rights for *all*. The Commission's actions not only undermine its independence and moral high ground, but also send a strong message that the rights of sexual minorities can be dispensed with at the altar of political expediency. This is a message that already has such a strong

reverberation among African states as earlier illustrated through the homophobic trend for instance to criminalise homosexual acts and even associations. Such a message also undermines the protection of sexual minorities, particularly women, who are doubly vulnerable.

In the exercise of its protective mandate, the Commission displays still a limited grasp of the concept. In the only two women's rights cases that the Commission has adjudicated on the basis of article 18(3) of the Charter, it fails to recognise the intersectional identities of the women whose rights were violated. In *Egyptian Rights Initiative & Interights v Egypt*, for instance, the political stance of the women protesters was the causal factor of their sexual violation, yet the Commission addresses sexual violence without addressing this important nexus. Similarly, in the *Ethiopian Women Lawyers Association & Equality Now v Ethiopia* case, the Commission's failure to recognise the multiple factors that led to Woineshet's vulnerability and susceptibility to rape and child marriage by abduction leads the Commission to reach a finding of discrimination in clear contrast to the facts and international human rights law. Non-recognition of the compounded avenues that have resulted in discrimination also compromises the ability to issue responsive remedies and reparations.

While the Commission articulates rights that recognise women's intersectional identities and resultant vulnerabilities in laws and norms, in practice, the Commission has displayed a poor grasp of intersectional identities and addressing resultant discrimination. Recognising the compounded ways in which certain groups of women are discriminated against is critical to providing redress and ensuring their realisation of real equality.

6.2.4 Does the African Commission apply a contextualised African response in its work?

This thesis calls on the African Commission to apply a contextualised African response, which is understood as recognising the lived realities of women in Africa and enhancing the cultural legitimacy of human rights. From a normative perspective, the Maputo Protocol is clearly cognisant of a contextualised African response particularly in affirming women's right to a positive cultural context.

In its protective mandate, the Commission has not adjudicated enough women's rights cases to reveal a trend in its ability or lack thereof to enhance the cultural legitimacy of rights. However, the Commission on occasion demonstrates a recognition of women's hardship. For example, in the *Ethiopian Women Lawyers Association & Equality Now v Ethiopia* case, the Commission castigates the respondent state for failing to respond to the prevalence of abduction, rape and forced marriage by not taking escalated measures. In some instances, however, the Commission fails to tailor its interventions in line with the African context. An illustration is the Commission's finding of inadmissibility in a pivotal women's rights case, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya*, for failing to be submitted within a reasonable period on the basis of a six-month rule - a rule that is neither required by the African Charter nor is it appropriate for the African context. From a women's rights perspective, and in light of the dearth of women's rights cases, the Commission should have hesitated to dismiss an otherwise meritorious complaint on a questionable procedural ground.

One missed opportunity for the Commission to enhance the cultural legitimacy of rights as required in gender responsiveness is observed. In its tussle with the AU's Executive Council over the withdrawal of CAL's observer status, the Council bases its reasoning on the protection of *African values and good traditions*. The implication of the Executive Council's reasoning is that accreditation of a lesbian organisation is inconsistent with these values and traditions. In its first response, to the Executive Council, the Commission indicates that it will reflect on the issues raised, evidently including those of African values. In its second response, the Commission reaffirms its decision to retain CAL's observer status simply stating that the decision was properly taken and that it will continue to reflect on the matters of African values in its work.

Rather than the briefly worded response that the Commission gave justifying retaining CAL's observer status, it had an opportunity to elaborate further on the cultural legitimacy of human rights and how protection of the rights of sexual minorities is not inconsistent with African values. This could have been done through an extensive legal memo that possibly includes: an overview of the poor human rights situation of sexual

minorities particularly lesbians who are disproportionately affected by violence; and an articulation of the human rights basis for its decision including reference to its resolution that protects sexual minorities from violence, that has since been considered by the Executive Council through the Commission's activity reports. The Commission could also have indicated the role that CAL contributes to the work of the Commission to further dispel the myth of inconsistency with African values. The Commission has for instance worked with CAL, among other actors, to develop a report on human rights defenders discussed earlier in this thesis.³ A response such as this, far from being an act of activism, would have been in line with the Commission's mandate to promote and protect the human rights of all including women sexual minorities. Such a response might perhaps have influenced a different course for the AU's response, which is ostensibly driven by prejudice but perhaps also ignorance of a well-informed human rights and gender responsive perspective. At worst the response might have triggered debate within the Executive Council itself or further discourse with the Commission, which could be beneficial for human rights promotion.

In its promotional mandate, the Commission has demonstrated a good understanding of women's lived realities particularly as evidenced in its recent general comments and guidelines. In chapter 2, this thesis lays out the predominant concerns for women's rights in Africa as gendered violence against women, harmful practices such as child marriage and sexual and reproductive rights concerns. The Commission adequately and gender responsively addresses all these concerns in its general comments and guidelines. The Commission can also be seen to make recommendation geared at cultural and societal transformation. In its normative documents and in its concluding observations to states' reports under the Maputo Protocol, the Commission often recommends the involvement and training of informal and traditional structures in redressing women's rights concerns. This approach is important in beginning to address the root causes of discrimination in Africa such as patriarchy and harmful gender norms, which are often sustained by these informal and traditional structures among other factors.

³ African Commission on Human and Peoples' Rights 'Report of the study on the situation of women human rights defenders in Africa' available at <http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report-of-the-study-on-the-situation-of-women-human-rights-defenders-in-africa.pdf> (accessed 12 November 2017). In this report, CAL is part of an advisory group acknowledged by the Special Rapporteur on Human Rights Defenders in Africa for undertaking data collection and preparing the report.

Good shows in some instances and silences in others indicate the Commission's inconsistency in adopting a contextualised African response. Particularly in redressing harmful practices, gendered violence against women and other systemic women's rights harms, an approach that addresses the complaint while also attempting to redress the root causes of the harm is gender responsive and the only way that women's circumstances on the ground can be transformed.

6.2.5 Ultimately, is the African Commission gender responsive?

Gender responsiveness as a feminist method is designed to provide a nuanced framework of analysis to guide analysis as well as actualisation of women's rights concerns. The parameters of gender responsiveness are envisioned to be applied in a contextual and interactive manner as opposed to operating as a quantitative checklist towards a figurative bottom-line as this would rob the discussion of the intended nuance. In this regard, an absolute finding of gender responsiveness is not given. The Commission is gender responsive in some ways and fails to be gender responsive in others as has been discussed at length.

Comparing its twin protective and promotional mandates, the Commission appears to be more gender responsive in its promotional mandate. One of the factors that can explain this finding is the significant involvement of NGOs in the Commission's promotional mandate. In being more inclusive, the Commission is able to get a better understanding of women's lived realities through representatives that have greater grassroots access. Through this understanding, the Commission is better able to tailor its interventions to a contextualised African response, to consider women's intersectional identities and in so doing result in substantive equality and ultimately gender responsiveness. This also demonstrates the parameters of gender responsiveness are interactive and mutually reinforcing. This nuanced approach is also illustrated in assessing the Commission's protective mandate. Although the Commission often demonstrates an understanding of women's circumstances, it often fails to respond to those circumstances appropriately for instance where it fails to recognise women's intersectional identities and how intersecting factors result in violation. This misapprehension often results in the taking of recommendations that cannot result in substantive equality.

Accordingly, in each intervention that the Commission undertakes, a gender responsive approach requires the nuanced consideration of the parameters with the context (women's circumstances and needs in each instance) dictating the emphasis placed on each parameter. Ultimately, the African Commission's gender responsiveness is an overarching approach and aspiration that the Commission should consistently apply and strive for as opposed to a finite goal.

6.3 Proposals towards enhancing the Commission's gender responsiveness

Drawing from the key findings, this section makes some proposals that can enhance the Commission's gender responsiveness.

6.3.1 Review of the African Commission's women's rights architecture: Introducing a Maputo Protocol division

The Commission's current architecture towards women's rights protection has proved inadequate. Its current arrangements encompass the SRRWA who is mandated to lead the Commission's interventions on women rights matters including promotional visits, development of norms, state reporting and engagement with other organs on the African human rights system and NGOs. The mandate of the SRRWA is held by one out of eleven commissioners at any one time. In addition to leading the SRRWA mechanism, a commissioner is usually assigned to at least two other special mechanisms. For instance, the current SRRWA also happens to be the Chairperson of the Working Group on Communications, a working group member of the Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV and the commissioner in charge of the human rights situation of five countries.⁴ These assignments are over and above the mandate holder's regular duties as a commissioner and not forgetting that commissioners often hold other designations in their own countries, often high profile. The SRRWA is usually assigned one officer from the secretariat to facilitate this enormous mandate. It is no wonder many have argued that

⁴ African Commission on Human and Peoples' Rights, About ACHPR. Available at <http://www.achpr.org/about/> (accessed 25 July 2018).

the Commission is designed to fail. The sheer mandate placed on one commissioner is incapable of achievement and prevents the mechanism of the SRRWA from operating at its optimum.

In light of the foregoing, a re-design of the Commission's architecture to better accommodate women's rights is proposed. This re-design entails the establishment of a Maputo Protocol division. This division would alter the Commission's structure slightly. The division would alter the Commission's organogram such that the Commission's structure will be division-based to comprise the African Charter division, the Maputo Protocol division, with the possibility of creating divisions to oversee the specificities of different treaties. These treaties are such as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons should it enter into force. The Commission's Chairperson would oversee all of the divisions, the Vice-chairperson would oversee the African Charter division while the SRRWA would oversee the Maputo Protocol division. The SRRWA would not be assigned to any other special mechanism allowing her to focus on the division. The Maputo Protocol division could function like the current committees with its membership comprising commissioners as well as seven women's rights experts drawn from the continent. These members may be expected to be popularly appointed, diversely qualified and representative of women's rights intersectional identities. Being a division, it would have a number of secretariat staff dedicated solely to the Maputo Protocol division. This would also have implications for the Commission's budget, with a definite amount of funds specifically set aside for the respective divisions and with each division capable of undertaking further fundraising. Such a model could indeed attract more funding towards the Commission, which is critical to increase the breadth and depth of its interventions. From a structural perspective, the proposed Maputo Protocol division would not require any normative reconfiguration of the law. The Commission's Rules of Procedure already empowers the Commission to create subsidiary mechanisms.⁵ The Commission can also draft this reformulated organizational structure and present it to

⁵ Rules of Procedure of the African Commission on Human and Peoples' Rights (2010) rule 23.

the AU for approval in line with the Rules.⁶ The process of obtaining such change is therefore convenient and practically possible.

Various scholars have proposed the creation of a new institution distinct from the Commission, a women's rights committee, to deal with enforcement of the Maputo Protocol.⁷ My counter proposal is that a division within the Commission can better serve women's rights concerns for two reasons. The first reason is that a separate women's rights committee in a continent still steeped in patriarchy runs the risk of ghettoisation of women's concerns within the continent. This indictment is made for the reason that the African Union (AU), which would have to acquiesce to and lend its financial and political support to an independent women's rights committee, is unlikely to do so. The AU's own commitment to women's rights is rhetorical at best. A woman has never chaired its highest governing organ, the Assembly, despite a few female heads of states having been members at one time or the other. Its AU Commission has only been chaired by a woman once, and women working within the Commission are so side-lined and discriminated against that they have recently termed it as 'professional apartheid'.⁸

The second reason is that, even if I am wrong in assessing the political environment foregoing, the Commission stands to gain if it strengthens its approach to women's rights internally. As the thesis has demonstrated, women's rights arguably share a nexus with all other human rights concerns. Establishing the Maputo Protocol division within the Commission therefore has the double advantage of the ability to singularly pursue a women's rights agenda, while also infusing other aspects of the Commission's mandates with a gender responsive approach. For instance, other commissioners who are members of the Maputo Protocol division would be influenced and guided into taking a gender responsive approach in their own mechanisms. In essence, the mandate of the Commission would remain as it is presently, with the only difference that it would be backed by a stronger and more dedicated attention to women's rights. Ultimately, this

⁶ As above rule 17.

⁷ See for instance: A Budoo 'Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union' (2018) 18 *African Human Rights Law Journal* 58-74 and A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 319-345.

⁸ Mail & Guardian 'Exclusive: The 'professional apartheid' sidelining women at the African Union' available at <https://mg.co.za/article/2018-05-04-00-the-african-unions-metoo-moment> (accessed 26 July 2018).

will enhance the totality of the Commission's gender responsiveness, organically as well as through conscious interventions by the Maputo Protocol division. A gender responsive Commission is a more desirable outcome for the continent's core human rights body. The alternative, stripping the Commission of primary custody over the Maputo Protocol particularly from a promotional perspective, would no doubt leave the Commission gender neutral and eventually as exclusionary as it was in its early days.

6.3.2 Proposals towards enhancing the Commission's mandates towards gender responsiveness

6.3.2.1 Popularisation of norms and standards

The African Commission has a broad scope under its promotional mandate to promote the enforcement of the existing and robust normative framework for women's rights. This thesis concludes that the Commission through its special mechanisms has undertaken a great deal of gender responsive norm setting particularly through its general comments and guidelines. The Commission should enter the next phase and now focus on popularising the normative standards towards their implementation in order for them to be transformed from paper rights to realisable gains for women. This can be done through many of the Commission's existing mechanisms. For instance, the Commission should ensure that all its promotional visits include an exposition to relevant government officials of relevant norms and standards. A more structured and less costly means can also be that the Commission organises a briefing session with each state that attends a state reporting session. States can be notified of this opportunity in advance in order to tailor their delegation accordingly.

State reporting under the Maputo Protocol is still minimal. Increased popularisation of the Maputo Protocol Guidelines for State Reporting is needed. This popularisation can also be incorporated into the agenda of all engagement with state parties such as promotional visits regardless of whether the SRRWA is part of the delegation.

6.3.2.2 Communications procedure

This thesis finds that the African Commission has not utilised the fullest extent of its protective mandate towards women's rights protection. In its consideration of admissibility of cases, the Commission should adopt a gender lens in order to recognise

gendered aspects of access to justice that could shape its admissibility criteria in a manner that does not further unreasonably hinder women's access to justice. The Commission is urged to review its utilisation of a male comparator standard in assessment of discrimination. The gender responsiveness method is proposed as an alternative framework for analysis in the Commission's consideration of cases with women's rights implications. The Commission should also pay attention to the recommendations issued aiming to ensure that they are gender responsive and can actually alleviate the impugned and future violations and disadvantage.

Regarding the dearth of women's rights litigation, it is particularly surprising that to date the Commission has not adjudicated a single case under the Maputo Protocol. While several reasons have been canvassed for this scarcity of cases, many are within the Commission's reach of influence. For instance, there exists to date a contention that the Commission does not have jurisdiction to adjudicate the Maputo Protocol. Litigants and prospective litigants also indicate several challenges that hinder their utilisation of the protective mandate. The Commission could have done more to address these concerns. On the question of its Maputo Protocol jurisdiction for instance, the Commission can adopt a resolution affirming its jurisdiction to allay the fears of those who think otherwise. Regarding the general dearth of cases, the Commission should make efforts to galvanise women's rights litigation by NGOs through more measures targeted at discourse and problem solving. So far, the SRRWA reports having held only one regional conference on women's rights in Africa to raise awareness on the Commission's protective mandate,⁹ and this conference only had representation from North and West Africa. This is certainly not enough and a greater frequency and more representative geographical coverage to such convenings is recommended. Overall, the Commission needs to demonstrate more concern over its role towards redressing women's rights violations which enhances accountability and eventually transforms societal norms.

⁹ Intersession report of the mechanism of the Special Rapporteur on the Rights of Women in Africa since its establishment, 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire, 9 -22 October 2012 para 17 and 18 and Newsletter of the Special Rapporteur on the Rights of Women in Africa on the occasion of the 30th anniversary of the African Commission on Human and Peoples' Rights 6 available at http://www.achpr.org/files/news/2017/11/d313/achpr_srrwa_newsletter_30th_anniversary_eng.pdf (accessed 8 May 2018).

6.3.2.3 Leveraging external relations

The African Commission should move beyond *ad hoc* interactions and establish formal relationships with AU organs as required in rule 124 of its Rules of procedure. A formal relationship in this sense can entail the development of a mutual roadmap or workplan between the Commission and the relevant body leading to joint convenings and interventions and will ensure more meaningful and sustained engagement. This way, both organs can reflect, project and leverage on each other's mandate towards their approach towards state to promote women's rights. Establishment of formal relationships are especially recommended with the following entities:

- (a) Between the SRRWA and the Directorate of Women, Gender and Development of the African Union Commission to jointly engage states in order to achieve increased ratification and domestication of the Maputo Protocol.
- (b) Between the African Commission, the African Court on Human and Peoples' Rights (African Court), the ECOWAS Community Court of Justice and the East Africa Court of Justice. A joint annual colloquium is proposed to discuss continental jurisprudential approaches to the interpretation of the African Charter including a session focused on the Maputo Protocol.

The Commission is also urged to seek an advisory opinion from the African Court on the interpretation of article 59 of the African Charter, which provides that the Commission's activity report is published after it has been considered by the AU Assembly. The contention that arises is the extent and meaning of the term *consider*. The AU Executive Council seems to have inferred its competence to consider reports, as a competence to direct and command the Commission. This provision and its interpretation is in fact at the heart of the Commission's current challenges with regard to the overbearing interference from the Executive Council. Finally, the African Commission is reminded that it enjoys a unique autonomous nature and is urged to reject all affronts to its independence.

6.3.2.4 Engendering compliance of the Commission's recommendations

Since substantive equality and other gender responsiveness parameters aim to transform women's actual lived experiences, ultimate gender responsiveness can only be attained if there is state compliance with the African Commission's recommendations. All of the

Commission's protective and promotional endeavours are punctuated by the issuance of recommendations. Communications procedures, promotional and investigative missions, issuance of resolutions as well as state reporting activities all culminate with the issuance of recommendations, and as concluding observations in the case of state reporting. The Commission's efforts should not terminate at the issuance of such recommendations, its duty to promote and protect human rights in Africa is fully actualised when these recommendations are implemented. This necessarily entails an aspect of follow-up as well as the taking of other legal and political actions available to it.

The compliance deficit has long been discussed by commentators, stakeholders and the Commission itself. This has led to the identification of various strategies that would enhance state compliance. One such effort is the holding of implementation seminars by the Commission and key stakeholders. The African Commission needs to give effect to recommendations made in the Dakar Report on the implementation of its decisions.¹⁰ Recommendations in the Dakar report addressed institutional and functional deficiencies. Key among the recommended actions from a functional perspective, include an imperative for the Commission to deliver 'decisions with sufficient clarity and precision on the types of remedies granted'.¹¹ This recommendation certainly aligns with the lack of adequate remedies identified in chapter 3 of this thesis. From an architectural perspective, the Commission should institutionalise a mechanism to monitor the implementation of its recommendations including by setting up an implementation unit.¹² Moreover, the SRRWA should work closely with this unit to bring to its attention women's rights cases as well as guide their compliance approach from a gender responsive perspective.

The Commission should also take on a contextual approach to state compliance. This notion of contextualisation is developed by Frans Viljoen.¹³ According to this approach, states should be understood as occupying a consistently shifting sliding scale. On one extreme end of the scale are states that are conscious and respectful of human rights,

¹⁰ African Commission on Human and Peoples' Rights 'Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights' 12 – 15 August, Dakar, Senegal.

¹¹ As above 10.

¹² Dakar Report n 10 above 9.

¹³ F Viljoen 'The impact and influence of the African regional human rights system on domestic law' in S Sheeran & N Rodley *The Routledge handbook of international human rights law* (2013).

democracy and the rule of law. On the other end are states that are not conscious of these tenets.¹⁴ In this approach, Viljoen contends that the ‘African human rights system should align its interventions and priorities according to the position a state occupies along this continuum by adopting either a more “legal” or more “political” approach.’¹⁵ This thesis adopts this recommendation as gender responsiveness similarly calls for a contextualised African approach which entails recognition and response to women’s lived contexts.

A general improvement in compliance will likely enhance the compliance environment for women’s rights cases too. However, in light of the much illustrated peril of a universalised approach to women’s issues, there needs to be a gendered approach in the following up of recommendations aimed at redressing harm to women, for instance as occasioned by violence against women and harmful practices. Such an approach would take into account the gender responsiveness parameters. Considering that there are very few women’s rights cases, it would not be unreasonable to expect that the Commission should prioritise such cases. Indeed, this does not deviate from its practice as the Commission has for instance been seen to engage extra effort where states issue arbitrary death sentences.¹⁶

Aside from the African Commission, other actors also have a role to play towards enhancing state compliance. The civil society is one such actor, research shows that one of the key factors likely to influence a state’s compliance is the strength and vibrancy of its civil society.¹⁷ This entails, involvement of the civil society before the recommendations are issued, for instance as litigants, and after through follow-up activities. Women’s rights organisations in particular and other civil society actors should increase the cost of non-compliance for states by employing strategies such as: naming and shaming and working with the media. Such strategies would serve to nationalise the

¹⁴ As above 462.

¹⁵ Viljoen ‘The impact and influence of the African regional human rights system on domestic law’ n 13 above 463.

¹⁶ See for instance: M Killander ‘Human rights developments in the African Union during 2014’ (2015) 15 *African Human Rights Law Journal* 543-544.

¹⁷ F Viljoen ‘The African human rights system and domestic enforcement’ in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 351-398. See also: Viljoen ‘The impact and influence of the African regional human rights system on domestic law’ n 13 above 461 on how the role of the women’s movement in the development of the Maputo Protocol has created greater impetus for legislative and policy implementation of the Maputo Protocol as compared for instance with the African Charter.

agenda thereby gaining the attention of citizens and other human rights actors and consequently increasing chances of compliance. Women's rights organisations should also highlight state non-compliance in human rights international fora as appropriate, for instance through shadow reports and human rights statements. Since this thesis is concerned with the gender responsiveness of the Commission, its role in this instance would be to facilitate and support such civil society actors. In this regard, the Dakar report recommends that the Commission should develop guidelines with indicators to assist stakeholders including states, national human rights institutions and NGOs to monitor the implementation of its decisions. Relatedly, the Commission should also provide training sessions on its working methods in monitoring the compliance of its recommendations.¹⁸

Overall, engendering compliance is arguably the ultimate measure of a gender responsive approach. Accordingly, the Commission should strive to enhance compliance with its recommendations so that such measures may transcend an academic or moot character and result in the attainment of substantive equality for women in Africa.

6.4 Proposed areas for future research

Flowing from the development of a gender responsive approach and its utilisation to analyse the performance of the African Commission, this thesis hopefully lays the groundwork for further research, including the following potential areas:

- (a) The first proposed area for future research relates to the continuation of the assessment of the African Commission that has begun in this thesis. In this regard, the following examinations are suggested:
 - This thesis reviews the Commission's gender responsiveness from establishment to date. Future bi-annual assessment of the Commission's gender responsiveness is encouraged for academic, reform and advocacy purposes.
 - Future assessments of the Commission can also take on a thematic approach. This thesis in demonstrating women's lived realities identified

¹⁸ Dakar Report n 10 above 10.

pervasive women's rights violation such as: violence against women, harmful practices and violations of sexual and reproductive health rights. Subsequent studies can accordingly examine the Commission's gender responsiveness while delimiting the focus to one such singular theme whose treatment can be explored across the Commission's protective and promotional mandates.

In hindsight, the current study could have benefited from a greater empirical focus in assessing gender responsiveness. In learning from this, future research should place greater reliance on empirical findings in order to complement the doctrinal findings to a larger extent with the views and perceptions of internal and external actors of the African Commission.

(b) The gender responsiveness tool developed in this thesis can be utilised against any human rights treaty body in Africa. In this regard, the following examinations are suggested:

- The gender responsiveness of the African Court's women's rights jurisprudence beginning with an analysis of its women's rights case.¹⁹
- The totality of the mandate of the African Committee of Experts on the Rights and Welfare of the Child can also be subjected to a gender responsive analysis. This is particularly important as girls' intersectional identities entail certain vulnerabilities that need specific attention.
- The gender responsiveness of the women's rights jurisprudence of the ECOWAS Community Court of Justice (ECCJ). The ECCJ is identified of all the other REC judicial organs since it has express jurisdiction to adjudicate the African Charter and the Maputo Protocol and has in fact adjudicated two cases on the Protocol.

(c) The current research is premised on the assumption of subsidiarity and that a gender responsive Commission has an impact on national level actualisation of rights by states who have the primary obligation as duty bearers under the African

¹⁹ Application 046/2016, *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) & The Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*, African Court on Human and Peoples' Rights.

human rights treaties. National level research should therefore be undertaken towards assessing the impact of the African Commission's gender responsiveness on women's rights protection at the national level.

(d) In assessing the Commission's protective mandate, the present research reveals a significant dearth in women's rights cases. A proposed area of research therefore relates to the examination of the factors that can explain this dearth and the scrutiny of barriers at the national and regional levels in this regard. A few scholars have already articulated some reasons towards the scarcity of cases and this can be developed further.²⁰

(e) There is also room for further research on the theoretical debates around the impact of women being represented in an institution and the corresponding gender responsiveness of that institution. The African Commission is at the forefront, among international human rights treaty bodies in terms of equal representation. This equality in representation has not necessarily translated into the desired outcome and more was expected. Accordingly, this raises two further research questions: (i) What is needed in order to fully translate women's membership into gender responsiveness? (ii) What are the constraining factors in this regard?

6.5 Conclusion

This thesis makes the overall finding that a large percentage of the Commission's interventions have laid the groundwork towards achieving gender responsiveness but often fall short. What is also clear is that the Commission has grown from its initial days when it barely addressed itself to women's rights concerns to making a noticeable and

²⁰ See for example: A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 331. Rudman identifies reasons for the dearth to include: slow implementation of certain provisions of the Maputo Protocol; the lack of state reporting under article 26 of the Maputo Protocol and the conflation of state reports; the persistent challenges to the universality of women's human rights vis-à-vis moral or traditional African values and how these relate to the different roles of women; the use of religion and culture to defend harmful and violent practices; a lack of awareness of human rights instruments in general and, more specifically, the Maputo Protocol; and a lack of progress regarding women's rights due to state-specific conditions and events such as environmental challenges, conflicts and health epidemics.

sustained effort towards gender responsiveness. In this regard, the Commission's development of norms emerges as its greatest strength from a gender responsive perspective. All of its soft law directives, in particular through general comments and guidelines related to women's rights would undoubtedly alleviate women's rights conditions if implemented faithfully.

While acknowledging the accomplishments, there are weighty concerns that seriously detract from the Commission's progress. Being a quasi-judicial organ, the Commission should be equally concerned with its protective and promotional role. Of these two roles, it is clear that the Commission excels more in its promotional role, evidently with significant support from external actors such as NGOs. The Commission has however grossly underutilised its protective mandate. This is evidenced by a less than ideal adjudication of the few women's rights cases, coupled with the fact that one and a half decades after the adoption of the Maputo Protocol, the Commission is yet to adjudicate a single case based on the Protocol. On this latter dearth of cases, the Commission has displayed a lack of action towards redressing challenges that limit women's rights litigation in this regard, thereby leaving the continent seriously compromised from an accountability perspective. Worse still, while the African Court was established to complement the protective mandate, the difficulties of accessing the Court leave the Commission as the first and last resort for many women in Africa. Bearing this in mind, its protective mandate is not one that should be floundering.

Far from setting out to cast a rosy or gloomy picture, the objective of this this thesis is to look back in order to better inform the Commission's interventions for women's rights protection and promotion in future. Overall, the study assesses the Commission's practice to date and illuminates the significant dissonance between procedural equality as exemplified by normative standards and substantive equality as evidenced by the poor status of women's rights in Africa. In doing so, both positive developments and drawbacks of the African Commission are assessed, revealing the varied extent of the Commission's gender responsiveness in the course of its various endeavours. Ultimately, while progress is certainly acknowledged, substantial challenges in its practice over the thirty years of its existence have detracted from its potential and deprive the Commission of an overall gender responsiveness.

Bibliography

Books

- African Union (2018) *African Union handbook 2018* Addis Ababa: African Union Commission
- Amnesty International (2010) *Sudan: Abolish the flogging of women* London: Amnesty International
- An-Na'im, AA (2002) *Cultural transformation and human rights in Africa* London: Zed books
- An-Na'im, AA (ed) (1992) *Human rights in cross-cultural perspectives: A quest for consensus* Philadelphia: University of Pennsylvania Press
- An-Na'im, AA & Deng, FM (1990) (eds) *Human rights in Africa: Cross-cultural perspectives* Washington, D.C: The Brookings Institution
- Anfred, S, Bakare-Yusuf, B, Kisiang'ani, EW, Lewis, D, Oyewumi, O & Steady, FC (2004) *African gender scholarship: Concepts, methodologies and paradigms* Dakar: CODESRIA
- Ankumah, EA (1996) *The African Commission on Human and Peoples' Rights: Practice and procedures* The Hague: Martinus Nijhoff Publishers
- Banda, F (2005) *Women, law and human rights* London: Bloomsbury
- Bartlett, KT & Kennedy, R (eds) (1991) *Feminist legal theory: Readings in law and gender* (1991) Colorado: Westview Press
- Becker, M, Bowman, CG, Nourse, VF & Yuracko, KA (2007) *Cases and materials on feminist jurisprudence: Taking women seriously* Minnesota: West Academic Publishing
- Buss, D & Manji, A (eds) (2005) *International law: Modern feminist approaches* Oxford: Hart
- Charlesworth, H & Chinkin, C (2000) *The boundaries of international law: A feminist analysis* New York: Juris
- Coalition of African Lesbians & African Men for Sexual Health and Rights (2013) *Violence based on perceived or real sexual orientation and gender identity in Africa* Pretoria: Pretoria University Law Press
- Cook, RJ (ed) (1994) *Human rights of women: National and international perspectives* Philadelphia: University of Pennsylvania Press
- Cook, RJ (ed) (2012) *Human rights of women: National and international perspectives* Colorado: Westview Press
- Cook, RJ & Cusack, S (2010) *Gender stereotyping: Transnational legal perspectives* Pennsylvania: University of Pennsylvania Press
- Cowan, JK, MB Dembour & Wilson, RA, (2001) (eds) *Culture and rights: Anthropological perspectives* Cambridge: Cambridge University Press
- Donnelly, J (2003) *Universal human rights in theory and practice* Ithaca and London: Cornell University Press

- Evans, M & Murray, R (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986 – 2000* (2002) Cambridge University Press: Cambridge
- Fitzpatrick, J (ed) (2002) *Human rights protection for refugees, asylum-seekers, and internally displaced persons: A guide to international mechanisms and procedures* New York: Transnational Publishers
- Forum for African Women (2005) Educationalists *Gender responsive pedagogy: A teacher's handbook* Nairobi: Forum for African Women Educationalists
- Fredman, S (2002) *Discrimination law* Oxford: Oxford University Press
- Heyns, C (ed) *Human rights law in Africa* (1999) The Hague: Kluwer Law International
- Human Rights Watch (2011) *"We'll show you you're a woman": Violence and discrimination against black lesbians and transgender men in South Africa* New York: Human Rights Watch
- Kouvo, S & Pearson, Z (2011) *Feminist perspectives on contemporary international law: Between resistance and compliance?* Oregon: Hart Publishing
- Kristof, ND & WuDunn, S (2010) *Half the sky: Turning oppression into opportunity for women worldwide* New York: Vintage Publishers
- Lacey, N (1998) *Unspeakable subjects: Feminist essays in legal and social theory* Oregon: Hart Publishing
- MacKinnon, CA (1979) *Sexual harassment of working women* New Haven, Connecticut: Yale
- MacKinnon, CA (2007) *Sex equality* New York: Foundation Press
- MacKinnon, CA (1987) *Feminism unmodified: Discourses on life and law* Cambridge, Massachusetts: Harvard University Press
- Mahoney, KE 'Canadian approaches to equality rights and gender equity in the courts' in Cook, RJ (ed) (2012) *Human rights of women: National and international perspectives* Colorado: Westview Press
- Murray, R (2000) *The African Commission on Human and Peoples' Rights and International Law* Oregon: Hart Publishing
- Murray, R & Evans, M (2001) *Documents of the African Commission on Human and Peoples' Rights* Oregon: Hart Publishing
- Murray, R & Evans, M (eds) (2008) *The African Charter on Human and Peoples' Rights: The system in practice 1986 – 2006* Cambridge: Cambridge University Press
- Murray, R (2004) *Human rights in Africa: From the OAU to the African Union* Cambridge: Cambridge University Press
- Nzegwu, NU (2006) *Family matters: Feminist concepts in African philosophy of culture* Albany: State University of New York Press
- Otto, D 'Women's rights' in Moeckli, D; Shah, S; Sivakumaran, S & Harris, D (eds) (2010) *International human rights law* Oxford: Oxford University Press
- Ouguergouz, F (2003) *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* The Hague: Martinus Nijhoff Publishers

- Oyewumi, O (1997) *The invention of women: Making an African sense of Western gender discourse* Minneapolis: University of Minnesota Press
- Oyewumi, O (ed) (2003) *African women and feminism: Reflecting on the politics of sisterhood* New Jersey: Africa World Press
- Pollis, A & Schwab, P (eds) (1980) *Human rights: Cultural and ideological perspectives* New York: Praeger
- Rajab-Leteipan, S & Kamunyu, M (2017) *Litigating before the African Commission on Human and Peoples' Rights: A practice manual* Nairobi: Equality Now
- Schabas, WA (2013) *The Universal Declaration of Human Rights: The travaux preparatoires Volume I October 1946 to November 1947* Cambridge: Cambridge University Press
- Scott, JW (1996) *Only paradoxes to offer: French feminists and the rights of man* Cambridge: Harvard University Press
- Shelton, D (2015) *Remedies in international human rights law* Oxford: Oxford University Press
- Spijkerboer, T (2016) *Gender and refugee status* New York: Routledge
- Ssenyonjo, M (2012) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* Leiden: Martinus Nijhoff Publishers
- Sudbury, J (1998) *'Other kinds of dreams': Black women's organisations and the politics of transformation* New York: Routledge
- Tadros, M (2013) *Politically motivated sexual assault and the law in violent transitions: A case study from Egypt* London: Institute of Development Studies
- Tamale, S (1999) *When hens begin to crow: Gender and parliamentary politics in Uganda* Colorado: Westview Press
- United Nations High Commissioner for Human Rights (2014) *Women's rights are human rights* New York & Geneva: United Nations Publication
- Varela, MMC, Dhawan, N & A Engel (2016) (eds) *Hegemony and heteronormativity: Revisiting 'The political' in queer politics* New York: Routledge
- Viljoen, F (2012) *International human rights law in Africa* Oxford: Oxford University Press
- Viljoen, F & Odinkalu, C (2006) *The prohibition of torture and ill-treatment in the African human rights system: A handbook for victims and their advocates* Geneva: World Organisation Against Torture
- World Health Organisation (2009) *Integrating gender into HIV/AIDS programmes in the health sector: Tools to improve responsiveness to women's needs* Geneva: WHO Press

Book chapters

- An-Na'im, A 'Promises we should all keep in common cause' in Cohen, J, Howard, M & Nassbaum, MC (eds) (1999) *Is multiculturalism bad for women?* Princeton, New Jersey: Princeton University Press
- An-Na'im, AA 'Cultural transformation and human rights in African societies' in An-Na'im, AA (ed) (2002) *Cultural transformation and human rights in Africa* London: Zed Books
- An-Na'im, AA 'State responsibility under international human rights law to change religious and customary laws' in Cook, RJ (ed) (1994) *Human rights of women: National and international perspectives* Philadelphia: University of Pennsylvania Press
- Bakare-Yusuf, B "'Yorubas don't do gender": A critical review of Oyeronke Oyewumi's *The invention of women: Making an African sense of Western gender* discourses' in Anfred, S; Bakare-Yusuf, B; Kisiang'ani, EW; Lewis, D; Oyewumi, O & Steady, FC (2004) *African gender scholarship: Concepts, methodologies and paradigms* Dakar: CODESRIA
- Bartlett, KT 'Feminist legal methods' in Bartlett, KT & Kennedy, R (eds) (1991) *Feminist legal theory: Readings in law and gender* Colorado: Westview Press
- Beyani, C 'Toward a more effective guarantee of women's rights in the African human rights system' in Cook, RJ (ed) (1994) *Human rights of women: National and international perspectives* Philadelphia: University of Pennsylvania Press
- Byanyima, W 'Africa and gender equality: Priorities of the AU' in Akokpari, J, Ndinga-Muvumba, A & Murithi, T (eds) (2008) *The African Union and its institutions* Johannesburg: Fanele
- Chanock, M 'Human rights and cultural branding: Who speaks and how' in An-Na'im, AA (2002) *Cultural transformation and human rights in Africa* London: Zed books
- Charlesworth, H 'Talking to ourselves? Feminist scholarship in international law' in Kouvo, S & Pearson, Z (eds) (2011) *Feminist perspectives on contemporary international law: Between resistance and compliance?* Oregon: Hart Publishing
- Charlesworth, H 'What are "Women's international human rights"?' in Cook, RJ (ed) (2012) *Human rights of women: National and international perspectives* Colorado: Westview Press
- Cook, RJ 'Women's international human rights law: The way forward' in Cook, RJ (ed) (2012) *Human rights of women: National and international perspectives* Philadelphia: University of Pennsylvania Press
- Dankwa, V 'The promotional role of the African Commission on Human and Peoples' Rights' in Evans, M & Murray, R (eds) (2002) *The African Charter on Human and Peoples' Rights: The system in practice, 1986 - 2000* Cambridge: Cambridge University Press
- Evans, M & Murray, R 'The state reporting mechanism of the African Charter' in Evans, M & Murray, R (eds) (2008) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* Cambridge: Cambridge University Press
- Fitzpatrick, J 'The human rights of refugees, asylum-seekers, and internally displaced persons: A basic introduction' in Fitzpatrick, J (ed) (2002) *Human rights protection for refugees, asylum-seekers, and internally displaced persons: A guide to international mechanisms and procedures* New York: Transnational Publishers

Kaufman, NH & Lindquist, SA (1995) 'Critiquing gender-neutral treaty language: The Convention on Elimination of All Forms of Discrimination against Women' in Peters, J & Wolper, A (1995) *Women's rights, human rights: International feminist perspectives* New York: Routledge

Killander, M 'The African Commission on Human and Peoples' Rights' in Ssenyonjo, M (ed) (2012) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* Leiden; Martinus Nijhoff Publishers

Lacey, N 'Feminist legal theory and the rights of women' in Knop, K (ed) (2004) *Gender and human rights* Oxford: Oxford University Press

MacKinnon, CA 'Difference and dominance: On sex discrimination' in MacKinnon, CA (ed) *Feminism unmodified: Discourses on life and law* (1987) Cambridge, Massachusetts: Harvard University Press

Manjoo, R 'Women's human rights in Africa' in Ssenyonjo, M (2012) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* Leiden: Martinus Nijhoff Publishers

Mayanja, R 'The Protocol on the Rights of Women in Africa' in Yusuf, AA & Ouguerouz, F (eds) (2012) *The African Union: Legal and institutional framework: A manual on the Pan-African Organization* Leiden: Martinus Nijhoff Publishers

Mbelle, N 'The role of non-governmental organizations and national human rights institutions at the African Commission' in Evans, M & Murray, R (eds) (2008) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* Cambridge: Cambridge University Press

Murray, R 'The Special Rapporteurs in the African System' in Murray, R & Evans, M (eds) (2008) *The African Charter on Human and Peoples' Rights: The system in practice 1986 – 2006* Cambridge: Cambridge University Press

Murray, R 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' in Buss, D & Manji, A (eds) (2005) *International law: Modern feminist approaches* Oxford: Hart

Musa, R 'Women, equality and the African human rights system' in Abbas, H (ed) (2008) *Africa's long road to rights: Reflections on the 20th anniversary of the African Commission on Human and Peoples' Rights* Nairobi: Fahamu

Nyamu-Musembi, C 'Are local norms and practices fences or pathways? The example of women's property rights' societies' in An-Na'im, AA (ed) (2002) *Cultural transformation and human rights in Africa* London: Zed Books

Nyanduga, B 'Working groups of the African Commission and their role in the development of the African Charter on Human and Peoples' Rights' in Evans, M & Murray, R (eds) (2008) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* Cambridge: Cambridge University Press

Onoria, H 'Introduction to the African system of protection of human rights and the draft protocol' in Benedek, W, Kisaakye, EM & Oberleitner, G (eds) (2002) *The human rights of women: International instruments and African experiences* London: Zed Books

Oyewumi, O 'Conceptualising gender: Eurocentric foundations of feminist concepts and the challenge of African epistemologies' in Anfred, S; Bakare-Yusuf, B; Kisiang'ani, EW;

Lewis, D; Oyewumi, O & Steady, FC (eds) (2004) *African gender scholarship: Concepts, methodologies and paradigms* Dakar: CODESRIA

Oyewumi, O 'Introduction: Feminism, sisterhood, and other foreign relations' in Oyewumi, O (ed) (2003) *African women and feminism: Reflecting on the politics of sisterhood* New Jersey: Africa World Press

Pathak, Z & Rajan, RS "'Shahbano'" in Castelli, EA (ed) (2001) *Women, gender, religion: A reader* New York: Palgrave

Pollis, A & Schwab, P 'Human rights: A western construct with limited applicability' in Pollis, A & Schwab, P (eds) (1980) *Human rights: Cultural and ideological perspectives*

Singerman, D & Amar, P 'Contesting myths, critiquing cosmopolitanism, and creating the new Cairo School of Urban Studies' in Singerman, D & Amar, P (eds) (2006) *Cairo cosmopolitan: Politics, culture, and urban space in the new globalised Middle East* (2006) American University in Cairo: Cairo Press

Steady, FC 'An investigative framework for gender research in Africa in the new millenium' in Anfred, S; Bakare-Yusuf, B; Kisiang'ani, EW; Lewis, D; Oyewumi, O & Steady, FC (eds) (2004) *African gender scholarship: Concepts, methodologies and paradigms* Dakar: CODESRIA

Viljoen, F 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights' in Baderin, MA & Ssenyonjo, M (eds) (2010) *International human rights law: Six decades after the UDHR* Burlington: Ashgate

Viljoen, F 'The African human rights system and domestic enforcement' in Langford, M; Rodríguez-Garavito, C & Rossi, J (eds) (2017) *Social rights judgments and the politics of compliance: Making it stick* Cambridge: Cambridge University Press

Viljoen, F 'The impact and influence of the African regional human rights system on domestic law' in Sheeran, S & Rodley, N (eds) (2013) *The Routledge handbook of international human rights law* Oxon: Routledge

Journal Articles

Ahmad, Z 'The plight of rural women: Alternatives for action' (1980) 119 *International Labour Review* 425

Albertyn, C, Fredman, S & Fudge, J 'Introduction: Substantive equality, social rights and women: A comparative perspective' (2007) 23 *South African Journal on Human Rights* 209

Alston, P 'The General Comments of the UN Committee on Economic, Social and Cultural Rights' (2010) 104 *American Society of International Law Proceedings* 4-7

Ambani, JO 'The sexual minority rights conundrum in Africa: Contextualising the debate following the Coalition of African Lesbians' application for observer status before the African Commission' (2016) 2 *Strathmore Law Journal* 185

An-Na'im, AA 'The rights of women and international law in the Muslim context' (1987-1988) 9 *Whittier Law Review* 495

- Andrews, PE 'Affirmative action in South Africa: Transformation or tokenism' (1999) 15 *Law in Context: A Socio-Legal Journal* 80
- Archampong, EA 'Reconciliation of women's rights and cultural practices: Polygamy in Ghana' (2010) 36 *Commonwealth Law Bulletin* 325
- Aziz, SF 'Bringing down an uprising: Egypt's stillborn revolution' (2014) 30 *Connecticut Journal of International Law* 1
- Balan, S 'Formal and substantive equality of opportunity' (2012) 4 *Cogito: Multidisciplinary Research Journal* 85
- Balogun, V & Durojaye, E 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights' (2011) 11 *African Human Rights Law Journal* 368
- Banda, F 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72
- Banda, F 'This one is from the ladies: Thank you Martin Chanock, honorary African feminist' (2010) 28 *Law in Context: A Socio-Legal Journal* 8
- Banner, F 'Rewriting history: The use of feminist narratives to deconstruct the myth of the capital defendant' (2001) 26 *New York University Review of Law & Social Change* 569
- Barnard, C & Hepple, B 'Substantive equality' (2000) 59 *Cambridge Law Journal* 562
- Bartlett, KT 'Gender law' (1994) 1 *Duke Journal of Gender Law & Policy* 1
- Bayefsky, AF 'The CEDAW Convention: It's contribution today' (2000) 94 *American Society of International Law* 197
- Bekker, G 'The African Commission on Human and Peoples' Rights and remedies for human rights violations' (2013) 13 *Human Rights Law Review* 506
- Bekker, G 'The protection of asylum seekers and refugees within the African regional human rights system' (2013) 13 *African Human Rights Law Journal* 24
- Bellitto, M 'Gender mainstreaming in the United States: A new vision of equality' (2015) 22 *UCLA Women's Law Journal* 125
- Berna, MB 'The cultural factor and women's rights within the African Charter on Human and Peoples' Rights and its Protocol' (2015) 14 *Law Annals Titu Maiorescu University* 16
- Biegon, J 'Diffusing tension, building trust: Proposals on guiding principles applicable during consideration of the activity reports of the African Commission on Human and Peoples' Rights' (2018) *Global Campus Policy Briefs* 6
- Biegon, J 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria gender expert meeting, 6 - 7 August 2009' (2009) 9 *African Human Rights Law Journal* 631
- Bond, J; Bruggeman, J; Katyal, S & Miller-Muro, L 'Intersectional international human rights' (2004) 5 *Georgetown Journal of Gender and the Law* 858
- Brautigam, CA 'Mainstreaming a gender perspective in the work of the United Nations human rights treaty bodies' (1997) 91 *American Society of International Law Proceedings* 389

- Budoo, A 'Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union' (2018) 18 *African Human Rights Law Journal* 58
- Cairns, ICM 'Gender mainstreaming & 'equality-proofing' in British law-making: A comment on the impact of the Equality Act 2010' (2013) 4 *Aberdeen Student Law Review* 103
- Campbell, M 'CEDAW and women's intersecting identities: A pioneering new approach to intersectional discrimination' (2015) 11 *DIREITO GV Law Review* 479
- Celeste, MA 'A brief herstory of Colorado women trailblazers in the law' (2003) 32 *Colorado Lawyer* 29
- Cerna, CM 'Universality of human rights and cultural diversity: Implementation of human rights in different socio-cultural contexts' (1994) 16 *Human Rights Quarterly* 752
- Chanock, M 'Neither customary nor legal: African customary law in an era of family law reform' (1989) 3 *International Journal of Law and the Family* 72
- Charlesworth, H 'Alienating Oscar – Feminist analysis of international law' (1993) 25 *Studies in Transnational Legal Policy* 4
- Charlesworth, H 'Not waving but drowning: Gender mainstreaming and human rights in the United Nations' (2005) 18 *Harvard Human Rights Journal* 1
- Chen, M 'Protective laws and the Convention on the Elimination of All Forms of Discrimination against Women' (1993) 15 *Women's Rights Law Reporter* 2
- Chen, MH 'Two wrongs make a right: Hybrid claims of discrimination' (2004) 79 *New York University Law Review* 685
- Chirwa, DM 'Reclaiming (wo)manity: The merits and demerits of the African Protocol on Women's Rights' (2006) 53 *Netherlands International Law Review* 63
- Clinton, HR 'Women's rights are human rights' (2002) 29 *Human Rights* 2
- Collins, H 'Discrimination, equality and social inclusion' (2003) 66 *Modern Law Review* 16
- Covington, SS 'Creating gender-responsive programs: The next step for women's services' (2001) 63 *Corrections Today* 3
- Cowell, F 'The death of the Southern African Development Community Tribunal's human rights jurisdiction' (2013) 13 *Human Rights Law Review* 153
- Crenshaw, K 'Race, gender and sexual harassment' (1992) 65 *Southern California Law Review* 1467
- Crooms, LA 'Indivisible rights and intersectional identities or, what do women's human rights have to do with the Race Convention?' (1997) 40 *Howard Law Journal* 619
- Day, J 'Closing the loophole – Why intersectional claims are needed to address discrimination against older women' (2014) 75 *Ohio State Law Journal* 447
- Di Silvio, L 'Correcting corrective rape: Carmichele and developing South Africa's affirmative obligations to prevent violence against women' (2011) 99 *Georgetown Law Journal* 1469
- Diamond, MJ 'Olympe de Gouges and the French Revolution: The construction of gender as critique' (1990) 15 *Dialectical Anthropology* 95

- Doebbler, CFJ 'A complex ambiguity: The relationship between the African Commission on Human and Peoples' Rights and other African Union initiatives affecting respect for human rights' (2003) 13 *Transnational Law & Contemporary Problems* 29
- Donnelly, J 'Cultural relativism and universal human rights' (1984) 6 *Human Rights Quarterly* 400
- Donnelly, J 'The relative universality of human rights' (2007) 29 *Human Rights Quarterly* 281
- Dunlap, MC 'The F word: Mainstreaming and marginalizing feminism' (1990) 4 *Berkeley Women's Law Journal* 251
- Durojaye, E & Oluduro, O 'The African Commission on Human and Peoples' Rights and the woman question' (2016) 24 *Female Legal Studies* 315
- Dyani, N 'Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict' (2006) 6 *African Human Rights Law Journal* 166
- Dyani, N 'Sexual violence, armed conflict and international law in Africa' (2007) 15 *African Journal of International and Comparative Law* 230
- Ebobrah, ST 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* 1
- Epperson, L 'Legislating inclusion' (2012) 6 *Harvard Law & Policy Review* 91
- Erasmus, G 'The new Protocol for the SADC Tribunal: Jurisdictional changes and implications for SADC community law' (2015) *US15WP01 Trade Law Centre* 1
- Figa, PS 'Women in the profession: Beyond tokenism' (1995) 24 *Colorado Lawyer* 2513
- Finckle, L & Bridgeman, MA 'Committed to inclusion' (2009) 28 *Legal Management* 24
- Fineman, MA 'Feminist theory in law: The difference it makes' (1992) 2 *Columbia Journal of Gender and Law* 1
- Fineman, ML 'Challenging law, establishing differences: The future of feminist legal scholarship' (1990) 42 *Florida Law Review* 26
- Franke, KM 'The central mistake of sex discrimination law: The disaggregation of sex from gender' (1995) 144 *University of Pennsylvania Law Review* 3
- Fredman, S 'Substantive equality revisited: A rejoinder to Catharine MacKinnon' (2016) 14 *International Journal of Constitutional Law* 747
- Fredman, S 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712
- Gathii, J 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2013) 24 *Duke Journal of Comparative & International Law* 249
- Geldenhuys, M; Kaufulu-Kumwenda, C; Nabaneh, S & Stefiszyn, K 'The African Women's Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e) of the Protocol' (2014) 14 *African Human Rights Law Journal* 681
- Greenman, E & Xie, Y 'Double jeopardy? The interaction of gender and race on earnings in the United States' (2008) 86 *Social Forces* 1217
- Hansungule, M 'The suspension of the SADC Tribunal' (2013) 35 *Strategic Review for Southern Africa* 135

- Harrington, J 'Special rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 2 *African Human Rights Law Journal* 247
- Heise, L, Ellsberg, M, & Gottemoeller, M 'Ending violence against women' (1999) 27 *Population Reports* 3
- Hellyer, HA 'Revolution in the Arab World: Egypt and its challenges' (2011) 3 *Middle East Law and Governance* 118
- Henkin, L 'Revolutions and constitutions' (1989) 49 *Louisiana Law Review* 1023
- Henkin, L 'The universality of the concept of human rights' (1989) 506 *Annals of the American Academy of Political Science* 12
- Higgins, TE 'Anti-essentialism, relativism, and human rights' (1996) 19 *Harvard Women's Law Journal* 89
- Ibhawoh, B 'Cultural relativism and human rights: Reconsidering the Africanist discourse' (2001) 19 *Netherlands Quarterly of Human Rights* 43
- Ibrahim, AM 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263
- Jaff, J 'The difference that difference makes' (1989) 19 *Cumberland Law Review* 467
- Jones, A 'Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17 *African Human Rights Law Journal* 321
- Joshi, Y 'The trouble with inclusion' (2014) 21 *Virginia Journal of Social Policy & the Law* 207
- Kaguongo, W 'Commentary on communications decided by the African Commission on Human and Peoples' Rights in 2004' (2007) 11 *Law, Democracy and Development* 166
- Kenney, SJ 'Pregnancy discrimination: Towards substantive equality' (1995) 10 *Wisconsin Women's Law Journal* 351
- Killander, M 'Human rights developments in the African Union during 2015' (2016) 16 *African Human Rights Law Journal* 543
- Killander, M 'Human rights developments in the African Union during 2014' (2015) 15 *African Human Rights Law Journal* 537
- Killander, M & Nkrumah, B 'Human rights developments in the African Union during 2012 and 2013' (2014) 14 *African Human Rights Law Journal* 281
- Kirollos, M 'The daughters of Egypt are a red line: The impact of sexual harassment on Egypt's legal culture' (2016) 13 *International Journal on Human Rights* 141
- Kiwanuka, RN 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *The American Journal of International Law* 80
- Klein, E 'The UN Human Rights Committee: The General Comments – The evolution of an autonomous monitoring instrument' (2015) 58 *German Yearbook of International Law* 189
- Klugman, J 'Women's health and human rights: Public spending on health and the military one decade after the African Women's Protocol' (2014) 14 *African Human Rights Law Journal* 715

- Lee, S 'Legal feminism and the UN's gender mainstreaming policy: Still searching for the blind spot' (2013) 6 *Journal of East Asia and International Law* 367
- Long, D & Murray, R 'Ten years of the Robben Island Guidelines and prevention of torture in Africa: For what purpose?' (2012) 2 *African Human Rights Law Journal* 311
- Ludwikowski, RR 'The French Declaration on the Rights of Man and Citizen and the American constitutional development' (1990) 38 *American Journal of Comparative Law Supplement* 445
- Mackay, F & Bilton, K 'Learning from experience: Lessons in mainstreaming equal opportunities' (2003) *University of Edinburgh, Governance of Scotland Forum* 152
- MacKinnon, CA 'Substantive equality revisited: A reply to Sandra Fredman' (2016) 14 *International Journal of Constitutional Law* 739
- MacKinnon, CA 'Substantive equality: A perspective' (2011) 96 *Minnesota Law Review* 13
- McIntyre, S 'Timely interventions: MacKinnon's contribution to Canadian equality jurisprudence' (2010) 46 *Tulsa Law Review* 81
- McKay, S 'The effects of armed conflict on girls and women' (1998) 4 *Peace and Conflict: Journal of Peace Psychology* 389
- Mclean, V 'Is gender-neutral drafting an effective tool against gender inequality within the legal system?' (2013) 39 *Commonwealth Law Bulletin* 445
- Meagher, SM 'Histories, herstories and moral traditions' (1990) 16 *Social Theory and Practice* 61
- Menkel-Meadow, C 'Mainstreaming feminist legal theory' (1992) 23 *Pacific Law Journal* 1496
- Meron, T 'International criminalization of internal atrocities' (1995) 89 *American Journal of International Law* 558
- Mezmur, BD 'Happy 18th birthday to the African Children's Charter: not counting its days but making its days count' (2017) 1 *African Human Rights Yearbook* 145
- Mezmur, BD 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 6 *African Human Rights Law Journal* 568
- Mickelson, K 'How universal is the Universal Declaration' (1998) 47 *University of New Brunswick Law Journal* 19
- Mills, D & Ssewakiryanga, R 'That Beijing thing': Challenging transnational feminisms in Kampala' (2002) 9 *Gender, Place & Culture* 385
- Mtintso, T 'Representivity: False sisterhood or universal women's interests? The South African experience' (2003) 29 *Feminist Studies* 569
- Mugwanya, GM 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 268
- Murdie, A & Peksen, D 'Women's rights INGO shaming and the government respect for women's rights' (2015) 10 *Review of International Organizations* 1
- Murray, R 'A feminist perspective on reform of the African human rights system' (2001) 2 *African Human Rights Law Journal* 211

- Murray, R & Viljoen, F 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 91
- Mutua, M 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342
- Mutua, M 'The African human rights systems in a comparative perspective: the need for urgent reformulation' (1992) 44 *Nairobi Law Monthly* 27
- Mutua, M 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339
- Mwambene, L & Sloth-Nielsen, J 'Benign accommodation? Ukuthwala, 'forced marriage' and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 1
- Mwambene, L & Wheal, M 'Realisation or oversight of a constitutional mandate? Corrective rape of black African lesbians in South Africa' (2015) 15 *African Human Rights Law Journal* 58
- Naldi, GJ & Magliveras, K 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 432
- Nathan, L 'The disbanding of the SADC Tribunal: A cautionary tale' (2013) 35 *Human Rights Quarterly* 870
- Ndashe, S 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2011) 15 *Feminist Africa* 26
- Nhlapo, RT 'International protection of human rights and the family: African variations on a common theme' (1989) 3 *International Journal of Law and the Family* 1
- Nhlapo, T 'Cultural diversity, human rights and the family in contemporary Africa: Lessons from the South African constitutional debate' (1995) 9 *International Journal of Law and the Family* 216
- Niyizurugero, JB & Lessène, G 'The Robben Island Guidelines: An essential tool for the prevention of torture in Africa' (2010) 6 *Essex Human Rights Review* 91
- Nsibirwa, MS 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 42
- Nyamu, C 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?' (2000) 41 *Harvard International Law Journal* 381
- Nyarko, MG & Jegede, AO 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 302
- O'Neill, O 'Justice, gender and international boundaries' (1989) *World Institute for Development Economics Research of the United Nations University* 5
- Obiora, LA 'Reconsidering customary law' (1993) 17 *Legal Studies Forum* 217
- Odinkalu, CA 'The individual complaints procedure of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law & Contemporary Problems* 388

- Ojwang, JB 'Polygamy as a legal and social institution in Kenya' (1974) 10 *East African Law Journal* 63
- Okereke, GO 'Violence against women in Africa' (2006) 2 *African Journal of Criminology & Justice Studies* 5
- Olivier, M 'A perspective on gender transformation of the South African judiciary' (2013) 130 *South African Law Journal* 448
- Oloka-Onyango, J & Tamale, S "'The personal is political" or why women's rights are indeed human rights: An African perspective on international feminism' (1995) 17 *Human Rights Quarterly* 691
- Olowu, D 'Mainstreaming women, equating men: Charting an inclusionary approach to transformative development in the African Decade for Women' (2011) 15 *Law, Democracy and Development* 166
- Otto, D 'Rethinking the "universality" of human rights law' (1997-1998) 29 *Columbia Human Rights Law Review* 13
- Peoples, FM 'Street harassment in Cairo: A symptom of disintegrating social structures' (2008) 15 *The African Anthropologist* 2
- Peteri, Z 'The Declaration of the Rights of Man and Citizen and the Hungarian Constitution' (1991) 33 *Acta Juridica Hungarica* 57
- Petkovic, VG 'The globalisation of gender and history in contemporary Serbian women's writing' (2014) 4 *Journal of Research in Gender Studies* 985
- Possi, A 'Striking a balance between community norms and human rights: The continuing struggle of the East Africa Court of Justice' (2015) 15 *African Human Rights Law Journal* 192
- Preis, AS 'Human rights as cultural practice: An anthropological critique' (1996) 18 *Human Rights Quarterly* 286
- Quashigah, K 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (200) 2 *African Human Rights Law Journal* 261
- Rafter, NH 'Equality or difference' (1992) 3 *Federal Prisons Journal* 17
- Riddel-Dixon, E 'Mainstreaming women's rights: Problems and prospects within the Centre for Human Rights' (1999) 5 *Global Governance* 149
- Robson, R 'Lesbianism in Anglo-European legal history' (1990) 5 *Wisconsin Women's Law Journal* 1
- Rudman, A 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1
- Rudman, A 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 319
- Rudolf, B 'The thematic rapporteurs and working groups of the United Nations Commission on Human Rights' (2000) 4 *Max Planck Yearbook of United Nations Law* 289
- Rush, SE 'Sexual orientation: A plea for inclusion' (1995) 10 *Berkeley Women's Law Journal* 70

- Ryan, RM 'The sex right: A legal history of the marital rape exemption' (1995) 20 *Law and Social Inquiry* 941
- Sackellares, SN 'From Bosnia to Sudan: Sexual violence in modern armed conflict' (2005) 20 *Wisconsin Women's Law Journal* 137
- Sarassin, O, Gabriel, U & Gygax, P 'Sexism and attitudes towards gender-neutral language: The case of English, French, and German' (2012) 71 *Swiss Journal of Psychology* 113
- Scott, EK 'Beyond tokenism: The making of racially diverse feminist organizations' (2005) 52 *Social Problems* 232
- Scott, JW 'French feminists and the rights of 'man': Olympe de Gouges's declarations' (1989) 28 *History Workshop* 1
- Shoko, T "'Worse than dogs and pigs?" Attitudes towards homosexual practice in Zimbabwe' (2010) 57 *Journal of Homosexuality* 634
- Sifris, R 'Involuntary sterilization of HIV-Positive women: An example of intersectional discrimination' (2015) 37 *Human Rights Quarterly* 464
- Sims, SL 'Women's history and the public schools' (1992) 14 *Women's Rights Law Reporter* 10
- Spieler, P 'The Maria da Penha case and the Inter-American Commission on Human Rights: Contributions to the debate on domestic violence against women in Brazil' (2011) 18 *Indiana Journal of Global Legal Studies* 134
- Stefiszyn, K 'The African Union: Challenges and opportunities for women' (2005) 5 *African Human Rights Law Journal* 377
- Sturman, R 'Gender and the human: An introduction' (2011) 23 *Gender & History* 230
- Subedi, SP 'Protection of human rights through the mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 201
- Tamale, S 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 49
- Thernstrom, A 'Voting rights, another affirmative action mess' (1996) 43 *University of California Los Angeles Law Review* 2037
- Thomas, TA 'Misappropriating women's history in the law and politics of abortion' (2012) 36 *Seattle University Law Review* 1
- True, J 'The unfulfilled mandate – Gender mainstreaming and UN peace operations' (2009) 10 *Georgetown Journal of International Affairs* 41
- Tucker, FH 'The study of women in history' (1972) 20 *Improving College and University Teaching* 16
- Tunamsifu, SP 'The right to justice: A challenge for survivors of conflict-related sexual violence in the Eastern Democratic Republic of the Congo' (2015) 15 *African Human Rights Law Journal* 473
- Udombana, NJ 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 45 *Yale Human Rights and Development Law Journal* 98
- Viljoen, F 'A human rights court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 13

- Viljoen, F 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 19
- Viljoen, F '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 and Social Justice* 11
- Viljoen, F 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (2000) 44 *Journal of African Law* 110
- Viljoen, F 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' (2005) 27 *Human Rights Quarterly* 135
- Viljoen, F 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 63
- Viljoen, F & Louw, L 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *The American Journal of International Law* 1
- Viljoen, F & Louw, L 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1
- Volpp, L 'Feminism versus multiculturalism' (2001) 101 *Columbia Law Review* 1186
- von Staden, A 'Subsidiarity, exhaustion of domestic remedies, and the margin of appreciation in the human rights jurisprudence of African sub-regional courts' (2016) 20 *The International Journal of Human Rights* 1113-1131
- Wachira, GM & Ayinla, A 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465
- Westendorp, I 'Housing rights and related facilities for female refugees and internally displaced women' (2001) 19 *Netherlands Quarterly of Human Rights* 403
- Wright, S 'Economic rights and social justice: A feminist analysis of some international human rights conventions' (1992) *Australian Yearbook of International Law* 258
- Yeshanew, SA 'Mainstreaming human rights in development programmes and projects: Experience from the work of a United Nations agency' (2014) 32 *Nordic Journal of Human Rights* 372
- Yusuf, C & Fessha, Y 'Female genital mutilation as a rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania' (2013) 13 *African Human Rights Law Journal* 376

Theses and dissertations

-
- Biegon, JK (2016) 'The impact of the resolutions of the African Commission on Human and Peoples' Rights' unpublished PhD thesis, University of Pretoria
- Budoo, A (2016) 'The role of gender budgeting in implementing the obligation to provide resources to realise women's human rights in Africa' unpublished PhD thesis, University of Pretoria

Reports, papers and studies

Advocates for Behavioural Change, African Men for Sexual Health and Rights and others 'Human rights violations based on sexual orientation and gender identity in Nigeria' A shadow report on Nigeria's compliance with the African Charter on Human and Peoples' Rights Submitted for consideration at the 56th Session of the African Commission on Human and Peoples' Rights

Association for Women's Rights in Development 'Women human rights defenders' available at <https://www.awid.org/priority-areas/women-human-rights-defenders> (accessed 11 November 2017)

Belknap, J Dunn, M & Holsinger, K 'Moving toward juvenile justice and youth serving systems that address the distinct experience of the adolescent female' Report to the Governor Columbus, Ohio Office of Criminal Justice Services (1997)

Bloom, BE & Covington, SS 'Effective gender-responsive interventions in juvenile justice: Addressing the lives of delinquent girls' Paper presented at the 2001 Annual Meeting of the American Society of Criminology Atlanta, Georgia, November 7-10, 2001

Centre for Human Rights 'Support to the African Human Rights System: Recent improvement of adjudication and litigation by the African Commission on Human and Peoples' Rights (2013-2015)

Coalition of African Lesbians & African Men for Sexual Health and Rights Violence based on perceived or real sexual orientation and gender identity in Africa (2013) 18-24 available at <http://www.pulp.up.ac.za/other-publications/violence-based-on-perceived-or-real-sexual-orientation-and-gender-identity-in-africa> (accessed 25 November 2017)

Commee-McCourt, A 'Gender responsiveness in the juvenile justice system' Independent study (2008)

Federation of Women Lawyers (FIDA) Kenya Key gains and challenges: A gender audit of Kenya's 2013 election process (2013)

Hassan, RM "'Clouds in Egypt's sky" Sexual harassment: from verbal harassment to rape: A sociological study'

Human Rights Watch 'Egypt: Epidemic of sexual violence' (2013)

Human Rights Watch 'Study on HIV, the law, and human rights in the African human rights system: Key challenges and opportunities for rights-based responses to HIV'

Human Rights Watch "We'll show you you're a woman": Violence and discrimination against black lesbians and transgender men in South Africa (2011) available at <https://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> (accessed 25 November 2017)

Inter-Parliamentary Union Gender-sensitive parliaments: A global review of good practice (2011)

International Service for Human Rights '2010 NGO Forum (I): Inside perspectives'

Office of the United Nations High Commissioner for Human Rights 'Human rights defenders: Protecting the right to defend human rights' 15 available at <http://www.ohchr.org/Documents/Publications/FactSheet29en.pdf> (accessed 12 November 2017)

Purnell, P 'Case summary: Application 005/2011 Daniel Amare & Mulugeta Amare v Mozambique Airlines & Mozambique' 20 December 2011 available at <http://arcproject.co.uk/wp-content/uploads/2013/04/CSW-005-2011.pdf> (accessed 20 June 2017)

Report of the Committee on the Elimination of Discrimination against Women: Eighteenth and nineteenth sessions, UN Doc A/53/38/Rev.1

Seventh African regional conference on women (Beijing + 10) decade review of the implementation of the Dakar and Beijing platforms for action: Outcome and the way forward Addis Ababa 12-14 October 2004

Women Human Rights Defenders International Coalition 'Global report on the situation of women human rights defenders' January 2012 1-8 available at http://defendingwomen-defendingrights.org/wp-content/uploads/2014/03/WHRD_IC_Global-Report_2012.pdf (accessed 13 November 2017)

World Justice Project 'What is the rule of law?' available at <https://worldjusticeproject.org/about-us/overview/what-rule-law> (accessed 21 June 2017)

Zimbabwe Human Rights NGO Forum 'Report to the African Commission on the situation of human rights defenders in Zimbabwe – 51st Ordinary Session of the African Commission on Human and Peoples' Rights, 18 April – 2 May 2012

Documents of the African Commission on Human and Peoples' Rights

Resolutions

Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt, ACHPR/Res.288(EXT.OS/XVI)14 adopted at the 16th Extraordinary Session, Kigali, Rwanda, 20 – 29 July 2014

Resolution on Cooperation between the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child in Africa, ACHPR/Res.144(XLV)09 adopted at the 45th Ordinary Session, Banjul, The Gambia, 13 – 27 May 2009

Resolution on Developing Guidelines on Combatting Sexual Violence and its Consequences, ACHPR/Res.365(EXT.OS/XX1)17 adopted at the 21st Extraordinary Session, Banjul, The Gambia, 23 February – 4 March 2017

Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04 adopted at the 36th Ordinary Session, Dakar, Senegal, 23 November – 7 December 2004

Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa,

ACHPR/Res.61(XXXII)02 adopted at the 32nd Ordinary Session, Banjul, The Gambia, 17 – 23 October 2002

Resolution on Maternal Mortality in Africa, ACHPR/Res.135(XLIV)08 adopted at the 44th Ordinary Session, Abuja, Nigeria, 10 – 24 November 2008

Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, ACHPR/Res.275(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014

Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission, ACHPR/Res.30(XXIX)98 adopted at the 24th Ordinary Session, Banjul, The Gambia, 22 – 31 October 1998

Resolution on the Crimes Committed against Women in the Democratic Republic of Congo, ACHPR/Res.173(XLVIII)10 adopted at the 48th Ordinary Session, Banjul, The Gambia, 10 – 24 November 2010

Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa, ACHPR/Res.361(LIX)16 adopted at the 59th Ordinary Session, Banjul, The Gambia, 21 October – 4 November 2016

Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa, ACHPR/Res.38(XXV)99 adopted at the 25th Ordinary Session, Bujumbura, Burundi, 26 April – 5 May 1999

Resolution on the Drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa, ACHPR/Res.277(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014

Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV, ACHPR/Res.163(XLVII)10 adopted at the 47th Ordinary Session, Banjul, The Gambia, 12 – 26 May 2010

Resolution on the Establishment of a Resolutions Committee, ACHPR/Res. 338(LVIII)16 adopted at the 58th Ordinary Session, Banjul, The Gambia, 6 – 20 April 2016

Resolution on the Health and Reproductive Rights of Women in Africa, ACHPR/Res.110(XLI)07 adopted at the 41st Ordinary Session, Accra, Ghana, 16 – 30 May 2007

Resolution on the HIV/AIDS Pandemic: Threat Against Human Rights and Humanity, ACHPR/Res.53(XXIX)01 adopted at the 29th Ordinary Session, Tripoli, Libya, 23 April – 7 May 2001

Resolution on the Human Rights Situation in the Republic of The Gambia, ACHPR/Res.299 (XVII)15 adopted at the 17th Extra-Ordinary Session, Banjul, The Gambia, 19 – 28 February 2015

Resolution on the Human Rights Situation in Togo, ACHPR/Res.397(LXII)18 adopted at the 62nd Ordinary Session, Nouakchott, Islamic Republic of Mauritania, 25 April – 9 May 2018

Resolution on the Need to Conduct a Study on Child Marriage in Africa, ACHPR/Res.292(XVI)14 adopted at the 16th Extraordinary Session, Kigali, Rwanda, 20 – 29 July 2014

Resolution on the Need to Conduct a Study on Child Marriage in Africa, ACHPR/Res.292(XVI)14 adopted at the 16th Extraordinary Session, Kigali, Rwanda, 20 – 29 July 2014

Resolution on the Prevention of Women and Child Trafficking in South Africa during the 2010 World Cup Tournament, ACHPR/Res.165(XLVII)10 adopted at the 47th Ordinary Session, Banjul, The Gambia, 12 – 26 May 2010

Resolution on the Ratification of the African Charter on the Rights and Welfare of the Child, ACHPR/Res.36(XXV)99 adopted at the 25th Ordinary Session, Bujumbura, Burundi, 26 April – 5 May 1999

Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, ACHPR/Res.111(XXXII)07 adopted at the 42nd Ordinary Session, Brazzaville, Republic of Congo, 15 – 28 November 2007

Resolution on the Rights of Indigenous Peoples' Communities in Africa, ACHPR/Res.51(XXIII)00 adopted at the 28th Ordinary Session, Cotonou, Benin, 23 October – 6 November 2000

Resolution on the Safety of Journalists and Media Practitioners in Africa, ACHPR/Res.185(XLIX)11 adopted at the 49th Ordinary Session, Banjul, The Gambia, 28 April – 12 May 2011

Resolution on the Situation of Women and Children in Africa, ACHPR/Res.66(XXXV)04 adopted at the 35th Ordinary Session, Banjul, The Gambia, 21 May – 4 June 2004

Resolution on the Situation of Women and Children in Armed Conflict, ACHPR/Res.283(LV)14 adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014

Resolution on the Situation of Women in the Democratic Republic of Congo ACHPR/Res.103(XXXX)06 adopted at the 40th Ordinary Session, Banjul, The Gambia, 15 – 29 November 2006

Resolution on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo, ACHPR/Res.284(LV)14 adopted at the 48th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014

Resolution on the Unconstitutional Change of Governments, ACHPR/Res.213(LI)12 adopted at the 51st Ordinary Session, Banjul, The Gambia, 18 April – 2 May 2012

Activity reports

Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1996 – 1997

Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999 – 2000

Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2000 – 2001

Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2001 – 2002

Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2002 – 2003

Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2003 – 2004

Eighteenth Activity Report of the African Commission on Human and Peoples' Rights 2004 – 2005

Nineteenth Activity Report of the African Commission on Human and Peoples' Rights July – December 2005

Twenty Sixth Activity Report of the African Commission on Human and Peoples' Rights December 2008 – May 2009

Twenty-eighth Activity Report of the African Commission on Human and Peoples' Rights November 2009 – May 2010

Thirty-ninth Activity Report of the African Commission on Human and Peoples' Rights May – November 2015

40th Activity Report of the African Commission on Human and Peoples' Rights December 2015 – April 2016

Forty-third Activity Report of the African Commission on Human and Peoples' Rights June – November 15 2017

Final Communiqués

Final Communiqué of the 56th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21 April – 7 May 2015

Final Communiqué of the 58th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 6 – 20 April 2016

Final Communiqué of the 59th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21 October – 4 November 2016

Final Communiqué of the 60th Ordinary Session of the African Commission on Human and Peoples' Rights, Niamey, Niger, 8 – 22 May 2017

Final Communiqué of the 61st Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 1 – 15 November 2017

Final Communiqué of the 62nd Ordinary Session of the African Commission on Human and Peoples' Rights, Nouakchott, Mauritania, 25 April – 9 May 2018

State reporting guidelines, concluding observations and examination questionnaires

African Commission on Human and Peoples' Rights 'Guidelines for National Periodic Reports'

African Commission on Human and Peoples' Rights 'Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa'

African Commission on Human and Peoples' Rights 'State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights'

Concluding Observations and Recommendations on Sixth Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011 – 2013), 58th Ordinary Session, Banjul, The Gambia, 6 – 20 April 2016

Concluding observations and recommendations on the Combined second periodic report under the African Charter on Human and Peoples' Rights and the Initial report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa

Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995 – 2013), 57th Ordinary Session, Banjul, The Gambia, 4 – 18 November 2015

Concluding observations and recommendations on the initial report of the Islamic Republic of Mauritania, 31st Ordinary Session, Pretoria South Africa, 2 – 16 May 2002

Concluding observations and recommendations on the initial report of the Republic of Niger, 35th Ordinary Session, Banjul, The Gambia, 21 May – 4 June 2004

Observations and Questions on the Initial and Combined Report of the Republic of Malawi to the African Commission on Human and Peoples' Rights (on file with author)

Questionnaire, The Combined Second (2nd) Periodic Report of the Republic of South Africa to the African Commission on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, 58th Ordinary Session, Banjul, The Gambia, 6 – 20 April 2016

Summary and draft questionnaire relating to the periodic report the Islamic Republic of Mauritania (on file with the author)

Reports, studies, newsletters and other publications

Activity report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, 56th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21 April – 7 May 2015

African Commission on Human and Peoples' Rights 'A Report on Child Marriage in Africa' available at http://www.chr.up.ac.za/images/files/news/news_2018/Child%20Marriage%20Report%20ENGLISH%20web.pdf (accessed 23 April 2018)

African Commission on Human and Peoples' Rights 'Report of the Fact-finding Mission to the Republic of Mali' 3-7 June 2013. Available at http://www.achpr.org/files/sessions/53rd/mission-reports/mali-fact-finding-2013/misrep_factfinding_mali_2013_eng.pdf (accessed 16 April 2018)

African Commission on Human and Peoples' Rights 'Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights' 12 – 15 August, Dakar, Senegal

African Commission on Human and Peoples' Rights 'Report of the Study on the Situation of Women Human Rights Defenders in Africa' available at <http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report-of-the-study-on-the-situation-of-women-human-rights-defenders-in-africa.pdf> (accessed 12 November 2017)

African Commission on Human and Peoples' Rights 'The Right to Nationality in Africa' available at <http://www.achpr.org/files/special-mechanisms/refugees-and-internally-displaced-persons/the-right-to-nationality-in-africa.pdf> (accessed 14 November 2017)

African Commission on Human and Peoples' Rights (2016) 8 *Police and Human Rights in Africa* 3-19. Available at <http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/newsletter-8.pdf> (accessed 11 November 2017)

African Commission on Human and Peoples' Rights (2017) 9 *Police and Human Rights in Africa* 3-33. Available at <http://www.achpr.org/files/news/2017/05/d289/police-and-hr-newsletter-no-9-eng-fre-ara.pdf> (accessed 11 November 2017)

Intersession activity report of the Chairperson, Committee on the Prevention of Torture in Africa 'Thematic report on the denial of abortion and post-abortion care as torture and other cruel, inhuman or degrading punishment or treatment', 61st Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 1 – 15 November 2017

Intersession activity report of the Chairperson, Committee on the Prevention of Torture in Africa 'Annual situation of torture and ill-treatment in Africa report', 59th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21 October – 4 November 2016

Intersession activity report of the Committee for the Prevention of Torture in Africa, 52nd Ordinary Session of the African Commission on Human and Peoples', Yamoussoukro, Cote d'Ivoire, 9 -22 October 2012

Intersession activity report of the Working Group on Indigenous Populations/Communities, 58th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 6 - 20 April 2016

Intersession report of the mechanism of the Special Rapporteur on the Rights of Women in Africa since its establishment, 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Cote d'Ivoire, 9 -22 October 2012

Intersession report of the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, 56th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21 April – 7 May 2015 paras 25-26.

Newsletter of the Special Rapporteur on the Rights of Women in Africa on the occasion of the 30th anniversary of the African Commission on Human and Peoples' Rights

Report of the African Commission on Human and Peoples' Rights Fact-finding mission to the Republic of the Sudan in the Darfur region, 8 – 18 July 2004 (Sudan: Fact-finding mission 2004)

Report of the Chairperson of the Working Group on the Rights of Older Persons and People with Disabilities in Africa, 52nd Ordinary Session of the African Commission on Human and Peoples', Yamoussoukro, Cote d'Ivoire, 9 -22 October 2012

Report of the Mechanism of The Special Rapporteur on The Rights of Refugees, Asylum Seekers, and Internally Displaced and Migrants in Africa since its creation, presented at the 52nd Ordinary Session of the African commission on Human and Peoples' Rights, Yamoussoukro, Cote d'Ivoire 9 - 22 October 2012

Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa presented at the 52nd Ordinary Session of the African commission on Human and Peoples' Rights, Yamoussoukro, Cote d'Ivoire 9 - 22 October 2012.

Report on the study of the African Commission on Human and Peoples' Rights 'HIV, the law and human rights in the African human rights system: Key challenges and opportunities for rights-based responses' available at http://www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf (accessed 17 November 2017).

Report on the study of the African Commission on Human and Peoples' Rights 'HIV, the law and human rights in the African human rights system: Key challenges and opportunities for rights-based responses' available at http://www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf (accessed 17 November 2017)

Statements, speeches and other resources

African Commission on Human and Peoples' Rights 'Documents: Mission reports' available at <http://www.achpr.org/search/?t=834&q=fact-finding> (accessed 21 June 2017)

African Commission on Human and Peoples' Rights 'Media alert' available at <http://www.achpr.org/news/2016/10/d263/> (accessed 25 April 2018)

African Commission on Human and Peoples' Rights 'NGOs with observer status' available at <http://www.achpr.org/network/ngo/by-name/> (accessed 16 August 2018)

African Commission on Human and Peoples' Rights 'Press release of the African Commission on the electoral impasse in the Republic of Zimbabwe' available at <http://www.achpr.org/press/2008/04/d62/> (accessed 2 May 2018)

African Commission on Human and Peoples' Rights 'Press Release of the African Commission on Human and Peoples' Rights on the socio-political and security situation in Mali' available at <http://www.achpr.org/press/2018/07/d408/> (accessed 2 May 2018)

African Commission on Human and Peoples' Rights 'Press Release: 2016: Africa Year of Human Rights with Particular Focus on the Rights of Women' available at <http://www.achpr.org/press/2016/10/d322/> (accessed 25 April 2018)

African Commission on Human and Peoples' Rights 'Press Release: Launch of The Campaign For The Decriminalization Of Abortion In Africa: Women And Girls In Africa

Are Counting On Us To Save Their Lives! Available at <http://www.achpr.org/press/2016/01/d287/> (accessed 8 May 2018)

African Commission on Human and Peoples' Rights 'Soft law' available at <http://www.achpr.org/instruments/> (accessed 20 November 2017).

African Commission on Human and Peoples' Rights 'Special Rapporteur on Rights of Women: Mandate and biographical notes' available at <http://www.achpr.org/mechanisms/rights-of-women/about/> (accessed 6 September 2017)

African Commission on Human and Peoples' Rights 'Statement by the Special Rapporteur on the Rights of Women in Africa in support of the AU Campaign to: "Restore the Dignity of Women and ensure Accountability in South Sudan"' available at <http://www.achpr.org/news/2016/12/d264/> (accessed 8 May 2018).

African Commission on Human and Peoples' Rights 'The Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa' available at <http://www.achpr.org/mechanisms/prisons-and-conditions-of-detention/> (accessed 11 November 2017)

African Commission on Human and Peoples' Rights 'Training manual based on the Guidelines for Policing of Assemblies by Law Enforcement Officials in Africa' available at http://www.achpr.org/files/special-mechanisms/human-rights-defenders/policing_of_assemblies_training_manual.pdf (accessed 10 December 2017)

African Commission on Human and Peoples' Rights <http://www.achpr.org/mechanisms/rights-of-women/> (accessed 10 October 2016)

African Commission on Human and Peoples' Rights, Sessions, 55th Ordinary Session 'Opening statement on behalf of participants of the Forum of NGOs' available at <http://www.achpr.org/sessions/55th/speeches/ngo-opening-statement/> (accessed 20 May 2018)

African Commission on Human and Peoples' Rights, Sessions, 56th Ordinary Session 'Opening statement on behalf of participants of the Forum of NGOs' available at http://www.achpr.org/sessions/56th/speeches/ngos_statement/ (accessed 20 May 2018)

African Commission on Human and Peoples' Rights, Sessions, 56th Ordinary Session 'NGO statements' available at <http://www.achpr.org/sessions/56th/ngo-statements/33/> (accessed 17 May 2018)

African Commission on Human and Peoples' Rights, Special mechanisms, Working Group on Indigenous Populations/ Communities in Africa <http://www.achpr.org/mechanisms/indigenous-populations/> (accessed 20 November 2017)

African Commission on Human and Peoples' Rights, Special mechanisms, Working Group on Rights of Older Persons and People with Disabilities <http://www.achpr.org/mechanisms/older-disabled/> (accessed 20 November 2017)

Opening statement by the Chairperson of the African Commission on Human and Peoples' Rights, Honourable Kayitesi Zainabo Sylvie available at http://www.achpr.org/sessions/56th/speeches/chair_opening-statement/ (accessed 25 April 2018)

Press statement by the African Commission on Human and Peoples' Rights in commemoration of the Day of the African Child, 16 June 2008 available at <http://www.achpr.org/press/2008/06/d63/> (accessed 25 April 2018)

Documents of the African Union

AU Assembly, Decision on the Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights Doc.Assembly/AU/7(II), Assembly/AU/Dec.11 (II)

Executive Council, Decision on the African Commission on Human and Peoples' Rights Doc.EX.CL/1058(XXXII), EX.CL/Dec.995(XXII)

Executive Council, Decision on the Report of the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) Doc.EX.CL/1089(XXXIII), EX.CL/Dec.1015(XXXIII)

Executive Council, Decision on the Thirty-eighth Activity Report of the African Commission on Human and Peoples' Rights Doc.EX.CL/921(XXVII), EX.CL/Dec.887(XXVII)

Documents of the United Nations

Reporting guidelines of the Committee on the Elimination of Discrimination against Women

UN Women 'Progress of the world's women 2015 – 2016: Transforming economies, realizing rights'

UN Women 'Virtual knowledge centre to end violence against women and girls'

United Nations Economic and Social Council 'Mainstreaming a gender perspective into all policies and programmes in the United Nations system, ECOSOC Resolution 2005/31' United Nations General Assembly 'Official records of the General Assembly, Fifty-second session, Supplement no.3 (A/52/3/Rev.1)' (1997)

World Health Organisation Integrating gender into HIV/AIDS programmes in the health sector: Tools to improve responsiveness to women's needs (2009)

World Health Organization Europe 'Checklist for assessing the gender responsiveness of sexual and reproductive health policies: Pilot document for adaptation to national contexts'

International instruments

International

Convention on the Elimination of All Forms of Discrimination against Women

Convention on the Rights of Persons with Disabilities

Declaration on the Elimination of Violence against Women
International Convention on the Elimination of All Forms of Racial Discrimination
Rome Statute of the International Criminal Court
Statute of the International Criminal Tribunal for Rwanda
Statute of the International Criminal Tribunal for the Former Yugoslavia
Universal Declaration of Human Rights
Vienna Convention on the Law of Treaties
Vienna Declaration and Programme of Action

International: United Nations soft law

Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law

CEDAW General Recommendation No. 15 on the Avoidance of Discrimination against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS), 1990, A/45/38

CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and health), 5 February 1999, UN Doc A/54/38/Rev.1, chap.1

CEDAW General Recommendation No. 28 on the core obligations of states parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, UN Doc CEDAW/C/GC/28

CEDAW General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and the statelessness of women, 14 November 2014, CEDAW/C/GC/32

Committee on the Elimination of Racial Discrimination General recommendation XXV on gender-related dimensions of racial discrimination

General Comment No. 18 Non-discrimination, 10 November 1989, UN Doc HRI/GEN/1/Rev.1

UN Human Rights Committee (HRC), General Comment No. 18 Non-discrimination, 10 November 1989, UN Doc HRI/GEN/1/Rev.1

UN Human Rights Committee (HRC), CCPR General Comment No. 28 Equality of rights between men and women (Art 3), 29 March 2000, UN Doc CCPR/C/21/Rev.1

Africa: Regional

Addis Ababa Declaration on Accelerating the Implementation of the Beijing Platform for Action (2014)

African Charter on Human and Peoples' Rights (1981)

African Union African Union handbook 2018 (2018)

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009)

African Union Gender Policy

Constitutive Act of the African Union (2000)

Constitutive Act of the African Union (2000)

Cotonou Declaration on strengthening and expanding the protection of all human rights defenders in Africa (2017)

Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa

Protocol on Amendments to the Constitutive Act of the African Union (2003)

Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security (2001)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Person (2016)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018)

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

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

Rules of Procedure of the African Commission on Human and Peoples' Rights (2010)

Solemn Declaration on Gender Equality in Africa (2004)

Statute on the Establishment of the Legal Aid Fund of Human Rights Organs of the African Union (2016)

Statutes of the Commission of the African Union

Africa: African Commission soft law

African Union 'Framework and guidelines on land policy in Africa

Declaration of Principles on Freedom of Expression in Africa

General Comment No. 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)

General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Guidelines on Combatting Sexual Violence and its Consequences in Africa, African Commission on Human and Peoples' Rights

Guidelines on the conditions of arrest, police custody and pre-trial detention in Africa

Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage

Model Law on Access to Information in Africa

Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights

Robben Island Guidelines for the prohibition and prevention of torture in Africa

Africa: Sub-regional

COMESA Gender Policy (2016)

Dakar Declaration on Key Populations in the Response to HIV and AIDS in ECOWAS Member States (2015)

EAC Gender Equality, Equity and Development Bill (2016) Protocol on the Tribunal in the Southern African Development Community (2014)

EAC Gender Policy (2018-2022)

East African Community HIV and AIDS Prevention and Management Act (2012)

IGAD Gender Policy Framework (2012-2020)

Model Law on HIV in Southern Africa (2008)

SADC Principles and Guidelines Governing Democratic Elections (2004)

SADC Protocol on Gender and Development (2008: revised 2016)

Supplementary Act Relating to Equality of Rights between Women and Men for Sustainable Development in the ECOWAS Region (2015)

Supplementary Protocol Amending the Protocol relating to the Community Court of Justice (2005)

The East Africa Community Treaty (1999)

The Treaty of the Economic Community of West African States (1993)

The Treaty of the Southern African Development Community (1992)

Case Law

African Commission on Human and Peoples' Rights

Communication 225/1998, *Huri-Laws v Nigeria*, ACHPR

Communication 227/1999, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, ACHPR

Communication 236/2000, *Curtis Francis Doebbler v Sudan*, ACHPR

Communication 245/2002, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, ACHPR

Communication 279/2003-296/2005, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan*, ACHPR

Communication 288/2004, *Gabriel Shumba v Zimbabwe*, ACHPR

Communication 308/2005, *Michael Majuru v Zimbabwe*, ACHPR

Communication 323/2006, *Egyptian Initiative for Personal Rights & Interights v Egypt*, ACHPR

Communication 341/2007, *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, ACHPR

Communication 375/2009, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya*, ACHPR

Communication 54/1991-61/1991-96/1993-98/1993-164/1997_196/1997-210/1998, *Malawi African Association, Amnesty International & others v Mauritania*, ACHPR

African Court on Human and Peoples' Rights

Application 046/2016, *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) & The Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*, African Court on Human and Peoples' Rights

Application 004/2011, *The African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*, African Court on Human and Peoples' Rights

Application 002/2013, *The African Commission on Human and Peoples' Rights v Libya*, African Court on Human and Peoples' Rights

Application 006/2012, *The African Commission on Human and Peoples' Rights v Republic of Kenya*, African Court on Human and Peoples' Rights

African Committee of Experts on the Rights and Welfare of the Child

Communication No. 4/Com/001/2014, *Institute for Human Rights and Development in Africa (IHRDA) v Malawi*, African Committee of Experts on the Rights and Welfare of the Child

ECOWAS Community Court of Justice

ECW/CCJ/JUD/08/17, *Dorothy Chioma Njemanze & 3 others v The Federal Republic of Nigeria*, ECOWAS Court

ECW/CCJ/APP/35/17 *Aminata Diantou Diane (represented by APDF & IHRDA) v Mali* ECOWAS Court

East African Court of Justice

Reference 1/2007, *James Katabazi and 21 others v Secretary General of the EAC and Attorney General of the Republic of Uganda*, EACJ

Other international forums

Advisory Opinion Oc-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, IACHR (19 January 1984) Ser. A No. 4 para 57

Application No. 5178/71, *De Geillustreerde Pers N.V. v Netherlands*, European Commission on Human Rights, UN Human Rights Committee (HRC)

Communication No. 488/1992, *Toonen v Australia*, CCPR/C/50/D/488/1992

Communication No. 1153/2003, *K.L. v Peru*, CCPR/C/85/D/1153/2003

Communication No. 182/1984, *F.H. Zwaan-de-Vries v Netherlands*, CCPR/C/29/D/182/1984

Karen Atala and Daughters v Chile IACHR (23 July 2008) Ser L/Doc 22 Rev 1.

Maria da Penha v Brazil IACHR (16 April 2001) Report No. 54/01, OEA/Ser.L./III.111, doc.20

National case law

Benin

Okpeitcha v Okpeitcha (2002) AHRLR 33 (BnCC 2001)

Canada

Miron v Trudel (1995) 2 SCR 418

South Africa

Prinsloo v Van der Linde 1996 4 (CCT)

President of the Republic of South Africa v Hugo 1996 11 (CCT)

Internet sources

African Commission on Human and Peoples' Rights <http://www.achpr.org/instruments/achpr/> (accessed 23 July 2015)

African Commission on Human and Peoples' Rights, About ACHPR, Former commissioners <http://www.achpr.org/about/former-commissioners/> (accessed 25 July 2018)

African Commission on Human and Peoples' Rights, About ACHPR. Available at <http://www.achpr.org/about/> (accessed 25 July 2018)

African Commission on Human and Peoples' Rights, About ACHPR. Available at <http://www.achpr.org/about/> (accessed 25 July 2018)

African Court on Human and Peoples' Rights 'African Court organises special training for lawyers to represent indigent applicants' available at <http://en.african-court.org/index.php/news/press-releases/item/171-african-court-organizes-special-training-for-lawyers-to-represent-indigent-applicants> (accessed 17 August 2018)

African Court on Human and Peoples' Rights 'Legal aid scheme' available at <http://en.african-court.org/index.php/component/k2/item/36-legal-aid-scheme> (accessed 17 August 2018)

African Court on Human and Peoples' Rights 'Over 30 lawyers to attend African Court training next week' available at <http://en.african-court.org/index.php/news/press-releases/item/243-over-30-lawyers-to-attend-african-court-training-next-week> (accessed 17 August 2018)

African Court on Human and Peoples' Rights 'Republic of Tunisia signs African Court Declaration to allow NGOs and individuals to access the Human and Peoples' Rights Court directly' <http://en.african-court.org/index.php/news/press-releases/item/145-republic-of-tunisia-signs-african-court-declaration-to-allow-ngos-and-individuals-to-access-the-human-and-peoples-rights-court-directly> (accessed 13 April 2018)

African Court on Human and Peoples' Rights <http://www.african-court.org/en/index.php/news/press-releases/item/223-judges-of-ecowas-court-of-justice-to-visit-the-african-court> (accessed 4 May 2018) and Capital News <https://www.capitalfm.co.ke/news/2018/02/ecowas-court-judges-visit-african-court/> (accessed 4 May 2018)

African Union '2016: African year of human rights with particular focus on the rights of women' available at <https://au.int/en/pressreleases/19615/2016-african-year-human-rights-particular-focus-rights-women> (accessed 18 November 2017)

African Union '2016: African year of human rights with particular focus on the rights of women' available at <https://au.int/en/pressreleases/19615/2016-african-year-human-rights-particular-focus-rights-women> (accessed 8 May 2018)

African Union 'List of countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' <https://au.int/sites/default/files/treaties/7778-sl-protocol-to-the-african-charter-on-human-and-peoplesrights-on-the-estab.pdf> (accessed 13 April 2018)

African Union 'List of countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' <https://au.int/sites/default/files/treaties/7783-sl-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa.pdf> (accessed 13 April 2018)

African Union 'List of countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' <https://au.int/sites/default/files/treaties/7783-sl-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa.pdf> (accessed 13 April 2018)

African Union 'List of countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' <https://au.int/sites/default/files/treaties/7783-sl-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa.pdf>

[protocol to the african charter on human and peoples rights on the rights of women in africa.pdf](#) (accessed 21 August 2018)

African Union 'List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples' Rights' available at <https://au.int/sites/default/files/treaties/7770-sl-african-charter-on-human-and-peoples-rights-2.pdf> (accessed 19 August 2018)

African Union 'Regional Economic Communities' <https://au.int/en/organs/recs> (accessed 27 April 2018)

African Union 'Women's rights in Africa' available at <https://www.ohchr.org/Documents/Issues/Women/WRGS/WomensRightsinAfrica-singlepages.pdf> (accessed 8 May 2018)

African Union Commission & Office of the United Nations High Commissioner for Human Rights Women's rights in Africa (2017) 30. Available at <http://www.ohchr.org/Documents/Issues/Women/WRGS/WomensRightsinAfrica-singlepages.pdf> (accessed 4 April 2017)

African Union Peace and Security 'South Sudan: Restore the Dignity of Women, Ensure Accountability' (2016) 0001 AU Special Envoy Briefs on Women, Peace & Security. Available at <http://www.peaceau.org/uploads/au-special-envoy-briefs-on-wps-issue-0001-final.pdf> (accessed 8 May 2018)

African Union Peace and Security 'Special Envoy on Women, Peace and Security' available at <http://www.peaceau.org/en/page/40-5676-static-bineta-diop> (accessed 8 May 2018)

Aljazeera 'African Union suspends Egypt' available at <https://www.aljazeera.com/news/africa/2013/07/201375113557928109.html> (accessed 2 November 2018)

Assis, MP 'Women in the rulings of the African Commission on Human and Peoples' Rights' available at <http://www.publicseminar.org/2015/05/women-in-the-rulings-of-the-african-commission-on-human-and-peoples-rights/> (accessed 17 June 2017)

Association for Women's Rights in Development 'After years of activism CAL attains observer status at ACHPR' available at <https://www.awid.org/news-and-analysis/after-years-activism-cal-attains-observer-status-achpr> (accessed 6 May 2018)

Blacklooks 'Outrage at denial of observer status to CAL by the African Commission on Human Rights' available at <http://www.blacklooks.org/2010/11/outrage-at-denial-of-observer-status-to-cal-by-the-african-commission-on-human-rights/> (accessed 16 May 2018)

Biegon, J 'The rise and rise of political backlash: African Union Executive Council's decision to review the mandate and working methods of the African Commission' (2018) *European Journal of International Law: Talk* available at <https://www.ejiltalk.org/the-rise-and-rise-of-political-backlash-african-union-executive-councils-decision-to-review-the-mandate-and-working-methods-of-the-african-commission/#more-16384> (accessed 7 May 2018)

Cambridge Dictionary <http://dictionary.cambridge.org/dictionary/english/tokenism> (accessed 8 August 2016)

Campaign for the Accelerated Reduction of Maternal Mortality in Africa (CARMMA) available at <https://au.int/en/sa/carmma> (accessed 8 May 2018)

Centre for Human Rights 'Support to the African Human Rights System: Recent improvement of adjudication and litigation by the African Commission on Human and Peoples' Rights (2013-2015) available at <http://www.chr.up.ac.za/index.php/projects/support-to-the-african-human-rights-system.html> (accessed 20 June 2017)

CLADEM 'Declaration of human rights from a gender perspective' (2002) available at http://www.cladem.org/en/images/stories/publications/Declaracion_INGLES.pdf (accessed 29 July 2016)

Coalition of African Lesbians 'The African Court denies civil society access to justice and fails to pronounce on the independence of the African Commission on Human and Peoples' Rights' available at <http://www.cal.org.za/2017/09/28/the-african-court-denies-civil-society-access-to-justice-and-fails-to-pronounce-on-the-independence-of-the-african-commission-on-human-and-peoples-rights/> (accessed 5 May 2018)

Coalition of African Lesbians 'Women and sexual minorities denied a seat at the table by the African Commission on Human and Peoples' Rights'. Available at <https://www.cal.org.za/2018/08/17/women-and-sexual-minorities-denied-a-seat-at-the-table-by-the-african-commission-on-human-and-peoples-rights/> (accessed 18 August 2018)

EALA 'EALA passes key Gender Bill on International Women's Day' <http://www.eala.org/media/view/eala-passes-key-gender-bill-on-international-womens-day> (accessed 27 April 2018)

ECOWAS Gender Development Centre <http://www.ccdg.ecowas.int/?lang=en> (accessed 3 May 2018)

European Institute for Gender Equality 'Gender equality glossary and thesaurus'. Available at <http://eige.europa.eu/rdc/thesaurus/terms/1218> (accessed 8 August 2016)

Gender is my agenda <http://www.genderismyagenda.com/> (accessed 8 May 2018)

Girls not brides 'Child marriage around the world: Malawi' <https://www.girlsnotbrides.org/child-marriage/malawi/> (accessed 23 January 2018)

Guttmacher Institute 'Abortion in Africa: May 2016 Fact sheet.' Available at <https://www.guttmacher.org/fact-sheet/facts-abortion-africa#1> (accessed 4 April 2017)

Human Rights Watch 'Malawi Amends Constitution to Remove Child Marriage Loophole' available at <https://www.hrw.org/news/2017/02/23/malawi-amends-constitution-remove-child-marriage-loophole> (accessed 25 January 2018)

Human Rights Watch <https://www.hrw.org/topic/womens-rights> (accessed 28 July 2016)

IHRDA 'IHRDA statement on the protective mandate of the African Commission' available at <https://www.ihrda.org/2012/04/3066/> (accessed 16 May 2018)

International Labour Organization ABC of women worker's rights and gender equality (2007) available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf (accessed 1 August 2016)

International Network for Economic, Social and Cultural Rights (ESCR-Net) '*Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, Communication 341/2007' available at <https://www.escr-net.org/caselaw/2016/equality-now-and-ethiopian-women-lawyers-association-ewla-v-federal-republic-ethiopia> (accessed 24 May 2017)

International Press Institute 'International Declaration on the Protection of Journalists' item 12 available at <https://ipi.media/international-declaration-on-the-protection-of-journalists/> (accessed 15 November 2017)

International Service for Human Rights 'African Commission adopts landmark decision on LGBT rights' available at <http://www.ishr.ch/news/african-commission-adopts-landmark-resolution-lgbt-rights> (accessed 25 November 2017)

International Women's Media Foundation 'Violence and harassment against women in the news media' 7-9 available at <http://www.iwmf.org/our-research/journalist-safety/violence-and-harassment-against-women-in-the-news-media-a-global-picture/> (accessed 15 November 2017)

IPAS 'The African Commission on Human and Peoples' Rights launches campaign to decriminalize abortion' available at <http://www.ipas.org/en/News/2016/January/ACHPR-decriminalization-campaign.aspx> (accessed 8 May 2018)

Kenya Human Rights Commission 'The outlawed amongst us' available at <http://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html> (accessed 19 June 2017)

Mail & Guardian 'Exclusive: The 'professional apartheid' sidelining women at the African Union' available at <https://mg.co.za/article/2018-05-04-00-the-african-unions-metoo-moment> (accessed 26 July 2018)

Office of the United Nations High Commissioner for Human Rights 'Special Procedures of the Human Rights Council' available at <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (accessed 5 September 2017)

Pan Africa International Lesbian, Gay, Bisexual, Trans and Intersex Association 'NGO space under threat at the African Commission' available at <https://panafricailga.org/ngo-space-under-threat-at-the-african-commission/> (accessed 6 May 2018)

Remarks by Kofi Annan 7th Secretary-General of the United Nations December 2006. Available at <http://www.un.org/press/en/2006/sgsm10788.doc.htm> (accessed 5 September 2017)

Remarks by Professor Frans Viljoen during a Centre for Human Rights, University of Pretoria Conference on Soft Law and Human Rights: The Impact of the Model Law on Access to Information 9 December 2015. Available at <http://www.chr.up.ac.za/index.php/ati-news.html> (accessed 15 November 2017)

Reuters 'African Union suspends Egypt' available at <https://www.reuters.com/article/us-egypt-protests-africa-idUSBRE9640EP20130705> (accessed 2 November 2018)

Tadros, M 'Politically motivated sexual assault and the law in violent transitions: A case study from Egypt' (2013) 7. Available at

<https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/2950/ER8%20final%20online.pdf?sequence=1&isAllowed=y> (accessed 24 April 2017)

The Citizen 'AU Court to start legal aid fund' available at <http://www.thecitizen.co.tz/News/-AU-court-to-start-Legal-Aid-Fund/1840340-4655240-ofs32f/index.html> (accessed 17 August 2018)

UN Women Virtual knowledge centre to end violence against women and girls available at <http://www.endvawnow.org/en/articles/306-ensuring-gender-responsiveness.html> (accessed 3 August 2016)

UNICEF 'A profile of child marriage in Africa.' Available at [https://www.unicef.org/wcaro/english/UNICEF-Child-Marriage-Brochure-low-Single\(1\).pdf](https://www.unicef.org/wcaro/english/UNICEF-Child-Marriage-Brochure-low-Single(1).pdf) (accessed 4 April 2017)

UNICEF 'Maternal health: Maternal mortality.' Available at <https://data.unicef.org/topic/maternal-health/maternal-mortality/#> (accessed 4 April 2017)

United Nations High Commissioner for Human Rights Women's rights are human rights (2014) available at <http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> (accessed 1 August 2016)

United Nations <http://www.un.org/womenwatch/daw/cedaw/history.htm> (accessed 30 July 2016)

United Nations Treaty Collection https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed 30 October 2018)

University of Pretoria 'African Court rejects Centre for Human Rights and CAL request, leaving political tension within AU unresolved' available at https://www.up.ac.za/en/faculty-of-law/news/post_2573674--press-statement-african-court-rejects-centre-for-human-rights-and-cal-request-leaving-political-tension-within-au-unresolved (accessed 5 May 2018)

Vilakazi, F & Ndashe, S 'The day the African Commission disavowed humanity' available at Pambazuka News <https://www.pambazuka.org/governance/day-african-commission-disavowed-humanity> (accessed 16 May 2018)

WHO 'Female genital mutilation: Fact sheet updated February 2017'. Available at <http://www.who.int/mediacentre/factsheets/fs241/en/> (accessed 4 April 2017)

Annex

List of interviewees

- Interview with Adrian Jjuuko, Executive Director - Human Rights Awareness and Promotion Forum, Uganda, on 24 April 2018, Johannesburg, South Africa
- Interview with Dumsani Dlamini – Women in Law in Southern Africa Research & Education Trust, Swaziland, on 24 April 2018, Johannesburg, South Africa
- Interview with Faiza Mohammed, Director – Africa Office, Equality Now, on 13 August 2018, Nairobi, Kenya
- Interview with Iheoma Obibi, Executive Director – Alliances for Africa, Nigeria, on 30 May 2018, Nairobi, Kenya
- Interview with Karen Stefiszyn, former Programme Manager – Gender Unit, Centre for Human Rights, on 20 April 2018, Pretoria, South Africa
- Interview with Sibongile Ndashe, lawyer formerly at Interights, now Executive Director, Initiative for Strategic Litigation in Africa, South Africa, on 9 May 2018, Johannesburg, South Africa
- Interview with the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, on 22 September 2017, Réduit, Mauritius

Interview questionnaire

For litigants that have brought women’s rights cases before the African Commission

1. Which case(s) were you involved in litigating?
2. Are you satisfied with the adjudication of the case by the African Commission? How would you rate your satisfaction with the recommendation(s): highly satisfactory, satisfactory, neutral, unsatisfactory or highly unsatisfactory? What is the reason for your opinion?
3. Are you satisfied with the recommendations of the African Commission in that case? How would you rate your satisfaction with the recommendation(s): highly satisfactory, satisfactory, neutral, unsatisfactory or highly unsatisfactory? What is the reason for your opinion?
4. Did you face any challenges in litigating this case? If yes, please explain further

5. What is your assessment of the African Commission's jurisprudence from a feminist perspective?
6. What in your view could explain the dearth of litigation of women's rights cases at the African Commission?
7. What factors in your view can ease a litigant's experience before the African Commission?
8. What has been the respondent state's response to the recommendations given by the African Commission?
9. Are you working with the African Commission in any other manner?
10. What recommendations would you make to the African Commission to enhance its women's rights protection and promotion mandate?
11. Is there anything more you would like to add?

For women's rights advocates with observer status before the African Commission

1. In which ways are you working with the African Commission?
2. Are you satisfied with your relationship with the African Commission by reason of your observer status? How would you rate your satisfaction: highly satisfactory, satisfactory, neutral, unsatisfactory or highly unsatisfactory? What is the reason for your opinion?
3. Have you ever submitted a case to the African Commission? If not, why not?
4. Have you ever submitted a shadow report to the African Commission? If not, why not?
5. What factors in your view can ease a women's rights advocate's experience before the African Commission?
6. What recommendations would you make to the African Commission to enhance its women's rights protection and promotion mandate?
7. Is there anything more you would like to add?

