

**RECONSTRUCTING WOMEN'S RIGHTS IN AFRICA USING THE AFRICAN  
REGIONAL HUMAN RIGHTS REGIME: PROBLEMS AND POSSIBILITIES**

by

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## ABSTRACT

The struggle for women's rights has gained momentum in the last three decades with recognition in an assortment of international, regional and national institutions and instruments. The African human rights regime constitutes one such framework for addressing women's rights. Activating the mechanisms of the regime for the benefit of African women, however, poses an ongoing challenge. Available data indicates African women's continuing vulnerability to human rights violations, with their already precarious situation exacerbated by factors such as the high prevalence of HIV/AIDS in some parts of Africa.

This dissertation assesses the African regional human rights regime in the context of the challenges African women confront in their attempts to access it. It acknowledges that the regional initiatives created to protect rights constitute a potentially valuable framework for addressing violations of women's rights, highlighting some successes but also exposing the limitations. The dissertation uses the case of the right to health recognised within the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* to study the question of rights at the regional level. It applies a feminist Third World Approaches to International Law (TWAIL) perspective to highlight the inclusions and omissions of this instrument in an attempt to construct a holistic, contextual and interdependent understanding of women's rights in Africa. This dissertation argues that such a re-reading of rights is imperative in order to accelerate women's ability to effectively mobilise for their rights using regional human rights mechanisms. It recognises the importance of the activities and influences of diverse actors to the implementation of rights. Building on the progress made by the regime, this dissertation identifies international and particularly regional and local actors, such as the African Union and its institutions, State Parties to the African Union, governmental and non-governmental organisations and entities whose activities, directly or indirectly, have implications for women's rights. It analyses their actions and influences and offers fresh perspectives to enable these stakeholders to further the transformation of women's situations using the regional human rights regime.

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## ABBREVIATIONS

AEC	African Economic Community
AU	African Union
ACJHR	African Court of Justice and Human Rights
CEDAW	Committee on the Elimination of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CIDA	Canadian International Development Agency
CSO	Civil Society Organisation
DANIDA	Danish International Development Agency
ECOSOC	Economic and Social Council of the UN
ECOSOCC	Economic, Social and Cultural Council of the African Union
ESCR	Economic Social and Cultural Rights
FAO	Food and Agricultural Organisation
FEMNET	African Women's Development and Communitarian Network
FIDA	International Federation of Women Lawyers
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic Social and Cultural Rights
ICJ	International Commission of Jurists
IFI	International Financial Institution
ILM	International Legal Materials
ILO	International Labour Organisation
IMF	International Monetary Fund
INGO	International Non Governmental Organisation
Interights	International Center for Legal Protection of Human Rights
NEPAD	New Partnership for Africa's Development
NGO	Non Governmental Organisation
NHRI	National Human Rights Institution
OAU	Organisation of African Unity
PAP	Pan-African Parliament
SAP	Structural Adjustment Programme
SDGEA	Solemn Declaration on Gender Equality in Africa
SIDA	Swedish International Development Agency
SOAWR	Solidarity for African Women's Rights
SRRWA	Special Rapporteur on the Rights of Women in Africa
TAC	Treatment Action Campaign
TNC	Transnational Corporation
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration on Human Rights
UN	United Nations Organisation
USAID	United States Agency for International Development
UNDP	United Nations Development Program
UNTS	United Nations Treaty Series
WHO	World Health Organisation
WiLDAF/FemDDAF	Women in Law and Development in Africa/Femmes Droit et Developpment en Afrique
WTO	World Trade Organisation

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I thank my awesome Father in heaven, the Almighty, All-Powerful Omnipotent GOD.

Thank you all!

## **DEDICATION**

To the loving memory of my Mother:  
Mrs. Margaret Titilola Adesola Esan, my inspiration

and to my Father:  
Chief Olubunmi Olabamiji Esan



## CHAPTER ONE: CONCERNS, CONCEPTS AND METHODOLOGY

### I. Introduction

As of June 2005, statistics show that at least twenty-seven million people from thirty-three countries were at risk of hunger in Africa; the majority were women and children. Of the estimated 22.5 million people living with HIV/AIDS on the continent, women constitute almost sixty-one percent.<sup>1</sup> In Cote d'Ivoire, for example, HIV prevalence among females (6.4%) was more than twice as high as among males (2.9%) and this is the pattern in most parts of Africa.<sup>2</sup> African women also bear the main burden of HIV/AIDS as care-givers. They have an average life expectancy of forty-six years and a maternal mortality rate of 940 per 100,000 births, the highest in the world. Forty-six percent of these women live on less than one dollar a day.<sup>3</sup>

This depressing state of affairs is exacerbated by both global and local factors. Inequities in the international economic order combined with liberalisation of economies, corruption and other social ills result in adverse impacts on welfare and poverty alleviation programmes, among other state-run programmes. Women as the poorest of the poor bear a disproportionate burden. For instance, women facing economic and social disempowerment find it difficult to access privatised healthcare services and often suffer the most from the removal of subsidies in informal sectors and in agriculture.<sup>4</sup> The increasing vulnerability of African women is well

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<sup>1</sup> UNAIDS (Joint UN Programme on HIV/AIDS) and the World Health Organisation, 2007. AIDS Epidemic Update December 2007 Online: <[http://data.unaids.org/pub/EPISlides/2007/2007\\_epiupdate\\_en.pdf](http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en.pdf)>, (accessed 07 January 2008); *The State of the World's Children 2007, Women and Children: The Double Dividend of Gender Equality*. (UNICEF, 2007). Online: <[www.unicef.org/sowc07/docs/sowc07.pdf](http://www.unicef.org/sowc07/docs/sowc07.pdf)>.

<sup>2</sup> UNAIDS, AIDS Epidemic Update: November 2009 at 21-22. Online: <[http://data.unaids.org/pub/Report/2009/2009\\_epidemic\\_update\\_en.pdf](http://data.unaids.org/pub/Report/2009/2009_epidemic_update_en.pdf)>.

<sup>3</sup> *The State of the World's Children*. *supra* note 1.

<sup>4</sup> Gale Summerfield and Nahid Aslanbeigui, "The Impact of Structural Adjustment Programmes and Economic Reforms on Women" and Maria Mies, "World Economy, Patriarchy, and Accumulation" in Nelly P. Stromquist (ed.), *Women in Third World: An Encyclopedia of Contemporary Issues* (New York: Garland Publishing, 1998).

documented by some international governmental organisations.<sup>5</sup> Several international, regional and domestic forums also articulate concerns of and for African women.<sup>6</sup>

As elsewhere, gender discrimination and the low status of women remain widespread in many parts of Africa. The search for solutions for this and other concerns by African states and other stakeholders is ongoing. In line with this, the Assembly of Heads of State and Government of the African Union recently declared 2010-2020 as the African Women's Decade in recognition of the continuing weakness in the mechanisms for integrating gender equality and the need for women's empowerment on the continent. This is in addition to the regime created by the Organisation of African Unity (OAU)/African Union (AU) for the protection of human rights, which constitutes one vehicle through which African states may be held accountable for the protection of women's rights.<sup>7</sup> However, whether this regime has been deployed optimally to

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<sup>5</sup> UNAIDS; *The State of the World's Children 2007*, *supra* note 1.

<sup>6</sup> For example, African Platform of Action: A Common Position for the Advancement of Women adopted at the Fifth Regional Conference on Women, Dakar, Senegal, 16-23 November, 1994, highlights twelve critical areas of concern for women. Online: African Centre for gender and Development website, <[http://www.uneca.org/fr/acgd/en/1024x768/en\\_gender/en\\_tool/en\\_9411\\_apal.htm#addis](http://www.uneca.org/fr/acgd/en/1024x768/en_gender/en_tool/en_9411_apal.htm#addis)>, (accessed 22 May 2008). Women and children are often the worst hit victims in internal conflicts, poverty, the HIV/AIDS pandemic as well as other socio-economic problems in Africa. In paragraph 6 of the Preamble to the resolution ACHPR/Res.14 (XVI) 94: Resolution on the Situation of Human Rights in Africa (1994), the African Commission on Human and Peoples' Rights rightly noted that "the persistent economic crisis in Africa has aggravated the human rights situation of vulnerable groups in African societies, in particular women and children." The Assembly of the AU declared 2010-2020 as the African Women's Decade by its Decision 487 (XIV), 2009.

<sup>7</sup> The *Charter of the Organisation of African Unity* of 25 May 1963. 479 U.N.T.S.39, 3 I. L. M. (1964) 1116, entered into force 13 September 1963 (*OAU Charter*) (Now replaced by the *Constitutive Act of the African Union*); African (*Banjul*) Charter on Human and Peoples' Rights (African Charter) adopted 27 June 1981, OAU Doc.CAB/LEG/67/3 rev.5, 21 I. L. M. 58(1982), entered into force 21 October 1986 (*African Charter* or *Charter*). Online: <[www.achpr.org](http://www.achpr.org)>. In this dissertation, regime and system are used interchangeably. While this dissertation makes no attempt to undertake a study of the theory of regimes, the term "regime" refers to the "African regional human rights regime" which encompasses references to the OAU (later the African Union) and the human rights system it initiated as a whole. The African human rights system (or the African system) refers to the instruments, institutions and processes established for the promotion and protection of human rights. For a study of the African human rights regime and the African human rights system see, Obiora C. Okafor, *The African Human Rights System: Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007); C. H. Heyns, "A 'Struggle Approach' to Human Rights" in C. Heyns and K. Stefiszyn (eds.), *Human Rights, Peace and Justice in Africa: A Reader* (Pretoria: PULP, 2006); Christof Heyns and Magus Killander, "The African Regional Human Rights System" in F. Gomez and K. de Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges* (Bilbao: University of Deusto, 2005); Frans Viljeon and Lirrette Louw, "State Compliance with the Recommendation of the African Commission on Human and Peoples' Rights 1994-2004" (2007) 101 Am. J. Int'l L 1; T. Murithi, *The African Union: Pan-Africanism, Peacebuilding and Development*

address women's rights issues is a question requiring further inquiry. This dissertation analyses women's rights within the context of the regional human rights regime in an attempt to determine whether it may serve as a vehicle of social transformation for African women.

The OAU's (now AU) regime created for promoting and protecting human rights consists of both institutional and normative structures to link international with national human rights protection. As will be shown, this regime has come a long way in over twenty-one years of its existence despite being dogged by enormous problems that challenge its very existence. These challenges have significant effects on the implementation of women's rights. This dissertation identifies challenges confronting the African regional human rights regime and their implications for women. One such challenge is a simplifying reductionist representation of "things African" that disparages, exaggerates or mis/represents the inadequacies and limitations of African regional human rights initiatives to overshadow its accomplishments. Such representations in legal discourses hinder the institutional and material growth of regional structures as well as the general influence of the initiatives at the domestic level.<sup>8</sup> Why do such challenges persist and what are their consequences for women's ability to engage the mechanisms of the regime for the development and implementation of their rights?

This dissertation considers the changes that have occurred within the regime over time and how such shifts have facilitated or may facilitate greater progress and increase the influence of this regional system for promoting a culture of human rights and thereby women's rights at the

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(Ashgate Pub, 2005); Mbata B. Mangu, "The Changing Human Rights Landscape in Africa: Organisation of African Unity, African Union, New Partnership for Africa's Development and the African Court" (2005) 23 (3) *Netherlands Quarterly of Human Rights* 379; Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007).

<sup>8</sup> Rachel Murray, "International Human Rights: Neglect of Perspectives from African Institutions" (2006) 55 *ICLQ* 193 at 203, decries the neglect of African human rights institutions in international human rights discourse. She argues that neglect and derision of African mechanisms undermine the validity of a universal system of human rights and deprives it of the respect necessary for enforcement of its human rights decisions.

domestic level. It not only maps achievements but also identifies current and future challenges and prospects for the regional regime's development of human rights and women's rights in Africa. It inquires into why the mechanisms available through the regional regime have yet to be effectively mobilised by women.

Questions that readily come to mind include: should African regional human rights institutions matter, especially given the growing critique of the neo-liberal, state-centrist nature of human rights?<sup>9</sup> Why should regional institutions made up of a collective of nation States matter especially with the State being a major culprit in violating rights? Whereas the relevance of regional institutions will become clearer in the course of this study, other questions remain. What does the African regional human rights regime offer women, especially when these women have yet to adequately engage with local institutions, such as courts, to protect their rights? What role should states, that is, governments and governmental bodies, and non-state parties, such as civil society groups, and more importantly non-governmental organisations (NGOs), play in mobilising the mechanisms of the regime? NGOs, for example, may obtain observer or consultative status within regional institutions, but cannot by themselves implement major changes; they often require a governmental forum to do so.<sup>10</sup> The African regional regime provides one such forum.

The African human rights regime matters to the extent that it provides a valuable rallying point and forum to voice struggles for change in an increasingly global community; a forum for interstate and other regional institutional cooperation among big, small and less powerful

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<sup>9</sup> The focus of traditional international law on relations between states finds expression in international human rights law's focus on how states treat their citizens.

<sup>10</sup> Andrew Williams, "The United Nations and Human Rights" in Paul Taylor & A.J.R. Groom (eds.), *International Institutions at Work* (London: Pinter Publishers, 1988) at 127, makes this assertion in the context of the United Nations.

African nations alike. In the long run, cooperation among all interested groups and individuals may stimulate much needed changes to human rights institutions and processes in order to positively impact the more vulnerable groups within the community. In this study, I identify women as a vulnerable group within most African societies. Therefore, any advantages derived from an examination of the impacts and influences of the regional regime on women may be potentially applicable to other vulnerable groups.

Meanwhile, the neo-liberal policies of African governments have considerable significance for the African human rights regime. The reliance on the market to guide economic priorities, the minimization of the social role of government and the encouragement of maximum privatisation of economic life has had its impact on the protection of human rights in the region.<sup>11</sup> As with other liberal systems, civil and political rights take priority over economic, social and cultural rights, which have particular significance for African women. This neo-liberal framework of the regional regime no doubt has its implications which will feature in subsequent discussions.

The remainder of this introductory chapter addresses some ideological and doctrinal structures common to knowledge about Africa as well as clarifies common concerns regarding women. It identifies the main concepts applied, outlines theories engaged and methods applied in this dissertation as well as the progression of topics.

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<sup>11</sup> Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (London: Routledge, 2000) at 47. In relation to this, a human rights expert interviewed with several years of experience involving the African Commission observed that a challenge to human rights in Africa relates to the fact that the people do not see the state as existing for them or for their benefit, but that they exist in spite of the state. Therefore, given the lack of confidence in the state, the African regional regime established by states shares this lack of confidence.

## II. Conceptual Clarifications

One of the main challenges in relation to knowledge produced about Africa is the conception of “things” African popularised by some scholars, the media and other commentators alike as dysfunctional, inadequate and generally negative.<sup>12</sup> For the most part, this assessment is over-generalised, exaggerated and overstated. In order to avoid basic misconceptions usual in knowledge production regarding Africa and African initiatives, this section clarifies the main concepts applied throughout this dissertation.

### 1. The Face of Africa

Africa is arguably the most misrepresented continent in the world, even though it accounts for almost one billion people, almost 14 percent of the world’s population, as the second largest and second most populous continent.<sup>13</sup> It covers about 30,330,000 square kilometres, about 22 percent of the world’s total land area. Africa is a rich mix of peoples, cultures, economies and histories that defies homogenisation.<sup>14</sup> Due to the diversity within African societies, it is usual for academic and other writers to focus on Sub-Saharan Africa<sup>15</sup> or other parts of Africa in an attempt to avoid over-generalisation.

While recognising essential differences in history, culture, religion and economies within the continent, for the purpose of this dissertation, Africa will figure as a whole continent. The regional regime’s institutional membership encompasses all fifty-three member states of the

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<sup>12</sup> See for example, Obiora C. Okafor, *supra* note 7 at 63.

<sup>13</sup> By 2010 the UN estimates the total population of Africa to be 1,006,905,000. Online: <<http://unstats.un.org/pop/dVariables/DRetrieval.aspx>>, (accessed 10 July 2008).

<sup>14</sup> Africa is home to a rich mix of peoples, cultures, economies and histories that defies homogenization.

<sup>15</sup> This refers to the area south of the Sahara Desert.

Organisation of African Unity (OAU).<sup>16</sup> It also avoids an academic balkanisation of Africa that encourages divisiveness and the alienation of parts of Africa, promoting a preconceived picture that emphasizes, for example, a Sub-Saharan Africa that is infinitely less developed, more impoverished and less able to hold its own in a fast-paced global world. Rather, this dissertation examines the African continent as a whole, acknowledging the need for unity and solidarity, but also recognising Africa's diversity, with the aim of strengthening the links and ties among Africans of all regions and institutions.

## **2. Re-visioning International Law's Assumptions: Women in the African Context**

Decades of international treaty-making for the protection of women, as well as women's participation in activism, advocacy and lobbying, have yet to realise equality between women and men anywhere in the world. The subordination of and discrimination against women in almost all spheres of human endeavour generally intensifies the appeal of universal solutions emphasising commonalities and solutions with universal appeal. In addition, frequently, scholars conceive of a representative singular homogenous "African woman." Even though the term "woman" is sometimes employed for strategic reasons to achieve particular goals,<sup>17</sup> the application of a single common vocabulary may produce an implicit bias towards some women while effectively marginalising others. Feminism, an ideological and theoretical framework, generally challenges universalising themes and concepts. Some feminist scholars caution against a blanket attempt to capture the "essence" of "woman" that ignores differences and diversities

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<sup>16</sup> The exception is Morocco that renounced its membership and therefore is not part of the fifty-three members of the OAU/AU.

<sup>17</sup> Gayatri C. Spivak, *Outside in the Teaching Machine* (New York: Routledge, 1993) at 5, advocates for a "strategic use of essentialism" as "an acknowledgment of the dangerousness of something one cannot not use."

arising from differential political, socio-economic, and cultural settings.<sup>18</sup> Universal solutions to the problems confronting the “monolithic African woman” would not only exclude a majority of women, but also impose a limit to the scope of possible solutions.

Legal rules and principles are often conceived in these types of universals. As such, the structure and administration of law generate and legitimise the subordination of women resulting in the neglect of systematic and other forms of discrimination against women. Even though feminism has been criticised as a western discourse carrying the baggage of “white, middle-class, Western women’s values, worldviews and agenda,”<sup>19</sup> the ability to adapt different strands of feminism in order to address the concerns of a diversity of women provide useful tools for analysing law and legal principles in relation to women. For instance, some feminist commentators have shown that many areas of law are fundamentally structured around men’s perspectives and experiences, often subordinating or excluding women; others reveal the disproportionate impact of the international economic order on women.<sup>20</sup>

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<sup>18</sup> For discussions on “trends” in feminism see, Brenda Cossman, “Turning the Gaze Back and the Postcolonial Project” (1997) Utah L. Rev. 525; Oyeronke Oyewumi, “Visualizing the Body: Western Theories and Africa subjects” in Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (Minneapolis University of Minnesota Press, 1997); Chandra Talpade Mohanty, “Cartographies of Struggle: Third World Women and the Politics of Feminism” in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds.), *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991); Doris E. Buss, “Going Global: Feminist Theory, International Law, and the Public/Private Divide” in Susan Boyd (ed.), *Challenging the Public /Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997).

<sup>19</sup> Pamela Sparr (ed.), *Mortgaging Women’s Lives: Feminist Critiques of Structural Adjustment* (London: Zed Books Ltd, 1994) at ix.

<sup>20</sup> These are examples of the growing strands of feminism. Catharine A. MacKinnon, *Feminist Unmodified: Discourses on Life and Law* (Cambridge; Mass.: Harvard University Press, 1987) and Catharine A. MacKinnon, *Towards a Feminist Theory of State* (Cambridge; Mass.: Harvard University Press, 1989). Other strands of feminism include Third World, Marxist, Socialist, liberal, African and Black feminisms among others.



In addition, the public/private paradigm conceived both as a space of activity as well as an ideological marker can present a continuing challenge to women.<sup>21</sup> A gendered meaning of work in labour law ensures that economic value is not attached to domestic work in the home. This has prompted Lucinda Finley to observe that “law will be present through direct regulation, through non intervention when intervention is needed and through helping to keep something invisible when visibility and validation is needed.”<sup>22</sup> Feminists argue that unless more women’s experiences, perspectives, and voices are incorporated into law, in order to empower and legitimate their experiences, male-dominated law will continue to reflect and shape prevailing social and individual understandings of its role, resulting in the silencing and discrediting of women.

Little wonder that the African women occupy a secondary position in popular and legal literature despite differences and diversity among African women.<sup>23</sup> African women suffer compound or complex discrimination as a result of their gender, race, class, ethnicity, and religion, among other components of their identities. Other than the image of the wife and mother, the most common portrayal of African women is that of victim. The identification of African women as subordinate victims, devoid of any form of agency to resist or challenge oppression, has roots in historical, economic, social, cultural and political structures. Even though it is impossible to envision a homogenous African woman due to their diversity of

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<sup>21</sup> Susan Boyd, “Challenging the Public and Private Divide: An Overview” in Susan Boyd (ed.), *supra* note 18 at 3, argues that the public/ private divide as an ideological division of life informs dominant western ways of knowing.

<sup>22</sup> L. M. Finley, “Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning” (1989) 64 *Notre Dame Law Rev.* 886, cited in M. D. A. Freeman, *Lloyds Introduction to Jurisprudence* (London: Sweet Maxwell, 1996) at 44.

<sup>23</sup> For feminist discourse on women and the politics of difference, see Elizabeth Spelman, *Inessential Women: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988) at 14, S. Gunew, “Feminism and the Politics of Irreducible Difference: Multiculturalism/Ethnicity/Race” in S. Gunew and Anna Yeatman (eds), *Feminism and the Politics of Difference* (Sydney: Allen and Unwin, 1993); Chandra Talpade Mohanty, “Under Western Eyes: Feminist Scholarship and Colonial Discourses” in *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Durham & London: Duke University Press, 2003) (“Under Western Eyes”).

histories, cultures and social circumstances, shared experiences among African women, whether urban or rural, educated or illiterate, young or old, enable this dissertation to consider women as a group taking cognisance of differences, when necessary. For this reason the identities ascribed to women will be discussed in detail in Chapter Three. Other assumptions trail the study of Africa and women respectively. This writer takes cognisance of the challenges and limitations of undertaking a general approach to the study of women and will attempt to address this as they arise.

The next section draws on theoretical perspectives from post-colonial, feminist, Third World (predominantly TWAIL) as well as human rights scholarship to unearth the complexities arising regarding Africa and African women. The remainder of this chapter sets out the method adopted and outlines the chapters to come.

### **III. Beyond Rescue? Africa and African Initiatives**

Several critical theoretical perspectives have emerged in an attempt to understand the intricacies and complexities apparent in the legal and other aspects of the lived experiences of Africans and other Third World peoples.<sup>24</sup> This section examines such approaches, rooted in history, that criticise and disrupt mainstream assumptions about the Third World, in this case, Africa and women.

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<sup>24</sup> James Thuo Gathii, “Imperialism, Colonialism, and International Law” (2007) 54 Buffalo L. Rev. 1013 at 1015. Gathii observes that “[c]lassical theories of imperialism, especially those of European theorists of the nineteenth and early twentieth centuries, were never really centrally concerned with the question of colonialism, except as a necessary but peripheral appendage of imperial expansion.”

## 1. Post-Colonial Approaches

Post-colonial scholars undertake critical inquiries into the histories of colonised peoples to draw attention to distortions regarding their past and present, arising from the legacy of colonialism and imperialism.<sup>25</sup> They seek to reclaim identities lost or buried by re-writing history from the point of view of the colonised rather than the coloniser.<sup>26</sup> These theorists observe, for example, that distorted assumptions about Africa derive from the desire of the colonisers to alter the history of the colonised people so as to conform to the colonial mission and advance its agenda.<sup>27</sup> Consequently, the colonisers resorted to creative modification or outright fabrication of the “customary,” and the resultant “custom” became substantially different from what existed prior to colonialism.<sup>28</sup>

For instance, customary law ideally emerges out of a peoples’ cultural history, and refers to the aggregate of practices, usages, mores and norms which are accepted as binding by members of a community. Ordinarily, an essential characteristic of customary law is its generic flexibility, that is, its ability to change to reflect changing social and economic conditions over time within the applicable community. This flexibility was largely lost due to colonial intervention. Application of customary law became dependent on its compatibility with certain validity tests: the repugnancy test – that customary law must not be repugnant to natural justice, equity and good

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<sup>25</sup> Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963) at 210; Mahmood Mamdani, *The Making of Citizen and Subject in Contemporary Africa* (Princeton; NJ: Princeton University Press: 1996); Francis Snyder, “Colonialism and Legal Form: The Creation of “Customary Law” in Senegal” (1981) 19 J. Legal Pluralism & Unofficial L. 49 at 112.

<sup>26</sup> For postcolonial scholarly work see, Frantz Fanon, *ibid.*; Frantz Fanon, *Black Skin, White Mask* (New York: Grove Press, 1967); Eve Darian-Smith and Peter Fitzpatrick (eds.), *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999); Dipresh Chakrabarty, *Provincialising Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000).

<sup>27</sup> Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and Legacy of Late Colonialism* (Princeton, New Jersey: Princeton University Press, 1996) at 117, identifies the difficulty in establishing the authoritative source of customary law, given that, to the British, law must safeguard the exigencies of power.

<sup>28</sup> *Ibid.* Mamdani gives the example of the creation of chiefs where none existed or the grant of powers and authority previously not commanded by the Chief in some African societies.

conscience; the incompatibility test that customary law must not be contrary to “any law for the time being in force”; and the public policy test that customary law must not be contrary to public policy as identified by the colonisers.<sup>29</sup> In spite of these changes, a large proportion of the African population retains customary law as their personal law. On the death of a person intestate, matters of inheritance and succession often fall under customary law. The largely inflexible application of customary law now exacerbates discrimination against women. Without attempting to romanticise its pre-colonial history, the point is that history or facts about Africa commonly accepted are not always accurate.

Post-colonial scholars also criticise the limitations imposed on Africa by the obsession to catch up with Europe or the North in general, by imitating European and American cultures and institutions. This obsession derives largely from both the external and internal components of the assumptions to be discussed. Critical of this obsession but writing in another context, Ngũgĩ Wa Thiong’o observes that:

How we view ourselves, our environment even, is very much dependent on where we stand in relationship to imperialism in its colonial and neo-colonial stages; that if we are to do anything about our individual and collective being today, then we have to coldly and consciously look at what imperialism has been doing to us and to our view of ourselves in the universe.<sup>30</sup>

This call to Africans to look within themselves to invent and make new discoveries, as well as to work out new concepts relevant to them, rings true even today, especially in light of the centralisation of colonial Northern culture in ‘globalisation’.<sup>31</sup> It is important in this regard to

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<sup>29</sup> These are applicable in former British Colonies of Africa, such as Nigeria and Ghana.

<sup>30</sup> Ngũgĩ Wa Thiong’o, *Decolonizing the Mind: The Politics of Language in African Literature* (London: Heinemann, 1986); Anthony Farley, “Perfecting Slavery” (2004-05) 36 *Loy. U. Chi. L. J.* 225 In another context, Farley identifies the role of education as motivating critical thinking. Rather than accepting everything we learn uncritically he proposes questioning the fundamental basis of things so as to begin to see the underlying circumstances.

<sup>31</sup> Fanon, *supra* note 25 at 316. Globalisation promotes neo-liberal economic policies rooted in the “free market” approach whereby the dominant approach to “development” includes the pursuit of free trade, privatisation, massive reductions in social supports, and other related economic policies.

begin to disrupt the idea that presumably whatever originates from the North defines the norms and is natural, neutral and positive when compared to things that originate in the non-North. Notwithstanding the challenges this poses for international human rights discourse, reconceptualising African initiatives by several African and other Third World scholars emancipates and empowers the potential in human rights, especially for the most vulnerable and the oppressed.<sup>32</sup> This should animate further investigations into the underlying assumptions regarding African human rights institutions.

## 2. Feminist Approaches

A commentator who combines both post-colonial and feminist approaches recognises the need to ‘unlearn’ the dominant epistemological system that privileges European historiographies and suppresses any other contributions.<sup>33</sup> Like post-colonial scholars, feminist scholars challenge mainstream approaches or values that deem certain bodies and subjects in specific spaces as undeserving of full personhood.<sup>34</sup> It is worth noting that feminism defies a single definition.

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<sup>32</sup> The end of the Second World War, the establishment of the United Nations Organisation in 1945 and the adoption of the *Universal Declaration of Human Rights (UDHR)* G A Res. 217A(III) of 10 December 1948 provided the impetus for the development of human rights. See Shadrack B. O. Gutto, *Human and Peoples’ Rights for the Oppressed: Critical Essays on Theory and Practice from Sociology of Law Perspectives* (Lund: Lund University Press, 1993) at 31. Gutto, a prominent scholar of the African regional regime, defines the oppressed to mean:

a social group or groups who finds themselves, or may be objectively determined to be, disadvantaged or accorded unequal, differential treatment, either because of deliberate policies or structural arrangements in (a) the family, community, country, region or the world they live in and/or (b) the position they occupy in the prevailing relations of production or arrangements and, as a consequence, become specifically exposed to human rights denials or abuses. The advantage or unequal (sic) treatment could be past, present or prospective and could be legally-sanctioned or not.

He however cautions that there is no constant group of oppressors or oppressed because oppression may be found within and outside any group.

<sup>33</sup> Dianne Otto, “Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law” in Doris Buss and Ambreena Manji (eds.), *International Law: Modern Feminist Approaches* (Oxford: Hart Publishing, 2005).

<sup>34</sup> Sherene Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George” in Sherene Razack (ed.), *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002).

There is no consensus among scholars as regards the meaning of the term “feminism.” It takes on different meanings in different contexts, whether as politics, an ideology or a philosophy.<sup>35</sup>

Broadly speaking, however, feminism describes an ideological, social and political movement that re-examines gender relations from women’s perspectives. It involves social and political activism that strives to end the oppression of women. Some strands of feminism seek to equalise women’s position with men,<sup>36</sup> others argue that the alleged neutrality and objectivity of the most commonly accepted perspective is in reality just one perspective: male.<sup>37</sup> Still others challenge values associated with a patriarchal organisation of society. Patriarchy refers to the economic, social and political organisation of society that legitimises male domination and subordination between men and women.<sup>38</sup> Despite the multiple strands of feminism that have emerged over the last three decades,<sup>39</sup> what unifies feminists remains their attempt to represent the commonality of fundamental feminist values aimed at eliminating the oppression of women

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<sup>35</sup> Chandra Talpade Mohanty, “Under Western Eyes” *supra* note 23. Mohanty argues that feminist scholarship is directly political and a discursive practice in that it is purposeful and ideological.

<sup>36</sup> M. D. A. Freeman, *supra* note 22 at 1027. Freeman observes that feminist theorists share the view that much of women’s experiences have been omitted in standard legal scholarly and popular descriptions of the world.

<sup>37</sup> Isabelle R. Gunning, “Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries” (1991-1992) 23 Colum. Hum. Rts. L. Rev. 189 at 190. See generally Catharine A. MacKinnon, *supra* note 20. MacKinnon identifies this perspective as largely that of white heterosexual middle to upper class males.

<sup>38</sup> See Association of African Women in Research and Development (AAWORD/AFARD), 1977-1999: Deconstructing Research and Development for Gender Equality. Report on AAWORD’s Institutional Evolution (AAWORD, 1999).

<sup>39</sup> The different strands of feminism (legal) include, the liberal, radical, Marxist and socialists feminists, post-modern, pragmatic, critical race, African and Third World feminisms to mention just a few. For readings in the different strands of feminisms see Susan Boyd, “Challenging the Public and Private Divide: An Overview” in Susan Boyd, (ed.), *supra* note 18; Patricia Hill Collins, *Black Feminist Thought: Knowledge Consciousness and the Politics of Empowerment*. Vol. 2 (New York: Routledge, 1991); Chandra Talpade Mohanty, “Cartographies of Struggle: Third World Women and the Politics of Feminism” *supra* note 18; A. Armstrong, “Rethinking Customary Law in Southern Africa: What Relevance for Action,” WLSA Newsletter, Vol. 7, No. 1; Ayo V. Atsenuwa, *Feminist Jurisprudence: An Introduction* (Florence and Lambard (Nig) Ltd, 2001); Deborah L. Rhode, *Feminist Critical Theories* (1990) 42 Stanford Law Review 617; Paula C. Johnson and Leslye Amede Obiora, “Human Rights Symposium: Panel Discussion How Does the Universal Declaration of Human Rights Protect Africa Women?” (Spring, 1999) 26 Syracuse J. Int’l L. & Com. 195; Brenda Cossman and Judy Fudge (eds.), *Privatization, Law and the Challenge of Feminism* (Toronto: University of Toronto Press, 2002); Dawn H. Currie, “Feminist Encounters with Postmodernism: Exploring the Impasse of Debates on Patriarchy and Law” (1992) 5 C J W L 63; Marlee Kline, “Race, Racism and Feminist Legal Theory” (1989) 12 Harv. Women’s Law J. 115.

without misrepresenting the plurality of women's experiences arising from their diverse social, political and cultural outlooks.<sup>40</sup> Feminist theoretical approaches not only challenge vested interests, but uproot perspectives that are familiar and comfortable.<sup>41</sup> Feminists challenge hegemonic knowledges that lay claim to universal, rational and value-free truths.<sup>42</sup>

Beyond a gender framework, some feminists question the role of colonialism, imperialism, racism and capital monopoly in contemporary struggles, recognising the divergence of histories and social locations.<sup>43</sup> African feminism would of necessity fall within this approach. Even though there is no monolithic African feminism due to the "different cultural imperatives, historical forces, and localized realities conditioning women's activism/movement in Africa,"<sup>44</sup> for convenience and in recognition of common features and shared beliefs that undergird African feminists work, this dissertation uses the singular term – African feminism.<sup>45</sup>

In this regard, African feminism "encompasses freedom from the complex configurations created by multiple oppressions."<sup>46</sup> According to Steady,

African feminism combines racial, sexual, class, and cultural dimensions of oppression to produce a more inclusive brand of feminism through which women are viewed first and foremost as *human*, rather than sexual beings. It can be defined as that ideology which encompasses freedom from oppression based on the political, economic, social, and cultural manifestations of racial, cultural, sexual, and class biases. It is more inclusive than other forms of

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<sup>40</sup> Patricia Smith (ed.), *Feminist Jurisprudence* (New York: Oxford University Press, 1993) at 5.

<sup>41</sup> Freeman, *supra* note 22 at 1124; also Susan Boyd, *supra* note 18.

<sup>42</sup> Feminists have consistently questioned and challenged the epistemological foundations of Western thought which they argue is patriarchal. This position has been posited by Sandra Harding, *Feminism and Methodology: Social Science Issues* (Bloomington: Indiana University Press, 1987).

<sup>43</sup> Chandra Talpade Mohanty, *supra* note 18 at 46. Mohanty's study focuses on Third World women.

<sup>44</sup> Obioma Nnaemeka, "Mapping African Feminisms, adapted version of 'Introduction: Reading the Rainbow' from *Sisterhood, Feminisms & Power: From Africa to the Diaspora*" in Andrea Cornwall (ed.), *Readings in Gender in Africa* (Indianapolis: Indiana University Press, 2005) at 32.

<sup>45</sup> *Ibid.*

<sup>46</sup> Filomina Chioma Steady, "African Feminism: A Worldwide Perspective" in Rosalyn Terborg-Penn, Sharon Harley, Andrea Benton Rushing (eds.), *Women in African and the Diaspora* (Washington; D.C.: Howard University Press, 1987) at 4.

feminist ideologies and is largely a product of polarizations and conflicts that represent some of the worst and chronic forms of human suffering.<sup>47</sup>

African feminist scholars have therefore begun to rewrite the history of African society to reflect the role women have played and can play in African societies.<sup>48</sup> In light of this, feminism provides an invaluable foundation for challenging male mainstream and the status quo, whether within or outside feminist discourses, and it offers a valuable tool for analysing women's rights in Africa.

### **3. Third World Approaches to International Law (TWAIL)**

Several international law scholars are paying greater attention to history with a shared determination to challenge existing paradigms, in order to identify and address obstacles to the development of the Third World.<sup>49</sup> Third World Approaches to International Law (TWAIL) represents "an attempt to understand the history, structure and process of international law from the perspective of third world states."<sup>50</sup> In part, it seeks to identify the continuum in the political, economic and social experiences of the past and present, emphasising the need for a transformation of the future that breaks this continuum.<sup>51</sup> TWAIL scholars criticise the

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<sup>47</sup> *Ibid.*

<sup>48</sup> Tiyanabe Paul Zeleza, *Manufacturing African Studies and Crises* (Dakar: CODESRIA Book Series, 1997) at Chapters 9 and 10; and Chioma Steady, *Women and Collective Action in Africa: Development, Democratization, and Empowerment, with Special Focus on Sierra Leone* (New York: Palgrave Macmillan, 2006).

<sup>49</sup> Some such scholars refer to their theoretical framework as the Third World Approaches to International Law (TWAIL). For discussions on TWAIL perspectives, see Makau Mutua, "What is TWAIL?" (2000) 94 *American Society of International Law Proceedings* 31; James Thuo Gathii, "Rejoinder: TWAILing International Law" (2000) 98 *Michigan Law Review* 2066; Karin Michelson, "Rhetoric and Rage: Third World Voices in International Law" (1998) 16 *Wisconsin International Law Journal* 353; Obiora Chinedu Okafor, "Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43 *Osgoode Hall Law Journal* 171; Antony Anghie & Bhupinder S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 *Chinese Journal of International Law* 77.

<sup>50</sup> Bhupinder S. Chimni, "The Past, Present and Future of International Law: A Critical Third World Approach" (2007) 8 *Melbourne Journal of International Law* 499.

<sup>51</sup> U. U. Ewelukwa, "Centuries of Globalization, Centuries of Exclusion: African Women, Human Rights, and the 'New' International Trade Regime" (2005) 20 *Berkeley J. Gender L. & Just.* 75.



construction of international law as universally applicable to all states equally.<sup>52</sup> It challenges the artificial neutrality of international law and the role of mainstream international law scholarship in legitimising “global processes of marginalization and domination.”<sup>53</sup> TWAIL scholars aim to democratise and localise international legal scholarship, not only in terms of participants but also its content.<sup>54</sup> Through “responding to international law as an imperialist project,” TWAIL scholars seek the “international transformation of conditions in the Third World.”<sup>55</sup>

The contested nature of international human rights law, particularly in Africa and other Third World regions, provides a springboard for discussing representations regarding the African human rights regime. International human rights law, like the broader discipline of international law of which it forms a part, is inclined towards universalisation, with women’s rights sharing this attribute.<sup>56</sup> In light of the Westphalian foundation of international law, and by extension, international human rights law, one cannot assume that a current regional human rights regime based on Northern liberal ideas will automatically benefit Africans. Consequently, African human rights law scholars question the origin – whether Northern, European or white – of the universality, the prioritisation and the hierarchical conception of rights.<sup>57</sup> Shadrack Gutto, for example, criticises the arrogant and ahistorical insistence by some Northerners, especially white Europeans and North Americans, that human rights are their creation, insisting rather that

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<sup>52</sup> Makau Mutua, “What is TWAIL?” *supra* note 49.

<sup>53</sup> Karin Mickelson, “Taking Stock of TWAIL Histories” (2008) ICLR 355 at 358. For more on the TWAIL approaches, see, Makau Mutua, *ibid*; Karin Mickelson, “Rhetoric and Rage” *supra* note 49; Obiora C. Okafor, “Newness, Imperialism and International Legal Reform in Our Time,” *supra* note 49.

<sup>54</sup> Karin Mickelson, “Taking Stock,” *ibid*.

<sup>55</sup> Makau Mutua, *supra* note 49.

<sup>56</sup> Rosa Ehrenreich Brooks, “Feminist Justice, at Home and Abroad: Feminism and International Law: An Opportunity for Transformation” (2002) 14 Yale J. L. & Feminism 345.

<sup>57</sup> Prominent third world and other scholars have engaged in these debates over time. They include Shadrack Gutto, *supra* note 32; Makau Mutua, *Human Rights. A Political and Cultural Critique* (Philadelphia: University of Pennsylvania, 2002); and Abdullahi Ahmed An-Na’im & Francis M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives* (Washington; D. C.: The Brookings Institution, 1990), among others.

“[s]pecific aspects of human and peoples’ rights may not be exactly the same for all people all the time, but *the aspiration, values and interests represented in human and peoples’ rights are independently present in practically all societies.*”<sup>58</sup>

In opposition to “mainstream” international law discourse, TWAIL scholars,<sup>59</sup> like other Third World scholars, argue that the focus on the universality of human rights largely reflects the interests of the developed countries of the North.<sup>60</sup> Attempts to advance an alternative conception of human rights, that other societies recognise human rights even if not regarded as such,<sup>61</sup> have historically met with cynicism and an accusation of self-justification.<sup>62</sup> International human rights discourse now increasingly acknowledges norms that resonate with Third World, including African, experiences.<sup>63</sup> As well, shared experiences as human beings in societies, and the undeniable differences in norms of interaction and institutions in different parts of the world,<sup>64</sup> lead several Third World scholars to concede that international human rights law is *both* universal and relative. Yet, the dominant ideology of human rights prioritises civil and political rights above economic, social and cultural rights. The reconsideration of

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<sup>58</sup> Gutto, *supra* note 32 at 45 [Emphasis as in text]. See also Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) Harvard International Law Journal 201.

<sup>59</sup> See the work of scholars of the Third World Approaches to International Law such as Anthony Anghie and B. S. Chimni, *supra* note 49; Makau Mutua, “What is TWAIL?,” *supra* note 49.

<sup>60</sup> By “mainstream” I mean scholars who argue for the universality of rights as set out in the UDHR. The universalism / cultural relativism debate has now receded but questions relating to the relevance of the dominant conception of human rights discourse to the Third World remain current. For the debate over cultural relativism see, Abdullahi Ahmed An-Na’im, “Toward Cross-Cultural Approach to Defining International Standards of Human Rights,” in Abdullahi Ahmed An-Na’im & Francis M. Deng (eds.), *supra* note 57; Jack Donnelly, “Cultural Relativism and Universal Human Rights” (1984) 6. Hum. Rts. Q. 400; Rhoda Howard, “Cultural Relativism and the Nostalgia of Community” (1993) 15 Hum. Rts. Q. 315 (argues that traditionalists employ the concept of cultural relativism in the form of cultural absolutism). For a descriptive analysis of the dominant discourse on human rights, see, Issa G. Shivji, *The Concept of Human Rights in Africa* (London: CODESRIA Book Series, 1989).

<sup>61</sup> Such are the attempts that propose and promote Asian values and an African conception of human rights.

<sup>62</sup> Rhoda Howard, *Human Rights in Commonwealth Africa* (New Jersey: Rowman & Littlefield, 1986) at 23, argues that there is no specifically African conception of human rights, only a philosophical confusion between human dignity and human rights.

<sup>63</sup> See, for example, the Declaration on the Right to Development G. A. res. 41/128 (1986).

<sup>64</sup> Shadrack B. O. Gutto, *supra* note 32 at 44.

rights in a more holistic manner remains a critical component of the human rights agenda of Africa and the focus of Third World human rights scholars.<sup>65</sup>

#### **4. Contextualising a Feminist TWAIL Approach**

This dissertation aligns with theoretical perspectives insistent on critical, nuanced and alternative understandings of human rights and especially women's rights. It draws on the post-colonial, feminist and TWAIL approaches, where appropriate, in order to disrupt dominant colonial assumptions regarding Africa, and in an attempt to stimulate a reversal of the colonial scripts. This dissertation develops what I regard as a feminist TWAIL analysis. I attempt to elaborate what I consider as a feminist TWAIL approach by drawing from TWAIL scholars whose works centre on women or gender issues in the Third World.<sup>66</sup>

As the terminology implies, feminist TWAIL analyses necessarily borrow attributes from different theoretical perspectives. It integrates perspectives from feminism (particularly Third World feminism), post-colonialism and TWAIL to centre primarily on women in the Third World. Feminist TWAIL analyses demonstrate keen awareness of continuing marginalisation and economic inequities experienced by the Third World and its disproportionate impact on Third World women. They criticise the eurocentricism of international human rights law and its concurrent presentation as universals even in the context of women's rights.<sup>67</sup> Feminist TWAIL

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<sup>65</sup> J. Oloka-Onyango, "Beyond Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa" (1995) 26 (1) Int'l L. J. 1.

<sup>66</sup> For legal analysis that may be categorized as a feminist TWAIL approach, see Vasuki Nesiah, "The Ground Beneath Her Feet" (2003) 4(3) Journal of International Women's Studies 30 and Celestine Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" (2000) 41 (2) Harvard International Law Journal 381.

<sup>67</sup> *Ibid.*

scholars remain “wary of glib universality narratives,”<sup>68</sup> that ignore the complexities of Third World women’s lives shaped by historical, economic, social, cultural, religious and other experiences. A feminist TWAIL analysis acknowledges the tensions regarding universalism and cultural relativism in rights discourse, emphasizing the need to locate rights in their proper context. This involves recognising and writing race, class, gender and other social and economic indicators of individual identity into analyses of international legal concepts, such as rights.<sup>69</sup>

Feminist TWAIL analyses of rights thus underscore the limitations imposed on rights discourse arising from its fundamental construction and the structure of women’s rights debates. It recognises limitations imposed by the state-centric model of international law for the development of women’s rights, whether to unmask violations committed by non-state parties or to expose the analytical constraint imposed by a rigid public/private dichotomy in the context of Third World women. It also recognises the interdependency of rights as imperative to promoting women’s dignity.<sup>70</sup> Feminist TWAIL analyses recognise the intersectionality of gender, class, ethnicity, race and other components of identity in the marginalisation and oppression of women, while seeking fuller participation of women in the development of international human rights law.<sup>71</sup>

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<sup>68</sup> Obiora Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” (2008) 10(4) ICLR 371 at 376 [Okafor, “Critical TWAIL”].

<sup>69</sup> Antony Anghie, “What is TWAIL: Comment” (2000) 94 Am. Soc’y Int’l L. Proc. 39, considers the disappearance of race in international law and observes that international law concepts often “embody power relations which are simply reproduced by their transference to the non- European world.”

<sup>70</sup> An earlier version of Feminist TWAIL analysis was originally published in Mosope Fagbongbe, “The Future of Women’s Rights from a TWAIL Perspective” (2008) 10(4) ICLR 401.

<sup>71</sup> *Ibid.*

In addition, feminist TWAIL scholars join other TWAIL scholars to query why “apparently liberatory projects do not always meet with the success they promise,”<sup>72</sup> especially with regards to women’s rights. This analysis draws from Third World feminisms and particularly Vasuki Nesiah’s observation that calls “for a re-orienting of our critical energies from merely taking sides in a debate, to questioning the material and ideological lens that interpolates the debate, i.e., the habitus from which we make our stand.”<sup>73</sup> A feminist TWAIL approach challenges ideological lens through which rights are perceived. In line with this approach, this dissertation seeks to develop proposals and theoretical perspectives that complicate and disrupt the naturalness, familiarity, and generalisations apparent in human rights discourse regarding Africa and African women. As will be seen subsequently, the right to health provision in the *Women’s Protocol* provides a constructive example for applying a feminist TWAIL analysis. The next part highlights the methodology adopted to achieve this task.

#### **IV. Methodological Framework and Outline of the Thesis**

Most contemporary international legal knowledge about Africa derives from texts. These are primary international law texts such as international treaties and secondary texts in scholarly books and journals. These sources of knowledge inspire the application of textual analysis to expose the strangeness of familiar assumptions, and to identify shifting discourses regarding women’s rights in Africa. This dissertation analyses regional treaties and secondary texts pertaining to women’s rights under the African human rights regime.

Textual analysis as conducted in this dissertation draws on aspects of institutional ethnography as developed and applied by Dorothy Smith, along with other anthropologists and sociologists.

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<sup>72</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 1994) at 39.

<sup>73</sup> Vasuki Nesiah, *supra* note 66.

As a form of discourse theory model, institutional ethnography, in part, seeks to unpack the generalising and abstracting mechanisms that happen through the literal texts generated within the institution.<sup>74</sup> Such generalising refers to abstraction of particular experience into the standardised vocabulary that is recognisable by the institution.<sup>75</sup> Applying this understanding, I attempt to unveil the ideological nature of some of the concepts used and ideas perpetuated in texts, institutional and academic, to sustain or to exclude certain suppositions regarding the African regional rights regime and women.

This dissertation also incorporates the outcomes of interviews conducted with experts in the field of human rights. A few interviews, five in total, were conducted between December 2009 and February 2010 with experts, both male and female, working with institutions that cut across governmental and non-governmental lines, especially experts with experience working with the mechanisms of the African human rights regime and its domestic application presently or in the recent past. Experts interviewed have gathered experience across the continent as well as abroad. The interviews were conducted through prepared questions via electronic mail and telephone conversations, where necessary. They provide avenues to clarify gray areas in the workings of the mechanisms of the African regime and its domestic application. These interviews provide a bridge between activist and academic worlds, which is necessary for

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<sup>74</sup> Traditional ethnography relates to the study of the exotic other in faraway places mostly tied to the colonialist agenda of European territorial expansion and domination of “savage” people based on the “presumption of a discrete bounded community, spatially isolated from others, unchanging through time and willing to disclose intimate cultural secrets to the neutrally positioned observing Western.” Decolonisation, globalisation and the “participation of native peoples in the construction of academic knowledge... a growing force among non-Western scholars to actively resist being the object of Eurocentric observation” Eve Darian Smith (ed.), *Ethnography and Law* (Aldershot: Ashgate, 2007) at xiii-xiv; Institutional ethnography exemplifies one of the shifts in traditional ethnography. Lauren E. Eastwood, “Making the Institution Ethnographically Accessible: UN Document Production and the Transformation of Experience” in Dorothy Smith (ed.), *Institutional Ethnography as Practice* (Oxford: Rowman & Littlefield: 2006) at 182.

<sup>75</sup> Dorothy Smith refers to this as an investigation “to reach beyond the locally observable and discoverable into the translocal social relations and organization that permeate and control the local.” Dorothy E. Smith, “Introduction” in Dorothy E. Smith (ed.), *Ibid.* at 65.

formulating concrete recommendation on how to move women's rights forward on the continent. These interviews have thus been integrated throughout this dissertation, concealing the identity of the interviewees at their request.

This dissertation is organised into six chapters. Chapter Two commences with a political and legal background to the African regional human rights regime. It highlights the contributions of the African regional institutional body, formerly the Organisation of African Unity (OAU), now the African Union (AU), to the institutionalisation of rights in Africa. The chapter also undertakes an overview of the international and regional systems for the protection of women's rights in order to identify dominant ideological structures underlying African human rights initiatives. It examines the relevance of the regional regime for African women in order to place women's rights in Africa in proper context.

Chapter Three undertakes a review of relevant scholarly texts in order to identify the dominant conceptions concerning Africa and African initiatives. It critically analyses academic suppositions and shifts in such suppositions regarding the African regional human rights regime. The chapter relies on the texts written by prominent theorists of post-colonial, feminist and Third World Approaches to International Law (TWAIL) to undertake a historical analysis of assumptions underlying the study of Africa and African initiatives. The conventional assumptions about the regime discovered through texts of human rights scholarship facilitate better understanding the African human rights regime. The chapter also revisits the dominant critiques of the African human rights regime in order to assess the accuracy and/or adequacy of such critiques.

The subordinate status of women in most African societies places them at a great disadvantage. Chapter Three recognises the diversity among women in terms of race, class, ethnicity and other factors, but suggests some commonality among African women. Thus, this chapter examines critically the representations of African women and the consequences of such representations. It juxtaposes these assumptions with references to African women in scholarly texts on the human rights regime in order to determine how these assumptions are reflected in literature. It argues that the combination of external negative assumptions about the African human rights regime and negative perception about women have had crippling consequences for applying mechanisms of the African regime for the benefit of women.

Following this, Chapter Four analyses the textual and practical manoeuvres undertaken by the regional human rights regime. The chapter examines the “official” texts of the regional regime, particularly the provisions of the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Women’s Protocol)*.<sup>76</sup> As the most recent and the most comprehensive instrument adopted at the regional level for the protection of women, this chapter uses health to explore the adequacy of the provisions of the *Women’s Protocol* to take due consideration of the particular circumstances of African women.

As Smith has shown, the technology of textuality is central to the mechanisms by which certain perspectives are excluded from the realm of law’s institutional concern.<sup>77</sup> The reproducibility, stability and hierarchical organisation of texts reveal the process by which ideologies are

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<sup>76</sup> *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, OAU Doc. CAB/LEG/66.6 Rev. 1, adopted 11 July 2003, entered into force 25 November 2005. As of February 2009, there are twenty-seven ratifications and forty-five signatures. Online: <<http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>>.

<sup>77</sup> Dorothy E. Smith, *supra* note 75. See also Emma Cunliffe and Angela Cameron, “Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice” (2007) 19 (1) C. J. W. L. 1.



constituted and perpetuated within legal institutions.<sup>78</sup> Chapter Four attempts to understand concerns that are textually privileged, as well as the institutional realities constructed by the African human rights regime, identifying assumptions that influence, for example, the African Commission's decisions.<sup>79</sup> Using the right to health as an example, this analysis seeks to determine whether or not the textually constructed institutional realities of African human rights institutions exclude the experiences of women from the realm of its institutional concerns.

Given the difficulty inherent in any attempt to garner the rationale behind a document from its face, especially due to the abstraction of experience through text,<sup>80</sup> decisions of the African Commission and other documents of the regime are also subjected to scrutiny. Although as of 2006 the African Commission had not had the opportunity to make a pronouncement on any direct communication involving the interpretation of women's rights, some past decisions of the Commission indirectly shed more light on the ways in which the Commission promotes or inhibits women's rights. The chapter also identifies the practical progress made in the context of women's rights at the regional level.

Chapter Five develops a nuanced understanding of how diverse stakeholders influence the implementation of women's rights either directly or indirectly as well as the implications of their activities at the domestic level. This chapter introduces both external and internal involvement with the African regime. It undertakes a brief summary of external involvement by international entities and how they perceive the regional human rights regime. Thereafter, the chapter undertakes a more extensive examination of the ways in which national institutions,

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<sup>78</sup> Emma Cunliffe and Angela Cameron, *ibid.*, at 6.

<sup>79</sup> The African Commission on Human and Peoples' Rights is the body created to "promote human and peoples' rights and to ensure their protection in Africa" in accordance with Article 30 of the *African Charter*.

<sup>80</sup> Dorothy E. Smith, *supra* note 75.

women activists and other forces influence domestic implementation of rights using the mechanisms available through the regional regime. It examines how these entities may usefully deploy these mechanisms to the benefit of African women. Drawing from Okafor, the contribution of the African regional system to the development of human rights or, in this case women's rights, cannot be accurately measured using a state-centric or compliance-centric optic. Okafor urges us to look beyond, without abandoning either optic, to other significant effects the African system can have, or has had, in the domestic sphere.<sup>81</sup> This fresh perspective leads one to ask: how do activist forces – that is, human rights NGOs, individual activists and other interested parties – interpret the instruments and mechanisms of the regional regime? How have they mobilised or how can they mobilise the creative spaces made available by the regional human rights regime, within domestic arenas for the benefit of the people? This chapter examines the roles and actions of state and non-state actors to achieve gender transformation through the mechanisms of the African regional human rights regime at the domestic level.

Chapter Six concludes the dissertation. It suggests the way forward to building a more engaged and responsive African regional human rights regime that will take women's rights beyond their present position. This dissertation thus engages texts both as an authoritative site for contestation and as a site of resistance to the “oppressiveness” (in ideological terms) of an institution. I intend to “read against the grain”<sup>82</sup> of dominant understanding to unveil the silences in the texts and existing scholarship relating to women and the African regional human rights regime. To this end, I propose an alternative narrative to reconstruct that perpetuated as a result of dominant assumptions concerning African human rights institutions. Such a reading

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<sup>81</sup> Obiora Chinedu Okafor, *Activist Forces*, *supra* note 7 at 34. According to Okafor, through this approach norms and mechanisms of the African system may produce a correspondence in the self-understandings and behaviours of states that remain outside the purview of state compliance.

<sup>82</sup> Chandra Talpade Mohanty, “Cartographies of Struggle,” *supra* note 18 at 46.

will be beneficial not only to women and other vulnerable members of African society, but will facilitate a clearer understanding of that regional regime.

## CHAPTER TWO: BACKGROUND TO THE AFRICAN REGIONAL HUMAN RIGHTS REGIME AND WOMEN'S RIGHTS

### I. Introduction

International human rights law remains a contested terrain.<sup>1</sup> Debates surround the hierarchical categorisation of rights into civil and political, economic, social and cultural, as well as solidarity or collective rights.<sup>2</sup> Also contested are questions relating to whether rights are universal or relative to particular societies and cultures.<sup>3</sup> These debates are continuing and despite the relative consensus about the relevance of rights, their application requires sensitivity to specific societal circumstances. Cross-cultural engagements with human rights have disrupted mainstream approaches in order to encourage more expansive human rights regimes that take seriously the plights of less-powerful, oppressed and marginalised peoples of the world.<sup>4</sup> The emergence of regional institutions for the protection of rights to complement the United Nations

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<sup>1</sup> Issa Shivji, "Constructing A New Rights Regime: Promises, Problems and Prospects" (1999) 8(2) Social and Legal Studies 253 at 254.

<sup>2</sup> For debates on the hierarchy of rights see, for example, R. Devlin, "Solidarity or Solipsistic Tunnel Vision? Reminiscences of a Renegade Rapporteur" in Kathleen E. Mahoney and Paul Mahoney (eds.), *Human Rights in the Twenty-First Century: A Global Challenge* (Dordrecht: Martinus Nijhoff Publishers, 1993) 991 at 993; U. Baxi, "Law, Democracy and Human Rights" in S. Kothari & H. Kothari (eds.), *Rethinking Human Rights: Challenges for Theory and Action* (Delhi, Lokayan, 1989) at 116-117.

<sup>3</sup> Human rights scholars have taken up debates on whether rights are universal or relative. The origin of the debates may be traced to the American Anthropology Associations' (AAA) statement relating to the Universal Declaration of Human Rights (*UDHR*). The statement written by Melville Herskovitz rejects the universality of international human rights norms contained in the *UDHR* as having a western and Judeo-Christian bias. They claim that western countries colonised two-thirds of the world, committing atrocities in the name of civilising missions, drafted and signed the *UDHR*, therefore hypocritically supporting the claim for human rights. For further debate on universalism and relativism, see for example, A. A. An-na'im, "Introduction" in A. An-na'im (ed.), *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (Philadelphia: University of Pennsylvania, 1992); Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2<sup>nd</sup> ed. (Ithaca, NY: Cornell University Press, 2003); L. Henkins, *The Age of Rights* (New York: Columbia University Press, 1990); B.O. Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6 Hum. Rts. Q. 141; Louis Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," (1982) 32 Am. U. L. Rev. 60 at 82; and Rhoda Howard, *Human Rights in Commonwealth Africa* (New Jersey: Rowman & Littlefield, 1986) at 23.

<sup>4</sup> Scholars of the Third World Approaches to International Law (TWAIL) "aspire towards the creation of an international law which truly reflects the needs and interests of peoples rather than states." See, Anthony Anghie, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 Chinese J. Int'l L 77 at 92. TWAIL scholars seek alternative approaches to all areas of international law whether international economic law, international environmental law or international human rights law. See also, Karin Mickelson, "Rhetoric and Rage: Third World Voices in International Law" (1998) 16 Wisconsin International Law Journal 353; Makau Mutua, "What is TWAIL?" (2000) 94 American Society of International Law Proceedings 31; James Thuo Gathii, "International Law and Eurocentricity (1998) 9 Euro. J. Int'l L. 184.

system, may be viewed as part of attempts to widen the scope of application of rights as well as to strengthen their implementation.

The African regional human rights regime is largely ignored or minimally studied, with a focus, for the most part, on its inadequacies.<sup>5</sup> At the fringes of engaged scholarship, however, lies a growing interest in re-reading, re-articulating and re-directing attention to the possibilities and potentials that this regional regime holds for addressing the needs and demands of Africans. This inspires the underlying rationale of this dissertation, to assess women's rights in the context of the African regional human rights regime.

This chapter undertakes an historical overview of the emergence of the Organisation of African Unity (OAU),<sup>6</sup> the regional umbrella institutional body under which the system for the protection of rights is established;<sup>7</sup> its transition into the African Union (AU);<sup>8</sup> and its institutionalisation of human rights in Africa, past and present. Given that women constitute the

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<sup>5</sup> Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context, Law, Politics and Morals* (Oxford: Oxford University Press, 2008); Obiora Okafor, *The African Human Rights System: Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007) at 8-9. According to Okafor, almost without exception, the African System is not only portrayed as the weakest and most ineffectual, it is also the most under-studied of its regional counterparts.

<sup>6</sup> The *Charter of the Organisation of African Unity (OAU Charter)* adopted on 25 May 1963 abrogated and replaced by the *Constitutive Act of the African Union*.

<sup>7</sup> For a history and analysis of the Organisation of African Unity (OAU), see, Taslim O. Elias, "The Charter of the Organisation of African Unity" (1965) *AJIL* 243-267; A. Chanda, "The Organisation of African Unity: An Appraisal" (1989-92) *Zambia L. J.* 1-29; C. Nwankwo, "The Organisation of African Unity and Human Rights" (1993) 4 *Journal of Democracy* 50; Gino Naldi, *The Organisation of African Unity: An Analysis of Its Role* (London: Mansell Pub. Limited, 1989); Amnesty International, *The Organisation of African Unity: Making Human Rights a Reality for Africans* (London: Amnesty International, August 1998) AI Index 63/01/98. The *OAU Charter* was dissolved and replaced by the *Constitutive Act* in 2001. The only indirect reference to human rights in the *OAU Charter* was limited to the preamble which affirmed the principles contained in the *Charter of the United Nations* and the *Universal Declaration of Human Rights* as foundations for peaceful and positive cooperation among states.

<sup>8</sup> *The Constitutive Act of the African Union (Constitutive Act)*, adopted by the Assembly of Heads of State and Government (AHSG) of the OAU in Lome, Togo in 2001. EAHG/Dec.1 (V) Reproduced in (2005) 13 *RADIC* 24; entered into force on 26 May 2001. As at 26/05/2007 the fifty-three members of the African Union (AU) had ratified the *Constitutive Act*. Online: <[http://www.africa-union.org/About\\_AU/AbConstitutive\\_Act.htm](http://www.africa-union.org/About_AU/AbConstitutive_Act.htm)>, (accessed 24 July 2007). See also *Protocol on Amendments to the Constitutive Act of the African Union*, Adopted by the 1<sup>st</sup> Extraordinary Session of the Assembly of the Union in Addis Ababa, 3 February 2003 and by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union in Maputo on 11 July 2003, reproduced in (2005) 13 *RADIC* 24.

primary concern in this dissertation, this chapter also gives a brief background to the protection of women's rights internationally and regionally. It pays specific attention to women's rights under the OAU/AU and implications of the transition into the AU for women's human rights. The chapter analyses the setbacks as well as gains regarding women's engagement with the OAU/AU human rights regime as a background to understanding women's rights at the regional level.

## **II. Human Rights in Africa: The OAU/AU**

Institutions are generally described as frameworks within which transactions may be facilitated, coordinated and stimulated.<sup>9</sup> In this sense, human rights institutions provide a framework for facilitating, coordinating and stimulating human rights transactions, as part of the activities of several international institutions, such as with the United Nations and regional institutions, as with the AU, or selective institutions, such as the British Commonwealth. The OAU/AU qualifies as a regional institution based on its geographical configuration comprised of all African States, in the sense that its state-based membership, its financing and its field of operations encompass three or more countries.<sup>10</sup>

The OAU emerged as a regional institution shortly after African nations began to attain political independence from colonial rule. The newly independent African states became convinced that unity was imperative to their survival.<sup>11</sup> Initially there was no consensus among the States as to the form or structure African unity should take. Some favoured a political union, others

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<sup>9</sup> Paul Taylor and A. J. R. Groom (eds.), *International Institutions at Work* (London: Pinter Publishers, 1988) at 4.

<sup>10</sup> *Ibid.* at 9.

<sup>11</sup> Felix Chuku Okoye, *International Law and the New African States* (London: Sweet & Maxwell, 1972) at 123. The search for unity took the form of organised conferences, preceded by regional formations, such as the "Brazzaville group", a meeting of twelve French-speaking African States and the "Casablanca group" made up of more radical newly independent States suspicious of the Brazzaville group's continued attachment to Metropolitan France. Both groups adopted separate charters on economic and social goals but the Casablanca groups also included the formation of a joint African High Command to safeguard the independence of African States.

preferred collaboration on economic and social matters.<sup>12</sup> Ultimately, the fear of foreign domination and the conviction that solidarity was a prerequisite for the progress of African peoples resulted in the 25 May 1963 founding of the OAU, as a regional organisation of all sovereign African states.<sup>13</sup> This section examines the idea behind the establishment of the OAU, its accomplishments, especially with regards to human rights, the events that resulted in its transformation into the African Union in 2001, and the implications of this transformation for human rights and particularly women's rights in Africa.

## 1. Success in Contradiction: OAU and Human Rights

According to Okoye, the OAU was

the first practical expression of continental unity and was created in response of governments to the elemental problems of security, peace, national economy, liberty and to the determination to find African solutions to African problems.<sup>14</sup>

The founders of the OAU recognised the need for inter-dependence among African States as well as for a unified approach to common problems.<sup>15</sup> They favoured establishment of machinery for cooperation in economic, cultural, social, scientific and technical fields over a political union.<sup>16</sup>

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<sup>12</sup> Egypt, Ghana, Mali and Morocco and Libya formed the Casablanca bloc which was insistent on a rapid progress towards the political union of Africa. Liberia, Nigeria and Togo – the Monrovia bloc – were more conservative and doubtful of rapid action toward unity, preferring an economic rather a political union. The Brazzaville group consisted French colonies still under French influence and largely paid lip service to African unity. For a brief history of the adoption of the *OAU Charter* see, T. O. Elias, *Africa and the Development of International Law*, 2<sup>nd</sup> Rev. Ed. by Richard Akinjide (Dordrecht; Boston: Martinus Nijhoff Publishers, 1988) at 121-124.

<sup>13</sup> *Ibid*; See also, His Excellency, Mr Radha Krishna Ramphul, "The Role of International and Regional Organisations in the Peaceful Settlement of Internal Disputes (With Special Emphasis on the Organisation of African Unity)" 13 *Georgetown J. of Int'l and Comp. Law* 371.

<sup>14</sup> *Ibid*, at 126.

<sup>15</sup> T. O. Elias, *supra* note 12 at 122-3. According to Elias, 22 African heads of state and government who attended the founding conference of the OAU were unanimous that "a loose form of association of independent African States based upon the principles of economic, cultural, scientific and technological cooperation among its members was the ideal at which to aim."

<sup>16</sup> *Ibid*, at 122.

The primary objectives for founding the OAU were to “promote the unity and solidarity of the African states”, “to co-ordinate and intensify their co-operation and effort to achieve a better life for the peoples of Africa”, “to defend their sovereignty” and “independence,” “eradicate all forms of colonialism from Africa” and to “promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.”<sup>17</sup> Given these goals, it was therefore not surprising that during its early years the OAU members were preoccupied with issues of self-determination, de-colonisation and independence.<sup>18</sup> The OAU zealously sought to guard the newly attained independence of Member States from colonial rule. In particular, Article III of the *OAU Charter* declared Member States’ adherence to the sovereignty of states and the principle of non-interference in internal affairs as basic principles guiding the OAU’s activities.<sup>19</sup>

During its formative years, the OAU contended with competing issues of border disputes arising from boundaries created by colonial powers, the continuation of colonial rule in some parts of Southern Africa, and economic development, among other issues. Even though the OAU was able to mobilise the authority and influence of some African leaders in attempts to resolve some of these issues, it lacked military and financial powers to back this up. Likewise, the OAU confronted problems of inadequate resources and staffing as well as the constant post-independence political upheavals in different parts of Africa, intensified in some cases by foreign interventions. These challenges circumscribed the successes recorded by the OAU.

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<sup>17</sup> See generally the preamble and Article II of the *OAU Charter*.

<sup>18</sup> Curtis F. J. 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 *Transnat’l L. & Contemp. Probs.* 7 at 10.

<sup>19</sup> This provision is similar to the Article 2(7) of the *UN Charter*. This political principle is recognised in customary international law.



The OAU's concern for human rights was symbolised by the adoption of the *African Charter on Human and Peoples' Rights*.<sup>20</sup> The initial concern of the OAU was predominantly in relation to self-determination and decolonisation. Rights were largely deployed selectively by African leaders.<sup>21</sup> On the one hand, the struggles for self-determination from colonialism recorded substantial success, yet on the other human rights violations of citizen's rights by African leaders increased. Indeed, the OAU's reaction to human rights violations within member states oscillated between total inaction, indifference, hypocrisy and concern. Events between the late 1960s and the mid-1990s revealed pervasive human rights violations by some African leaders.<sup>22</sup> For instance, the domestic jurisdiction clause was employed as a justification for the OAU's failure to intervene in the Nigerian civil war (1966-1967), for its inaction in the face of Idi Amin's governmental actions against Ugandan Asians (1972) as well as for initial indifference to the Rwandan genocide (1994). Moreover, the OAU largely justified its reaction to gross violations of human rights of citizens under dictatorial, often military regimes on the principle of non-interference despite reference to the *UN Charter* and the *UDHR* in its own *Charter*.<sup>23</sup> The OAU's struggle against apartheid in South Africa was thus complicated, with concern entwined to some extent with hypocrisy in the sense of its indifference to internal violation of rights within other African states. The complexity of the situation is beyond the purview of this study.

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<sup>20</sup> *African (Banjul) Charter on Human and Peoples' Rights (African Charter or Charter)* adopted 27 June 1981, OAU Doc.CAB/LEG/67/3 rev.5, 21 I. L. M. 58(1982), entered into force 21 October 1986 (*African Charter or Charter*). Online: <[www.achpr.org](http://www.achpr.org)>.

<sup>21</sup> For a detailed study of the historical deployment of human rights in Africa see, Bonny Ibhawoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (Albany: State University of New York Press, 2007)

<sup>22</sup> Available literature chronicle Idi Amin of Uganda and General Sanni Abacha as examples of African leaders with records of blatant disregard for human rights. See, N. J. Udombana, "Can a Leopard Change its Spots? The African Union Treaty and Human Rights," (2002) 17 Am. U. Int'l Rev. 1117; J. Oloka-Onyango, "Beyond Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa" (1995) 26 (1) Int'l L. J. 1.

<sup>23</sup> A common example of the non-interference policy was the era of Idi Amin of Uganda when he emerged as the Chairman of the OAU at the 1975 Summit held in Kampala, Uganda. A few African States boycotted the meeting. They were Botswana, Mozambique, Tanzania and Zambia. See, Chris Maina Peter, *Human Rights in Africa. A Comparative Study of the African Human and Peoples' Rights Charter and the New Tanzanian Bill of Rights* (New York: Greenwood Press, 1990).

Given these mixed signals, it is not surprising that the accomplishments of the OAU, especially in the field of human rights, are largely understated. Only a few commentators recognised the OAU as “an effective framework for African co-operation,” as “a valuable forum for discussion and negotiation” and “a significant international body.”<sup>24</sup> The OAU was more successful in the area of dispute resolution between African states, managing to preserve African unity through successful dispute settlements.<sup>25</sup> It served as the first international forum for settling disputes among African states. The OAU developed its own approaches to dispute resolution that emphasised political negotiation through the use of authority to initiate and sustain negotiation between parties, as well as to encourage consensus building rather than binding, formal legal procedures.<sup>26</sup> The OAU survived threats to its existence, such as the challenge posed by the case involving membership of the Western Sahara in the OAU.<sup>27</sup> In addition, the OAU largely succeeded in its de-colonisation mandate. It played a prominent role in ending apartheid in South Africa; and it assisted some states, such as Guinea Bissau/Cape Verde, Angola, Mozambique, Zimbabwe and Namibia, to secure political freedom.<sup>28</sup>

Perhaps the single most important achievement of the OAU for Africa was its actual founding.

Okoye highlights this fact by observing that African States were able to:

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<sup>24</sup> Felix Chuks Okoye, *supra* note 11 at 174; Naldi “Peace-keeping Attempts by the Organisation of African Unity” (1985) 34 *The International and Comparative Law Quarterly* 593.

<sup>25</sup> Anthony G. Pazzanita, “Legal Aspects of Membership of the Organisation of African Unity: The Case of Western Sahara” (1985) 17 *Case Western Reserve Journal of International Law* 123; G. J. Naldi, “The Organisation of Africa Unity and the Saharan Arab Democratic Republic” (1982) 26 *J. Afr. L.* 152; P.M. Munya, “The Organisation of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation” (1999) 19 (2) *Boston College Third World Law Journal* 537; and Radha Krishna Ramphul, *supra* note 13. Some of the successful disputes settlements include Algeria and Morocco 1963-1968 and Guinea and Ivory Coast 1967. The OAU was mostly successful in settling truly local disputes but less successful at resolving disputes involving foreign influences in some form such as the case of Congo and Nigeria-Biafra civil war.

<sup>26</sup> Art. III (4) and XIX of the *OAU Charter*. Ramphul, *supra* note 13 at 377-8, for example, in boundary disputes the working rule that emerged was that colonial boundaries should be respected.

<sup>27</sup> G. J. Naldi, *supra* note 25 at 158 According to Naldi, the effort of the OAU to reach a compromise between disputing parties were commendable.

<sup>28</sup> Article II (1) (e) of the *OAU Charter*. All African states had become independent before the replacement of the OAU.

sink their differences in a new continental organisation... apart from the understandable emotional commitment to unity seem to be the African States' awareness of the political bankruptcy at the international level of their actions as small independent States, the economic and social advantages of unity, the trend towards a political and economic integration in Europe, and indeed a clear recognition by African States that regionalism far from being tempered by the United Nations, had become a major instrument of international co-operation.<sup>29</sup>

Thus, despite its shortcomings, the OAU deserves recognition for its establishment, its contributions to the human right to self-determination, among other rights innovations, and its continued survival in the face of numerous challenges, until its eventual replacement.

## **2. Recognising Human Rights: The UN and the OAU**

The handling of human rights violations committed by Member States ranked high among the criticisms levelled against the OAU. This subsection gives a brief background to the OAU's engagement with contemporary international human rights protections.

Direction for contemporary international human rights is found in Article 1 of the *United Nations Charter* to promote “universal respect for, and observance of human rights and fundamental freedoms.”<sup>30</sup> In 1948 the UN produced and adopted the *Universal Declaration of Human Rights (UDHR)*,<sup>31</sup> to set universal principles and norms for securing rights for all.<sup>32</sup> In 1966, the International Covenants on Economic, Social and Cultural Rights, and Civil and

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<sup>29</sup> Felix C. Okoye, *supra* note 11 at 172.

<sup>30</sup> The *Charter of United Nations* signed at San Francisco on 26 June 1945 entered into force 24 October 1945. Online: <<http://www.unhchr.ch/html/menu3/b/ch-cont.htm>>.

<sup>31</sup> Proclaimed by the United Nations General Assembly, General Assembly resolution 217A (III) 10 December 1948.

<sup>32</sup> These principles are now embodied in many constitutions around the world. Many French-speaking African countries borrowed from the Napoleonic Code and Thomas Paine's Right of Man. See, T. O. Elias, *New Horizons in International Law* (The Netherlands: Sijthoff & Noodhoff International Publishers, 1979) at 160.

Political Rights were adopted to elaborate the rights recognised by the *UDHR*.<sup>33</sup> The Committee on Economic, Social and Cultural Rights and the Human Rights Committee respectively became monitoring bodies for implementing the two Covenants.<sup>34</sup> The *UDHR*, *ICESCR* and the *ICCPR*, together regarded as the international bill of rights, are the foundational documents of contemporary human rights protection.

The eminent scholar Dr. T.O. Elias, highlighting the importance of the UN system for the protection of human rights, observes that:

Without the enlargement of the community of States into the society of States within the framework of the United Nations which only decolonisation had made possible so relatively quickly since the founding of the Organisation, mankind might have continued to stagnate as it did in preceding centuries, with human rights, such as they were, still limited only to a fraction of the human race.

The UN itself recognised that despite its efforts the benefits of the system were still limited. Indeed, commentators document the challenges confronted by the UN in attempts to expand the human rights horizon, especially during the initial stages of its existence.<sup>35</sup> There was consensus regarding the desirability of encouraging regional organisations to deal with matters relating to maintenance of international peace, security and other activities consistent with the UN's

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<sup>33</sup> *International Covenant on Civil and Political Rights* (ICCPR) and *International Covenant on Economic Social and Cultural Rights* (ICESCR) General Assembly resolution 2200A (XXI) of 16 December 1966; the former entered into force 23 March 1976 and the latter, 3 January 1976.

<sup>34</sup> While the Human Rights Committee was established immediately upon entry into force of the ICCPR, the ESCR Committee was established later in 1985, Economic and Social Council Resolution 1985/17, online: <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/663/73/IMG/NR066373.pdf?OpenElement>>. The UN has adopted other specialised human rights treaties, such as the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) 660 UNTS 195 (GA Res 2106A (1965) adopted 21 December 1965 and the *International Convention on the Elimination of all Forms of Discrimination against Women* (Women's Convention), UN Doc A/34/146, adopted 18 December 1979, entered into force 3 September 1981. It has also adopted alternative procedures. For example, the Resolution 1503 by the Economic and Social Council instituted a working group, of the Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, to screen all petitions or communications submitted to the UN.

<sup>35</sup> The problems include the lack of support for the idea of introducing an International Court of Human Rights or even that of instituting a UN High Commissioner for Human Rights. See Elias, *supra* note 12 at 163-4.

purposes and principles.<sup>36</sup> Such regional organisations include the Organisation of American States (OAS) and, to a lesser extent, the OAU.

As an inter-African organisation, the OAU fell within the UN category of regional organisations. Thus, the Heads of State and Government of the OAU recognised the UN in the Preamble to the *OAU Charter* by their reaffirmation to adhere to “the Charter of the United Nations and the Universal Declaration of Human Rights”, its principles, and to “provide a solid foundation for peaceful and positive co-operation among states.” Similarly, Article II(1)(e) states that promoting “international co-operation, having due regard to the United Nations Charter and the Universal Declaration of Human Rights” is a purpose of the OAU. The Preamble to the *OAU Charter* recognised freedom, equality, justice and dignity as objectives essential to achieving the aspirations of African peoples<sup>37</sup> and affirmed adherence to several international human rights instruments.<sup>38</sup> These assertions arguably constituted the primary scope of the OAU commitment to the human rights agenda of the UN until adoption of the *African Charter* in 1981.<sup>39</sup>

### 3. Institutionalising Regional Human Rights in Africa

The adoption of the *African Charter* signalled the institutionalisation of regional protection of human rights initiated under the aegis of the OAU. Regional human rights institutions, such as

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<sup>36</sup> See Art. 52, *UN Charter*. As early as 1969, the UN Division of Human Rights, in cooperation with the Government of the United Arab Republic, organised a seminar to study the possibility of establishing regional commissions on human rights, especially in Africa: Seminar on the Regional Commission on Human Rights with Special Reference to Africa, held in Cairo, 2-15 September 1969, U. N. Doc. ST/TAO/HR/39 (1969). In 1979, the Monrovia Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa held in Monrovia, 10-21 September 1979 was also organised under the auspices of the UN: U.N. Doc. ST/HR/SER.A/4 (1979).

<sup>37</sup> Preamble to the *OAU Charter*.

<sup>38</sup> *Ibid.*

<sup>39</sup> Prior to 1981, the OAU adopted the *Convention Governing the Specific Aspects of Refugee Problems in Africa* to address growing refugee problems which had human rights implications.

the institutions established by the OAU, recognise rights comparable with international standards. The “home grown” character of such regional structures endow them with added legitimacy among member countries.<sup>40</sup> Initial activities to institutionalise regional human rights protection in Africa can be traced to the International Commission of Jurists’ first All African Conference of Jurists on the Rule of Law held in Lagos in 1961. The Conference, attended by 194 judges, practicing lawyers and teachers of law from twenty-three African countries, as well as nine other countries, adopted a resolution calling on African governments to adopt an African Convention of Human Rights, among other recommendations.<sup>41</sup>

These recommendations, however, were not taken up for some time to come. A series of other events, processes, and activities, including calls by the UN<sup>42</sup> for Africa to create regional mechanisms, resulted in eventual adoption of the *African Charter*. It serves as the basic document among an assortment of treaties, norms, institutions, practices and procedures that make up the African human rights system.<sup>43</sup>

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<sup>40</sup> Other regional mechanisms include the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention) adopted by the Council of Europe to constitute the normative basis for establishing a system for human rights protection in Europe. As well, the adoption *Charter of the Organisation of American States* and the *American Convention on Human Rights* (Inter-American Convention) marked the founding of an Inter-American human rights system.

<sup>41</sup> International Commission of Jurists (ICJ), African Conference on the Rule of Law, Lagos Nigeria, 3-7 January 1961. The Conference adopted a general resolution on the Rule of Law entitled “The Law of Lagos.” Available online: <[http://www.chr.up.ac.za/hr\\_docs/african/docs/other/other22.doc](http://www.chr.up.ac.za/hr_docs/african/docs/other/other22.doc)>.

<sup>42</sup> Due to problems associated with limited access to local political processes, limited material and financial resources, and the difficulty of enforcing global human rights treaties, the UN General Assembly called on states to “consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights.” See G. A. Res. 32/27. 32 U. N. GAOR, 105<sup>th</sup> plen.mtg., U. N. Doc. A/32/458 (1977), reprinted in 31 U.N.Y.B.740 (1977). The UN also took a variety of initiatives to achieve its objective. This included organizing seminars in Dakar, UN Doc. ST/TAO/HR/25, 1966, in Cairo, see, “Seminar Series on the Creation of Regional Commissions on Human Rights with regard to Africa” UN Doc. ST/TAO/HR/38, 1970, and in Dar-es-Salaam, among others, see, “A Study of New Ways and Means of Promoting Human Rights with Special Attention to the Problems and Needs of Africa” UN. Doc. ST/TAO/HR/48, 1973. See also generally, Burns H. Weston, Robin A. Lukes and Kelly M. Hnatt, “Regional Human Rights Regimes: A Comparison and Appraisal” (1987) 20 Vand. J. Transnat’l L. 585.

<sup>43</sup> For more detailed studies of the African human rights system, see, Evelyn A. Ankumah, *The African Commission on Human and Peoples’ Rights* (The Hague: Martinus Nijhoff, 1996); Malcolm Evans & Rachel Murray, (eds.), *The African Charter on Human and Peoples’ Rights. The System in Practice 1986-2000* (Cambridge: Cambridge University Press, 2002); G. Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African*

### a) The *African Charter*, Human Rights and the OAU

The *African Charter* laid the foundation for institutionalised regional human rights promotion and protection in Africa.<sup>44</sup> It provides a normative framework for implementing and promoting not only individual civil and political rights, economic, social and cultural rights, but also collective or peoples' rights as well as individual duties to the state.<sup>45</sup> These latter provisions distinguish the *African Charter* from other international human rights treaties<sup>46</sup> and arguably earned it the status as the most criticised human rights instrument.<sup>47</sup> The *African Charter* asserts universality of rights by affirming several rights elaborated in other international human rights treaties. At the same time, it reflects the cultural context within which it seeks to protect all African peoples, men, women and children.<sup>48</sup> Article 17(3) of the *Charter*, for example, provides that "the promotion and the protection of morals and traditional values recognised by the community shall be the duty of the state." The *African Charter* also recognises the inchoate

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*Regional Human Rights System* (Ardsley: Transnational Publishers, Inc., 2003); Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge: Cambridge University Press, 2004); F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nijhoff, 2003); U. O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague: Martinus Nijhoff, 1997); Wolfgang Benedek, "The African Charter and Commission on Human and Peoples' Rights: How to Make it More Effective" (1993) 11 NQHR 25; Curtis F. J. 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 Transnat'l L. & Contemp. Probs. 7. For studies on regionalism and regional integration in Africa, see, A. Lavergne (ed.), *Regional Integration and Cooperation in West Africa: A Multidimensional Perspective* (IDRC: Africa World Press, 1997); Deji Olowu, "Regional Integration, Development, and the African Union Agenda: Challenges, Gaps and Opportunities" (2003) 13 (1) Transnational Law & Contemporary Problems 211-53; S. K. B. Asante, *The Political Economy of Regionalism in Africa: A Decade of Community of West African States (ECOWAS)* (United States: Praeger Pubs. 1986).

<sup>44</sup> For an analysis of the *African Charter* and the system it establishes, see, *ibid*, U.O. Umozurike; *ibid*, Evans & Murray (eds); *ibid*, W. Benedek; *Ibid*, E. A. Anghumah; F. Ouguergouz, *ibid*, and Christof Heyns, "The African Regional Human Rights System: The African Charter" (2004) 108 (3) Penn State Law Review 679.

<sup>45</sup> The *African Charter* distinguishes itself as the first international human rights treaty upholding the interdependence and indivisibility of rights along with individual duties and collective rights. For example, Article 27 (1) states that "Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community."

<sup>46</sup> Christof Heyn, *supra* note 44 at 686.

<sup>47</sup> "The Banjul (African) Charter met with a largely hostile reception from academic circles." Gino J. Naldi, "The African Union and the Regional Human Rights System" in Malcolm Evans and Rachel Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2<sup>nd</sup> Ed.), (Cambridge: Cambridge University Press, 2008) at 25.

<sup>48</sup> This is lauded as emphasising the indivisibility of human rights and the importance of developmental issues to African nations. Christof Heyn, *supra* note 44 at 690

third generation rights, such as the right to development<sup>49</sup> and environmental rights.<sup>50</sup> Even though its provisions generated immense controversies among human rights scholars,<sup>51</sup> the *African Charter* remains the core regional instrument for human rights protection in Africa. It has been complemented by several other human rights treaties by virtue of the provision that allows the OAU to adopt supplementary special protocols or agreements.<sup>52</sup>

The African Commission on Human and Peoples' Rights<sup>53</sup> was established in 1987, pursuant to Article 30 of the *African Charter*, to monitor its implementation. It discharges this mandate through its reporting and communication procedures, an on-site investigation mechanism, and the thematic mandates of special rapporteurs as well as working groups dealing with specific issues. The African Commission has been criticised for ineffectiveness, especially compared with its European and Inter-American counterparts.<sup>54</sup> Notwithstanding obstacles to its full effectiveness, it has contributed and continues to contribute to standard-setting, jurisprudence and institutional development of human rights.<sup>55</sup> For instance, the African Commission has

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<sup>49</sup> Article 22 of the *African Charter*.

<sup>50</sup> *Ibid.*, Article 24.

<sup>51</sup> See for example, H. Onoria, "Introduction to the African System of Protection of Human Rights and the Draft Protocol" in W. Benedek, E. M. Kisaakye and G. Oberleitner (eds.), *The Human Rights of Women: International Instruments and African Experiences* (London: Zeb Books Ltd, 2002) Onoria argues that differences, such as the communitarian focus and the emphasis on traditions and values borne out of African civilisation, are a major weakness of the *African Charter*.

<sup>52</sup> Prior to adoption of the *African Charter*, the OAU adopted the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, on 10 September 1969, entered into force on 20 June 1974. It was however after the *African Charter* that several human rights treaties followed. These include the *African Charter on the Rights and Welfare of the Child*, adopted in July 1990, entered into force on 29 November 1999 CAB/LEG/24.9/49 (1990) and the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* adopted in Addis Ababa in June 1998 CAB/LEG/66.5. Online: <<http://www.african-union.org>>.

<sup>53</sup> As a treaty body, the Commission retains its existence after the transformation into the AU.

<sup>54</sup> B. O. Okere, *supra* note 3; B. H. Weston, "Regional Human Rights Regimes: A Comparison and Appraisal" (1987) 20 (4) *Vanderbilt Journal of Transnational Law* 585 at 613.

<sup>55</sup> C. A. Odinkalu, "Human Rights Mechanisms in Africa: Recent Developments in their Norms, Institutions and Jurisprudence" (2003) 3 *Human Rights Law Review* 105; Mashood A. Baderin, "Recent Developments in the African Regional Human Rights System" (2005) (5)(1) *Human Rights Law Review* 117.



affirmed the indivisibility as well as the justiciability of economic, social and cultural rights in recent decisions.<sup>56</sup>

As well, the establishment of the African Court on Human and Peoples' Rights is a significant institutional development for the region<sup>57</sup> since the transformation of the OAU to the AU.

### **b) Human Rights and Transition to the AU**

The formal transformation of the OAU into the AU in 2002 during the OAU Summit in Durban preceded the adoption of the *Constitutive Act of the African Union*.<sup>58</sup> Part of the mandate of the AU, as the replacement umbrella body of the fifty-three member states, is the regional protection of rights. The *Constitutive Act* elaborates objectives and principles that indicate a resolve to promote, protect and respect human and peoples' rights in accordance with the *African Charter* and other relevant human rights instruments.<sup>59</sup> Unlike the *OAU Charter*, the *Constitutive Act* emphasises the importance of human rights to the political, economic and social stability and development of Africa. It expresses determination to strengthen African institutions (human rights institutions inclusive) by providing them with the necessary power and resources to enable them to discharge their mandate efficiently.<sup>60</sup> In addition to institutions

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<sup>56</sup> See for example, *The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria* African Commission on Human and Peoples' Rights Comm. No. 155/96 (2001); *Purohit and Moore v. The Gambia*, African Commission on Human and Peoples' Rights Comm. No. 241/2001 (2003).

<sup>57</sup> *Protocol to the African Court on Human and People's Right on the Establishment of an African Court on Human and People's Rights*, OAU/LEG/AFCHPR/PROT(iii) adopted by the Assembly of Heads of State and Government, Thirty- Fourth Session, Burkina Faso, 8-10 June 1998, entered into force on 25 January 2004 (hereinafter *African Court Protocol* or *Court Protocol*).

<sup>58</sup> The AU became operational with the adoption of the Durban Declaration in Tribute to the Organisation of the OAU on the Occasion of the Launching of the African Union by the Assembly of the African Union. ASS/AU/Decl.2 (1) 10-12 July 2002 Durban, South Africa. AU website, online: <[http://www.africa-union.org/Official\\_documents/Decisions\\_Declarations/durban%202002/Durban-Ass-AU-decl2.pdf](http://www.africa-union.org/Official_documents/Decisions_Declarations/durban%202002/Durban-Ass-AU-decl2.pdf)>. Accessed 31 July 2007.

<sup>59</sup> See Articles 3 and 4 of the *Constitutive Act*, *supra* note 8.

<sup>60</sup> *Ibid.*, generally the Preamble.

external to the AU (such as the African Commission), several AU organs have specific human rights mandates.<sup>61</sup>

Hence, the transformation of the AU, at the very least, indicates a symbolic shift away from the traditionally inconsistent approach of the OAU towards human rights protection. This symbolic shift is apparent in its normative or standard setting activities, as identified in the *Constitutive Act* and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, as well as the institutional addition of an African Court.<sup>62</sup> Given the focus of this dissertation, the next part undertakes a background of international and other regional protection of women's rights before examining the institutionalisation of women's rights at the African regional level.

### III. International Protection and Institutionalising African Women's Rights

The existing treaties, mechanisms and processes available for protecting women's rights are generally impressive. Internationally, regionally and nationally, attention to women's rights has increased over the last three decades. Even though women-specific human rights instruments are found in almost all parts of the world,<sup>63</sup> nowhere can women claim to have achieved equality

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<sup>61</sup> These include the Assembly of the African Union; the Pan-African Parliament; Commission of the African Union specifically through its Women, Gender and Development Directorate; and the Economic, Social, and Cultural Council which has mandates specifically relevant to human rights and women's rights in particular. See generally Articles 6, 9, 17, 20 and 22 of the *Constitutive Act*. See Mosope Fagbongbe, "Regional Protection of Women's Economic Social and Cultural Rights in Africa: The Women's Protocol and the African Union" (2007) 15 *African Yearbook of International Law* 163. The role of the African Commission will be discussed subsequently.

<sup>62</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol or Protocol)* OAU Doc. CAB/LEG/66.6 Rev. 1, adopted by the Assembly of African Heads of State and Government in Maputo, Mozambique, 11 July 2003, entered into force 25 November 2005. Twenty-one states had ratified the *Women's Protocol* as of 26 May 2007. Online: <<http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>>, accessed 31 July 2007.

<sup>63</sup> For example, the Council of Europe has several declarations and recommendations addressing women's rights, such as the *Declaration on the Equality of Women and Men*, adopted by the Committee of Ministers on 16 November 1988. Other regional instruments on women's rights include the *Cairo Declaration for the Elimination*

with men or freedom from discrimination on the basis of gender.<sup>64</sup> This section undertakes a cursory examination of the UN system for the protection of women as well as other regional systems. It argues that none of the systems can claim to have attained the optimum level of protection of women's rights.

## 1. The UN System for Women's Rights

The *Charter of the United Nations Organisation* reaffirms “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and *women* and of nations, large and small....”<sup>65</sup> This represents the first contemporary formal recognition of equality between the sexes. Subsequently, the Commission on the Status of Women (CSW) established within the UN system became the first contemporary international women-specific human rights mechanism.<sup>66</sup> Initially a sub-commission of the Commission on Human Rights, the CSW became a full commission in 1947 with the mandate to elaborate policies and strategies aimed at achieving gender equality in all parts of the world, as well as to consider and make recommendations on communications relating to the status of women.<sup>67</sup>

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of FGM adopted by Arab countries in 2003; the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* adopted on 9 June 1994 by the General Assembly of the Organisation of American States at its 24<sup>th</sup> Session, entry into force 5 March 1995; and the *Women's Protocol*.

<sup>64</sup> Susan Boyd (ed.), *Challenging the Public /Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 6. Boyd observes that despite law reform in family law and employment law and the coming into force of Section 15 of the *Canadian Charter of Rights and Freedoms* in 1985, the inequality of women compared to men persists in various spheres of Canadian society.

<sup>65</sup> See Paragraph 2 of the Preamble to the *Charter of the United Nations Organisation* [Emphasis added]. See also Article 1(3) of the *UN Charter*. Following this were several international human rights treaties containing the principle of non-discrimination.

<sup>66</sup> UN Resolution 11(II) of 21 June 1946.

<sup>67</sup> The original mandate of the CSW was amended by the Economic and Social Council of the UN, which is entrusted with the responsibility for human rights (along with the General Assembly), several times to meet emerging exigencies. See Christine Ainetter Brautigam, “International Human Rights Law: The Relevance of Gender” in Wolfgang Benedek, Esther M. Kisaakye and Gerd Oberleitner (eds.), *supra* note 51 at 5.

The CSW employed several strategies that moved women's rights to the front burner of the international human rights law discourse. These included contributions to drafting general human rights treaties, such as the UDHR;<sup>68</sup> convening high-visibility events and activities, such as the Fourth World Conference on Women, also known as the Beijing Conference;<sup>69</sup> and the drafting of women-specific international human rights treaties and declarations.<sup>70</sup> The most significant women-specific treaty drafted under the auspices of the UN remains the *Convention on the Elimination of all Forms of Discrimination against Women* (*Women's Convention*) that creates a binding (upon State Parties or States that ratify) international treaty, comprehensive in scope and global in nature.<sup>71</sup> The *Women's Convention* establishes clear obligations and duties of states towards elimination of gender discrimination and the achievement of equality between

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<sup>68</sup> The CSW participated in the drafting of different UN documents including the Universal Declaration of Human Rights as well as the Declaration on the Elimination of Discrimination against Women, U.N.Doc. A/6716 (1967); the *Women's Convention* *supra* note 34. There are 186 States Parties to the *Women's Convention* as at 5 December 2009. For the contribution of the CSW and the women's movement generally to the drafting of the UDHR, see J. Morsink, "Women's Rights in the Universal Declaration" (1991) 13 Human Rights Quarterly 233.

<sup>69</sup> Other conferences include the Teheran World Conference on Human Rights 1968, the First World Conference on Women held in Mexico city in 1975, the second World Conference on Women held in Copenhagen in 1980; the third held in Nairobi in 1985; and the declaration of the U.N Decade for Women 1975-1986. Other U.N. conferences that recognised the rights of women include the Vienna Conference at which the international community made a firm commitment to make women's rights one of the priorities of the international human rights agenda. Article 18 of the Vienna Declaration and Program of Action states: "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community." See, World Conference on Human Rights, Vienna, 14-25 June, 1993, A/CONF.157/23 12 July 1993.

<sup>70</sup> Treaties drafted by the CSW are the *Convention on the Political Rights of Women* 193 UNTS 135 adopted in 20 December 1952, entered into force 7 July 1954, the *Convention on the Nationality of Married Women*, 309 UNTS 65 adopted in 20 February 1957, entered into force 11 August 1958, the *Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages* 521 UNTS 231, adopted 10 December 1962, entered into force 9 December 1964. See, Christine Ainetter Brautigam, *supra* note 67 at 9.

<sup>71</sup> *The Declaration on the Elimination of Discrimination against Women* was the first attempt at a comprehensive document to address the needs of women. The Declaration was adopted by the General Assembly in 1967; its non-binding status necessitated the adoption of the *Women's Convention*, *supra* note 34. The International Labour Organisation also boosts international standards for the protection of women in labour, maternity and family. As of September 2008, 185 ratification accessions and successions had been made to the *Women's Convention*. For a list of ratifications see, online: <<http://www.un.org/womenwatch/daw/cedaw/states.htm>>, (accessed 26 September 2008).

women and men.<sup>72</sup> It mandates the Committee on the Elimination of Discrimination against Women (CEDAW) to monitor the implementation of rights enumerated.<sup>73</sup>

An Optional Protocol was subsequently adopted to supplement the inadequate enforcement mechanisms of the *Women's Convention*.<sup>74</sup> Article 1 and 2 of the *Optional Protocol* create a communications procedure whereby individuals and groups who allege violation of their rights can lodge complaints or bring communications before the CEDAW for redress under the *Women's Convention*.<sup>75</sup> Article 8 of the *Optional Protocol* introduces an inquiry procedure that allows the CEDAW to investigate allegations of grave or systemic violations of women's rights within State Parties. The *Optional Protocol* reaffirms existing remedies under other international human rights instruments and improves the monitoring of the *Women's Convention*.

Other initiatives for promoting women's rights at the UN are the *Declaration on the Elimination of Violence against Women*<sup>76</sup> and the appointment of a Special Rapporteur on Violence against Women, including its Causes and its Consequences, by the Commission on Human Rights.<sup>77</sup>

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<sup>72</sup> Christine Ainetter Brautigam, *supra* note 67 at 11-12.

<sup>73</sup> State Parties to the *Women's Convention* report on compliance to the Committee on the Elimination of Discrimination against Women (hereinafter "CEDAW") every four years.

<sup>74</sup> This focus on human rights enforcement is addressed subsequently in this dissertation.

<sup>75</sup> *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* adopted 1999, 38 I.L.M. 763, 43rd Sess., Agenda Item 6, U.N. Doc. E/CN.6/1999/WG/L.2 (1999), entered into force 22 December 2000 for countries that have ratified it. As of 27 November 2007, 90 countries have ratified the Optional Protocol. Online: <<http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>>. Article 18 provides for enforcement of the *Women's Convention* and creates obligations for state reporting. Article 29 provides a framework to resolve conflicting views concerning interpretation and application of the Convention to State Parties.

<sup>76</sup> UN Doc. A/RES/48/104 of 20 December 1993.

<sup>77</sup> UN Commission on Human Rights Resolution 1994/45, adopted on 4 March 1994. The mandate of the Special Rapporteur was extended at the Commission's 59<sup>th</sup> session, Resolution 2003/45. Since 2006, the Special Rapporteur reports to the Human Rights Council per Human Rights Council's decision 1/102. The Special Rapporteur transmits urgent appeals and communications to State regarding alleged cases of violence against women, undertakes fact-finding country visits and to submit annual thematic reports to the Human Rights Council in the discharge of her mandate. The current Special Rapporteur on Violence against Women is Dr. Yakin Erturk. See also online: <<http://www2.ohchr.org/english/issues/women/rapporteur/>>, (accessed 21 November 2008).

Even though the Declaration is not binding, it encourages states to condemn all forms of violence against women.

Commentators however identify several shortcomings with the UN system for the protection of women, prominent among which are States' reservations to the *Women's Convention* limiting its application.<sup>78</sup> Apart from attracting the highest number of objections, declarations, and reservations compared with other international human rights treaties,<sup>79</sup> the *Women's Convention* and its implementation mechanisms attract other criticisms.<sup>80</sup> The "opt out"<sup>81</sup> clause in the *Optional Protocol* allows state parties, upon ratification or accession, to opt out of the inquiry procedure. Bangladesh, Belize, Columbia and Cuba have made opting out declarations to the *Optional Protocol*.<sup>82</sup> Also criticised are delays experienced in examining state reports by the CEDAW as an obstacle to the international system for the protection of women's rights.<sup>83</sup>

These, among other challenges confronting the international institutional protection of rights, resulted in requests for complementary regional human rights instruments for the protection of women's rights. While the UN system espouses minimum standards for protection of women's rights, the regional and national initiatives complement and elaborate upon such standards. In line with this, Christof Heyn and Magnus Killander's observation regarding human rights

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<sup>78</sup> As at 2006 over 50 countries made declaration and reservations to the *Women's Convention* with only 3 withdrawals of reservations to particular provisions between 2004 and 2006.

<sup>79</sup> 185 countries, over ninety percent of the members of the UN are party to the *Women's Convention*, although over fifty countries 50 countries retain their declaration or reservations while over 10 countries have withdrawn their reservations. Online: < <http://www.un.org/womenwatch/daw/cedaw/states.htm>>.

<sup>80</sup> The *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter *Optional Protocol*), 6 October 1999. U. N.T.S, Vol. 2131 at 83. As at 11 November 2009, there are ninety-nine State Parties.

<sup>81</sup> See Article 10 of the *Optional Protocol*.

<sup>82</sup> UN Treaty Collection, online: <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en)>. Accessed 11 November 2009.

<sup>83</sup> Delays are due to a backlog of overdue reports and the shortness of the period designated for the CEDAW committee meeting. To address this problem, the General Assembly of the UN by Res 60/230 authorised the CEDAW committee to hold three annual session of three weeks each with a one-week pre-sessional working group for each session, effective from January 2006 as a temporary measure for addressing the back log of reports..

similarly apply to women's rights.<sup>84</sup> According to their reasoning, attention to women's rights at the regional level provides the continent with an entry point to international human rights of women and the other way round. Not only will such a regional system allow African women to make a stronger contribution towards the development of international human rights law generally, it will also allow for greater acceptance of these norms by African states and citizens to the extent that African experience is integrated into these rights.<sup>85</sup> Women's roles are particularly critical in setting standards at the regional level so that such norms, their application, implementation and enforcement specifically recognise and address the particularities of the experiences of African women.

Complementary women-specific attention to human rights at the regional level encompasses the European, Inter-American and the African regional human rights systems. Each of these is considered below.

## **2. The European Regional System for Women's Rights**

The European regional human rights system emerged under the auspices of the Council of Europe.<sup>86</sup> The *Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention*), its additional protocols and the *European Social Charter* with its

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<sup>84</sup> Christof Heyns and Magnus Killander, "Africa in International Human Rights Textbooks" at 4. Online: <[http://www.up.ac.za/dspace/bitstream/2263/5509/1/Heyns\\_Africa\(2007\).pdf](http://www.up.ac.za/dspace/bitstream/2263/5509/1/Heyns_Africa(2007).pdf)>.

<sup>85</sup> *Ibid* at 4.

<sup>86</sup> The Council of Europe which consisted of only 15 Western European member states at inception in 1949 now has 47 member states: *Statute of the Council of Europe*. The *European Convention on Human Rights* (as it is popularly known) was signed on 4 November 1959 and entered into force in 1953. Other organisations with strong human rights components include the Organisation for Security and Cooperation in Europe (OSCE) as well as the European Economic Community (now European Union)

amendments, constitute the main normative human rights elements of this system,<sup>87</sup> supplemented by a number of declarations and recommendations. The *European Convention* does not include a general principle of equality and non discrimination, but Article 14 prohibits any “distinction” based on the rights and liberties guaranteed under the *Convention*. Article 8 protects private and family life and Article 12 guarantees the right of men and women to marry and to found a family. These provisions are to be read in conjunction with Article 5 of the 7<sup>th</sup> *Additional Protocol to the European Convention* of 1984.<sup>88</sup> In 2000, the Committee of Ministers of the Council of Europe adopted Protocol 12 to the *European Convention* which has the effect of extending the non-discrimination guarantee in Article 14.<sup>89</sup> The mechanisms for implementing these rights was restructured in 1998 when the Council of Europe replaced the European Commission on Human Rights and the European Court of Human Rights with a single body, the permanent European Court on Human Rights. European standards for equality and non-discrimination have been developed and clarified through a number of cases.<sup>90</sup>

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<sup>87</sup> For a discussion of the documents see Wolfgang Benedek, “The European System of Protection of Human Rights and Human Rights of Women” in Wolfgang Benedek *et al*, *Human Rights of Women*, *supra* note 51 at 211 -214.

<sup>88</sup> Council of Europe, *Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984. ETS 117 Online UNHCR Refworld, online: <<http://www.unhcr.org/refworld/docid/3ae6b3654.html>>, (accessed 21 March 2009). Article 5 provides that “[s]pouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.”

<sup>89</sup> Council of Europe, *Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination*, ETS 177, 4 November 2000, entered into force 1 April 2005. UNHCR Refworld, Online: <<http://www.unhcr.org/refworld/docid/3ddd0cb44.html>> Accessed 21 March 2009.

<sup>90</sup> Oddny Mjoll Arnardottir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2003). See for example, *Airey v Ireland*, Application No: 6289/73, 9 October 1979 and *X and Y v. The Netherlands* Application No: 8978/80, 26 March 1985. See also, Rebecca J. Cook, “Essay: International Human Rights Law Concerning Women: Case Notes and Comments” (1990) 23 Vand. J. Transnat’l L. 779.



Also relevant to the European system is the *European Social Charter*.<sup>91</sup> The *Charter* and its Additional Protocol protect economic and social rights. The former guarantees the right to equal remuneration of male and female workers while the later enables parties to the *Charter* to grant *inter alia*, “equal opportunities and equal treatment in matters of employment and occupation without discrimination on grounds of sex.”<sup>92</sup> A committee of independent experts elected by the Council of Europe’s Committee of Ministers implements this provision of the *European Social Charter* through the review of state reports.<sup>93</sup> In addition, the Council of Europe set up a committee of experts to promote equality on the basis of an action plan for the promotion of equality between men and women in 1988.<sup>94</sup> The Steering Committee for Equality between Women and Men (CDEG) seeks to promote European co-operation between member States with a view to achieving real equality between women and men as a *sine qua non* of genuine democracy, among other things.<sup>95</sup>

Other European organisations with a human rights remit include the Organisation for Security and Cooperation in Europe (OSCE) and the European Union (EU). Although principally a security organisation, the OSCE holds regular conferences to monitor the human rights

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<sup>91</sup> The *European Social Charter* was adopted in 1961 and revised in 1996 ETS 163 3 V. 1996. As of 1 September 2008, 39 countries are members of the *Charter*, 24 of which ratified the revised Charter. See, for example, Articles 3, 8, 20 and 27 of the revised Charter.

<sup>92</sup> Article 1 of the *Additional Protocol to the European Social Charter*, ETS No. 128 V.5.1988 entered into force 4 September 1992. 13 member states have ratified the protocol as of 26 September 2008. Online: <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=128&CM=7&DF=26/10/2008&CL=ENG>>.

<sup>93</sup> *Additional Protocol to the European Social Charter Providing for a System of Collective Complaint*, ETS 158. See also Wolfgang Benedek, “The European System of Protection of Human Rights and Human Rights of Women” in W. Benedek *et al*, *supra* note 51 at 213. The Committee of Ministers supervises the implementation of recommendations which it addresses to member states.

<sup>94</sup> The Committee of Ministers of the Council of Europe also adopted the Declaration on Equality of Women and Men and the Declaration on Policies for Combating Violence against Women in a Democratic Europe adopted in 1988 and 1993 respectively.

<sup>95</sup> The terms of reference of the Committee were to examine the situation as regards equality between women and men in European society and consider its progress. See Directorate General of Human Rights, Council of Europe. Online: <<http://www.humanrights.coe.int/Equality/Eng/EqualityCommittee/EqualityCommittee.htm#ToP>>. The Committee also seeks to promote taking into account of gender dimensions in activities undertaken by the other Steering Committees; to undertake specific actions contributing to the implementation of a genuinely equal democracy between women and men; to address all forms of violence against women; and to promote the right to free choice in matters of reproduction and lifestyles among other rights.

performance of member states. The Office of Democratic Institutions and Human Rights (ODIHR) of the OSCE Council provides practical support for democratic institutions and human rights, and has included gender issues in its programmes.<sup>96</sup>

The EU through its political and other organs, the European Parliament, the European Commission, the European Court of Justice and the European Council (not the Council of Europe) have each developed a human rights policy as the basis for adopting several declarations and provisions on human rights. By virtue of the Treaty of Amsterdam (a revision of the Treaty on the European Union), equal treatment and gender mainstreaming were introduced into the main treaty.<sup>97</sup> The European Court of Justice has also determined several cases concerned with equality.<sup>98</sup> The European system largely developed its human rights promotional aspects after 1989 when it had to absorb a number of Eastern European states.

Although significant progress has been made, the European system lacks a comprehensive women's rights instrument (the planned additional protocol on equality has yet to materialise). Hence, the European system largely takes an *ad hoc* approach towards promoting the equal status of women.

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<sup>96</sup> To increase gender awareness, a "Focal Point on Gender Issues" and a "Gender Mainstreaming and Human Rights of Women Advisor" were created in the ODIHR. It also organises research projects and workshops to promote women's participation in politics, in conflict resolution and post-conflict rehabilitation among its other activities.

<sup>97</sup> The Treaty of Amsterdam entered into force in 1999. Article 2 provides for equal treatment of men and women while Article 3 (2) provides that in all its activities the Community will work towards the elimination of inequalities and the promotion of equality of men and women.

<sup>98</sup> For example in *Abdoulaye and Others v Regie Nationale Des Usinees Renault SA* Case No: C 218/98 16 September 1999, the Court held that the principle of equality laid down in Article 119 (now 141) of the EC treaty did not preclude the making of a lump-sum payment exclusively to female employees who took maternity leave. Robyn Emerton, Kristine Adams, Andrew Byrnes and Jane Connors (eds.), *International Women's Rights Cases* (London: Cavendish Publishing Ltd, 2005) at 446-447. The debates regarding the possibilities of overlapping and conflicting decisions of the European Court of Human Rights and the European Court of Justice is beyond the purview of this work. See, Clemens Rieder, "Protecting Human Rights within the European Union: Who is Better Qualified to do the Job – The European Court of Justice or the European Court of Human Rights" (2005) 20 *Tulane European and Civil Law Forum* 73.

### 3. The Inter-American System for Women's Rights

The need to deal with social polarisation on economic and ideological grounds, characteristic of the cold war era, determined the limited attention to human rights and women's rights, in particular, within the Inter-American system. The end of the cold war and the emergence of democracy brought about changes to the benefit of women, to the extent that more open and pluralistic societies created spaces for public debate and organising, previously unimaginable under authoritarian governments.<sup>99</sup> The changes became apparent in activities of the Inter-American Commission and Court, both supervisory organs of the two basic human rights documents of the Inter-American system, the *American Convention on Human Rights* and the *American Declaration on the Rights and Duties of Men*.<sup>100</sup>

The Inter-American Commission on Women (the Women's Commission) is the specialised arm of the Organisation of American States (OAS) with the mandate to advance women's rights and gender equality at the regional level.<sup>101</sup> The Women's Commission has facilitated organising meetings and adopting treaties, declarations and resolutions relating to women. In 1990, the Commission held the Inter-American Consultation on Women and Violence to address violence against women, followed by sessions of the intergovernmental meeting of experts that resulted in the draft Inter-American Convention on Women and Violence. At its Twenty-fourth regular General Assembly, the OAS adopted the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para)*.<sup>102</sup> Further, an *Additional Protocol to the American Convention on Human Rights in the Area of*

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<sup>99</sup> Claudio Grossman, "The Inter-American System: Opportunities for Women's Rights" (1994-1995) 44 Am. U. L. Rev. 1305 at 1306.

<sup>100</sup> *Ibid.*

<sup>101</sup> The Inter-American Commission on Women traces its history to 1923 when it began a hemispheric struggle for women's suffrage in OAS member states.

<sup>102</sup> *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, also known as the *Convention of Belem do Para*, opened for signature 9 June 1994, 1438 U.N.T.S. 63.

*Economic, Social and Cultural Rights* was adopted,<sup>103</sup> *inter alia*, to extend the right to social security for women's paid leave before and after birth.<sup>104</sup>

Initially, the Inter-American Commission and Court erred on the side of caution in cases regarding women. In the *Loayza-Tamayo* case,<sup>105</sup> relating to sexual violence against women, the Inter-American Court applied a different (stricter) evidentiary standard in the case of rape than required for other forms of mistreatment and torture to decide the case on gender-neutral grounds. However, in *Miguel Castro-Castro Prison v Peru*,<sup>106</sup> for the first time, the Court addressed violations of human rights of women directly by incorporating the *Convention of Belem do Para* into its analysis to give full recognition of the human rights of women in the Inter-American context.<sup>107</sup> Along with both human rights instruments protecting women and the decisions of the Inter-American Commission and Court, this system appears to operate a more systematic model for the protection of women's rights than the European system.

#### 4. The African System for Women's Rights

The OAU did not entirely ignore women even though the principal institutions or organs of the OAU left little or no room for women's participation<sup>108</sup> in decision-making positions until the 1990s. There were no female Heads of State and Government who could participate in the

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<sup>103</sup> The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), 17 November 1988. OAS Treaty Series No 69, 1988.

<sup>104</sup> *Ibid.*, Article 9(2).

<sup>105</sup> The Inter-American Court had decided matters relating to women in earlier cases such as, *Loayza-Tamayo v Peru* (*Merits*), Inter-Am. Ct. H. R. (ser. C) No. 33 (September 17 1997) and the Case of *Plan de Sanchez Massacre v. Guatemala* (*Merits*) Inter-Am. Ct. H. R. (ser. C) No. 105 (29 April 2004), but it was not until November 2006 that the Inter-American Court directly addressed the violation of human rights of women.

<sup>106</sup> *Miguel Castro-Castro Prison v Peru* (*Castro-Castro Prison Case*) Inter-Am. Ct. H. R. (ser. C.) No. 160 (25 November 2006).

<sup>107</sup> Karla I. Quintana Osuna, "Recent Developments: Recognition of Women's Rights before the Inter-American Court of Human Rights" (2008) 21 Harvard Human Rights Journal 301 at 302.

<sup>108</sup> These institutions were (1) the Assembly of Heads of State and Government; (2) the Council of Ministers; (3) the General Secretariat; and (4) the Commission on Mediation, Conciliation and Arbitration.

Assembly of Heads of State and Government.<sup>109</sup> Few women were appointed to ministerial positions in the Council of Ministers (now Executive Council).<sup>110</sup> Similarly, at the OAU secretariat, before the mid-1990s the bulk of women were found in clerical and administrative positions, with only a handful holding key decision-making positions.<sup>111</sup>

Recent occurrences have paved the way for women's active participation at the regional level. The single most significant event is the adoption of the *Women's Protocol* by the AU following its transformation.<sup>112</sup> Others relate to the content of the *Constitutive Act of the African Union*, as well as recent establishment of the African Court on Human and Peoples' Rights and the appointment of judges to that Court.<sup>113</sup> The relevance of these normative and institutional developments to women cannot be ignored. This section examines these changes and its implications for African women. The next subsection therefore examines the OAU's and the AU's commitment to the promotion of women's rights.

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<sup>109</sup> A similar situation existed in the European region whereby as at 2000 two females served in the European Council. President Tarja Halonen of Finland and President Mary McAleese of Ireland, other heads of states of Denmark, the Netherlands and the United Kingdom were not elected but legitimised by birth.

<sup>110</sup> Although historically there are female leaders in some parts of Africa, such as the Queen-regents of Swaziland, Dzeliwe Shonwe and Ntombe Thwala 1982-83 and 1983-86 respectively, and Elizabeth Domitien, Prime Minister of the Central African Republic 1975-76, it was not until the 1990s that women leaders became visible. The first African female non-monarchical head of government, Ms. Ruth Perry, became the Liberian interim leader in August 1996 during the transition government set up under a peace agreement between rival Liberian armed factions. Similarly only two ministerial appointees were counted at a Ministerial meeting held in the mid-1990s. See, Aili Mari Tripp, "New Trends in Women's Political Participation in Africa," online: <<http://democracy.stanford.edu/Seminar/AiliTripp.pdf>>, accessed 28 May 2008. In 1997, Joyce Mende-Cole, the Senior Regional Gender Advisor for the United Nations Development Programme (UNDP), noted that "The OAU Secretariat is a male bastion. Women are nowhere (in the Addis Ababa-based Secretariat's leadership)," revealing the dearth of women's participation at the OAU: Patricia A. Made, "What's she doing there?" Online: <<http://www.hartford-hwp.com/archives/30/061.html>>, accessed 26 May 2008.

<sup>111</sup> For example in 1997 the Secretary General and his five Assistant Secretary-Generals were men. The only woman who served as a head of division was the Women's Affairs Officer in the OAU Women's Unit: *Ibid*.

<sup>112</sup> The reason for the immediate adoption of the *Women's Protocol* by the AU is not clear. R. Murray, "Women's Rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa" in Doris Buss and A. Manji (eds), *International Law: Modern Feminist Approaches* (Oxford: Hart Publication, 2005).

<sup>113</sup> For the list of judges, see, the 2006 Activity Report of the Court, Assembly/AU/8 (VIII). Online: <[http://www.africancourtcoalition.org/content\\_files/files/AfricanHRCourtreportJan2007.doc](http://www.africancourtcoalition.org/content_files/files/AfricanHRCourtreportJan2007.doc)>.

### a) The OAU Women's Rights Agenda or Non-Agenda?

As noted in preceding sections, the OAU was largely preoccupied with de-colonisation and protecting the sovereignty of member states. It was not until the adoption of the *African Charter* and mechanisms established thereof, such as the African Commission and its Special Rapporteur on the Rights of Women in Africa (SRRWA), that protecting women's rights at the regional level took a more coordinated turn.<sup>114</sup> However, the OAU did, in part, acknowledge the importance of women's empowerment. In 1991, the Heads of State and Government of the OAU signed the *African Economic Community (AEC) Treaty*<sup>115</sup> that laid a framework for economic integration of the continent to be carried out over a thirty-four year period.<sup>116</sup> The objectives of the *AEC Treaty* are to promote economic, social and cultural development; integrate African economies leading to increased self-reliance; harness and develop Africa's human and material resources; promote co-operation so as to raise the standard of living and enhance economic stability; foster peaceful relations among member states; and contribute to the progress, development, and economic integration of the continent.<sup>117</sup> By virtue of Article 75 of the *AEC Treaty*, OAU Member States committed themselves to work together for the "full development of the African woman through the improvement of her economic, social and cultural conditions" by taking "all measures necessary to ensure greater integration of women in development activities within the Community."

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<sup>114</sup> Article 18 (3) of the *African Charter*; For appointment of the Special Rapporteur on the Rights of Women in Africa (hereinafter SRRWA), see, the Final Communiqué of the 23rd Ordinary Session of the African Commission on Human and Peoples' Rights, 1998 Para. 11. Online: <[http://www.achpr.org/english/\\_info/index\\_women\\_en.html](http://www.achpr.org/english/_info/index_women_en.html)>, accessed 21 July 2007. The SRRWA has been the most visible mechanism paying attention to women's rights beyond the African Commission.

<sup>115</sup> *Treaty Establishing the African Economic Community* 30 I.L.M 1241 [hereinafter *AEC Treaty*], reprinted in Gino J. Naldi (ed.) Documents of the Organisation of African Unity (1992) 203, known as the Abuja Treaty, entered into force 1993. See also Gino J. Naldi and Konstantinos D. Magliveras, "The African Economic Community: Emancipation for African States or Yet another Glorious Failure?" (1999) 24 N.C.J. Int'l & Com. Reg. 601.

<sup>116</sup> Article 3(1) of the *AEC Treaty*.

<sup>117</sup> *Ibid.*, Article 4 (1).

In line with this provision the OAU made efforts to strengthen its Women's Unit as an important organ to "play a more catalytic role in the promotion of gender issues and implementation of collective strategies aimed at enhancing the role and status of women in Africa."<sup>118</sup> The Women's Unit sought to "integrate women's issues and concerns into OAU programmes and policies through coordination and intervention."<sup>119</sup> The main programs of the Women's Unit were drawn from the *AEC Treaty* as well as "the African Platform for Action: Africa's Common Position for the Advancement of Women."<sup>120</sup> This Platform of Action called for immediate consideration of all critical areas of concern identified to include women's poverty, insufficient food security and lack of economic empowerment as well as women's legal and human rights.<sup>121</sup> The Platform was adopted "as a renewed commitment" by African governments, a "synthesis of regional perspectives and priorities and a framework for action for the formulation of policies and implementation of concrete and sustainable programmes for the advancement of women."<sup>122</sup>

The OAU has also showed interest in women's involvement in peace and development.<sup>123</sup> Through its Council of Ministers, the OAU reaffirmed commitment to "take special measures to promote the participation of women in political decision-making, particularly in governments,

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<sup>118</sup> Organisation of African Unity, "OAU Gives Priority to the Enhancement of the Role and Status of Women." Population Newsletter Vol. 1 No. 2 April 1994. Online: <<http://www.un.org/popin/oau/popnews/popnwv12.htm>>. (accessed 29 May 2008).

<sup>119</sup> *Ibid.*

<sup>120</sup> Adopted at the Fifth African Regional Conference on Women, Dakar Senegal, 16-23 November 1994. See also Addis Ababa Declaration on the Dakar African Platform for Action on Women AHG/Dec.2 (XXXI) adopted at the Thirty-first Ordinary Session of the Assembly of Heads of State and Government 26-28 June 1995. Online: <<http://www.africa-union.org/root/au/Documents/Decisions/hog/5HoGAssembly1995.pdf>> at 15.

<sup>121</sup> See para 3 of the Platform of Action.

<sup>122</sup> *Ibid.*, see para. 6, mission statement. The conference reviewed the Nairobi Forward-Looking Strategies for the Advancement of Women in order to arrive at the Dakar African Platform of Action.

<sup>123</sup> OAU Plan of Action on Enhancing the Participation of Refugee, Returnee and Internally Displaced Women and Children in Rehabilitation, Reintegration, Reconstruction and Peace-Building.

Inter-African organisations, in national delegations participating in African meetings including meetings relating to peace and development process.”<sup>124</sup>

The *African Charter* guarantees *inter alia* rights to equality, non-discrimination,<sup>125</sup> and the elimination of all forms of discrimination against women “as stipulated in international declarations and conventions.”<sup>126</sup> Despite the controversial nature of the protection afforded women in the *African Charter*, it remains the document central to the protection of women, complemented by the recently adopted *Women’s Protocol*.<sup>127</sup> Additionally, the Special Rapporteur on the Rights of Women in Africa (SRRWA) was appointed in 1998 to: carry out studies on the situation of women’s rights in Africa; carry out activities to enhance monitoring of implementation of the *African Charter* by the African Commission; work in collaboration with NGOs and other organisations to harmonise initiatives on women’s rights; work towards the drafting and ratification by all member states of the protocol on women’s rights; and report to the African Commission, including making recommendations geared towards improving the situation of women.<sup>128</sup> The SRRWA has been particularly instrumental in drafting, publicising and encouraging member states to ratify the *Women’s Protocol*.<sup>129</sup>

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<sup>124</sup> CM/Dec.469 (LXX) Decision on the Progress Report of the Secretary-General on the Efforts Deployed Towards Mainstreaming African Women’s Concerns into Peace and Sustainable Development Processes Doc. CM/2117 (LXX) adopted at the 70<sup>th</sup> OAU Council of Ministers Meeting Algiers, 8-10 July 1999.

<sup>125</sup> Articles 2 and 3 of the *African Charter*.

<sup>126</sup> *Ibid.*, Article 18 (3).

<sup>127</sup> The controversy surrounding these provision centers on the presumed generalisation in Article 18(3). While some scholars argue that the provision is adequate, others insist that without specifically adopting domestic legislation by the state parties, the provision would be ineffectual. See generally, U.O. Umozurike, *supra* note 43; Malcolm Evans & Rachel Murray (eds.), *supra* note 43; W. Benedek, *supra* note 51; Evelyn A. Ankhumah, *supra* note 43; and F. Ougergouz, *supra* note 43.

<sup>128</sup> “The legal basis for creation of a post of the Special Rapporteur on the Rights of Women in Africa is stipulated under Article 45 (b) and 66 of the *African Charter* and in Chapter VI of the Rules of Procedure of the Commission, which governs establishment of subsidiary bodies of the Commission.” Mandate and Resolution of the Special Rapporteur on Women’s Rights. Online: <[http://www.acphpr.org/english/-infor/index\\_women\\_en.html](http://www.acphpr.org/english/-infor/index_women_en.html)>, accessed 19 May 2005.

<sup>129</sup> See intercession activity reports of the SRWA 39<sup>th</sup>, 40<sup>th</sup> and 41<sup>st</sup> Ordinary Sessions of the African Commission.



Clearly, the OAU was not oblivious to the plight of women neither did it totally neglect women in its rhetoric. However, it was not until its transformation into the AU that actions to address the concerns of women intensified at the regional level.

## **b) Women's Rights and the AU**

The transition to the AU created the opportunity for institutional change toward greater commitment to protect women's rights. Unlike the *OAU Charter*, the *Constitutive Act* specifies that the AU shall function in accordance with promoting the principle of gender equality.<sup>130</sup> Moreover, in July 2003, the AU adopted the *Women's Protocol* which institutionalises, affirms and guarantees rights that address specific human rights violations of African women, together with other rights. For example, Article 5 dealing with female genital surgery (commonly known as female genital mutilation or FGM) is the first binding international human rights provision to specifically call for elimination of the practice. Facilitated by intense advocacy and lobbying especially by women's rights groups, the *Women's Protocol* entered into force in November 2005 making it one of the quickest entries into force ever in the history of the region.<sup>131</sup> Prior to this, in 2004, the Assembly of the AU reaffirmed its commitment to gender equality by adopting the Solemn Declaration on Gender Equality in Africa.<sup>132</sup>

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<sup>130</sup> *Ibid.*, Article 4(l). See also the *Protocol on Amendments to the Constitutive Act of the African Union*, online: <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20Amendments%20to%20the%20Constitutive%20Act.pdf>. The amendment renders the *Constitutive Act* more gender sensitive, among other changes. As at 09/08/07, 41 member states had signed the Protocol and 18 countries had ratified it. Article 13 of the *Protocol* provides for its entry into force 30 days after deposit of the instrument of ratification by two-thirds majority of member states of the AU. Online: <<http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20Amendments%20to%20the%20Constitutive%20Act.pdf>>.

<sup>131</sup> Resolution on the Status of Women in Africa and the Entry into Force of the Women's Protocol, adopted at the 38<sup>th</sup> Ordinary Session of the African Commission, the Gambia 21 November – 5 December 2005. The Protocol entered into force approximately twenty-eight months after its adoption.

<sup>132</sup> Solemn Declaration on Gender Equality in Africa (SDGEA), Assembly/AU/ Decl.12 (III), Assembly of the African Union Third Ordinary Session 6-8 July 2004 Addis Ababa, Ethiopia.

Other mechanisms of the AU that pay some attention to women and gender equality include the New Partnership for Africa's Development document (NEPAD)<sup>133</sup> adopted by African leaders to address economic and social developments of the continent and to prevent marginalisation of Africa in globalisation.<sup>134</sup> Benchmarks adopted under NEPAD indicate certain key objectives for democracy and political governance which member states would seek to achieve. These are constitutional democracy, promotion of economic, social, cultural, civil and political rights, separation of power and protection of the rights of women, children, the vulnerable and refugees.<sup>135</sup> The African Peer Review Mechanism is a self-monitoring mechanism established to give effect to the NEPAD document and to deal with human rights practices of member states became operative during this period.<sup>136</sup> Also relevant is the recently constituted African Court of Human and Peoples' Rights.<sup>137</sup>

#### IV. Moving Forward

This Chapter makes no attempt to cover the whole gamut of mechanisms available within any of the systems under consideration but merely highlights salient developments regarding women's rights protection in the different systems. Indeed, women's engagement with the African regional regime will be examined in fuller detail subsequently in this dissertation. The

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<sup>133</sup> The New Partnership for Africa's Development (NEPAD) October 2001 provides a framework for Africa's development. Online: <<http://www.nepad.org/2005/files/documents/inbrief.pdf>>, accessed 31 July 2007.

<sup>134</sup> Adopted at the 37<sup>th</sup> Summit of the OAU in July 2001, OAU NEPAD Doc. (2001). Online: <<http://www.nepad.org>>.

<sup>135</sup> *Ibid.*

<sup>136</sup> African Peer Review Mechanism (APRM) Adopted at the 38<sup>th</sup> Ordinary session of the Assembly of Heads of State and Government, 8 June 2002 in Durban, South Africa. AHG/235 (XXXIII) Annex II See Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (APRM), NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI, 9 March 2003. Online: <[http://www.au2002.gov.za/docs/summit\\_council/aprm.htm](http://www.au2002.gov.za/docs/summit_council/aprm.htm)>, accessed 31 July 2007. As of June 2008, four countries, Ghana, Rwanda, Kenya, and South Africa, had been reviewed under this process, Benin, Nigeria, Burkina Faso, Algeria, and Uganda are in the process and twenty-nine countries have acceded to the APRM. See also Rachel Murray (ed.), *Human Rights in Africa*, *supra* note 43 at 40-41.

<sup>137</sup> The judges of the African Court were sworn into office on 2 July 2006. As of 2 May 2007, the African Court had held three sessions. See the Activity Report of the Court for 2006, Assembly/AU/8 (VIII). Online: <[http://www.africancourtcoalition.org/content\\_files/files/AfricanHRCourtreportJan2007.doc](http://www.africancourtcoalition.org/content_files/files/AfricanHRCourtreportJan2007.doc)>, accessed 29 November 2007.

difference in historical experiences and tradition, as well as the need to respond to the political, economic and cultural environment in which these systems developed, largely dictates the approaches taken toward achieving individual regional objectives.<sup>138</sup> In sum, the international regime and all three regional systems examined have progressively strengthened their capacity and capability to protect, promote, monitor and enforce women's rights in the last few decades. Even though the OAU did not inspire confidence among the people because it lacked credibility due to the human rights violations committed by African leaders before, during and after the establishing the regional human rights system, the African system cannot be ignored.

The mechanisms available to women in all the systems are not only increasing but also improving. This is not to suggest that any of the systems have attained their full potential. Many women around the world remain unaware of these regimes and the implications of the protections offered. As well, each system has its own distinctive challenges to contend with.

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<sup>138</sup> Wolfgang Benedek, *supra* note 51 at 223.

## CHAPTER THREE: CRITICAL REVIEW OF WOMEN'S RIGHTS IN AFRICA

### I. Introduction

There has been an explosion of literature relating to Africa's regional regime for the protection of human rights in recent years.<sup>1</sup> This may be attributed principally to recent developments identified in the previous chapter, such as the adoption of the *Constitutive Act of the AU* along with the transformation of the OAU into the AU in 2002. Other notable events are the adoption of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* and the establishment of the African Court geared toward strengthening protection and implementation of rights.<sup>2</sup> Certain identifiable assumptions, however, underlie the literature, leading one international human rights commentator to observe that, although international human rights law advocates tolerance, inclusiveness and the promotion of equality among peoples, nations and individuals across the world, there seems to be a hierarchy of regional human rights systems, the European, Inter-American and African.<sup>3</sup> This hierarchy is frequently marked by ideological preconceptions about their effectiveness, with the African regional human rights regime at the bottom.

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<sup>1</sup> Christof Heyns and Magus Killander, "The African Regional Human Rights System" in F. Gomez and K. de Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges* (Bilbao: University of Deusto, 2005); Frans Viljeon and Lirrette Louw, "State Compliance with the Recommendation of the African Commission on Human and Peoples' Rights 1994-2004" (2007) 101 Am. J. Int'l L 1; T. Murithi, *The African Union: Pan-Africanism, Peace-building and Development* (Ashgate Pub, 2005); Mbata B. Mangu, "The Changing Human Rights Landscape in Africa: Organisation of African Unity, African Union, New Partnership for Africa's Development and the African Court" (2005) 23(3) Netherlands Quarterly of Human Rights 379; Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007).

<sup>2</sup> These events include the entry into force of the Protocol to the African Court on Human and People's Right on the Establishment of an African Court on Human and People's Rights, OAU/LEG/AFCHPR/PROT.1 rev.2(1997) Online: <[http://www.achpr.org/english/\\_info/court\\_en.html](http://www.achpr.org/english/_info/court_en.html)>, adopted 10 June 1998, entry into force 25 January 2005. The transition of the African Union in 2002 and the provision for an African Court of Justice of the African Union in the Constitutive Act of the African Union and the Protocol and Statute of the African Court of Justice and Human Rights that merges the African Court and the African Court of Justice.

<sup>3</sup> Rachel Murray, "International Human Rights: Neglect of Perspectives from African Institutions" (2006) 55 International Community Law Quarterly 193.

As with the colonial experience, contemporary global and local (economic) dynamics, among sundry other factors, dictate current events and situations in most African societies. Preconceived ideas, whether conscious or subconscious, determine dominant assumptions about Africa. These ideas about Africa, largely negative, have the likely consequence of obliterating rational attempts to identify intrinsic African concepts that can positively stimulate growth and progress.<sup>4</sup> Without playing down the seriousness of the challenges many African states face, unsavoury assumptions overwhelm potentially positive aspirations on the continent, in addition to obscuring actual progress by existing mechanisms and institutions. Yet, the legal and other implications of these assumptions for Africa, its institutions and Africans generally, have yet to be fully interrogated.

Such assumptions (that condemn Africa to an inability to contribute anything significant) encourage the continued neglect of Africa in the world literature on human rights, and where considered, the information and analysis are often inaccurate.<sup>5</sup> Not much attention has been paid to exploring the consequences of these problems, especially as they relate to women and other vulnerable groups in African societies. For African women, the stereotypical assumptions of their subordinate role as well as other challenges exacerbate these problems and also limit their ability to positively engage with the regime. This dissertation attempts to unearth these assumptions about the African regime as well as women. It underscores the consequences of such assumptions and the need to move away from them in order to proffer ways to make the system more beneficial for women and, thus, for Africans generally.

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<sup>4</sup> Most views of Africa are influenced by adventure films, sensational media reporting, and racial stereotypes which are usually pejorative in content and presentation. Contemporary commentators as well as writers of African history recognize that the picture of Africa in such materials sometimes verge on the exotic or the mundane: Robert O. Collins and James M. Burn, *A History of Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2007) at 1.

<sup>5</sup> Rachel Murray, *supra* note 3; Christof Heyns and Magnus Killander, "Africa in International Human Rights Textbooks" Online: <[http://www.up.ac.za/dspace/bitstream/2263/5509/1/Heyns\\_Africa\(2007\).pdf](http://www.up.ac.za/dspace/bitstream/2263/5509/1/Heyns_Africa(2007).pdf)>. These authors specifically recognise the neglect of the African human rights regime in world human rights literature.

Given the centrality of African women's engagement with rights at the regional level to this dissertation, it is pertinent to note that in over three decades that the OAU/AU has undertaken the task of developing a system for protecting, promoting, enforcing and monitoring human rights, no comprehensive study of women's engagement with the regime has been undertaken.<sup>6</sup> Even though the subject of women's rights in the African context as a whole has begun to gain wider academic interest in the last decade, more is required. Recent scholarly interest in African women's rights derives from increasing visibility of African women activists and academics, African women's movements, groups and social networks at international and other forums, such as the United Nations international conferences on women, the changing socio-political configuration of many African states from militarism and dictatorships to more democratic institutions, as well as increasing interest in the research and practice of women's rights in Africa.

The above events and activities have resulted in the rapid growth of the literature on African women's rights including their rights at the regional level. Yet, African women remain largely invisible or misrepresented in mainstream Western human rights literature.<sup>7</sup> Limited space is still allotted to the roles and involvement of African women at the continental level in the growing number of textbooks.<sup>8</sup> One may attribute this trend to several reasons, such as the fact

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<sup>6</sup> This is not to say there has been no study of women's rights at the regional level. The available studies often focus on a particular aspect of women's rights, such as the *Women's Protocol* or the *African Charter* or specific issues covered in these treaties.

<sup>7</sup> Tiyaambe Zeleza, for example, locates the political impetus of the women's movement largely in the west and to a crisis of conventional developmental theory and practice, as well as to the consequent rise of women in development projects. Tiyaambe Zeleza, "Gender Biases in African Historiography" in M. Imam, Amina Mama, and Fatou Sow (eds.), *Engendering African Social Sciences* (Dakar: CODESRIA Book Series, 1997) at 81. This invisibility and misrepresentation is gradually being addressed in the rapidly growing academic journal articles publications as will be shown subsequently.

<sup>8</sup> For example, Malcolm Evans and Rachel Murray, (eds.), *The African Charter on Human and Peoples' Rights. The System in Practice 1986-2000* (Cambridge: Cambridge University Press, 2002); G. Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (Ardsey; New York: Transnational Publishers, Inc., 2003); Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge: Cambridge University Press, 2004); F. Ouguergouz, *The African Charter on Human and Peoples'*

that challenges to the relevance of rights and law for African women do not encourage inquiries into women's rights.<sup>9</sup> Scholars adopting this approach query the benefit in a human rights law approach, cautioning its application as a tool for achieving justice for African women. Disinterest, or even societal hostility towards any assertion of rights by women, may also prevent interest in promoting their rights.

Additionally, questions of awareness, accessibility and participation may also inhibit a broad exploration of the value of using mechanisms of the African regional regime to promote and protect women's rights. Apart from the relatively high levels of illiteracy among many African women,<sup>10</sup> inadequate publicity constrains access to knowledge relating to the regime at the domestic level. Where knowledge of the regime may be established, accessibility and participation present another challenge to any detailed inquiry. Given the difficulties in accessing domestic remedies, such as disinterest in litigation, the likelihood of using the regional mechanisms is even more remote. This is particularly so because of the requirement of exhaustion of domestic remedies before recourse to the African system (for both the African Commission and the Court). The ability of African women to actively participate at the regional level is also exacerbated by inequalities of resources and power among women.

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*Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nihjoff, 2003); U. O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague: Martinus Nihjoff, 1997). Of these texts, *Human Rights in Africa: From the OAU to the African Union* provides the most extensive analyses of women's rights. Chapter Five analyses the role of the African system in the protection of women's rights, the progress made and the problems faced. Given the limit of the space, the chapter does not cover the whole gamut of women's rights under the regime. The other texts provide random analysis of women's rights under the African system.

<sup>9</sup> Feminists assert that male dominance in international human rights law is characteristic of traditional Western thought and its historic neglect of the needs of women. This makes the human rights venture questionable in relation to women. See Hilary Charlesworth, "Human Rights: Men's Rights" in J. Peters and A. Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995) at 103. Added to this, African and other third world scholars criticize the Eurocentric character of human rights: M. Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania, 2002). For discussions on the relevance of human rights to African women, see Farendia Banda, *Women Law and Human Rights* (Oxford: Hart Publishing, 2005) at 298.

<sup>10</sup> According to UNESCO, one in five adult are still not literate and two-thirds of them are women. <<http://www.unesco.org/en/literacy/>>.

Thus, this chapter undertakes an excursion into the literature on the African regional human rights regime in order to identify assumptions about its institutions. It argues that these assumptions flow from mis-representations, exaggerations and inaccurate analysis of African regional institutions. The chapter identifies underlying conventional or dominant assumptions concerning these institutions, including their origins and the factors that sustain and perpetuate them. It attempts to unveil alternatives through a critical re-reading of literature regarding the African regional human rights regime. In so doing, it not only touches on the legitimacy of such institutions, but also on the development, growth and need to strengthen such institutions within the context of the increasing trend towards a “global State.”<sup>11</sup>

The chapter also suggests that the assumptions about African women in conjunction with assumptions about the African regional regime pose severe and double challenges to women, their rights, and their access to, participation in and engagement with the regional regime. It recognises the need to identify and reassess basic presumptions about African women, their causes and how they are sustained, as well as the linkages with assumptions regarding Africa and its initiatives. The chapter also examines the challenges and consequences that such assumptions pose to women’s engagement with the regional regime and implementation of their rights. It attempts to redefine and reconstruct the conventional paradigm regarding African women and their role in the regional regime, so as to devise new ways of understanding their roles and engagement. Given the shifts taking place with regards to knowledge about African human rights initiatives it is argued that more creative space is now open for women’s involvement.

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<sup>11</sup> B. S. Chimni, “A Just World under Law: A View from the South” (2007) 22 *Am. U. Int’l L. Rev.* 199 at 204.



## II. Conventional Assumptions about African Human Rights Initiatives

Earlier analyses of human rights in Africa focussed on discourses relating to development and refugee problems or on exposing human rights violations by African leaders.<sup>12</sup> The subsequent direct involvement of scholars and activists with the drafting of the *African Charter* and the establishment of the African Commission on Human and Peoples' Rights (African Commission) invigorated more extensive analyses of human rights.<sup>13</sup> Nevertheless, negative assumptions permeated much of the literature in different guises, with few exceptions until more recently.

The conventional assessment of African regional institutions has been largely unfavourable. Such assessment, often marked by assumptions endorsed by scholars of both Northern and non-Northern origins, serves to entrench a negative understanding about the regime on the consciousness of readers as well as the Africans that the regime seeks to protect. Arguably, negative assumptions of the regional regime may work at cross-purposes with the emancipatory potential of human rights, resulting in a defeatist attitude that may hinder any attempt to promote human rights, especially by using the mechanisms of the regime. Conversely, constructive representations of its potential may invigorate interest in the regime, resulting in beneficial outcomes to all concerned. Thus, a critical evaluation of the scholarly literature relating to the regime, its institutions and processes is necessary to determine what constitutes these negative assessments, how they have been sustained and whether a shift away from them is in view.

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<sup>12</sup> The regional institutionalisation of human rights commenced with the adoption of the *African Charter*. The focus, prior to this, was mostly on the human rights suppression and violations by some African leaders such as Macias Nguema of Equatorial Guinea and Idi Amin of Uganda, mostly by activists, scholars and writers from the West concerned with questions in Africa: Issa Shivji, *The Concept of Human Rights in Africa* (London: CODESRIA Book Series, 1989) 9-10.

<sup>13</sup> For instance, see Isaac Nguema, "Human Rights Perspectives in Africa: The Roots of a Constant Challenge" (1990) 11 (3-4) *Human Rights Law Journal* 261. Isaac Nguema was a member and former President of the African Commission on Human and Peoples' Rights.

## 1. Historical and Contemporary Discourse on Africa and African Initiatives

Certain problematic assumptions in academic literature, traceable to the history of Africa written during the colonial and early post-colonial periods can also be found in legal and human rights discourses. Such assumptions often have consequences for the development of African initiatives, such as the regional human rights regime. This section undertakes a broad analysis of such assumptions and how they have been advanced over time from the pre-colonial period through to the post-colonial period.

Any accurate account of Africa's contemporary history must be located within its history of colonialism and imperialism. Prior to its colonial period, transmission of African history relied primarily on oral tradition (spoken history) passed from one generation to the next.<sup>14</sup> The first written accounts on Africa comprise records of European explorers, often "shrouded in myth, distorted by legends of ferocious people with bizarre physical features."<sup>15</sup> With the advent of colonialism, written accounts about Africa took on a different outlook, whereby the central ideology of domination produced ideological constructs aimed at strengthening the colonial enterprise. Historical events like the Atlantic slave trade took on the perspectives of the colonisers, largely neglecting or otherwise not representing the perspectives of the colonised.<sup>16</sup> One commentator observed that "[v]alue-laden statements about the inhabitants of colonised countries were presented as 'facts' against which there was little possibility of argument."<sup>17</sup> The dynamics of struggles and resistance by Africans to the colonial encounter were largely

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<sup>14</sup> J. F. Ade Ajayi and Michael Crowder (eds.), *History of West Africa* (London: Longman, 1987).

<sup>15</sup> Robert O. Collins and James M. Burn, *supra* note 4 at 175.

<sup>16</sup> *Ibid*, at 227. Some authors try to justify or absolve the West of the violence and pain inflicted on Africans during the Atlantic slave trade by arguing that the number of African transported across the Atlantic during the trade was fewer than portrayed by historians, implying that more Africans were enslaved in Africa by Africans. While it is difficult to prove the accuracy of such a claim, the point is that notwithstanding the number of Africans shipped off for slavery, the harm caused as a result of the trade remained indisputable.

<sup>17</sup> Sara Mills, *Discourse* (London: Routledge, 2004) at 97.

excluded from this literature.<sup>18</sup> The impression conveyed to the average reader of African history consisted of impersonal, mechanistic, and predetermined forces that permitted Africans little, if any, control over their own destinies.<sup>19</sup> This one-sided narrative permeated modern literary interpretations and accounts of Africa even until the scholarly explosion of African history in the 1960s decade of independence.<sup>20</sup>

Such conventional assumptions about Africa consist of both external and internal components. The external component largely propounded by scholars from the North identifies Africans as genetically backward, with African culture as barbaric and its religion, as well as customs, as superstitious. This component, traceable to a paternalistic mentality and a feeling of superiority, assumes that African peoples lack any substantive history worth reiterating except as one of tribal battles and internecine wars.<sup>21</sup> In his rejection of this position, Ndahinda captures this commonly propagated sentiment as follow:

Africa carries in the popular mind an infamous reputation as a theatre of never-ending inter-ethnic rivalries and conflicts culminating in the most atrocious human rights violations.<sup>22</sup>

This external component gains acceptance in classical international law with its Westphalian foundation. Originally, international law sought to regulate the balance of power between relatively powerful states, giving them privileges and rights often contrary to the interest of non-

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<sup>18</sup> Issa G. Shivji, *supra* note 12 at 2. According to Shivji, the intellectual domination of Africa was not a conspiracy but a reflection of the continent's domination by imperialism.

<sup>19</sup> Collins and Burn, *supra* note 4 at 2.

<sup>20</sup> Adu A. Boahen, *African Perspective of Colonialism* (Baltimore: John Hopkins University Press, 1987) at 94-114. Unlike many historians, Professor Boahen undertakes a balanced examination of the colonial system in Africa. He observes both the positive and negative political, economic and social legacies of colonialism. While he acknowledges the positive, he observes that the debit side of colonialism far outweighs the credit side.

<sup>21</sup> This is the common portrayal of non-western culture in foreign literature. Edward Said, *Orientalism* (New York: Vintage Books, 1979); and Felix Mukwiza Ndahinda, "Human Rights in African Political Institutions: Between Rhetoric, Practice and the Struggle for International Visibility" (2007) *Leiden Journal of International Law* 699 at 700.

<sup>22</sup> *Ibid*; see also, Issa G. Shivji, *supra* note 12 at 1.

European colonised people, regarded as “objects rather than subjects of the law.”<sup>23</sup> This demarcation into subjects and objects is further explained in Antony Anghie’s examination of the relationship between international law and colonialism.<sup>24</sup> According to him, colonialism was central to the construction of international law, while the question of cultural difference animated its civilising mission.<sup>25</sup> Anghie argues that:

The imperial idea that fundamental cultural differences divided the European and the non-European worlds was profoundly important to the civilizing mission in a number of ways: for example, the characterization of non-European societies as backward and primitive legitimized the European conquest of these societies and justified the measures colonial powers used to control and transform them.<sup>26</sup>

The internal component somewhat linked with the external component converges in human rights discourses regarding Africa. Mamdani, for example, traces the origin of the internal component, often perpetuated by educated (elite) Africans, to the differentiated rules, practices and policies instituted by the colonising ruling class over the colonised.<sup>27</sup> The colonised people and Africans in particular were categorised as the “Other.”<sup>28</sup> Observers suggest that “the subject populations internalised their classification as other,”<sup>29</sup> generating a deep feeling of inferiority as well as a loss of dignity. According to Adu Boehen, this internalisation embodied in the notion of a “colonial mentality,” resulted in resignation and submission to the colonisers’ ideas,

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<sup>23</sup> Felix Chuks Okoye, *International Law and the New African States* (London: Sweet & Maxwell, 1972) at 176.

<sup>24</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 1994)

<sup>25</sup> *Ibid.*, at 3.

<sup>26</sup> *Ibid.*, at 3-4.

<sup>27</sup> Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and Legacy of Late Colonialism* (Princeton, New Jersey: Princeton University Press, 1996).

<sup>28</sup> Achille Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001) at 2-3. Mbembe observes that it is in relation to Africa that “absolute otherness” is taken the farthest. He observes that Africa stands out as the supreme receptacle of the West’s obsession with the facts of “absence”, “lack” and “non-being”, of “identity and difference, of negativeness – in short, nothingness.”

<sup>29</sup> The apparatus of domination employed by European powers transcends the technological, economic and ideological: Crawford Young, *The African Colonial State in Comparative Perspective* (New Haven: Yale University Press, 1994) at 44.

which has yet to disappear after decades of independence.<sup>30</sup> It is common not only for Africans to subscribe uncritically to colonial perceptions of what is true,<sup>31</sup> but also for many African intellectuals to parrot Africanist and other foreign authors, often without acknowledging history or context. The conventional belief that traditional African States never knew nor recognised the existence of human rights belongs to the current of thought which even today negates the very existence of rights in these societies.<sup>32</sup> This belief is rooted in the vision of Africa as a land of pagans, fetish practices, irrational and ignorant inhabitants and has produced consequences diametrically opposed to any attempt to develop or promote human rights to the disadvantage of Africans.<sup>33</sup> Africans, to a large extent, internalise this external component of self-perception in a variety of ways, crystallising in “Africa’s collective consciousness.”<sup>34</sup>

Both the internal and external components of these assumptions are sometimes reproduced within academic legal literature drawn from international law and international human rights law in particular. Affirming this view, Odinkalu states:

The perception of the African regional human rights systems generally has to some degree been shaped by and filtered through a pessimism about Africa that often consigns the continent to a fate worse than making peace with both mediocrity and despondency.<sup>35</sup>

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<sup>30</sup> Adu A. Boahen, *supra* note 20; other historians also recognise this mentality, prescribing ways for Africans to regain consciousness of themselves. See Steve Biko, *I Write What I Like* selected and edited by Aelred Stubbs CR, Introduced by N. Barney Pitso (London: Penguin Books, 1978) (Steve Biko’s Black Consciousness against South African Apartheid sought to redirect the African mind to regain consciousness of herself as a person in her own right and not an appendage to the white person. See also, Kwame Nkrumah, “Consciencism” in Emmanuel C. Eze (ed.), *African Philosophy: An Anthology* (Oxford: Blackwell Publishers, 1998) at 93; Isaac Nguema, *supra* note 13 at 264.

<sup>31</sup> Ngũgĩ Wa Thiong’o, *Decolonizing the Mind: The Politics of Language in African Literature* (London: Heinemann, 1986).

<sup>32</sup> Isaac Nguema, *supra* note 13 at 264.

<sup>33</sup> *Ibid.*

<sup>34</sup> Connie Ngondi-Houghton, “Donors and Human Rights NGOs in East Africa: Challenges and Opportunities” in Mutua Makau (ed), *Human Rights NGOs in East Africa: Political and Normative Tension* (Philadelphia: University of Pennsylvania, 2008) at 166. This refers to the acceptance of the negative assumptions about Africa and African initiatives. See, Ngondi-Houghton’s summary of the negative depiction of Africa.

<sup>35</sup> Chidi Anselm Odinkalu, “Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples’ Rights” in Malcolm D. Evans and Rachael Murray (eds.), *The African Charter on Human and Peoples’ Rights. The System in Practice 1986-2000* (Cambridge: Cambridge University Press, 2002) at 178.

Given these assumptions it is reasonable to question whether African institutions and scholars have broken or can break this hold of paternalistic colonial mentalities and collective consciousness, especially in the literature relating to regional human rights institutions.

## **2. Assessing African Regional Human Rights Institutions in Legal Literature**

Confirming the existence of the above assumptions in international legal discourse and literature, Adrien Katherine Wing, *et al.*, observes that:

In the Western hemisphere, Africa is frequently viewed as a basket case and ‘welfare continent’ rather than a market place and exporter of values and norms. This is particularly the case in scholarly and policy-making circles in the U.S. Nowhere is there more ignorance and misunderstanding about Africa than among American legal academics and the U.S. foreign policy establishment.<sup>36</sup>

These assumptions are more the norm than the exception. Thus, this subsection analyses scholarly assumptions about the regional human rights framework and their relevance or impact on development of the regional regime.

Gradual interest in human rights in Africa among international lawyers coincided with the establishment of the OAU. Its preoccupation with decolonisation, clamour for self-determination, struggles to end apartheid in South Africa as well as attempts to deal with the problem of refugees arising from the conflicts in parts of Africa, all had human rights implications that aroused scholarly interest.<sup>37</sup> Also, the inclusion of human rights as part of the ideological tool in the West’s Cold War armoury stimulated interest in the subject along with

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<sup>36</sup> Adrien Katherine Wing, Jeremy Levitt and Craig Jackson, “An Introduction to the Symposium: The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift?” (2003) *Transnat’l L. & Contemp. Probs.* 1.

<sup>37</sup> Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007) at 164-5.

other developments on the international scene.<sup>38</sup> Foreign Africanist and African scholars, and activists as well as activist institutions such as Amnesty International and Human Rights Watch, also commenced studies on human rights in Africa. Despite the difficulty inherent in making categorical distinctions within the literature generated, the latter group produced reports centred on exposing human rights violations in African countries.<sup>39</sup> Others produce literature with a mix of analytical and expository content, often posited as neutral but sometimes revealing conceptual biases.<sup>40</sup>

Two recent articles highlight the biases and particularly the neglect apparent in discourses on human rights in Africa. These are “International Human Rights: Neglect of Perspectives from African Institutions” by Rachel Murray and “Africa in International Human Rights Textbooks” written by Christof Heyns and Magnus Killander.<sup>41</sup> Murray criticises the international neglect of perspectives from African institutions, opting rather to focus on significant developments and contributions of African institutions to international human rights law.<sup>42</sup> Accordingly, Murray decries the negative comments and limited prospects ascribed to the African system by many Northern scholars, as well as the “one-way traffic” flow in Western [Northern] scholarly perceptions of African institutions, with their failure to imagine that they can learn anything from Africa.<sup>43</sup> She identifies the example of the 2000 edition of the textbook, *International*

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<sup>38</sup> *Ibid.*, at 166-7. Some of the developments include the call by the UN for the establishment of a regional mechanism, the adoption of the Covenants on Civil and Political as well as the Economic, Social and Cultural Rights, as well as the policies of the United States of America that emphasise human rights.

<sup>39</sup> Issa Shivji, *supra* note 12 at 9. As recently as 2003, Amnesty International painted a gloomy picture of the human rights situation for the continent: Africa Regional Overview 2003, Amnesty International, online: <[www.amnesty.org/report](http://www.amnesty.org/report)>, (accessed 20 July 2008).

<sup>40</sup> Issa Shivji, *ibid.*

<sup>41</sup> Rachel Murray, *supra* note 3 and Christof Heyns and Magnus Killander, *supra* note 5.

<sup>42</sup> Rachel Murray, *ibid.*, at 203.

<sup>43</sup> *Ibid.*, See also Obiora C. Okafor and S. C. Agbakwa, “Re-imagining International Human Rights Education in our Time: Beyond Three Constitutive Orthodoxies” (2001) 14 *Leiden Journal of International Law* 563 at 576.

*Human Rights: Law Politics, and Morals*.<sup>44</sup> According to Steiner, *et al.*, the African human rights regime is “[t]he newest, the least developed or effective (in relation to the European and Inter-American regimes), the most distinctive and the most controversial of the three established regional human rights regimes....”<sup>45</sup> Further, the authors maintain that “the basic structure and the tasks of the Commission and the Court do not introduce novel themes ... (to the examination of the architecture of intergovernmental human rights institutions.”<sup>46</sup> To Murray these statements imagine African institutions as “third generation organs of less value than European or Western institutions.”<sup>47</sup> She bemoans the characterisation of these institutions as inexperienced, ineffective and irrelevant, despite their relative youthfulness when compared with older and more experienced European and Inter-American counterparts.<sup>48</sup>

Murray locates the rationale for this position in the assumption that the earlier systems are transplantable and applicable, with a high probability of being replicated in the African context.<sup>49</sup> The neglect of any evolutionary analyses, as well as the practice of allocating limited space to presenting and analysing the African human rights regime, exposes the derision with which some Northern scholars perceive the regime.<sup>50</sup> Murray submits that these scholars’ “too ready dismissal of African institution has been due to neglect by international human rights discourse of views outside the ‘ruling’ or ‘dominant’ Western and European States.”<sup>51</sup> Although the European, Inter-American and the African human rights systems have comparable basic

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<sup>44</sup> A cursory examination of its latest (2008) edition also neglects to disclose any change in observations about the implementation of the *African Charter*. Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context, Law, Politics and Morals* (Oxford: Oxford University Press, 2008).

<sup>45</sup> *Ibid.*, at 1063.

<sup>46</sup> *Ibid.*

<sup>47</sup> Rachel Murray, *supra* note 3 at 193. Murray cites the example of Geoffrey Robertson’s statement that the African Commission is “pathetic,” among other unsavory descriptions: Geoffrey Robertson, *Crimes Against Humanity. The Struggle for Global Justice* (London: Penguin, 2000) at 60.

<sup>48</sup> Murray, *ibid.*, at 195.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, at 196.



structures, save for progressive modifications to improve their effectiveness, the above underscores the idea of a system devoid of anything significant to offer. Also, the statement that the African system fails to introduce anything new in terms of structure and tasks impliedly negates any actual or potential contribution of its system to the mainstream.

Also, through an analysis of a selection of six recent international human rights textbooks, Christof Heyns and Magnus Killander express concern about the continued neglect of Africa in the world literature on human rights.<sup>52</sup> While they welcome the increased consideration of the African human rights system in some human rights textbooks, the authors express concern about the frequency or quantity as well as quality of references to the African system.<sup>53</sup> They observe, for example, that some of the texts fail to mention recent developments within the African system that have positive human rights implications, such as the increasing interest in human rights at the regional level arising from the adoption of the AU *Constitutive Act* and the human rights mandate of the African Peer Review Mechanism (APRM) established in 2002.<sup>54</sup> The authors also highlight discrepancies between the presentation of the African system and its actual operation, such as an analysis that the African system considers gross violations of human rights only and not individual complaints.<sup>55</sup> Heyns and Killander suggest that the increased focus on human rights standards in Africa may ensure that these standards are taken more

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<sup>52</sup> Christof Heyns and Magnus Killander, *supra* note 5. The textbooks examined in the article are: T. Buergenthal, D. Shelton, and D. P. Stewart, *International Human Rights in a Nutshell* (3<sup>rd</sup> ed.) (St. Paul, Minn: West Group, 2002); Jack Donnelly, *Universal Human Rights in Theory and Practice* (2<sup>nd</sup> ed.), (Ithaca: Cornell University Press, 2003); Manfred Nowak, *Introduction to the International Human Rights Regime* (Leiden: Martinus Nijhoff, 2003); Rhona. K. M. Smith, *Textbook on International Human Rights* (2<sup>ne</sup> ed.) (Oxford: Oxford University Press, 2005); Javaid Rehman, *International Human Rights Law – A Practical Approach* (London: Longman, 2002); and Christian Tomuschat, *Human Rights – Between Idealism and Realism* (Oxford: Oxford University Press, 2003).

<sup>53</sup> *Ibid.* at 4.

<sup>54</sup> *Ibid.*, at 5.

<sup>55</sup> Nowak and Buergenthal, *supra* note 52, offer this analysis by comparing the individual complaint mechanism of the African system with the ECOSOC 1503 procedure. Heyns and Killander observe that the literal reading of Article 58 of the *African Charter* may account for this interpretation but the African Commission's practice considers this as a special procedure. See also *Jawara v The Gambia* (2000) AHRLR 107 paras. 41 and 42. The Commission restated its power to hear individual complaints.

seriously by those in Africa and abroad. The authors also observe that increased accessibility of the decisions of the African Commission may foster greater accuracy in the portrayal of the African system.<sup>56</sup>

The analyses in these articles point to the seriousness with which scholars are beginning to consider African regional human rights institutions. It also reveals the imperative for further examination. As noted in the previous chapter's analysis on regional protection of women's rights, none of the regional systems have attained perfection. There are continuing restructuring and developments aimed at improving the implementation of rights within these systems. Therefore, relegating African human rights institutions to the margins of international human rights discourse and the exclusion of its contributions to the development of rights serves no useful purpose. Rather, it underscores the continuing questioning of the legitimacy of the universality of rights. While increasing scholarly contributions, both non-Northern and Northern, to the regional human rights discourse have resulted in more inclusive and accurate exposition of the regime's practices and processes, more is still required in this area.

### **3. Re-Imagining African Human Rights Initiatives**

This subsection argues that the assumption that the regime cannot contribute anything significant to the development of human rights underlying critiques of African initiatives is no longer supportable. Importantly, while critical analyses of African institutions are crucial for framing problems, suggesting faults and responsibilities, and possibly making recommendations for resolution or reform, the inevitability of negative critiques wherever African institutions

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<sup>56</sup> Christof Heyns and Magnus Killander, *supra* note 5. *Ibid.*, at 13.

neglect(ed) to follow the dominant Northern-style liberal democratic institutional apparatus becomes problematic. A critical examination of the regime, conducted with a thorough understanding of the socio-economic, political and other events surrounding its activities, indicates actual progress made by the African regime in the field of human rights.

Despite the relatively underdeveloped public information and scholarly literature, the ineffectiveness, failures and deplorable human rights record of the OAU have been a predominant focus, with few exceptions until recently.<sup>57</sup> For example, it is not unusual for some scholars to assert that apartheid in South Africa was the sole uniting factor of the OAU, especially in light of the internal divisions, intra-African conflict and despicable actions of some African leaders.<sup>58</sup> While this section does not engage a debate about the accuracy of such a position, the simple observation that the OAU outlived the apartheid regime is telling. Others refer vaguely to limited successes of the OAU in the field of conflict prevention, management and resolution, concluding that it was not well positioned as a political organisation to protect the human rights of individuals.<sup>59</sup>

Further, notwithstanding the symbolic institutional departure from its alleged egregious human rights inclination that the transition of the OAU into the AU signifies, some commentators identify nothing but a bleak future for human rights in the region. Underlying this reasoning is an assumption that, not only does the AU, though relatively new, retain some of the inadequacies and problems of the defunct OAU, but it also has to contend with new ones, such

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<sup>57</sup> Corrine A. A. Packer & Donald Rukare, "The New African Union and Its Constitutive Act" (2002) 96 (2) Am. J. Int'l L. 365 at 366.

<sup>58</sup> Zednek Cervenka & Collin Legum, "The Organization of African Unity in 1978: The Challenge of Foreign Intervention (1978-79) 11 Afr. Contemp. Rec. Ann. Surv. & Docs. A25.

<sup>59</sup> Gino J. Naldi, "Future Trends in Human Rights in Africa: The Increased Role of the OAU?" in Malcolm D. Evans and Rachel Murray (eds.), *supra* note 35 at 5.

as globalisation and increasing poverty in many parts of Africa.<sup>60</sup> The remarkable speed with which the *Constitutive Act* of the AU was adopted and ratified, its content and the general lack of popular participation in the transformation process, all drew criticisms from commentators. The negative and sometimes contradictory positions expressed by scholars point to the need for a re-contextualization and re-examination of certain assertions about the regional human rights regime.

Indeed, there appears to be a gradual shift from the negative and contradictions to recent expressions of the positive potential of African human rights initiatives. Such writings recognise that the concept and practice of human rights at the regional level was conditional upon the history as well as the political concerns of African leaders at the time. This genre of analyses locates the creation of the human rights regime within its historical pan-African setting and struggles against the remaining vestiges of colonial domination, accounting for the selective interest of African leaders in human rights. It does not ignore the simultaneous deployment of human rights rhetoric – self-determination, for example, – in struggles against colonialism, as well as apartheid in South Africa, by these same leaders.<sup>61</sup> Commentators, in this regard, suggest that considering the state-centric character of contemporary international human rights law, apparent in the *UN Charter*, it was not surprising that the *OAU Charter* centralised state interest rather than the interests of peoples.<sup>62</sup> Thus, literature in this genre largely emphasises the OAU successes within the limits of its mandate without overlooking its shortcomings. Adopting this approach, Naldi concludes that, though a latecomer to the field of human rights,

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<sup>60</sup> Nsongurua J. Udombana, “Can the Leopard Change its Spots? The African Union Treaty and Human Rights” (2002) 17 Am. U. Int’l L. Rev. 1177.

<sup>61</sup> P. Mweti Munya, “The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation” (1999) 19 B.C. Third World L. J. 537 at 542; O. Ojo, “Understanding Human Rights in Africa” in J. Berting, *Human Rights in A Pluralist World: Individuals and Collectivities* (Netherlands: Nationale UNESCO, 1990) at 15.

<sup>62</sup> The preamble and Article II with the exception of (1) (b) is indicative of this position. See Munya, *ibid*.

the OAU has made important contributions, such as the inclusion of the rights to self-determination, to the development of international human rights law, at least at a theoretical level.<sup>63</sup>

Likewise, despite its imperfections, the African Commission has adopted procedures and practices that attempt to strengthen implementation of human rights. Its rules of procedure empower the African Commission to accept individual complaints unspecified in the *African Charter*.<sup>64</sup> Analysing the individual complaint procedure of the African Commission, for example, Odinkalu observes that “[a]ny temptation to dismiss [the African Commission] as a worthless institution today must be regarded as premature, ill-informed, or both.”<sup>65</sup> He thus condemns:

... the perception of the African regional system that is often conveyed in much of the available literature as something of a juridical misfit with a treaty basis that is dangerously inadequate and an institutional mechanism [African Commission] liable, ironically to be stated as errant when it pushes the envelop of interpretation positively.<sup>66</sup>

Similarly, Doebbler observes that, “the commission has extended human rights protections to areas where no other international human rights body has dared to tread.”<sup>67</sup> He suggests that, not only has the African Commission been dealing with the problems with which it is confronted; it has been more creative in dealing with the promotion and protection of human rights than any

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<sup>63</sup> G. Naldi, *supra* note 59 at 35.

<sup>64</sup> Apart from communications from states (Art. 47), the *African Charter* merely provides for “other communications” (Art. 55).

<sup>65</sup> Chidi Anselm Odinkalu, “The Individual Complaints Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment” (1998) 8 *Transnat’l L. & Contemp. Probs.* 359 at 365.

<sup>66</sup> Chidi Anselm Odinkalu, “Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples’ Rights” in Malcolm Evans and Rachel Murray (eds.), *supra* note 35 at 179.

<sup>67</sup> Curtis F. J. Doebbler (Dr.), “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 *Transnat’l L. & Contemp. Probs.* 7 at 14.

other international human rights body.<sup>68</sup> Recent institutional, legal and other developments also affirm the relevance of the African Commission and the African system generally.<sup>69</sup> Examples are the more extensive deployments of thematic procedures of the African Commission than before, such as the thematic mechanisms of the Special Rapporteurs,<sup>70</sup> the processes set in motion to enhance its capacity,<sup>71</sup> and the significant decisions arising from its individual complaint procedures.<sup>72</sup> Due to the quasi-judicial status of the African Commission, rather than view its findings as merely persuasive authority, some scholars point to the textual provisions of the *African Charter* and the binding nature of the AU's decisions in support of an argument that such findings have binding legal force, both internationally and nationally.<sup>73</sup> These scholars argue that the Commission is competent to issue remedies as a quasi-judicial body resembling a judicial body.<sup>74</sup>

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<sup>68</sup> *Ibid* at 25. Doeblbler observes that in the communications 48/90, 50/91, 52/91, and 89/93 *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, the African Commission precludes governments found to have committed serious and massive violation of rights from relying on the exhaustion of domestic remedies. See Doeblbler, *ibid.* at 25.

<sup>69</sup> For literature on recent development in the African system, see for example Frans Viljoen and Lirrette Louw, "State Compliance with the Recommendation of the African Commission on Human and Peoples' Rights 1994-2004" (2007) 101 *Am. J. Int'l L* 1; D. M. Hollywood, "It Takes a Village...Or at Least A Region: Rethinking Peace Operations in the Twenty-First Century, the Hope and Promise of African Regional Institutions" (2007) 19(1) *Florida Journal of International Law* 75; Frans Viljoen, "Promising Profiles: An Interview with the Four New Members of the African Commission on Human and Peoples' Rights" (2006) 6 *African Human Rights Law Journal* 237; George Mukundi Wachira, "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.

<sup>70</sup> The African Commission adopted resolutions of the human rights situations in Zimbabwe, Sudan, Uganda and Ethiopia using its thematic procedures. See 18<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> Activity reports of the African Commission on Human and Peoples' Rights EX.CL/199 (VIII) 28 July 2005, EX.CL/279 (IX) 25-29 June 2006, and EX. CL/322 (X) 25-26 January 2007 respectively. Other special procedures of the Commission such as the Special Rapporteurs and the Working Groups are also increasingly more productive. See also Chaloka Beyani, "Recent Developments in the African Human Rights System 2004-2006" (2007) 7(3) *human Rights Law Review* 582.

<sup>71</sup> Report of the Brainstorming Meeting on the African Commission, 20<sup>th</sup> Activity Report Annex II.

<sup>72</sup> See for example Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*.

<sup>73</sup> Frans Viljoen and Lirette Louw, "The Status of the Finding of the African Commission: From Moral Persuasion to Legal Obligation" (2004) 48 *Journal of African Law* 1 at 18.

<sup>74</sup> *Ibid.*

The issue of legal force of decisions made at the regional level is now resolved with the establishment of the African Court of Human and Peoples' Rights.<sup>75</sup> Although yet to make its mark, a few commentators are resolute concerning the African Court's potential to contribute to strengthening human rights and the regional system. Such literature maintains that, given the existence of competent African jurists, the African human rights regime will gain greater legitimacy, for example, if the African Court gives sound advisory opinions.<sup>76</sup>

It is impossible to identify particular scholars holding particular perceptions about the regional human rights regime because of the frequency of the shifts in scholarly positions. However, the goal of this chapter is to identify the negative assumptions largely derived from the idea that nothing innovative or substantial can be learned from Africa or African initiatives. It engages with critical analysis of the regime in order to purge it and the literature on the African human rights regime of the vestiges of such assumptions by recognising its contributions as well as by reconceptualising and restructuring not only the institutions but the emerging literature. The purpose is to ensure that the regime is not disregarded but strengthened to better impact the people which it seeks to benefit. Critics must beware of underlying assumptions, whether subtle or obvious, that may discourage the creative development or use of the regime. As noted earlier, whereas critiques are generally meant to point to problems and challenges with the result of stimulating action to address them, the literature on the regional regime requires more balanced inquiries. The overall contribution of the African regional human rights regime to norm-making and institutionalising human rights in Africa should not be understated; neither can its potential for the future be ignored.

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<sup>75</sup> In July 2008, the *Protocol to the Statute of the African Court on Justice and Human Rights* was adopted by the Assembly of Heads of State and Government of the AU. This Protocol merges the Protocol on the African Court on Human and Peoples Rights with the African Court of Justice, an organ of the AU. The Protocol shall enter into force one month after the ratification of fifteen (15) member states.

<sup>76</sup> Doebller, *supra* note 67 at 27.

### **III. Revisiting Dominant Critiques of African Women**

It is critical to have a balanced analysis infused into the understanding and the research regarding African women with the aim of enabling them to improve their status without paralysing them with predominantly negative assumptions. For this purpose, it is necessary to examine the African human rights literature regarding women in order to reconstruct and reconceptualise our understanding of the existing literature from an African feminist approach that incorporates the Third World perspective.<sup>77</sup> Before such a reconstruction, it is necessary to understand the dominant popular perception of African women as well as to examine the ways in which women have been represented in the literature on the African human rights regime and the challenges posed by these representations.

This section considers more closely the social, economic, political and cultural assumptions that underpin the understandings of the African women in socio-legal literature by historicising and contextualising them, where necessary. Bearing in mind the challenges confronting Africa and African institutions articulated above, this section reviews the dominant attitudes, stereotypes and perceptions about African women. It deconstructs these assumptions in order to better understand their lived experiences and contexts.

#### **1. Economic Perception**

It is impossible to exclude African women from the forces of global and local socio-economic experiences that impact their everyday life. Neo-liberalism, the guiding paradigm of economic or corporate globalisation and its trade liberalisation, privatisation and deregulation significantly impact the economies of African societies, which in turn have significant impacts on their

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<sup>77</sup> For a brief introduction of these approaches see Chapter One of this dissertation.



peoples, including women.<sup>78</sup> The rhetoric of a neo-liberal market economy and free trade, as bases for releasing the creative potential of private capital, as the engine of economic growth, with its attendant privatisation of public enterprises and services, has yet to translate into material prosperity inside African societies. Women are severely affected by neo-liberal economic policies that have the effect of depriving them of resources, such as land, capital and technology, as well as of adequate food, water and health care services. The majority of women in Africa continue to live under conditions of economic underdevelopment and social marginalisation.<sup>79</sup>

Despite worldwide condemnation of violence against women, economic policies and programmes with devastating impacts, especially on African women, adopted by African governments were not recognised as a form of violence inflicted on women until recently.<sup>80</sup> Structural Adjustment Programmes (SAPs) imposed upon African governments by the International Monetary Fund and World Bank, supposedly designed to alleviate economic problems of states, have aggravated the already disadvantaged economic position of women.<sup>81</sup> African governments adopt policies that enable them to abdicate basic social obligations to provide vital welfare and health services, as well as agricultural and industrial support, disproportionately affect women.

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<sup>78</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) at 7.

<sup>79</sup> Bisi Adeleye-Fayemi, "Creating a New World with New Visions: African Feminism and Trends in the Global Women's Movement" in Joanna Kerr, Ellen Sprenger and Alison Symington (eds.), *The Future of Women's Rights: Global Visions and Strategies* (London: Zeb Books, 2004) at 39.

<sup>80</sup> Abiola Akiyode Afolabi, "Neo-Liberalism: A Tool for Economic Violence: Making a Case for the Oppressed Women in Nigeria" in *Gender and Neoliberal Policies* (AWORD, 2006) at 243.

<sup>81</sup> Such policies have continued in the form of the so-called "economic reform strategies" which retain emphasis on privatisation and deregulation. For studies of SAP in Africa see, A. Adedeji, *Structural Adjustment for Socio-Economic Recovery and Transformation: the African Alternative* (Addis Ababa: UN Economic Commission for Africa, 1990).

The majority of women occupy the lower rungs of the employment ladder, due to low levels of education. In the formal sector, women employed in modern manufacturing, commercial, agricultural and public or private services operate under adverse conditions and are often the first to be retrenched and down-sized. Women are increasingly hired in peripheral, insecure, less-valued jobs including home-based, casual or temporary work characterised by very low pay, irregular income, little or no job or income security.<sup>82</sup> In addition, women occupy a large percentage of the informal sector in most African societies, with trade and agriculture comprising the dominant component.<sup>83</sup> Problems of access to productive resources, lack of regulation and legal or social protection, as well as an inability to compete with multinational producers, intensify the economic subordination of women working in this sector.

Other traditional processes exacerbate the economic situation of many women in African societies. In some areas, certain norms bar women from work outside the home and in other instances, conflict with household responsibilities prevents some women from undertaking regular employee working hours.<sup>84</sup> Women are also at a disadvantage as a result of discriminatory application of customary land tenure systems.<sup>85</sup> Several African societies still practice customs that exclude a woman's right of inheritance.<sup>86</sup> Statutory land law promulgated to address this problem has also proven inadequate to protect women.<sup>87</sup> Benefits and gains of

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<sup>82</sup> International Labour Office, *Global Employment Trends for Women 2004*, March 2004 at 12. Online: <<http://kilm.ilo.org/GET2004/DOWNLOAD/trendsw.pdf>>.

<sup>83</sup> UN, *The Millennium Development Goals Report 2005* (New York: UN, 2005) at 16.

<sup>84</sup> *Global Employment Trends for Women*, *supra* note 82.

<sup>85</sup> For instance, customary laws on inheritance are restrictive as regards women's ownership of property in many parts of Africa.

<sup>86</sup> In the Nigerian case of *Mojekwu v. Ejikeme* [2000] 5 NWLR 402 at 434 where a custom was invoked to exclude a woman's right to inheritance. The Court of Appeal upheld the woman's right. In Yorubaland in Nigeria also a woman cannot inherit the property of her deceased husband but the courts have interpreted this custom to the advantage of women in the *Akinnubi v. Akinnubi*, where the wife was able to apply for the letter of administration of the husband's estate as the next of friend over the estate.

<sup>87</sup> Women still have a hard time accessing land and necessary financial resources to acquire land.

post-colonial economic development have had minimal positive impact on the status of many African women.

Efforts to address existing and emerging economic challenges in Africa and other Third World countries are not in short supply. The Millennium Declaration<sup>88</sup> adopted by the 2000 UN Millennium Summit sets out eight Millennium Development Goals (MDGs) to address the main development challenges of member states. The MDGs, to be achieved by 2015, embody commitments and quantifiable targets for reducing poverty, educating all children, improving the status of women, improving maternal health, reducing child mortality, combating HIV/AIDS, malaria and other diseases, ensuring sustainability, and establishing an effective partnership between rich countries and developing countries. Although these goals single out women, among other vulnerable groups that require particular attention, efforts to achieve them are yet to make significant differences in the lives of African women.

Diversity within African societies, however, dictates caution in generalising about the economic situation of African women. Inequality between the sexes varies according to ethnic composition, geographical setting, social class and historical epochs.<sup>89</sup> For example, even though it is common to focus on the more precarious position of rural women, emerging trends contradict an exclusive focus on an *a priori* conception of a poor, backward and illiterate rural woman.<sup>90</sup> Without denying that rural women face innumerable challenges accessing resources, such as health care and education, more recent poverty indicators reveal a decreasing gap between the rural and urban poor, pointing to an emerging urban crisis in many African

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<sup>88</sup> The Millennium Assembly of the United Nations, online: <<http://www.un.org/millennium/>>, (accessed 24 September 2008).

<sup>89</sup> Abiola Akiyode Afolabi, *supra* note 80 at 244.

<sup>90</sup> Olufemi Taiwo, "Feminism and Africa: Reflections on the Poverty of Theory" in Oyeronke Oyewumi, *African women and Feminism: Reflecting on the Politics of Sisterhood* (Trenton, NJ: Africa World Press, 2003) at 61.

countries.<sup>91</sup> Those living in both rural and urban areas face similar but different levels of difficulties. Consider, for example, health care services: rural women face problems of accessibility to resources in terms of location (too far) and availability (not enough); urban women, on the other hand, face problems of cost (too expensive) as a determinant of access. Moreover, drawing on time-budget analysis from the Participatory Poverty Assessment in Nigeria, Afolabi observes that both rural and urban women work 17-18 hours a day, with some flexibility for rural women due to crop seasonality.<sup>92</sup> Similarly, contrary to the United Nations sources, the poverty gap between the male-headed household and the female-headed household is also closing. Women, as well as men, urban or rural, face numerous economic challenges; but women, by virtue of their long history of subordination, remain at a greater disadvantage.

The point is that the policies and programmes adopted by African states, based on neo-liberal policies, along with other economic disadvantages suffered by African women, intensify the conventional perception that locates the identity of the African woman at the bottom of the socio-economic ladder. It contributes to maintaining the status quo regarding the majority of African women. Yet, it is important to contextualise any discourse regarding African women in order to understand the complexity of the situation at hand. Assumptions proceed out of ideologies that take the form of “eternal truth;” and it is essential to acknowledge that there is no such truth regarding the situation of African women, thus the need to continually interrogate and reconstruct dominant perceptions.

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<sup>91</sup> Commentators observe that the scale of urban poverty is often underestimated because in recent times, increasing urbanisation leads the rural poor to move to urban areas: David Satterthwaite, “Rural and Urban Poverty: Understanding the Differences” Online: < <http://usinfo.state.gov/journals/ites/0901/ijee/satterthwaite.htm>>.

<sup>92</sup> A. Afolabi, *supra* note 80 at 247.

## 2. Socio-Political Perception

Historically, motherhood was considered women's predominant role during colonialism, especially by the colonisers as pointed out below:

Let our young women have an education; ... Our females must be qualified, because they are to be the mothers of our children. As mothers are the first nurses and instructors of children; from them children consequently get their first impressions, which being always the most lasting should be the most correct.<sup>93</sup>

Any advantage gained by a woman was ultimately not for her individual benefit but based on her pre-conceived social responsibility. This practice has been sustained, such that the prioritisation of this role ensures that any engagement in professional activities should not encroach on responsibilities of African women as mothers. As with most societies, a woman is expected to stay home to raise children and care for her family. Any activity that may impinge on her reproductive function evokes societal disapproval. Thus, the woman who chooses employment must reconcile this with family obligations; for example, accept part-time employment, if necessary, so that her job may not have negative effects on the child's schooling.<sup>94</sup> These attitudes, often rooted in history, deprive many women of the opportunity to pursue their own goals. While the importance of the role of mothers cannot be overemphasised, a negative meaning and understanding ascribed to motherhood is problematic and also perpetuates the low status for women.

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<sup>93</sup> Paul Gilroy, *The Black Atlantic: Modernity and Double Consciousness* (London: Verso, 1993) at 26 citing Delany on the relationship between the sexes.

<sup>94</sup> Jadesola Akande *et al.*, "The Perception of African Men and Women on the Equality between Men and Women – The Nigerian Case Study" in *The Perception and Representations of African Men and Women of Equality between Men and Women* (Association of African Women in Research and Development AAWORD, 2007) at 492-493. For the finding in Tunisia's report.

Second to her role as mother, the dominant perception of African women is that of wife under the absolute authority of her husband. The husband is the “supreme commander” of his home;<sup>95</sup> failure to submit in this role may incur violence. Little wonder that a dominant subject of inquiry regarding African women is violence against women in the private sphere (home) and in the public. Studies and commissioned reports focus on acts of violence, such as arbitrary deprivation of liberty, battering, dowry-related violence and rape. Social tolerance and justification for domestic violence are found in law in some cases, such as when wife battering is justified as reasonable chastisement of an erring wife.<sup>96</sup> An unmarried woman commands less respect than a married woman in most African societies.

Colonial laws similarly consolidated the status of African women as minors, not for the purpose of protecting but for restraining them. The positive aspects of the minor status of the child were not applicable to women. For instance, at common law, the status of the minor is temporary and precludes parental rights to a minor’s income and the alienation of immovables administered by a guardian.<sup>97</sup> Unlike the child, a woman retained the minority status in a permanent negative sense, with no independent power to either inherit or bequeath.<sup>98</sup>

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<sup>95</sup> *Ibid.*, at 277; see also, E. Ankumah, *The African Commission on Human and Peoples’ Rights: Practices and Procedures* (The Hague: Martinus Nijhoff, 1996) at 153-4.

<sup>96</sup> For example, the Nigerian *Penal Code* Cap 89 Laws of Northern Nigeria 1963, applicable to the Northern part of Nigeria.

<sup>97</sup> Ada Okoye, “Citizenship and Customary Law from Colonial to Commonwealth” Online: <[www.gwsafrica.rig/knowledge/ada.htm](http://www.gwsafrica.rig/knowledge/ada.htm)>.

<sup>98</sup> In *Magaya v Magaya* [1999] 3 LRC 35, the Supreme Court of Zimbabwe equated the status of a woman to that of a “junior male” or minor even though the 1982 *Age of Majority Act* of Zimbabwe provide that women above the age of 18 could not be treated as minors. See *Natal Code of Native Law* of 1891, the section on “personal status”, particularly ss. 94 and 143, cited in Mahmood Mamdani, *supra* note 27 at 117.

Related to their status as minors, African women are perceived as victims. Whether as mothers, wives, or minors, African women are perceived as ignorant, helpless and suffering victims.<sup>99</sup> They are portrayed as beasts of burden, subsistence farmers, or prostitutes, in dire need of rescue in contemporary social narratives.<sup>100</sup> This low status ascribed to African women as well as their perception as victims are perpetuated by post-colonial educational systems and media organisations applying gender stereotypes.

In Nigeria, for example, school texts and curriculum materials often portray females as passive in nature, having no interest in science education. The schools apply differentiated curriculum and schedules that encourage stereotypical choice of subjects. Home Economics, for example, is paired with Technical Drawing, Literature with Further Mathematics or Physics, such that the students are forced to select one of the options.<sup>101</sup> Such stereotyping, reinforced by academic substantiation and legal fossilization, coalesces to affirm the subjugation and marginalisation of women.

In the political sphere, the triumvirate concepts of human rights, democracy and good governance dominate developmental rhetoric as regards Africa and the rest of the Third World.<sup>102</sup> Despite calls for caution in their application to Third World societies, these concepts noticeably signify attempts to encourage systems of governance that promote rights and equal

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<sup>99</sup> Sylvia Tamale, "Feminist Legal Activism in the African Context" Online: <[http://www.gwsafrica.org/teaching/sylvia's%20paper.html#\\_ftn4](http://www.gwsafrica.org/teaching/sylvia's%20paper.html#_ftn4)>.

<sup>100</sup> Oyeronke Oyewumi, "The White Woman's Burden: African Women in Western Feminist Discourse" in Oyeronke Oyewumi, *African Women and Feminism: Reflecting on the Politics of Sisterhood*, *supra* note 90 at 37.

<sup>101</sup> Stella Y. Erinosho, *Girls and Science Education in Nigeria* (Abeokuta: Ango International Publishing, 1994).

<sup>102</sup> Human rights, democracy and good governance or rule of law (by whatever synonym used) have been regarded as "a kind of holy trinity." See Karin Mickelson, "Afterword: Challenging Legitimacy" in Edward K. Quashigah and Obiora C. Okafor (eds.), *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (The Hague: Kluwer Law International, 1999) at 561.

representation.<sup>103</sup> For instance, democracy is regarded as incompatible with unequal gender relations because women constitute half or more of the population in most societies, including African societies. At the same time the electoral system instituted by many African countries systematically excludes women from aspiring to high political offices.<sup>104</sup> Women still lack equal access to public offices and positions due to the social, economic, cultural and political factors that combine to create obstacles to women's participation in political processes. These include some cultural and religious beliefs that locate women in the private sphere, compounded by discriminatory laws and violence. Society's perception of a "good" woman is one who is not active publicly;<sup>105</sup> and the ones who accept assertive, public or leadership roles are perceived as cultural deviants.

The location of African women at the bottom of the socio-political ladder is not peculiar to African societies. Northern feminist critics challenge the gendered and male-centred nature of Northern institutions and discourses.<sup>106</sup> Although women worldwide now enjoy the right to vote and to run for elective offices within government, only a few occupy decision-making positions.<sup>107</sup> However, implicit within such critiques are assumptions of "the North" as the primary referent in theory and praxis common to textual modes of knowledge production in academic disciplines. The discipline of law is not excluded from assumptions that place the non-North as the "Other." At the extreme of this Other-ing lays the "composite and singular"

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<sup>103</sup> *Ibid.* at 560.

<sup>104</sup> For example, in Nigeria, participation in political party activities may require attending meetings at odd times of the day as well as a high incidence of political thuggery.

<sup>105</sup> Akande *et al.*, *supra* note 94 at 300.

<sup>106</sup> For further study on Western feminist discourses, see Susan Boyd, "Challenging the Public and Private Divide: An Overview" in Susan Boyd (ed.), *Challenging the Public /Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997); Brenda Cossman and Judy Fudge (eds.), *Privatization, Law and the Challenge of Feminism* (Toronto: University of Toronto Press, 2002).

<sup>107</sup> As of July 2009, women occupy only 18% of parliamentary seats around the world. Source: International Women Democracy Centre, online: <[http://www.iwdc.org/resources/fact\\_sheet.htm](http://www.iwdc.org/resources/fact_sheet.htm)> [accessed 17 November 2008]. At the same time, Rwanda ranks first as the country with the most number of women holding parliamentary seats in the world. See online: <<http://www.ipu.org/wmn-e/classif.htm>>.



African and other Third World women who constitute the most oppressed of all universally subordinate women.<sup>108</sup> Put succinctly, Oyeronke Oyewumi observes that the white woman's burden – similar to the imperialist white man's burden – was to rescue the “exploited, helpless, brutalized, and down-trodden African woman from the savagery of African male and primitive culture symbolized by barbaric customs.”<sup>109</sup> Even though time, circumstances and diversity have engineered substantial changes in the lived experiences of many African women, these are often not effectively articulated to indicate the complexity and nuances of most situations or any possible potential for resistance and actual transformations.

### 3. Cultural Perceptions

Culture, consisting of customs and traditions in which the lives of many African women are embedded, is usually a major determinant of the rights and status of most African women.<sup>110</sup> Even though it defies a single all-encompassing definition, commentators agree that culture is a dynamic concept that fluctuates depending on time, space, history and socio-legal circumstances. Mutua points out succinctly that culture “represents the accumulation of a people's wisdom and thus their identity, it is real and without it a people is without a name, rudderless, and torn from its moorings.”<sup>111</sup> Another commentator describes culture as the totality of a people's way of life, their values, moral principles and religious and social

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<sup>108</sup> For a Third World critique of feminism, see C. T. Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Durham & London: Duke University Press, 2003); Oyeronke Oyewumi, “The White Woman's Burden: African Women in Western Feminist Discourse” in Oyeronke Oyewumi (ed.), *supra* note 90 at 28.

<sup>109</sup> *Ibid.*

<sup>110</sup> N. B. Pityana, “The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context” in M. D. Evans and R. Murray (eds.), *supra* note 35; E. M. Kisaakye, “Women, Culture and Human Rights: Female Genital Mutilation, Polygamy and Bride Price” in Wolfgang Benedek, Esther M. Kisaakye and Gerd Oberleitner (eds.), *The Human Rights of Women: International Instruments and African Experiences* (London: Zed Books, 2002) at 59.

<sup>111</sup> Makau Mutua, *Human Rights: A Political and Cultural Critique*, *supra* note 9 at 21.

practices, which can be a force for liberation or oppression.<sup>112</sup> Going by the above exposition, any attempt to depict culture in static terms will lead to contradictions that neglect the inevitability of changes that drive the concept. Culture is infused with change owing to contacts and interactions, such as those that occurred during the colonial era and the ongoing fusion of cultures in today's global world.

An enduring discourse in African human rights literature relates to the tension between culture and women's rights, that is, an extension of the universality and cultural relativism debate. This debate centres on discriminatory practices against women, commonly termed "cultural" and/or "traditional" practices, particularly female genital cutting. Others include inheritance rights, widowhood practices and early marriage or child marriage, which undermine the right of the girl child to good health, education, freedom of speech and association, among other rights. Third World feminist scholars criticise the inherently problematic nature of defining these practices as "cultural" and "traditional," arguing that this conceals the power relations.<sup>113</sup>

Other references to the tensions regarding the application of women's rights relate to religious practices that discriminate against women. The resurgence of Islamic fundamentalism in several African societies has prompted the introduction of the Sharia in parts of Africa. For example, in Nigeria, proponents justify the introduction of Sharia legal system in the late 1990s and early 2000s as a means for addressing the feeling of socio-economic deprivation, cultural and political

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<sup>112</sup> Roselynn Musa, "Provisions of the Protocol" in Roselynn Musa, Faiza Juma Mohammed, and Firoze Manji (eds.), *Breathing Life on Women's Rights in Africa (Solidarity for African Women's Rights and African Union, 2006)* at 19. Online: <[http://www.fahamu.org/downloads/soawr\\_download.pdf](http://www.fahamu.org/downloads/soawr_download.pdf)>.

<sup>113</sup> Uma Narayan, *Dislocating Cultures: Identities, Traditions and Third-World Feminism* (New York: Routledge, 1997) at 57, 87. (Narayan observes the tendency to proffer cultural explanations for problems within communities of colour compared with mainstream Western communities. This practice is also seen as part of colonial vocabulary to mark the other.) See also Chandra Talpade Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Durham & London: Duke University Press, 2003)

disillusionment within the society.<sup>114</sup> However, rather than providing a panacea, the introduction of the Sharia imposes greater hardship and has disproportionate negative consequences for poor people, especially poor women and girls as exemplified in cases in which women have been sentenced to death by stoning in Nigeria and Somalia.<sup>115</sup> The 2002 case of Amina Lawal, a Nigerian woman convicted of adultery and sentenced to death by stoning under Sharia law is instructive. Amina was sentenced to death by stoning on allegations of being pregnant out of wedlock. Not only was the adjudicatory process that led to her sentence questionable, the sentence itself was incompatible with a woman's rights to her body.

The overall consequences of the above challenges encourage violence and aggression towards women; discourage women's participation in the public domain and decision-making; condition women into being less ambitious, motivated and involved in their own advancement; as well as enable the ineffective and inconsequential integration of women in the development process.<sup>116</sup> The focus on cultural practices as the primary and most important challenge confronting African women denies class, ethnic and national cleavages in African societies, as well as the agency and complexities of women's realities.<sup>117</sup> Locating women in a subordinate victim position in

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<sup>114</sup> Hauwa Mustapha, "Islamic Legal System, Women's Rights and Development in Northern Nigeria" in *Sharia & Women's Human Rights in Nigeria: Strategies for Action*, Proceedings of a 2-day strategic conference on Islamic legal system and Women's Rights in Northern Nigeria organised by WARD C and WACOL, Nigeria. 27- 30 October 2002.

<sup>115</sup> Baobab for Women's Human Rights, *Sharia Implementation in Nigeria, The Journey So Far* (2003), online: <<http://www.baobabwomen.org/Sharia%20&%20BAOBAB%20publication.pdf>> at 4-5. For instance, in Somalia, Aisha Ibrahim Duhulow, a thirteen year old girl, was placed in police custody after reporting her rape by three armed men. She was later convicted for adultery by an Islamic Court in Kismayo and stoned to death in October 2008. See "Stoning Victim 'Begged for Mercy' BBC News, 4 November 2008; UN News Service, "Stoning Death of Teenager Sparks Outrage From UN Advocates", 7 November 2008. Online: <<http://allafrica.com/stories/200811100753.html>>. The Commissioner Soyata Maiga, the Special Rapporteur on the Rights of Women in Africa sent a Note Verbale to the President of The Republic of Somalia, H.E. Abdullahi Yusuf Ahmed, regarding the stoning expressing her profound concern about this incident. 26<sup>th</sup> Activity Report of the African Commission, June 2009.

<sup>116</sup> Biola Udegbe, "Portrayal of Women in Nigeria Media and the Psychological Implication" in Abiola Odejide (ed.), *Women and the Media in Nigeria* (Ibadan: Women's Research and Documentation Centre) at 131-136.

<sup>117</sup> Olufemi Taiwo, *supra* note 90 at 51-52; Molaria Ogundipe-Leslie, *Recreating Ourselves: African Women and Critical Transformations* (Trenton: Africa World Press, 1994).

popular culture and especially human rights literature provokes extensive scholarly analyses on the effects, consequences and actions to eliminate such cultural practices often at the expense of other prevailing forms of violence against women. Despite the absence of a unitary or homogenous African culture, African women are characterised as a powerless, perpetual victims: victims of culture reinforced by stereotypical and racist representation of culture.<sup>118</sup>

This point is that the use of “culture” promotes an essentialist and a racialised understanding of things African. It posits a “good” culture against a “bad” culture to sustain a racialised discourse. This dissertation makes no attempt to justify harmful practices but argues that the focus on African “culture” or “traditional” practices is not only problematic because it conceals power relations and how they operate in the garb of “culture,” but also because it ignores practices that may further human rights goals. For example, in most African societies the practice of the extended family system serves as a safety net for economically marginalised women. Also, commentators regard the focus on African culture as a form of ideological domination that misrepresents the realities of African women.<sup>119</sup> The flexible nature of culture is indicative of the imperative to decolonise the subordinate assumptions that dominate the ideological construction of African women, whether as mothers, wives, politically and economically disempowered, or as minors or victims, whether in the public or the private sphere. The construction of women as victims of culture is consistent with the problematic ideological and racialised discourses of culture. In sum, the uncritical application of terms, such as culture and motherhood to represent practices that violate the rights of women is problematic neglecting other applications that may be more beneficial in promoting rights.

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<sup>118</sup> African culture(s) is as diverse as there are ethnic groups. This perception also holds true for muslim women especially with regards to discussions relating to the Sharia.

<sup>119</sup> Olufemi Taiwo, *supra* note 90 at 56.

Next, I examine available literature relating to women in order to determine how these popular perceptions play out in academic literature. The period since the adoption of the *African Charter* and the establishment of the African Commission through to the entry into force of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (*Women's Protocol*) is the focus of this inquiry. Prior to this, not much had been written regarding women's involvement with the regime.<sup>120</sup>

#### IV. Re-visioning Representations of Women in African Human Rights

##### Literature

Prior to the 1990's, texts on women's rights within the scope of regional institutions were few and far between.<sup>121</sup> The seminal 1993 article, "Human Rights and African Women: A Comparison of Protection under Two Major Treaties" by Claude Welch,<sup>122</sup> provided one of the foremost analyses of women's rights within the African human rights system. The article compares international agreements, the *African Charter* and the *Convention on the Elimination of All Forms of Discrimination against Women*, in order to determine whether they have made a difference to the status of women in Africa. Welch recognised that the African Commission,

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<sup>120</sup> For earlier works relating to the international human rights of women in Africa, see Rhoda E. Howard, *Human Rights in Commonwealth Africa* (Totowa, NJ: Rowman Littlefield, 1986); J. Oloka-Onyango, "The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugees and Internally Displaced Women in Africa" (1996) 24 Denv. J. Int'l L. & Pol'y 349; and Wolfgang Benedek & Wolfgang Heinz (ed.), *Regional Systems of Human Rights Protection in Africa, America and Europe: Contributions to the Programme* (Brussels: Friedrich Naumann Foundation, 1992).

<sup>121</sup> Claude Welch & Ronald Meltzer (eds.), *Human Rights and Development in Africa* (Albany: State University of New York Press, 1984); Rhoda E. Howard, *Human Rights in Commonwealth Africa* (New Jersey: Rowman & Littlefield Publishers, 1986). Most other materials paid limited attention to women. See for example; Philip Kunig, Wolfgang Benedek and Costa R. Mahalu (eds.), *Regional Protection of Human Rights by International Law: The Emerging African System* (Utrecht: Verfassung und Recht 1985). Subsequent academic materials include U. O. Umzurike, *The African Charter on Human and Peoples' Rights* (The Hague: Martinus Nijhoff, 1997); Evelyn Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedure*, (The Hague/London: Martinus Nijhoff Publishers, 1996); Vincent O. Nmeihelle, *The African Human Rights System, Its Laws, Practices and Institutions* (The Hague: Kluwer, 2001); R. Murray, *The African Commission on Human and Peoples' Rights and international law* (Oxford; Portland; Or: Hart Publishing, 2000); M. Evans and R. Murray, *The African Charter on Human and Peoples' Rights. The System in Practice 1986-2000*, *supra* note 35.

<sup>122</sup> (1993) 15 Human Rights Quarterly 549-574.

like the Committee on the Elimination of Discrimination against Women, had yet to significantly ameliorate women's subordinate status. While he recognised the shortcomings of international human rights instruments generally, he cautioned against overlooking the significant potential of international regimes as one of the many means of diminishing inequalities characterising Africa as with the rest of the world.<sup>123</sup> Welch's analysis was in response to the criticisms of the African human rights system and the idea of a wholesale abandonment of the system in the protection of women's rights.

As observed in previous chapters, the *African Charter* is arguably one of the most criticised treaties. Article 18(3) which provides specific protection for women states that "[t]he 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." Not only is this provision criticised for being too broad by its incorporation of international declarations and conventions, the underlying assumption of women as the mother is obvious in this provision as well as in scholarly literature. In the *African Charter*, inclusion of the protection of women and children within the same provision is telling.

Another criticism of the *African Charter* relates to the provision protecting African traditional values and culture. The main contention is its location within the section protecting the family, considered as "most repressive of rights of women (and girl children) in African societies."<sup>124</sup> Article 17(3) states that "[t]he promotion and protection of morals and traditional values recognised by the community shall be the duty of the State." The conventional argument regarding relations between traditional values and women's rights suggests that protecting

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<sup>123</sup> *Ibid* at 550.

<sup>124</sup> Henry Onoria, "Introduction to the African System of Protection of Human Rights and the Draft Protocol" in Wolfgang Benedek *et al* (eds.), *The Human Rights of Women*, *supra* note 110 at 234.

traditional values will ultimately impose limitations on the possibility of the *African Charter* to protect the rights of women.<sup>125</sup> The decontextualised racialised discourses relating to tradition and culture when applied imply that women are victims of their own culture.

The victim role occupied by African women is central to literature about women's human rights in Africa. Such literature focuses on the particularly low status of women in Africa (especially rural women) resulting from "cultural" barriers interacting with low levels of economic development and poverty.<sup>126</sup> To buttress this point, Claude Welch observes that "[i]f human rights begin with breakfast, a great majority of Africa's residents go very hungry indeed. And, within this group, women and children suffer the most."<sup>127</sup> Other commentators emphasise and elaborate upon this assertion. Wing and Smith observe that the discrimination experienced by African women is exacerbated by the effects of discrimination arising from internal problems of poverty, unemployment and related challenges as well as external forces of globalisation and underdevelopment.<sup>128</sup> They emphasise the victim role of the African women arising from violations of rights which include, *inter alia*, practices, such as lobolo and polygamy; religious law; domestic violence, female genital surgery and HIV/AIDS.<sup>129</sup>

The inclusion of the last part of the provision in Article 18(3), "as stipulated in international declaration and convention," as well as Articles 60 and 61, has been used by scholars to mitigate

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<sup>125</sup> Chaloka Beyani, Toward a More Effective Guarantee of Women's Rights in the African Human Rights System" in Rebecca J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania, 1994) at 292.

<sup>126</sup> Claude Welch, *supra* note 121 at 550.

<sup>127</sup> *Ibid* at 551.

<sup>128</sup> Adrien Katherine Wing & Tyler Murray Smith, "The New African Union and Women's Rights" (2003) 13 *Transnat'l L. & Contemp. Probs.* 33 at 37.

<sup>129</sup> *Ibid.* at 38-53.

the supposed negative import of traditional values.<sup>130</sup> Beyani, for example, draws on domestic cases to illustrate that retrogressive customs and tradition will no longer be tolerated, because the culture in question must be interpreted in line with international declarations and conventions.<sup>131</sup> According to Benedek, Article 18(3) has far-reaching potential which allows the African Commission to interpret rights of women under the *African Charter* on the basis of the *Women's Convention*, and other international instruments based on Article 60 of the *African Charter*.<sup>132</sup> Onoria regards the difference in the conceptualisation and enforcement mechanisms of the *African Charter* as its major weakness; but he emphasises that it “forms the basis for having states account for the status of women and protection of their rights within their *national legal orders*.”<sup>133</sup> Additionally, Onoria perceives Article 18(3) of the *African Charter* as the starting point for holding states accountable for the protection of women's rights.<sup>134</sup> Despite criticisms and commendations of the provisions of the *African Charter*, several scholars point to the fact that African women have put the potential of Article 18(3) and related provisions to little use, since there have been hardly any cases brought before the African Commission.<sup>135</sup>

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<sup>130</sup> Article 60 of the *African Charter* states that 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 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 Specialised Agencies of the United Nations of which the parties to the present Charter are members.” Article 61 states that the “Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms of Human and Peoples’ Rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrines.”

<sup>131</sup> Chaloka Beyani, *supra* note 125. Welch implies this position in his quote of Stratton. Claude Welch, “Human Rights and African Women: A Comparison of Protection under Two Major Treaties” *supra* note 122 at 574; that domestic cases may be a resource available to the African Commission for improving the status of women.

<sup>132</sup> Wolfgang Benedek, “The European System of Protection of Human Rights and Human Rights of Women” in Wolfgang Benedek, Esther M. Kisaakye and Gerd Oberleitner (eds.) *supra* note 110 at 225.

<sup>133</sup> *Ibid.* at 233 [Emphasis by the author].

<sup>134</sup> *Ibid.* at 233.

<sup>135</sup> *Ibid.* also Rachel Murray, “Women’s Rights and the Organisation of African Unity and the African Union: The Protocol on the Rights of Women in Africa” in Doris Buss and Ambreena Manji (eds.), *International Law: Modern Feminist Approaches* (Oxford: Hart Publishing, 2005) at 259.



This lack of use of the provisions for protecting women, as well as the conventional interpretation of Article 18(3), prompted several scholarly proposals for adoption of a separate treaty to exclusively guarantee women's rights. Kibwana, summing up the criticisms, observes that the *African Charter* is not a comprehensive bill of rights for women; it is cast in masculine language with choice places for tradition and custom; it lacks resources for women and provides limited sanctions for erring states, and proposed adopting "a protocol, agreement, or Charter that amplifies women's rights for securing their rights."<sup>136</sup>

Unlike the *African Charter*, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)* thereby adopted is seen as "perhaps the most promising vehicle at the AU's disposal for promoting and protecting African women's rights."<sup>137</sup> Others regard the *Women's Protocol* as "an ambitious and yet radical reform in women's rights protection in Africa."<sup>138</sup> Conversely, not all reviews of the *Women's Protocol* are positive. In an assessment of the *Women's Protocol*, Rachel Murray observes that:

In its present state, the Protocol wavers between being an interpretation of the ACHPR [African Charter] for women on the one hand, and a collection (not a comprehensive one) of some existing international standards on the other. It ends up falling short of both these objectives.<sup>139</sup>

Murray also points out that the *Protocol* does not go further than existing standards to offer greater protection for all women in Africa.<sup>140</sup> Despite the accolades and criticism, the *Women's*

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<sup>136</sup> K. Kibwana, "Empowering the African Woman: A Study of the Protection of Women's Rights Under the African Charter on Human and Peoples' Rights and a Proposal Regarding the Development of a Charter on the Rights of the African Woman" (1995) 5 *Review of the African Commission on Human and Peoples' Rights* 1 at 7.

<sup>137</sup> Adrien Wing & Tyler Murray Smith, *supra* note 128 at 78.

<sup>138</sup> Deji Olowu, "A Critique of the Rhetoric, Ambivalence, and Promise in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa." (2006) 8 (1) *Human Rights Review* 78 at 80.

<sup>139</sup> Rachel Murray, "Women's Rights and the Organisation of African Unity and the African Union: The Protocol on the Rights of Women in Africa" *supra* note 135 at 264.

<sup>140</sup> *Ibid.* at 268.

*Protocol* differs from the *African Charter* to the extent that it provides a list of gender-specific and context-specific rights for women.

It is also worthy to note that a common practice among scholars of women's rights at the regional level is to compare the *Women's Protocol* with the *Women's Convention*. While this practice is useful, it becomes necessary to question the underlying assumption upon which an evaluation is made when differences identified between the two treaties consistently receive negative assessment with regards to the *Women's Protocol*. According to Olowu, the "African Women's Protocol" makes a "curious omission;" whereas

the CEDAW [*Women's Convention*] creates an extensive list of obligations for States Parties in addressing the particular problem faced by rural women, the African Women's Protocol completely avoids the use of the word "rural" and makes no specific reference to the plight of rural African women.<sup>141</sup>

Likewise, Murray observes that in some cases the *Women's Protocol* falls below existing standards, as "its failure to include express reference to the right of women to vote or to participate in private life as well as at the international level despite the latter being in CEDAW [*Women's Convention*]." <sup>142</sup>

The underlying assumption upon which these comparisons are made relates to first, the subordinate economic, socio-political and cultural assumptions regarding African women and second, the negative assumptions regarding African initiatives. The former is discussed in this section while the latter relates to assumptions discussed earlier.<sup>143</sup> For example, the assertion that the *Women's Protocol* avoids the word "rural" cannot be substantiated because even though

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<sup>141</sup> *Ibid.* at 84.

<sup>142</sup> R. Murray, *supra* note 135 at 268.

<sup>143</sup> See Part II of this Chapter.

the subject of rural women does not occupy a separate article, it is not altogether neglected.<sup>144</sup> Article 14(2)(a), for example, directs States Parties to take all appropriate measures to “provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in *rural* areas.” In article 19(d), States Parties are to take all appropriate measures to: “promote women’s access to credit, training, skills development and extension services at *rural* and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women.” An undue emphasis on rural women would support the problematic assumption that rural African women confront more intense discrimination compared to other African women and are thus in need of greater protection.<sup>145</sup> As discussed earlier, present realities indicate the need for a holistic treatment of African women. The idea that items covered by the *Women’s Convention* must also appear in the *Women’s Protocol* may amount to mere duplication of norms. While there is no absolutely perfect initiative, the *Women’s Protocol* attempts to address contemporary challenges facing African women. Needless to say, it also complements the *African Charter*, which otherwise addressing some of its omissions. The *Women’s Protocol* is examined in greater detail in the next chapter.

## V. Reconciling Textual Sources

The general apathy toward the state and its institutions among some African human rights scholars and the seeming powerlessness of the majority of African population is beginning to recede. The negative consciousness regarding African institutions that dominated intellectual work, thereby restricting the character of knowledge produced at the regional level is beginning to record a gradual shift. Like the European and Inter-American systems for human rights

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<sup>144</sup> See, articles 14(2)(a) and 19 (d) of the *Women’s Protocol*.

<sup>145</sup> Dejo Olowu, *supra* note 138 at 90

protection, the cautionary but continuous progress towards strengthening their institutional processes is also evident in recent developments regarding human rights in the African region. The perception of the African regional regime, among commentators and scholars alike, as a lost cause, incompetent and lacking the ability to make significant contributions to human rights on the continent or internationally, no longer holds true.

The ingrained and invidious divisions of knowledge central to the ways that knowledge about Africa is perpetuated require greater critical consideration. The practice of perpetuating this knowledge production which emanates from and is perpetuated by the North (Anglo-American), but also commonly propagated by some African intellectuals, is rooted in a sort of intellectual domination which remains a reflection of the continent's domination by imperialism.<sup>146</sup> The need to engage in scholarship beyond reform cannot be overemphasised for the institutional progress of the African human rights regime. Murray's observation that there needs to be a move away from seeing the contribution of African institutions, which may differ from interpretations by European or northern bodies, as a threat to human rights, towards a more constructive way of rethinking and enhancing rights, remains pertinent.<sup>147</sup>

Recent academic materials generally reveal an increasing shift in perception not only of African human rights institutions but women's engagement with it. Several recent publications are instructive in this regard. The 2007 publication, *International Human Rights in Africa* by Frans Viljoen,<sup>148</sup> *inter alia* examines instruments within the normative framework of the African

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<sup>146</sup> Issa Shivji, *supra* note 12 at 2.

<sup>147</sup> R. Murray, "Institutions," *supra* note 3 at 197.

<sup>148</sup> Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007). Viljoen's study of international human rights encompasses not only Africa but also human rights at the global, sub-regional and national levels. The book centres on the African regional human rights system to supplement earlier books on the subject. It indicates the author's experience as a scholar and activist within the system with its well developed

human rights system that pays specific attention to the protection available to women, refugees, indigenous peoples and children. Apart from general references to women, *International Human Rights in Africa* provides a brief analysis of women at the regional system.<sup>149</sup> Viljoen recognises the contribution of the *Women's Protocol* to the normative expansion of the system in relation to pre-existing norms comprising the *African Charter* and the *Women's Convention*, and the ways in which the *Women's Protocol* has taken women's rights forward, as well as the limitations of its provisions. Viljoen's book demonstrates a changing attitude towards human rights in Africa. It recognises the progress made towards protecting human rights in Africa while at the same time identifying shortcomings in order to propose solutions. However, as noted, women, their rights and participation, are not fully covered in the book.

*Women, Law and Human Rights* by Fareda Banda is one of the growing number of texts on women's rights in Africa. It focuses on the position of African women and the role law can play in their empowerment efforts.<sup>150</sup> Its central concern is an exploration of linkages between constitutional and international law, human rights norms and local personal law. Banda highlights the strengths and challenges of human rights in Africa from a feminist international law perspective. The author challenges the inadequacies of regional commitment to the protection of women's rights under the *African Charter* as well as the AU's commitment to gender through an examination of the impact of the *Women's Convention* on Africa, the process of drafting the *Women's Protocol* and a comparison of both instruments. *Women, Law and*

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and balanced narratives of the processes and practices of human rights at the regional level. It conducts an in-depth study of the role of various organs of the AU in the realisation of human rights, highlights the problems of integration, cooperation and coordination among AU human rights mechanisms and asserts the need for global and other alliances.

<sup>149</sup> *Ibid.*, at 266-277.

<sup>150</sup> Fareda Banda, *Women, Law and Human Rights: An African Perspective*, (Oxford: Hart Publishing, 2005).

*Human Rights* praises the newfound gender consciousness exhibited by the regional regime and advocates the use of the *Women's Protocol* to press for change.<sup>151</sup>

A number of international academic journals also feature articles that undertake analyses on women's rights in the African human rights system.<sup>152</sup> A noticeable increase in scholarship in this area may again be attributed to the transformation of the AU as well as the adoption of the *Women's Protocol*. Prior to the adoption of the *Women's Protocol*, the deficiencies of the *African Charter* in relation to women's rights dominated, while the proposed solution was to welcome the idea of a separate human rights treaty for women.<sup>153</sup> With the adoption of the *Women's Protocol*, scholarly publications on women's rights at the regional level issued mixed signals. While some scholars commend its adoption,<sup>154</sup> others emphasise the inadequacies of the *Women's Protocol* with suggestions of ways to overcome same. Rachael Rebouche,<sup>155</sup> for example, observes what she refers to as the definitional and conceptual shortcomings of the *Women's Protocol* in relation to labour and the use of land as a resource. She argues that these concerns may be addressed only through interpretation of the *Women's Protocol* for it to have any serious impact on the current human rights obligation and provide new reasons for enforcing obligations that exist in these areas.<sup>156</sup>

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<sup>151</sup> *Ibid* at 83.

<sup>152</sup> A notable journal of this genre is the African Human Rights Law Journal published by the Centre for Human Rights of the University of Pretoria. See for example, Martin Semalulu Nsibirwa, "A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" (2001) 1(1) African Human Rights Law Journal 40. Other recent articles include Adrien Katherine Wing and Tyler Murray Smith, "The New African Union and Women's Rights" (2003) Transnat'l L. & Contemp. Probs. 33.

<sup>153</sup> Kivutha Kibwana, "Empowering the African Woman: A Study of the Protection of Women's Rights under the African Charter on Human and Peoples' Rights and a Proposal Regarding the Development of a Charter on the Rights of the African Woman" (1995) 5 Review of the African Commission on Human and Peoples' Rights 1.

<sup>154</sup> Fareda Banda, "Blazing the Trail: The African Protocol on Women's Rights Comes into Force" (2006) 50(1) Journal of African Law 72.

<sup>155</sup> Rachel Rebouche, "Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women" (2006) 19 Harv. Hum. Rts. J. 235.

<sup>156</sup> *Ibid.*, at 237.

A number of electronic books, handbooks and other materials also provide valuable information about women and the African human rights regime.<sup>157</sup> The point here is that the previous void or blurred vision of the African regime, as well as women's roles and engagement with the practices and processes of the Africa regime has given way to greater visibility in recent texts and documents, even though the assessment of the capacity of the regime to improve the status of women remains uncertain.

It is still easy to conclude that little progress has been made in the area of women's rights, but criticisms are beginning to be replaced by more positive analyses. The above analysis also affirms that notwithstanding the deficiencies, inadequacies and negative assumptions about the African human rights regime and of African women in available texts, one thing is clear: there is increasing interest in the study of the processes and practices of women's rights within the African regional human rights regime. The regional regime is not only attaining increasing relevance to women, but also its human rights system has increasing potential to impact women beneficially. There is a gradual shift away from the disdain with which some human rights scholars have viewed the regional regime.<sup>158</sup> The African regime can no longer be regarded as a fruitless endeavour, unable to contribute anything significant to the continent or to international human rights in general. This chapter, through engaging with the assumptions and the critiques of the African human rights regime and women's rights, supports corroborations, coalitions and critiques that reflect alternative readings of the regime aimed at gaining a better understanding

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<sup>157</sup> For example, Roselynn Musa, Faiza Juma Mohammed, and Firoze Manji (eds.), *Breathing Life on Women's Rights in Africa (Solidarity for African Women's Rights and African Union, 2006)* at 19. Online: <[http://www.fahamu.org/downloads/soawr\\_download.pdf](http://www.fahamu.org/downloads/soawr_download.pdf)>; and Roselyn Karugonjo-Segawa, *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (Denmark: Danish Institute for Human Rights, 2005)

<sup>158</sup> E. Bondzie-Simpson, "A Critique of the African Charter on Human and Peoples' Rights" (1988) 31 *Howard Law Journal* 643-65.

of the African regional human rights regime in order to make them more accessible and beneficial to the African peoples for whom they are established.

As will be shown, the recent increase in the level of women's participation in the regime's processes, especially in decision-making positions, is encouraging.<sup>159</sup> As well, the increasing involvement of women's groups and organisations with women's rights at both national and continental levels attest to an acknowledgment of the relevance of the regime.<sup>160</sup> In sum, the reinvigoration of interest in women's rights by the regime, the increasing participation of women and the practical application of a gender equality principle within the organs of the AU as well as within the African Commission, have encouraged writings on the subject. This analysis also shows that increased academic research and critical analyses have the potential to further deepen understanding of the subject. Space for viable suggestions for improvement is also yet to be exhausted. Without doubt, there is ample room for progress as there remain gaps in the available texts, opening spaces for further analyses of women's rights at the African human rights regime. Given this preliminary evaluation, subsequent chapters provide greater detail of the normative and other textual provisions and their (possible) interpretations regarding women's rights as well as the practical progress made at the regional level.

The next chapter undertakes a critical feminist TWAIL analysis of the regime's normative protection of women through a study of a combination of treaties and other documents of the regime. It also highlights the practical moves undertaken by the regime.

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<sup>159</sup> *Infra* Chapter Four.

<sup>160</sup> The participation of women's groups at the region became evident in the drafting, adoption and ratification processes of the *Women's Protocol*.



## CHAPTER FOUR: GENDER INTERPRETATIONS, THE *WOMEN'S PROTOCOL* AND PRACTICES OF THE AFRICAN SYSTEM

### I. Introduction

This chapter undertakes a feminist TWAIL analysis of the textual and practical manoeuvres undertaken within the African human rights regime. Drawing from TWAIL's "shared ethical commitment to the intellectual and practical struggles to expose, reform, or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair or unjust global order,"<sup>1</sup> feminist TWAIL analysis constitutes a part of the diverse interests and frameworks in TWAIL scholarship.<sup>2</sup> This analysis engages international human rights law in its determination to give voice to the marginalised women within the Third World, and particularly Africa.<sup>3</sup>

The chapter analyses women's rights in the context of the African regional regime with a view to identifying approaches to human rights discourse that restrict or channel women's rights into narrow areas. It exposes flaws in the content of the regional instruments arising from the failure to recognise the context within which these women operate. At the same time, strengths of the provisions are not ignored. The primary document under consideration in this chapter is the *Women's Protocol*. It thus asks: do the texts, especially of the *Women's Protocol*, speak to lived experiences of African women? What rights have been concealed or displaced by the texts? The chapter attempts to deconstruct conventional paradigms about the human rights of African women, as well as to develop an alternative story of women's human rights in the region

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<sup>1</sup> The Third World Approaches to International Law (TWAIL) was introduced in Chapter One of this dissertation. Obiora Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10(4) ICLR 371 at 376 [Okafor, "Critical TWAIL"].

<sup>2</sup> Vasuki Nesiah, "The Ground Beneath Her Feet" (2003) 4(3) Journal of International Women's Studies 30 and Celestine Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" (2000) 41 (2) Harvard International Law Journal 381.

<sup>3</sup> Karin Mickelson, "Taking Stock of TWAIL Histories" (2008) ICLR 355 at 358 [K. Mickelson, "Taking Stock"].

through analyses of both the textual and the practical manoeuvres of the system. It examines the system holistically by re-assessing rights protected, those excluded and the challenges to the implementation of the rights recognised.

The second section undertakes a feminist TWAIL analysis of the *Women's Protocol*. Given the wide-ranging rights as well as the overlapping nature of rights guaranteed in this instrument, I shall be unavoidably selective in my analysis. This section therefore focuses primarily on economic, social and cultural rights, and particularly on the right to health under the *Women's Protocol* as a case through which to study rights generally. As will be shown subsequently, the choice of the right to health is inspired by the importance of health and the continuing violation of this right by many African states, as well as by its inherent connection with other human rights.

Using a feminist TWAIL lens, this chapter argues that an interdependent, interrelated, and intersectional approach to rights that takes cognisance of the historical and socio-economic context and other concerns specific to African women and their societies is imperative to achieving progress in women's rights through the African human rights system. Following this, the third section analyses the mechanisms available to implement rights identified and their adequacy regarding the protection of women's rights. In line with the reconstructive tradition of TWAIL scholarship, the chapter offers feasible suggestions on how to strengthen rights and rights mechanisms for the protection of women at the regional level as well as proposals for future of women's engagement with the regime. Section four provides a summary of the main arguments of the chapter.

## II. A Critical Feminist TWAIL Analysis of the *Women's Protocol*

This section undertakes a feminist TWAIL analysis of the *Women's Protocol* and of women's rights protection under the African human rights regime generally in order to determine the ideological context in which the instrument is embedded and to examine whether or not it meets the needs of those it seeks to protect. It also investigates the mechanisms for implementing the *Women's Protocol* in order to determine how states may be held accountable for their international obligations to protect women. A brief background study of the *Women's Protocol* foregrounds this section.

### 1. Background

The *Women's Protocol* is the first binding, women-specific treaty adopted at the African regional level. Its history may be traced to a seminar organised by the African Commission in collaboration with Women in Law and Development in Africa (WiLDAF/ FeDDAF) and the International Commission of Jurists (ICJ) in March 1995.<sup>4</sup> The seminar recommended, *inter*

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<sup>4</sup> The Seminar held in Lome, Togo was titled: "The African Charter on Human and Peoples' Rights and the Human Rights of Women." See the 8th Annual Activity report of the African Commission on Human and Peoples' Rights 1994 -1995. Adopted on 22 March 1995, ACHPR/COM.FIN/XVII/Rev. in R. Murray and M. Evans, *Documents of the African Commission on Human and Peoples' Rights* (Oxford: Hart Publishing, 2001) at 418 ([hereinafter *Documents*]). See also the Final Communiqué of the 17th Ordinary Session of the African Commission on Human and Peoples' Rights (Final Communiqué 17). Online: [http://www.achpr.org/english/communiqués/communiqué17\\_en.html](http://www.achpr.org/english/communiqués/communiqué17_en.html). For studies on the Women's Protocol, see R. Murray, "Women's Rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa" in Doris Buss and A. Manji, *International Law: Modern Feminist Approaches* (Oxford: Hart Publication, 2005); Adrien Katherine Wing and Tyler Murray Smith, "The New African Union and Women's Rights" (2003) 13 *Transnat'l L. & Contemp. Probs.* 33; Melinda Adams and Alice Kang, "Regional Advocacy Networks and the Protocol on the Rights of Women in Africa" (2007) 3 *Politics & Gender* 451; Ebenezer Durojaye, "Addressing Human Rights Concerns Raised by Mandatory HIV Testing of Pregnant Women through the Protocol to the African charter on the Rights of Women" (2008) 52 (1) *Journal of African Law* 43; Karen Stefiszyn, "The African Union: Challenges and Opportunities for Women" (2005) 5 *African Human Rights Law Journal* 358; Danwood Mzikenge Chirwa, "Reclaiming (Wo)manity: the Merits and Demerits of the African Protocol on Women's Rights" (2006) 53 *Netherlands International Law Review* 63; and Fareda Banda, "Blazing the Trail: The African Protocol on Women's Rights Comes into Force" (2006) 50 (1) *Journal of African Law* 72.

*alia*, the drafting of an additional protocol on women's rights and the nomination of a Special Rapporteur responsible for the protection of women's rights.<sup>5</sup>

In line with these recommendations, the African Commission entrusted two of its members, Dr Duarte Martins and Professor Dankwa, to initiate work on an additional protocol on women's rights.<sup>6</sup> Subsequently, the African Commission decided to appoint a Special Rapporteur on the rights of African women.<sup>7</sup> During the process of drafting the additional protocol, the Inter-African Committee on Traditional Practices Affecting the Health of Women and Girls (IAC), in collaboration with the Women's Unit of the OAU, submitted a draft convention on traditional practices affecting women and girls to the OAU secretariat.<sup>8</sup> The OAU secretariat requested the African Commission to incorporate these two drafts along with other contributions into one document: "The Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa."<sup>9</sup> After more work on the draft, delays and extensive lobbying by civil society groups, mostly women's groups, the *Women's Protocol* was adopted by the

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<sup>5</sup> The recommendations were presented by Commissioner Vera Valentina B. S Duarte Martins at the 17<sup>th</sup> Ordinary Session of the African Commission, Lome, Togo, March 1995: Para. 28 of the Final Communiqué 17. Commissioner Julienne Ondziel Gnelenga was appointed as the first Special Rapporteur on the Rights of Women in Africa at the 25th Ordinary Session of the African Commission held in Burundi in 1999 pursuant to the recommendations. ACHPR/ Res.38 (XXV) 99. For the mandate of the SRRWA, see online: <[http://www.achpr.org/english/\\_info/women\\_mand.htm](http://www.achpr.org/english/_info/women_mand.htm)>. The mandate was subsequently renewed in 2003 with the appointment of Commissioners Angela Melo and Soyata Maiga in 2007 as the Special Rapporteurs on the Rights of Women in Africa, ACHPR/ Res.63 (XXXIV)03 and ACHPR/ Res.112 (XXXXII) 07: Resolution on the Renewal of the Mandate of the Special Rapporteur on the Rights of Women in Africa, respectively. Online:

<<http://hrlibrary.ngo.ru/africa/resolutions/rec68.html>>,  
<[http://www.achpr.org/english/resolutions/resolution112\\_en.htm](http://www.achpr.org/english/resolutions/resolution112_en.htm)>.

<sup>6</sup> Final Communiqué 17, *supra* note 4 para. 30.

<sup>7</sup> Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995-1996. Adopted on 3 April 1996 AHG/207 (XXXII) in R. Murray and M. Evans, *Documents supra* note 4 at 424.

<sup>8</sup> Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999 – 2000. AHG/222 (XXXVI) at 7 para. 30.

<sup>9</sup> *Ibid* at para. 32. See also DOC/OS/34c(XXIII). Briefing document to the parliamentary portfolio Committee by Ambassador J. Duarte: 24 August 2004. Online:

<<http://www.pmg.org.za/docs/2004/appendices/040824charter1.htm>>. For a detailed history of the *Women's Protocol*, see Fareda Banda, "Protocol to the African Charter on the Rights of Women in Africa" in Malcolm Evans and Rachel Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (Cambridge: Cambridge University Press, 2008) at 441-474; Mosope Fagbongbe, "Towards an African System for the Protection of Women's Rights: *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*" (LL.M Thesis, University of Manitoba, 2005).

Assembly of Heads of State and Government of the AU in 2003.<sup>10</sup> It entered into force in 2005. As of February 2010, twenty-seven member states of the AU had ratified the instrument.<sup>11</sup>

## **2. Content of the *Women's Protocol***

The *Women's Protocol* is a separate and distinct instrument adopted to supplement provisions of earlier human rights instruments, particularly the *Women's Convention* and the *African Charter*.

It was adopted out of concern that:

despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.<sup>12</sup>

Discriminatory and harmful practices against women identified within many African societies include female genital cutting (popularly known as Female Genital Mutilation or FGM), early and forced marriage, female infanticide, dowry price, various taboos or practices that prevent women from controlling their fertility, widowhood rites and widow inheritance.<sup>13</sup>

The *Women's Protocol* addresses context-specific concerns and other women's rights violations through legal and policy-oriented approaches. It obligates State Parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures.<sup>14</sup> The *Women's Protocol* is innovative in the sense of recognising rights not previously included in any binding international instruments. For example, it affirms a woman's right to medical abortion in cases of sexual assault, rape or incest and when continuation of the

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<sup>10</sup> Melinda Adams and Alice Kang, *supra* note 4 at 461.

<sup>11</sup> For a list of ratification, see, online: <<http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf>>.

<sup>12</sup> *Women's Protocol*, the Preamble.

<sup>13</sup> See for example Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children. Online: <<http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>>.

<sup>14</sup> *Women's Protocol*, art.1 (1).

pregnancy endangers the health and life of the mother.<sup>15</sup> It calls for prohibition of female genital cutting.<sup>16</sup> The *Women's Protocol* specifically recognises the rights of the most vulnerable women within African societies, such as women with disabilities and widows.<sup>17</sup> The adoption of the 32-articled *Women's Protocol* is an essential stage in the recognition of women's rights and as a legal framework for ensuring respect for these rights.<sup>18</sup>

The *Women's Protocol* defines women as “persons of the female gender, including girls,”<sup>19</sup> and discrimination against women to mean:

...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.<sup>20</sup>

This expansive definition of discrimination inspires the guarantee of the range of rights within the *Women's Protocol*.<sup>21</sup> These rights encompass civil, political, economic, social, and cultural as well as collective rights.

The *Women's Protocol* specifically recognises rights to dignity<sup>22</sup>; life, integrity and security of person and prohibition of all forms of exploitation, cruel, inhuman or degrading punishment and treatment<sup>23</sup>; elimination of harmful traditional practices such as “female genital mutilation”<sup>24</sup>; protection of women in marriage, separation, divorce and annulment of marriage<sup>25</sup>; equality

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<sup>15</sup> *Ibid.*, art 14(2)(c).

<sup>16</sup> *Ibid.*, art. 5 (b).

<sup>17</sup> *Ibid.*, arts. 23 and 20 respectively.

<sup>18</sup> Non-binding international mechanisms for the protection of women's rights include the Beijing Declaration and Programme of Action; the African Union's Solemn Declaration on Gender Equity in Africa.

<sup>19</sup> *Women's Protocol*, Article 1.

<sup>20</sup> *Ibid.*

<sup>21</sup> For a brief historical overview of the *Women's Protocol*, see, Fareda Banda, “Blazing a Trail” *supra* note 4.

<sup>22</sup> *Women's Protocol*, art. 3.

<sup>23</sup> *Ibid.*, art. 4

<sup>24</sup> *Ibid.*, art. 5

<sup>25</sup> *Ibid.*, arts. 6 & 7

before the law and equal protection and benefit of the law<sup>26</sup>; equal participation of women in the political life and decision-making process.<sup>27</sup> Others are the right to education and training;<sup>28</sup> economic and social welfare rights, such as the right to equal access to employment and recognition of the economic value of the work of women in the home;<sup>29</sup> the right to health including sexual and reproductive health;<sup>30</sup> the right to nutritious and adequate food;<sup>31</sup> and the right to adequate housing.<sup>32</sup>

The *Women's Protocol* recognises communally or collectively held rights, namely the promotion and maintenance of peace;<sup>33</sup> the right to live in a positive cultural context;<sup>34</sup> the right to a healthy and sustainable environment;<sup>35</sup> and the right to sustainable development.<sup>36</sup> It also affords special protection to women who face further discrimination due to circumstances often beyond their control, namely women in armed conflict situations;<sup>37</sup> widows and elderly women;<sup>38</sup> women with disabilities;<sup>39</sup> and women in distress, such as poor women or pregnant or nursing women in detention.<sup>40</sup>

In view of the wide-ranging rights recognised by the *Women's Protocol*, feminist TWAIL analysis in this section cuts across many rights, although it focuses primarily on rights commonly categorised as economic, social and cultural (ESC). Bearing in mind the interdependence and indivisibility of rights, I adopt this approach in order to narrow the scope

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<sup>26</sup> *Ibid.*, art. 8

<sup>27</sup> *Ibid.*, art. 9

<sup>28</sup> *Ibid.*, art. 12

<sup>29</sup> *Ibid.*, art. 13.

<sup>30</sup> *Ibid.*, art. 14.

<sup>31</sup> *Ibid.*, art. 15.

<sup>32</sup> *Ibid.*, art. 16.

<sup>33</sup> *Ibid.*, art. 10

<sup>34</sup> *Ibid.*, art. 17

<sup>35</sup> *Ibid.*, art. 18

<sup>36</sup> *Ibid.*, art. 19

<sup>37</sup> *Ibid.*, art. 11

<sup>38</sup> *Ibid.*, arts. 20, 21 and 22.

<sup>39</sup> *Ibid.*, art. 23.

<sup>40</sup> *Ibid.*, art. 24.

of this analysis and to emphasise the inextricable interconnectedness of rights, dignity and welfare of African women as well as the imperative to strengthen their protection. I analyse the *Women's Protocol* and the structures created for its implementation and enforcement in order to assess their potential and future effectiveness. As will become evident, several feminist TWAIL considerations run through the analyses in this chapter. These include the interdependence and interconnectedness of rights, the relevance of context and the need to reconstruct rights for the benefit of African women.

### **3. Economic, Social and Cultural Rights**

Even though the indivisibility, interdependence and interrelatedness of rights, including women's rights, have been internationally acknowledged,<sup>41</sup> the difficulty of bridging the gap between theory and practice for rights implementation and enforcement remains a challenge everywhere. It is increasingly clear that the underlying liberal approach to rights prioritises a narrow definition of rights that marginalises economic, social and cultural rights, excludes rights violations in (presumed) private spheres, neglects to hold non-state actors accountable for human rights violations and largely ignores women's perspectives on rights. This approach to rights is detrimental to women. It is worth reiterating that, although this section focuses primarily on economic, social and cultural rights essential to the dignity of African women, the rights addressed overlap with other recognised categories of rights, thus necessitating an expansive understanding of women's rights.

Such an expansive approach to rights is not new. For example, the text of the *African Charter* recognises three generations of rights – civil and political; economic, social and cultural; as well

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<sup>41</sup> Paras. 5 and 18, Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993 (A/CONF.157/1993/24).



as collective rights. Nonetheless, in practice, as with dominant liberal traditions, civil and political rights have taken precedence in the interpretation of the *African Charter* by the African Commission. In instances where economic and social rights are at issue, the African Commission's interpretation has been uninspiring until recently.<sup>42</sup> *Purohit and Another v. The Gambia* and *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria* were exceptional cases that raised or engaged economic and social conditions before the African Commission.<sup>43</sup> Indeed, the African Commission has yet to engage with women's rights through its communication procedure to any serious extent. It is therefore useful to ask: To what extent may the obligations created in the texts of the *Women's Protocol* facilitate the realisation of rights recognised? How far can the *Women's Protocol* go in its protection of such rights?

Any attempt to individualise or compartmentalise women's rights is likely to have a detrimental effect on African women. For instance, the right to food is related to the right to health and the right to education. A woman who is unable to provide adequate nutrition is more likely to be unhealthy and illiterate.<sup>44</sup> Similarly, there is greater likelihood that an illiterate woman will lack access to a balanced diet (both for herself and her family), or access to adequate health care services or health care information. An expansive approach to human rights remains imperative despite the ideological foundation of "universal" human rights in liberal *laissez faire*

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<sup>42</sup> This work recognises that the African Commission is limited to interpret the *African Charter* based on communications brought before it: African Commission on Human and Peoples' Rights, Comm. No. 269/2003 (2005) Online: <<http://www1.umn.edu/humanrts/africa/comcases/269-2003.html>>. In *Interights (On behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Ethiopia*, African Commission Communication No. 233/99 (2003), the African Commission did not avert itself to undertaking a gendered interpretation of the *African Charter* in communications that raised the issue of rape of women and young girls.

<sup>43</sup> *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria* Communication No. 155/96 (2001); *Purohit and Moore v. The Gambia*, African Commission on Human and Peoples' Rights, Communication No. 241/2001, Sixteenth Activity Report 2002-2003, Annex VII, para. 49.

<sup>44</sup> The Millennium Development Goals (MGDs), Goal 1 seeks to eradicate poverty and hunger. The United Nations Millennium Declaration was adopted in 2000 to form a new global partnership to reduce extreme poverty setting out time bound targets known as the MGDs. Online: <<http://un.org/millenniumgoals/bkgd.shtml>>.

philosophy, which privileges and prioritises state-centric, civil and political rights violations in the public sphere.<sup>45</sup> A study of the right to health recognised by the *Women's Protocol* provides a framework for undertaking this feminist TWAIL analysis.

The African Commission has declared that a State has the duty to respect, protect, promote and fulfil civil and political rights as well as social and economic rights.<sup>46</sup> Several decisions of the African Commission espouse this expansive reading of the right to health. In *Union Interafricaine des Droits de l'Homme v. Zaïre*,<sup>47</sup> the communication alleged the failure of the Government to provide basic services, such as safe drinking water, electricity and essential medicines. The African Commission held this to constitute a violation of Article 16 of the *African Charter*. This analysis draws on this expanded approach to the right to health as variously conceptualised and applied, in part by the African Commission as well as other human rights institutions, particularly the United Nations Committee on Economic Social and Cultural Rights (CESCR).

#### **4. The Women's Protocol: Re-reading the Right to Health**

The right to health is inextricably linked with human dignity and well-being. Likewise, as rightly observed by Rebecca Cook, the “[p]romotion of women’s health depends upon the

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<sup>45</sup> Several authors have questioned the construction of rights as a non-political, non-ideological and impartial discourse: Makau wa Mutua, “The Ideology of Human Rights” (1996) 36 *Virginia Journal of International Law* 589. Others have gone further to illustrate the different ways various groups tap into the rights discourse for their own purposes. See for example Bonny Ibhawoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (New York: State University of New York Press, 2007).

<sup>46</sup> *SERAC v. Nigeria*, *supra* note 43 at para. 44.

<sup>47</sup> Communication 100/93 (1995), the Ninth Activity Report of the African Commission on Human and Peoples’ Rights 1995-1996, adopted on 3 April 1996, Malcolm Evans and Rachel Murray (eds.), *Documents supra* note 4 at 448.

interaction of most if not all human rights.”<sup>48</sup> The World Health Organisation (WHO) embodies this by defining the right to health to mean “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”<sup>49</sup> The right to health is thus conceived as a “fundamental human right indispensable for the exercise of other human rights.”<sup>50</sup> The interaction of the right to health with other rights forms the basis of the analysis in this chapter. The right to health is *related to* and *dependent* on other human rights, such as those listed in Article 25 of the UDHR, namely rights to an adequate standard of living, including “food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood.” Likewise, the Committee on Economic, Social and Cultural Rights (CESCR) divides the right to health into freedoms and entitlements. According to the CESCR:

The freedoms include the right to control one’s health and body, including sexual and reproductive freedoms and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest standard of health.<sup>51</sup>

Also included in the right to health, according to the CESCR, are socially-related concerns, such as violence and armed conflicts.<sup>52</sup> This presumably recognises both private or domestic violence as well as public violence arising in armed conflict situations to draw attention (or lack thereof) to resources and the gender dimensions of ESCR.

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<sup>48</sup> Rebecca Cook, “Gender, Health, and Human Rights” in Jonathan M. Mann, Sofia Gruskin, Michael A. Grodin and George J. Annas (eds.), *Health and Human Rights: A Reader* (London: Routledge, 1998) at 260.

<sup>49</sup> Preamble to the Constitution of the World Health Organisation (WHO) as adopted by the International Health Conference, New York, 19-22 June, 1946, entered into force 7 April 1948.

<sup>50</sup> The Right to the Highest Attainable Standard of Health, General Comment No. 14 (2000), E/C.12/2000/4 Committee on Economic, Social and Cultural Rights, Twenty-second session Geneva, 25 April – 12 May 2000. Online: <[http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En)>.

<sup>51</sup> *Ibid.*, para. 8.

<sup>52</sup> *Ibid.* para 10.

In summary, even though this chapter cannot provide an exhaustive analysis of ESCR or the right to health, it applies a feminist TWAIL analysis to the right to health to encompass first, related and dependent rights including, but not limited to, the right to an adequate standard of living (that is rights that improve one's standard of living, such as a right to food); second, health freedoms, such as sexual and reproductive freedoms; third, health entitlements, such as the right to a system of health protection based on equality of opportunity; and lastly socially-related concerns, such as violence.<sup>53</sup> These components of the right to health underscore protection available in various international human rights instruments and declarations. For instance, the *African Charter* incorporates components of related and dependent health rights. In Article 16, every individual shall “have the right to enjoy the best attainable state of physical and mental health.” One cannot enjoy this right without the right to food and other such rights. Health entitlements mean that State Parties are to “take the necessary measures to protect the health of the people and to ensure that they receive medical attention when they are sick.”<sup>54</sup> Article 18(3), in part, incorporates socially-related concerns by urging states to “ensure the elimination of every discrimination against women.”<sup>55</sup>

Thus regional instruments, like related international ones, selectively draw on components of the right to health. What are the rights protected and what about those omitted? Does the *Women's Protocol* provide for the whole spectrum of the right to health? What are the gaps or omissions and how do we bridge them? Can the right to health recognised in the *Women's Protocol* adequately guarantee safeguards to African women?

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<sup>53</sup> See also UN Office of the High Commissioner for Human Rights, Fact Sheet No 31, The Right to Health, June 2008. No 31. UNHCR Refworld Online:

<<http://www.unhcr.org/refworld/category,REFERENCE,OHCHR,,,48625a742,0.html>>.

<sup>54</sup> *African Charter*, Article 16.

<sup>55</sup> *Ibid*, Article 18(3).

The components of the right to health identified above can be found in several provisions of the *Women's Protocol* but Article 14 constitutes the principal provision, providing that:

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
  - a) the right to control their fertility
  - b) the right to decide whether to have children, the number of children and the spacing of children;
  - c) the right to choose any method of contraception;
  - d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
  - e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
  - f) the right to have family planning education.
2. States Parties shall take all appropriate measures to:
  - g) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
  - h) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
  - i) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

Even though this provision is innovative in several respects, it does not adequately cover all components of the right to health. Article 14 urges State Parties to ensure women's sexual and reproductive health, namely to recognise women's rights to control their fertility, and to decide the number and spacing of children and choice of contraception. It takes cognisance of the pandemic proportion of HIV/AIDS and its disproportionate impact on Africa and African women. In addition, while recognising the need for State Parties to provide adequate, affordable and accessible health service to all women, it reiterates the additional vulnerability of rural

women.<sup>56</sup> Article 14(2)(i) goes beyond existing international treaties to authorise medical abortion in specific situations. Indeed, the *Women's Protocol* has wide coverage in its recognition of this right to health.

Conversely, Article 14 focuses primarily on sexual and reproductive rights almost to the exclusion of other health rights. This is not surprising because such health rights encompass women's practical needs which are "usually a response to an immediate perceived necessity," unlike their strategic needs geared towards a strategic goal, such as gender equality.<sup>57</sup> Reproductive choice is limited to particular situations and women and not all situations or all women. Article 14 thus reaffirms dominant assumptions in relation to African women identified in the previous chapter, as it toes the line of the conventional perception of women as mothers. Additionally, it appears that attention to HIV/AIDS in this provision is an afterthought.<sup>58</sup> The conjunction "including" is used in both instances where the disease is mentioned. Any expectation that the *Women's Protocol* would go as far as, for example, promoting a regional policy towards guaranteeing access to anti-retroviral drugs for particularly vulnerable women is left unfulfilled. Like other international instruments, even though Article 14 covers some components of the right to health, it is not an exhaustive protection of women's health. Nevertheless, other elements of the right to health fall within other provisions of the *Women's Protocol*. These are analysed within the categories earlier identified and discussed below.

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<sup>56</sup> Art. 14(2) (a), *Women's Protocol*.

<sup>57</sup> C. O. N. Moser, "Gender Planning in the Third World: Meeting Practical and Strategic Needs" (1989) 17 (11) *World Development* 1799 at 1809. Moser observes that the underlying assumption is that motherhood is the most important role for women in third world development, which translates into concern for practical gender needs relating to their reproductive role. African scholars have proposed women's sociocentric interests to complement women's practical and strategic needs/interests. These interest advance not only interests related to development and democratization, but interests oriented toward improving society as a whole. See Filomina Chioma Steady, *Women and Collective Action in Africa: Development, Democratization, and Empowerment, with Special Focus on Sierra Leone* (New York: Palgrave Macmillan, 2006) at 6.

<sup>58</sup> See Second Meeting of the Working Group on the Additional Protocol to the African Charter on Women's Rights in Africa, held in Dakar, 14-15 June 1999. R. Murray and M. Evans (eds.), *Documents of the African Commission on Human and Peoples' Rights* (Oxford: Hart Publishing, 2001) at 779. Article 14 of the draft document makes no mention of HIV/AIDS.

### a) Related and Dependent Health Rights

The combination of the terms *related to* and *dependent upon*<sup>59</sup> implies that the right to health is inextricably connected to other rights without which the right to health is meaningless. For instance, where there is no life, one cannot begin to speak of health. The African Commission adopted this approach to the right to health in *Purohit and Anor v. the Gambia*<sup>60</sup> when it read Article 16 with Article 18(4) of the *African Charter* relating to the aged and the persons with disability. The Commission observed that “[e]njoyment of the right to health is vital to all aspects of a person’s life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms.”<sup>61</sup>

Even though Article 14 does not cover related and dependent rights, these rights are addressed elsewhere in the *Women’s Protocol*. For instance, Article 15, sub-titled “right to food security,” states that:

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

- a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;
- b) establish adequate systems of supply and storage to ensure food security.

The right to adequate food cannot be divorced from the health of an individual. In *SERAC v. Nigeria*, Nigeria was held in violation of several rights of the Ogoni people guaranteed under the *African Charter*. The African Commission read the right to food into the right to health, among other rights guaranteed by the *African Charter*.<sup>62</sup> According to the African Commission,

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<sup>59</sup> General Comment No. 14, *supra* note 50, para. 3. Italics added.

<sup>60</sup> *Purohit’s case*, *supra* note 43, para. 80.

<sup>61</sup> *Ibid.*

<sup>62</sup> According to the African Commission, the right to food is implicit in the African Charter in such provisions as the right to life and the right to health. *SERAC v. Nigeria*, *supra* note 43.

the right to food is “inseparably linked to the dignity of human beings and therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.”<sup>63</sup>

The interconnectedness of rights takes on greater significance given the socio-economic status of the majority of African women who may have limited access to important components of the right to health. According to the Food and Agricultural Organisation (FAO), women in 25 of the 53 member states of the AU currently face food emergencies for reasons of internal displacements and civil strife.<sup>64</sup> The health situation of such women is likely to be precarious. Related to food are drinking water and land as declared in Article 15 of the *Women’s Protocol*. Only 64 percent of the African population have access to improved water supply.<sup>65</sup> In Zambia, for instance, women often have to spend hours to access potable water during the dry season.<sup>66</sup>

As well, despite their contribution to food production and food security, African women have less access than men to land both for use and as collateral. Land determines the livelihood, social status and social security of many African women. Statistics show that globally women have access and control over only an estimated five percent of land. At this point, it is worth reiterating the familiar statistics about sub-Saharan Africa that women provide about 70 percent of total agricultural labour and produce about 90 percent of the food but receive less than 10 percent of total credit to farmers. In both Tanzania and Kenya for example, women constitute 80

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<sup>63</sup> *Ibid*, para. 65.

<sup>64</sup> Countries such as Eritrea face food shortages due to severe droughts, while Ethiopia and Zimbabwe are reported to be in need of food aid. See, Food and Agriculture Organization (FAO), Food Supply Situation and Crop Prospect in Sub-Saharan Africa. Online: <<http://www.fao.org/docrep/005/ac977e/ac977e00.htm>>.

<sup>65</sup> Improved drinking water refers to water by nature of its construction or through active intervention, protected from outside contamination. “A Snapshot of Drinking Water in Africa” WHO/UNICEF 2008.

<sup>66</sup> Honorine Muyoyeta, “Integrated Assessment of Gender, Land and Water and their Impact on Food Security: The Case of Zambia” Women’s Land and Water Right in Southern Africa. July 2004 Online: <<http://www.wlwsa.org/The%20Case%20of%20Zambia.pdf>>.



percent of the agricultural labour resource.<sup>67</sup> Without the rights to food, drinking water and land, many African women's access to the right to health is compromised.

The rights to life, education, and access to information are similarly related to and dependent on the right to health with equal importance and relevance. The gendered nature of related and dependent rights discourse must also be taken into account with regards to women's right to health. For women, for example, the right to life should not be understood in a restrictive manner to address violations of conventional due process rights or imposition of capital punishment in an arbitrary manner.<sup>68</sup> Rather, it should also entail the comprehensive care of women throughout their life cycle. The right to life in this context should oblige State Parties to adopt positive measures to protect the girl child from infanticide, child mortality, early marriage and early child birth leading to high rates of maternal mortality resulting from a lack of essential or emergency obstetric care, as well as harmful practices, such as female genital cutting, all of which could have severe consequences.<sup>69</sup> Also important is ante-natal and post natal care for women. Available statistics show, for example, that maternal mortality rates are 10.5 per thousand live births in the Gambia and 16.6 per thousand births in the rural areas.<sup>70</sup> The high maternal mortality rate not only violates the right to health of these women but also their right to life. Women's right to health may also be threatened due to lack of care for women during and post-menopause. The related and dependent approach to the right to health reinforces the importance of recognising the interdependency of rights in an equitable and non-discriminatory manner, taking account of the societal circumstances of African women. Article 14 does not

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<sup>67</sup> African Women's Development Fund Fact Sheet. Online: <<http://awdf.org/web/index.php?page=87>>.

<sup>68</sup> See for example, General Comment No. 6: The Right to Life: UN GAOR, 16<sup>th</sup> Session. UN Doc. A37/40 (1982). Full text online:

<[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument)>.

<sup>69</sup> *Ibid.*

<sup>70</sup> African Women's Development Fund Fact Sheet, *supra* note 67, compared with less than 5 percent in Canada and Norway in the 1990s: Statistics Canada. Selected Mortality Statistics, Canada 1920-1990, Ottawa, Ont.: Statistics Canada, 1994.

adequately address these concerns; therefore, a more expansive understanding as outlined above is important.

## **b) Health Freedoms**

Health freedoms include the right to control one's health and body. While some aspects of sexual and reproductive freedoms have been variously articulated in international human rights documents, the *Women's Protocol* provides the first explicit articulation of the right to medical abortion in given circumstances in a binding international human rights instrument.<sup>71</sup> The recognition of abortion in the *Women's Protocol* is not surprising given the high maternal mortality rates among African women, especially those resulting from unsafe abortion procedures. An estimated 529,000 women die worldwide each year of pregnancy related complications, with 99 percent in developing countries.<sup>72</sup> In addition, it is estimated that more than four million unsafe abortions occur annually in Africa while unsafe abortions account for 13 percent of maternal deaths.<sup>73</sup> According to Ipas, a sexual and reproductive health and rights organisation, there are approximately 650 deaths for every 100,000 abortions compared to fewer than 10 per 100,000 procedures in developed regions.<sup>74</sup>

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<sup>71</sup> This is however not new in some African countries. For instance in Ghana, a woman can demand legal termination under similar circumstances as those provided under the *Women's Protocol*. See Act 29; section 58 Consolidation of Criminal Code of Ghana, 1960 as amended by PNDCL 102 of 1985.

<sup>72</sup> WHO (2005), *The World Health Report 2005: Make Every Mother and Child Count*. Chapter One, "Mother and Children Matter – So Does Their Health." Geneva: WHO Online: <[http:// www.who.int/whr/2005/chapter1/en/index.html](http://www.who.int/whr/2005/chapter1/en/index.html)>.

<sup>73</sup> Reproductive Health in Africa, IPAS in Africa Online: <[http://www.ipas.org/Publications/asset\\_upload\\_file424\\_2529.pdf](http://www.ipas.org/Publications/asset_upload_file424_2529.pdf)>.

<sup>74</sup> *Ibid.* For example in Nigeria, where abortion is legal only to save the life of a mother, maternal death rate is about 800 deaths per 100,000 live births, one of the highest in the world.

One aspect of health freedoms yet to receive adequate attention especially with regards to women is freedom from non-consensual medical treatment and experimentation.<sup>75</sup> This constitutes a component of the right to health often not categorised as such. It is found in Article 4 of the *Women's Protocol* that guarantees the rights to life, integrity and security of the person. Article 4(2)(h) provides that “States Parties shall take appropriate and effective measures to prohibit all medical and scientific experiments on women without their consent.” The importance of this provision cannot be taken lightly. The progress and benefit of medical and scientific research experimentation offer solutions to the burden of diseases, such as malaria, tuberculosis and HIV/AIDS which disproportionately affect women. This provision goes beyond the *Women's Convention* to require the informed consent of the research participant. However, several questions arise in relation to the provision.

Informed consent presumes a participant's comprehension, voluntary choice and the disclosure of adequate information.<sup>76</sup> Are all these elements of informed consent adequately met in the context of African women? Can consent in this case be the sole determinant of appropriateness? What about the adequacy of the ethical standards required for research conducted by organisations, such as pharmaceutical companies, engaged in such studies?<sup>77</sup>

Informed consent has been described as “individual's autonomous authorization of a medical intervention or of participation in research.”<sup>78</sup> A person (patient or participant) must authorise

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<sup>75</sup> Article 7, International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976.

<sup>76</sup> The Nuremberg Code emerged out of the Nuremberg Military Tribunal's decision in *United States v. Karl Brandt and others*. The Nuremberg Code “Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10”, Vol. 2, Nuremberg, October 1946 – April 1949 (Washington, DC: US Government Printing Office, 1949). pp. 181-182. Online: <<http://www.hhs.gov/ohrp/references/nurcode.htm>>.

<sup>77</sup> Similar queries have been made by human rights activists: Jegede Ademola Oluborode, “Africa: Women and Scientific Experiments – Is Informed Consent Enough?” Pambuka News, 29 May 2008. Online: <<http://allafrica.com/stories/200805290720.html?page=2>>.

<sup>78</sup> Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (6<sup>th</sup> ed.) (New York: Oxford University Press, 2009) at 119.

something through an act of informed and voluntary consent. This may also refer to “the social rules of consent” that “one must obtain legally or institutionally valid consent from patients or subjects before proceeding with diagnostic, therapeutic; or research procedures.” From the analysis of Beauchamp and Childress, the first form of informed consent is more vigorous than the second, which is often all that is required in the case of research and medical experimentation. The authors identify five elements of informed consent to include competence, disclosure, understanding, voluntariness and consent.<sup>79</sup>

Without attempting to undertake an exhaustive legal analysis of what constitutes informed consent, the adequacy of these elements of informed consent may be called into question given the social and economic contexts in which many African women live. With regards to disclosure and understanding, for example, how “free and informed” is consent given under conditions of poverty, illiteracy and other forms of powerlessness? For example, in a trial for a HIV microbicide, a woman, due to illiteracy or other reasons, may believe that the product assigned to her will protect her from HIV even after being told repeatedly that the drug is merely experimental.<sup>80</sup> Voluntariness implies lack of coercion, persuasion or manipulation. Driven by poverty some female participants may agree to small incentives, such as towels and t-shirts. As well, in largely patriarchal African societies where, in most cases, men are the decision-makers within families, it is difficult to determine the voluntariness of consent.

Another challenge in relation to scientific and medical experimentation is the adequacy of ethical considerations and whether participants benefit from the overall outcome of such trials. Clinical trials should ordinarily conform to regulatory standards and ethical review guidelines,

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<sup>79</sup> *Ibid.*, at 120.

<sup>80</sup> Microbicides are products being developed to be used by women to reduce transmission of HIV during sexual intercourse. CONRAD, a reproductive health research organisation, conducted the trials in the three countries, while Family Health International sponsored the trial in Nigeria. “Cellulose Sulphate Microbicide Trial Stopped,” World Health Organisation. Online: <<http://www.who.int/mediacentre/news/statements/2007/s01/en/index.html>>.

both national and international.<sup>81</sup> It is not impossible that powerful transnational pharmaceutical organisations may conduct questionable medical and scientific experiments.<sup>82</sup> Few potential trial communities in Africa have the required resources, infrastructure or experience to conduct rigorous clinical trials according to such guidelines. A study led by the World Health Organisation Regional Office for Africa (WHO/AFRO) highlights the absence of national ethics committee for medical research in 36% of its member states.<sup>83</sup> It also indicates that only one of these countries ensured that the clinical trials financed by either external governmental or private sponsors were subject to an ethical evaluation and received approval in the country of origin. In a study conducted in Sudan in 2007, 53 out of the 116 researchers who were interviewed were unaware of the existence of ethics committees in that country.<sup>84</sup> It is also difficult to determine whether the trial will contribute to any broader health care agenda of the trial communities. In the trials of microbicide, for example, will sponsors be held responsible for

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<sup>81</sup> Several international documents regulate ethical standards in scientific and medical treatment and experimentation. These include the Nuremberg Code from which the idea developed, the World Medical Association Declaration of Helsinki 1964, subsequently amended in 1975; 1981; 1989; 1996 and 2000, with further clarifications in 2002 and 2004, and the Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research, by the National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research 18 April 1979. Online: <<http://www.scrippscollege.edu/academics/irb/pdf/belmont-report.pdf>>. Others are the Universal Declaration on the Human Genome and Human Rights, UNESCO Gen. Conf. Res. 29 C/Res. 16, 11 November 1997, reprinted in Records of the General Conference, UNESCO, 29<sup>th</sup> Sess., 29 C/Resolution 19 at 41 (1997) (endorsed by the UN General Assembly, G.A. Res. 152, U.N. GAOR 53<sup>rd</sup> Sess., U.N.Doc. A/RES/53/152 (1997)) and the Council of Europe's *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: [Convention on Human Rights and Biomedicine]*. ETS no. 164 1997, 36 I.L.M. 817 (This Convention is not applicable to non-state parties of the Council of Europe) and the International Ethical Guidelines for Biomedical Research Involving Human Subjects, adopted by the Council for International Organizations of Medical Sciences (CIOMS) in collaboration with World Health Organisation, Geneva, 2002.

<sup>82</sup> According to Thomas Pogge, pharmaceutical research is already skewed in favour of the affluent: medical conditions accounting for 90% of the global disease burden receive only 10% of all pharmaceutical research worldwide. "Of the 1,393 new drugs approved between 1975 and 1999, only 13 were for tropical diseases – of which five were byproducts of veterinary research and two commissioned by the military." Under the TRIPS regime, investors of new drugs are rewarded with a twenty-year monopoly. In sum, the poor populace of the research participants are largely powerless: Thomas Pogge "Severe Poverty as a Human Rights Violation" in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford: Oxford University Press, 2007) at 37.

<sup>83</sup> J.M. Kirigia, C. Wambebe, A. Baba-Moussa, "Status of National Research Bioethics Committees in the WHO African Region" (2006) 6 BMC Medical Ethics E10; D Maiga, B. D. Akanmori, L. Chocarro, "Regulatory Oversight of Clinical Trials in Africa: Progress over the Past 5 Years" (2009) 27 Vaccine 7249-7252.

<sup>84</sup> D. E. M Elsayed, N. E. Kass, "Assessment of the Ethical Review Process in Sudan" (2007) 7 (3) Developing World Bioethics 143; D. E. M Elsayed, "The Current Situation of Health Research and Ethics in Sudan (2004) 4 (2) Developing World Bioethics 154.

providing anti-retroviral treatment for participants when they need it many years after their participation in the trials; and if so, for how long? Ordinarily, given the high pricing of the (outcome) products, will the participants enjoy the benefits of the research?

The fact that Africa remains a fertile ground for research and stands the greatest risk to be impacted by medical exploitation makes the protection of women within the required ethical standards imperative. States Parties must therefore focus greater attention to ensure adequate ethical standards and guarantee compliance with international guidelines prior to commencing such trials or research. At present, there is no guarantee that the safeguards included in the *Women's Protocol* can produce the desired benefit for African women. The socio-economic situations of African women must be taken into consideration to determine the adequacy of the consent requirement. The right to health, including consent in medical and scientific experimentation, must be grounded in the historical and socio-economic contexts of African women. Added to this, there is even less likelihood that women would enjoy free consent and benefit of medical and scientific experiments in the absence of adequate ethical standards. These queries, not addressed by the *Women's Protocol*, require further consideration in order to ensure that African women actually benefit from scientific and medical experimentations.

### **c) Health Entitlements**

Health entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. For example, the CESCRC construes health entitlements to include:

the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries

and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care.<sup>85</sup>

Additionally, the CESCRC regards participation of the population in the provision of health services and decision-making at national and community levels to be of the utmost importance.<sup>86</sup> Hence, the human right to health requires states to respect existing access to health services and may not obstruct or diminish access. Also included are state obligations to provide health care services that individuals are unable to obtain or provide on their own, such as clinic and hospital-based services dependent on specialised skills of health care professionals and surgical interventions.<sup>87</sup>

Health care services constitute enforceable entitlements to be facilitated progressively within available resources. This approach recasts exclusion from medical care due to resource scarcity as a prima facie infringement of an enforceable right. Such an infringement is unacceptable unless capable of cogent justification. In line with this, the *Women's Protocol* provides that State Parties shall take all appropriate measures to provide adequate, affordable and accessible health services to women in both urban and rural areas.<sup>88</sup> They are also to provide specific services to women during pregnancy and breastfeeding.<sup>89</sup>

As noted, a major obstacle to meeting this obligation in many African states relates to the funding of the health sector. States often have to resort to rationing of resources available for medical care. Globalisation contributes to states' (in)ability to provide adequate medical care. While an examination of globalisation<sup>90</sup> and the neo-liberal policy framework adopted by the

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<sup>85</sup> CESCRC, General Comment 14, *supra* note 50 para. 17.

<sup>86</sup> *Ibid.*

<sup>87</sup> Rebecca Cook, *supra* note 48 at 262.

<sup>88</sup> Article 14 (2) (a), *Women's Protocol*.

<sup>89</sup> Article 14 (2) (b), *ibid.*

<sup>90</sup> Globalisation in this context relates to economic and other aspects. It is seen as possessing liberating and empowering qualities as well as marginalising and exclusionary ones. J. Oloka Onyango, "Who is Watching Big Brother? Globalization and Protection of Cultural Rights in Present Day Africa" (2005) 27 (4) Hum. Rts Q. 1248.

international financial institutions – the World Bank and the International Monetary Fund (IMF) – is beyond the purview of this section, their severe impact on Africa cannot be disregarded.<sup>91</sup> For instance, the privatisation of health care services, among others, due to dominance of market forces and the withdrawal of the state from socio-economic activities, challenges the ability of States Parties to deal with social concerns, such as providing adequate health care services to women (especially poor women). The weakening of the state has resulted in private organisations, such as non-governmental organisations (NGOs), particularly Western NGOs, for the most part, taking over the role of the state as health services providers. These NGOs thus decide which particular services to provide and the conditions of their provision.

Even though not all aspects of the right to health can be resolved solely in the context of the relationship between the state and the individual, this right must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health.<sup>92</sup> The CESCR clarifies that health services must be accessible to all sectors of the population, especially the most vulnerable or marginalised groups, ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS.<sup>93</sup>

The African Commission has applied this understanding of health by pronouncing a violation of Article 16(1) of the *African Charter* in *Purohit's case*. It observed that the right to health includes the right to health facilities, and access to goods and services to all without discrimination of any kind.<sup>94</sup> The African Commission acknowledged that “millions of people in Africa are not enjoying the right to health maximally because African countries are generally

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<sup>91</sup> M. Ould-Mey, “Global Adjustment: Implications for Peripheral States” (1994) 15 Third World Quarterly 2.

<sup>92</sup> General Comment No. 14, *supra* note 50 at para. 9; also, Manoj Kumar Sinha, *Enforcement of Economic, Social and Cultural Rights: International and National Perspectives* (Delhi: Manak Publications Ltd., 2006) at 129.

<sup>93</sup> *Ibid.* at para 12.

<sup>94</sup> See *Purohit's case*, *supra* note 43, para. 80.



faced with the problems of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.”<sup>95</sup> It therefore read into Article 16(1) of the *African Charter* a State Party’s obligation to “take concrete and targeted steps while taking full advantage of their available resources, to ensure that the right to health is fully realised in all aspects without discrimination of any kind.”<sup>96</sup> The African Commission’s approach is commendable given the dismal state of health care systems in many African states. UNICEF statistics reveal that about one in six African children die before their fifth birthday, half of whom die from diseases preventable by vaccines; and one woman dies every two minutes from complications of pregnancy and delivery.<sup>97</sup> Even though Article 14 of the *Women’s Protocol* addresses the issue of health entitlements, it could have gone further to clarify its elements.

#### **d) Socially Related Concerns**

Commentators agree that there is abundant evidence that the major determinants of health status are societal, even though the nature of these determinants remains vague. The HIV/AIDS pandemic has resulted in greater attention to societal factors that contribute to vulnerability and to preventable disease, disability and premature death. Socially related concerns include violence, armed conflict, poverty, HIV/AIDS, and rapid population growth, which drive the need to realise the right to health in many African countries.<sup>98</sup> These concerns often have significant impacts on women’s ability to attain the highest attainable standard of health.

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<sup>95</sup> *Ibid.*, para. 84.

<sup>96</sup> *Ibid.*

<sup>97</sup> *The State of the World’s Children: Childhood under Threat* (New York: UNICEF, 2005).

<sup>98</sup> General Recommendation No.14, *supra* note 50, para.10.

Violence, for instance, may take economic, physical, sexual or psychological forms, with grave consequences for women worldwide. The *Women's Protocol* captures this by defining violence against women to mean:

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.<sup>99</sup>

The elimination of violence against women rightly traverses the content of the *Women's Protocol*. Gender-based violence, targeted at an individual based on gender, has the consequence of entrenching the subordination of women. The expansive definition of violence in the *Women's Protocol* encompasses several elements of socially-related concerns, such as freedom from violence in private and public life as well as in peace time and during armed conflicts, that are context-specific to many African women. States may be held accountable to protect women from violence committed against them, whether in private or in public life. The linkage between sexual violence and armed conflict is not in doubt with the prevalence of armed conflict in several African countries. Even though allegations of rape, for example, have been made in several communications before the African Commission, the Commission is yet to pronounce on this problem.<sup>100</sup> However, the Secretary General of the UN recently condemned the systematic use of sexual violence as a weapon, mainly against women, to pursue military,

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<sup>99</sup> Article 1, *Women's Protocol*.

<sup>100</sup> See for example, *Malawi African Association & Others v. Mauritania* Communication Nos. 54/91, 61/91, 98/93.164/97, 196/97 and 210/98 (2000). The communication involved the violation of the right to health in relation to detention of prisoners. Even though the communication alleged the rape of women and the Government of Mauritania was held in violation of provisions of the *African Charter*, the African Commission failed to elaborate on the rights of women violated beyond recommending that the state should take appropriate measures to ensure payment of compensatory benefit to the widows and the beneficiaries of the victims of the violations. Similarly in *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Ethiopia*, Communication No. 233/99 (2003), allegations of torture and rape of Eritrean women and young girls in the affected areas by Eritrean soldiers were not addressed. The opportunity to address same was lost since the communication was suspended *sine die* by the Commission.

political, social and economic objectives during armed conflicts.<sup>101</sup> Article 7(1)(g) of the Rome Statute of the International Criminal Court also defines crimes against humanity to include “[r]ape, sexual slavery, enforced prostitution, forced sterilization, or any other form of sexual violence of comparable gravity.”

As well, the HIV/AIDS pandemic as a socially-related health concern cannot be ignored. Out of the 33.4 million people living with AIDS worldwide in 2007, an estimated 15.4 million are women.<sup>102</sup> 2007 statistics show that an estimated 61 percent of adults living with AIDS in parts of Africa are women. Obijiofor Aginam, applying TWAIL analysis, points out that Africa’s AIDS crisis conjures “images of savagery and mass murder challenging ‘post-ontological’ international law to ameliorate human suffering occasioned by AIDS.”<sup>103</sup> This leads one to question the adequacy of the provision on HIV/AIDS in Article 14, especially given the projection of Africa as the epicentre of the pandemic and its disproportionate impact on women.

HIV/AIDS raises several human rights questions in Africa. These include the impact of criminalisation of HIV transmission, discrimination and the right to access to healthcare. Many African countries create due process exceptions for people living with HIV and/or criminalise its transmission. The Constitution of Zimbabwe, for example, states that no person shall be deprived of personal liberty except in a specific number of cases, such as when deprivation is for the purpose of preventing the spread of an infectious or contagious disease.<sup>104</sup> Zimbabwe,

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<sup>101</sup> UN Security Council, Report of the Secretary-General Pursuant to Security Council Resolution 1820, S/2009/362, 15 July 2009. Online:

<<http://daccessdds.un.org/doc/UNDOC/GEN/N09/405/56/PDF/N0940556.pdf?OpenElement>>.

<sup>102</sup> AIDS Epidemic Update, December 2007 UNAIDS and WHO. Online:

<[http://data.unaids.org/pub/EPISlides/2007/2007\\_epiupdate\\_en.pdf](http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en.pdf)>

<sup>103</sup> Obijiofor Aginam, “International Law, HIV/AIDS, and Human Rights in Africa: A Post-Colonial Discourse” (2006) 100 Am. Soc’y Int’l L. 350 at 351.

<sup>104</sup> Zimbabwean Constitution (1996), art. 13(1) and (2). See also the Constitution of Ghana (1992), art 14 (1)(d) and Ugandan Constitution (1995), art 23 (1) (d).

like several other African states, also specifically criminalises HIV transmission.<sup>105</sup> Section 79 of the Criminal Law (codification and Reform) Act<sup>106</sup> provides that:

(1) Any person who – (a) knowing that he or she is infected with HIV; or (b) realising that there is a real risk or possibility that he or she is infected with HIV; intentional does anything or permits the doing of anything which he or she knows will infect, or does anything which he or she realises involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV, whether or not he or she is married to that other person, and shall be liable to imprisonment for a period not exceeding twenty years.

While the purpose of criminalising HIV transmission is to promote public health, some commentators have questioned its effectiveness as a means of preventing risky behaviour.<sup>107</sup>

With regards to discrimination, women have been cast out of their homes and villages because of positive HIV status, children have been denied schooling and access to medical treatment, and HIV-positive individuals have been denied employment or fired from their jobs.<sup>108</sup> Recent reports in Namibia, Democratic Republic of Congo, Zambia and South Africa reveal that women are being sterilised without their consent after being told that procedure is a routine treatment for AIDS.<sup>109</sup> The resort to sterilisation stems from the idea of women as victims and vectors of HIV, blamed for bringing the disease into the family. These HIV-positive women are denied their reproductive autonomy because they are not allowed to decide whether or not to have children. Further, discrimination increases the impact of the epidemic on people living

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<sup>105</sup> Criminal Law (Codification and Reform) Act, 2004, c. 1. (Zimbabwe), Online: [http://www.kubatana.net/docs/legisl/criminal\\_law\\_code\\_050603.pdf](http://www.kubatana.net/docs/legisl/criminal_law_code_050603.pdf) . See also the Law on Prevention, Care and Control of HIV/AIDS (No. 2005-31), 5 April 2006, Benin; The Law Establishing Rules Relating to the Prevention, Care and Control of HIV/AIDS (No. 06-28 of 29 June 2006) Mali.

<sup>106</sup> Section 79 *ibid.*, (Zimbabwe).

<sup>107</sup> Sun Goo Lee, "Commentary: Does Criminalisation of HIV Transmission Truly Promote Public Health Goals? Review of Ten African HIV Laws" (2008) 9 Medical Law International 245 at 250, argues that these legislation create problems because they impose broad mental culpability, lack specificity in publishable behaviours, punishes simple exposure and mother-to-child transmission.

<sup>108</sup> Tim Receveur, Communities Must Overcome Fear, Stigma and Halt HIV/Aids Epidemic, AllAfrica.com.

<sup>109</sup> The Guardian "African Women with HIV 'Coerced into Sterilisation,'" 23 June 2009 at 17. Online <<http://www.guardian.co.uk/world/2009/jun/22/africa-hiv-positive-women-sterilisation>>.

with HIV/AIDS and those presumed to be infected, as well as their family and associates. People are generally more vulnerable to infection when their economic, social or cultural rights (for example, the rights to health and work) and/or civil and political rights (for example, the right to privacy) are not respected, protected or fulfilled.<sup>110</sup>

This problem of HIV/AIDS is further exacerbated by the predominance of poverty which complicates the situation of already vulnerable women. Poverty serves as an additional obstacle to achieving women's right to health. Poverty is described as:

a human condition characterized by sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.<sup>111</sup>

This goes beyond the common vision of poverty as an economic phenomenon. It encompasses economic, social and other dimensions of poverty that draw a connection between health, other human rights and poverty eradication.<sup>112</sup> A Canadian Population Health Institute's publication buttresses the connection between poverty and health rights in its key finding that "poverty leads to poor health status."<sup>113</sup> Likewise, the fact that continuing poor health status especially of already vulnerable women may also lead to or exacerbate poverty creates a vicious circle.

The *Women's Protocol* raises the issue of poverty in the context of sustainable development by urging State Parties to:

... take all appropriate measures to: promote women's access to credit, training, skills development and extension services at rural and urban levels in

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<sup>110</sup> Helen Watchirs, "A Human Right Approach to HIV/AIDS: Transforming International Obligations into National Laws" (2002) 22 Australian Year Book of International Law 78 at 83-4.

<sup>111</sup> CESCR, Poverty and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2001/10, 4 May 2001, para. 8.

<sup>112</sup> *Ibid.*, para. 1.

<sup>113</sup> Shelley Phipps, "The Impact of Poverty on Health: A Scan of Research Literature" (Poverty and Health, CPH collected Papers, June 2003. Online: <[http://secure.cihi.ca/cihiweb/products/CPHIImpactonPoverty\\_e.pdf](http://secure.cihi.ca/cihiweb/products/CPHIImpactonPoverty_e.pdf)>.

order to provide women with a higher quality of life and reduce the level of poverty among women.<sup>114</sup>

Even though the above provision makes no direct mention of health, it would be impossible to have a higher quality of life without adequate health care. Unlike the *Women's Protocol*, which does not adequately recognise the fact that poverty remains an obstacle to women's right to health, the African Commission identifies poverty as a hindrance to the ability of African countries to provide the necessary amenities, infrastructure and resources that facilitate enjoyment of the right to health.<sup>115</sup> The *Women's Protocol* draws linkages between the socially-related health rights but the question remains whether it has gone far enough to guarantee African women the "highest attainable standard of health conducive to living a life of dignity."

Since the right to access to healthcare includes the right to treatment, due consideration should be given to the unequal international economic order which manifests itself in politics around HIV/AIDS. The World Trade Organisation (WTO) and its Trade-Related Aspects of Intellectual Property Rights (TRIPS) impacts the realisation of the right to health of people living with HIV/AIDS in developing countries and particularly in Africa.<sup>116</sup> The pharmaceutical industry owned by globalised transnational corporations has been an obstacle to the availability of effective anti-retroviral treatment.<sup>117</sup> Access to essential anti-retroviral drugs, for prevention of mother-to-child transmission and treatment of HIV patients in many African countries, remains contentious.<sup>118</sup> Given these concerns, the *Women's Protocol* could have gone further to ameliorate the suffering of women occasioned by AIDS. Perhaps the *Women's Protocol* could have taken a more proactive approach to addressing the HIV/AIDS scourge and its deadly

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<sup>114</sup> Article 19(d), *Women's Protocol*.

<sup>115</sup> *Purohit's case*, *supra* note 43.

<sup>116</sup> The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Treaty was concluded in 1995. Online: <<http://www.cptech.org/ip>>.

<sup>117</sup> J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 13.

<sup>118</sup> See the South African case of *Minister of Health and Others v. Treatment Action Campaign and Others* 2002 (10 BCLR 1033 (CC) [TAC case]).

impacts on African women, for instance, by calling for the decriminalisation of HIV transmission and improved access to HIV testing and counselling and to antiretroviral therapy. Article 14 could have gone beyond mere mention of HIV/AIDS to acknowledge the fundamental threat the virus poses to women.

### **e) A Feminist TWAIL Evaluation of the Right to Health**

As a contemporary instrument, the contents of the *Women's Protocol* go beyond existing international human rights instruments for the protection of women. It identifies important components of the right to health particularly relevant to women in Africa. However, in many respects the *Women's Protocol* merely mentions such concerns without specifying the content of such rights. In some cases, the *Women's Protocol* reinforces dominant assumptions about women, thereby missing an opportunity to re-conceptualise certain rights. The mention of HIV/AIDS in the *Women's Protocol*, for example, appears to be an afterthought rather than an inclusion based on its disproportionate impact on women.<sup>119</sup> In many instances, the *Women's Protocol* reproduces earlier international treaties, especially the *Women's Convention*, without challenging the universalising effect of these liberal-oriented documents. For instance, while the *Protocol* positively requires informed consent to medical and scientific experimentation, the socio-economic context of many African women may require more than informed consent to protect vulnerable women. As well, the conventional perception of women as first and foremost mothers is evident in the main provision protecting the right to health with its focus predominantly on sexual and reproductive health.

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<sup>119</sup> Earlier drafts of the Protocol were totally silent on the issue of HIV/AIDS. See for example Article 16 of the Kigali Draft Protocol on Women's Rights (as reviewed and amended by the Commissioners) November 1999. Malcolm Evans and Rachel Murray, *Documents, supra* note 4 at 123-128.

Despite its shortcomings, the *Women's Protocol* goes beyond earlier international human rights instruments adopted to protect women's right to health. Doubtless, it pays attention to the context within which these rights would function, such as identifying the authorisation of abortion in specific cases and affirming women's freedom from medical and scientific experimentation without their informed consent. The above analysis reveals that the *Women's Protocol* provides a valuable framework for addressing women's health and other rights. It suggests that the *Protocol* does not exist in a vacuum and would therefore require expansive interpretation, creative manoeuvring at the domestic level and perhaps an amendment of the document itself.

Fortunately, the *Women's Protocol* recognises possible limitations within its provisions by conceding that:

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.

This implies that the *Women's Protocol* may be read in conjunction with other instruments, such as with the *African Charter* to reinforce women's right to health.

The *Women's Protocol* provides an enforceable instrument available to African women. Together with the *African Charter* and the other treaties for the protection of human rights, African women stand to gain much if these rights are adequately implemented, enforced and applied domestically. Implementation of the *Women's Protocol* must have due regard to the interdependence, interconnectedness and interrelated nature of all human rights. Additionally, the historical and contextual situation of African women must be duly recognised to adequately address women's rights. In view of this, the next section examines the implementation



mechanisms available under the *Women's Protocol*, while the next chapter focus on the roles of actors that enable the domestic application of the *Women's Protocol*.

### **III. Implementing Rights under the *Women's Protocol***

In order to implement the *Women's Protocol*, State Parties have an obligation to “provide appropriate remedies to any woman whose rights or freedom, as herein recognised, have been violated.”<sup>120</sup> Remedies may encompass appropriate legislative and other measures where violations persist, as well as provide judicial, administrative or legislative actions.<sup>121</sup> The *Women's Protocol* shares the implementation mechanisms available under the *African Charter*. Article 26 of the *Women's Protocol* obliges States Parties to submit periodic reports in accordance with Article 62 of the *African Charter* indicating the legislative and other measures undertaken for full realisation of the rights recognised. By implication, the reporting procedure available under the *African Charter* is similarly applicable for enforcement of the *Women's Protocol*.

In addition, by virtue of Article 32 of the *Women's Protocol*, the African Commission shall be seized with matters of interpretation arising from the application and implementation of the *Women's Protocol*, pending the full functioning of the African Court on Human and Peoples' Rights.<sup>122</sup> The first step towards implementing women's rights recognised by the *Women's Protocol* therefore must be the ratification and thereafter its active incorporation into the domestic laws of State Parties. This subsection considers the adequacy of the two main implementation mechanisms, namely, state reporting and the communication procedures.

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<sup>120</sup> *Women's Protocol*, article 25(a).

<sup>121</sup> *Ibid.*, art. 25(b).

<sup>122</sup> *Ibid.*, art. 32.

## 1. State Reporting

States Parties shall 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 realisation of the rights herein recognised.<sup>123</sup>

Upon ratification, this provision encourages compliance by empowering the African Commission to receive and consider reports submitted by State Parties. This implies an initial report followed by a periodic report every two years indicating legislative and other measures taken to realise the rights in the *Women's Protocol*.<sup>124</sup>

State reporting procedures are not new to international human rights law implementation. They are applied in the UN system to “ensure compliance with international norms”<sup>125</sup> under major treaties and to monitor measures adopted by State Parties to fulfil their treaty obligations. The procedures involve review of periodic reports by treaty bodies to provide a forum, not only to showcase achievements but also to highlight difficulties and obstacles States confront in the implementation of rights. State reporting procedures provide a forum for constructive dialogue between a State Party and the treaty bodies, with inputs by way of shadow or parallel reports submitted by prominent international human rights NGOs and domestic civil society groups. According to the African Commission, “the State reporting exercise facilitates experience sharing, best practices and lessons learnt.”<sup>126</sup>

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<sup>123</sup> *Ibid.*, art. 26.

<sup>124</sup> The African Commission on Human and Peoples' Rights, State Reporting Procedure, Information sheet No. 4. Online: <[http://www.achpr.org/english/information\\_sheets/ACHPR%20inf.%20sheet%20No.4.doc](http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20No.4.doc)>.

<sup>125</sup> Malcolm Evans, Tokunbo Ige and Rachel Murray, “The Reporting Mechanism of the African Charter on Human and Peoples' Rights” in Malcolm Evans and Rachel Murray (eds.), *supra* note 4 at 37. The authors observe that it is the only procedure that is compulsory in all UN instruments.

<sup>126</sup> Activity Report of the African Commission on Human and Peoples' Rights Submitted in Conformity with Article 54 of the African Charter on Human and Peoples' Rights. Executive Council Thirteenth Ordinary Session 24-28 June 2008 held in Egypt. EX.CL/446(XIII). Online: <[http://www.chr.up.ac.za/hr\\_docs/documents/23rd%20and%2024th%20Activity%20Reports.pdf](http://www.chr.up.ac.za/hr_docs/documents/23rd%20and%2024th%20Activity%20Reports.pdf)>.

The fact that state reporting depends on the willingness of the State Party to honour its treaty obligations poses a continuing challenge to the reporting procedures. No treaty implementation body has achieved full compliance with the obligation to report, as evidenced by the backlog of reports yet to be submitted to UN treaty monitoring bodies. Several reasons may be adduced for the general lack of compliance with state reporting obligations. While some State Parties generally prefer not to be exposed to external scrutiny, most States are parties to multiple treaties and are often faced with the challenge of producing separate periodic reports under individual treaties simultaneously, leading to non-submission or overdue reports.

Apart from this, the African Commission faces constraints regarding its ability to review state reports. For example, it confronts significant constraints regarding time available for considering reports submitted by State Parties, given the fact that its regular sessions take place twice a year for a period of two weeks each. This raises concerns regarding the thoroughness with which reports are considered due to the shortness of the sessions. Also questionable is the viability of the time frame required for submission of reports. The submission of a two yearly periodic report requires commitment and efficiency by State Parties in consultation with all stakeholders, such as relevant government ministries, parastatal and civil society groups in order to produce qualitative and comprehensive reports.<sup>127</sup> State Parties have difficulty meeting this obligation and often have to combine reports to cover several overdue ones. Even though submission of combination reports implies fewer reports and more time to focus on those submitted, this approach may defeat the purpose of a procedure that seeks to assess the progressive fulfilment of treaty obligations. This challenge has motivated deliberations to

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<sup>127</sup> In the Concluding Comment to South Africa's first periodic report, the African Commission observed that "reports required under Article 62 should be shared with all sectors of the society to give them an opportunity to contribute in its preparation or to react thereto." Republic of South Africa, First Periodic Report on the African Charter on Human and Peoples' Rights: 2001. Online: <[http://www.chr.up.ac.za/hr\\_docs/countries/docs/Periodic%20report%20african%20charter%20final%20print.doc](http://www.chr.up.ac.za/hr_docs/countries/docs/Periodic%20report%20african%20charter%20final%20print.doc).

review the submission of state reports upwards under Article 62 from every two years to four years.<sup>128</sup>

Upon submission of a state report, the reporting state has an obligation to send competent representation to answer questions during consideration of its report. Even though some States Parties send high level competent delegations, others either fail to send representation or delay the same, making it difficult for the Commission to consider such a report.<sup>129</sup> Some State Parties prefer to avoid the procedure for fear of exposure or embarrassment, even though treaty bodies insist that consideration of state reports is largely to provide an opportunity for constructive dialogue between the states and the treaty body.

The African Commission has taken several measures to encourage submission of periodic reports by State Parties and to address some of the above constraints which have yielded limited success to date.<sup>130</sup> These include calls and letters to States Parties requesting their reports, individual Commissioners raising the issue of non-compliance in the course of promotional visits to individual countries, encouraging State Parties' submissions during its sessions, and including a list setting out the status of compliance to state reporting obligations in annual activity reports.<sup>131</sup> As of May 2009, only twelve of the fifty-three member states had submitted all reports, twelve others had never submitted a single report, and most submit consolidation

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<sup>128</sup> Thirty-ninth Ordinary Session of the African Commission, 11-25 May 2006 Report of the Meeting of the Brainstorming Meeting on the African Commission on Human and Peoples' Rights 9-10 May 2006 at 26. The AU organized a two-day brainstorming session attended by the members of the African Commission, representatives of the government of the Gambia, Commission of the AU, among others. The session recommended that the AU should consider a review of the Charter to render the submission and presentation of State reports under Art 62 from two years to four years.

<sup>129</sup> Malcolm Evans, Tokunbo Ige and Rachel Murray, *supra* note 125 at 53.

<sup>130</sup> Further, the African Commission, by a decision taken in 1995, allows State Parties to combine several reports into one consolidated report to facilitate the clearing of backlog of overdue reports. The African Commission may also examine a report after two notifications to a state to send a representative for the consideration of the report. See also Resolution Reiterating the Importance of Compliance with Reporting Obligations under the African Charter, 41<sup>st</sup> Ordinary Session of the African Commission held in Accra, 16-30 May 2007.

<sup>131</sup> For example, paras. 96 and 97 of the 23<sup>rd</sup> Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/446(XIII) Annex 1. Executive Council, Thirteenth Ordinary Session 24-28 June 2008. Online: <[http://www.achpr.org/english/activity\\_reports/23rd%20and%2024th%20Activity%20Reports.pdf](http://www.achpr.org/english/activity_reports/23rd%20and%2024th%20Activity%20Reports.pdf)>.

reports.<sup>132</sup> Rwanda had submitted the highest number of reports, totalling four out of more than ten overdue reports as of 2007<sup>133</sup> while Zimbabwe's third periodic report, submitted in 2006, covered a period of ten years, 1996-2006, during which the country should have submitted five periodic reports.<sup>134</sup>

Despite challenges to compliance with state reporting, and criticisms of its inadequacy to force States to comply with their treaty obligations, scholars caution against under-rating the potency of a reporting system as a catalyst for change and as a point of pressure upon states.<sup>135</sup> State reporting is regarded as "an opportunity to reaffirm a government's commitment to respect the human rights of its own citizens and to reassert that commitment in the domestic forum."<sup>136</sup> It also serves as a reminder of States' obligations under international treaties.

The general concerns regarding the reporting procedure under the *African Charter* lead one to inquire into the potential of the reporting obligation under the *Women's Protocol*. Two sets of guidelines currently inform the structure and content of reports received from States Parties: the 1988 Guidelines for National Periodic Reports under the *African Charter*,<sup>137</sup> and the Amendment of the General Guidelines for the Preparation of Periodic Reports by State Parties

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<sup>132</sup> Indeed a brief glance at the statistics as of May 2009 show that, 17 states parties had submitted one report but owe more; 6 states have submitted two or more reports but owe more reports; 6 states had submitted all their reports and will present the latest report at the next session of the African Commission; and 12 states have not submitted any report. 26th Activity Report of the African Commission, EX. CL/ 529 (XV), online: <[http://www.chr.up.ac.za/hr\\_docs/documents/26th%20Activity%20report%20of%20the%20ACHPR.pdf](http://www.chr.up.ac.za/hr_docs/documents/26th%20Activity%20report%20of%20the%20ACHPR.pdf)> at para. 134.

<sup>133</sup> Status of Submission of State Initial/Periodic Reports to the African Commission (Updated March 2009) Online: <[http://www.achpr.org/english/\\_info/statereport\\_considered\\_en.html](http://www.achpr.org/english/_info/statereport_considered_en.html)>.

<sup>134</sup> The Republic of Zimbabwe 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Combined Report under the African Charter on Human and Peoples' Rights, 20 October 2006. Online:

<[http://www.achpr.org/english/Archives/State%20reports/eng/Zimbabwe/Zimbabwe%20Report\\_%203\\_eng.pdf](http://www.achpr.org/english/Archives/State%20reports/eng/Zimbabwe/Zimbabwe%20Report_%203_eng.pdf)>.

<sup>135</sup> Malcolm Evans *et al.*, *supra* note 4 at 37.

<sup>136</sup> P. Alston, "Purposes of Reporting" *United Nations Manual on Human Rights Reporting* (New York: 1991) at 13.

<sup>137</sup> Guidelines for National Periodic Reports under the African Charter, reprinted in R. Murray and M. Evans, *Documents*, *supra* note 4, (hereinafter Guidelines for National Periodic Reports).

adopted in 1998.<sup>138</sup> Several ambiguities are created by the existence of two guidelines. The former is regarded as “complex, repetitive and lengthy,” while the latter identified as “brief to the point of being vacuous.”<sup>139</sup>

Both guidelines specifically require State Parties to submit reports on the elimination of all forms of discrimination against women.<sup>140</sup> The 1988 Guidelines require State Parties to report measures taken to eliminate discrimination against women as defined by the *Women’s Convention*, while the Amendment merely requests information on what a state is doing to improve the condition of women.<sup>141</sup> The differences in the scope and protection afforded under the *Women’s Protocol* and the *Women’s Convention* may create further ambiguities, if both guidelines continue to apply simultaneously. These differences relate to the provisions of both instruments. For example, while Article 14((2)(c), of the *Women’s Protocol* protects the right to medical abortion in specific cases, there is no corresponding provision in the *Women’s Convention*. It is not clear which guideline should take precedence when reporting under the *Women’s Protocol*. What format should periodic reports assume? Should the format comply with the Guidelines or its Amendment or with both?

So far it appears that reporting on women’s rights remains incorporated into reports submitted by State Parties under the *African Charter*. Reporting on women’s rights under the *African Charter* has been far from adequate. For example, in the most recent report submitted by South Africa, apart from preparing the report in 2001 and submitting same in 2005, data provided were segregated by race, with gender featuring minimally.<sup>142</sup> Will State Parties be required to submit

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<sup>138</sup> Amendment of the General Guidelines for the Preparation of Periodic Reports by States Parties, DOC/OS/27 (XXIII) (hereinafter Amendment).

<sup>139</sup> Evans, *et al.*, *supra* note 4 at 45.

<sup>140</sup> Guidelines for National Periodic Report, *supra* note 137 at Part VII.

<sup>141</sup> Amendment, Article 5(a), *supra* note 138.

<sup>142</sup> Republic of South Africa, First Periodic Report on the *African Charter*, *supra* note 127.

two separate reports to the African Commission for the *African Charter* and the *Women's Protocol*? Will this not further encumber states who are under obligations to submit so many reports under different treaties? Is the frequency of reports required feasible? These are questions in dire need of answers in order to further the implementation of rights under the *Women's Protocol*.

In addition to state reporting, the African Commission also considers individual complaints as well as other businesses during its sessions. These activities impose more time pressure on the eleven-member body and may account in part for the poor follow-up of state reports.

## **2. Complaints Mechanism**

As mentioned earlier, the African Commission is seized with matters of interpretation arising from the application and implementation of the *Women's Protocol*, pending establishment of the African Court of Human and Peoples' Rights (African Court).<sup>143</sup> In line with the *African Charter*, the mechanisms for inter-state communications and individual complaints are available to give effect to Article 32 of the *Women's Protocol*.<sup>144</sup> Inter-state communication grants a State Party which, for good reason, believes that another state has violated a provision of the *Charter*, the power to bring a complaint to the attention of the state, the AU and the African Commission.<sup>145</sup> So far, the inter-state mechanism has failed to gain popularity among African states owing, in part, to the historical preference of African leaders to adhere to the principles of non-interference in the internal affairs of member states and of state sovereignty.<sup>146</sup> State Parties

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<sup>143</sup> Article 32, *Women's Protocol*.

<sup>144</sup> For inter-state communication, see, Articles 47- 53 of the *African Charter* and Article 55 for individual communication.

<sup>145</sup> *Ibid*, art. 47.

<sup>146</sup> A general principle of international law embodied in Article 2(7) of the *United Nations Charter*. Attempts to file inter-state complaints before the African Commission have had limited successful so far.

often choose to ignore violations by other states for fear of exposing themselves to similar scrutiny.

The African Commission registers greater success with regards to the individual complaint procedure under Article 55 of the *African Charter*.<sup>147</sup> By this procedure, individuals and groups who claim violation of their rights may file complaints before the African Commission to interpret the provision of the violated treaty in light of a fact-specific situation and thereafter make recommendations. An individual communication may be admissible only if it complies with Article 56 of the *African Charter*, whereby the complaint must *inter alia*: indicate the authors of the communication even when anonymity is requested; be compatible with the treaty of the AU; avoid disparaging or insulting language; and show that domestic remedies have been exhausted.

Communications directly related to violations of women's rights are almost non-existent in the docket of the African Commission. A few complaints, however, have been indirectly related to women's rights. In *Interights on behalf of Safia Yakubu Husaini and et al. v. Nigeria*,<sup>148</sup> relating to the application of the Sharia Penal Code in parts of northern Nigeria, the complaint was framed as a violation of fair trial and due process rights. Women's rights violations or discrimination against women were not directly alleged. In addition, since the African Commission held the communication inadmissible, the opportunity to illuminate women's rights within the context of the regional system was lost. Overall, the potential of the communication procedure of the African Commission has yet to be optimised by African women for their benefit.

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<sup>147</sup> Even though Article 55 empowers the African Commission to consider and decide communications, it does not indicate who can submit communications other than State Parties.

<sup>148</sup> *Interights on behalf of Safia Yakubu Husaini and et al. v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 269/2003 (2005) Online: <<http://www1.umn.edu/humanrts/africa/comcases/269-2003.html>>.



Like the reporting procedure, the African Commission faces time constraints with regards to the individual complaint procedure. It has been unable to deal adequately with the backlog of communications submitted to it. The African Commission convened its Sixth Extra-Ordinary Session to, among other reasons, clear the backlog of communications before it.<sup>149</sup> As expected, this extraordinary session was unable to successfully clear this backlog. The potential of the complaints procedure has yet to be adequately put to use for the enforcement of women's rights.

Apart from challenges confronting the African Commission, several other obstacles inhibit women's access to these procedures, namely inadequate resources, lack or limited knowledge of the mechanism's existence, and lack of confidence in the procedures. Women, women's rights organisations and other human rights organisations interested in gender issues and women's rights have yet to put the complaint procedure of the African Commission to its test proactively. Additionally, the African Commission has yet to direct any effort to consider gender analysis in the interpretation of the *African Charter* or in the form of a general comment. While the African Court is likely to confront challenges as the African Commission in implementing women's rights, its possibilities are potentially higher. An examination of the role of the African Court will gain greater significance since the African Commission retains its complaints procedure for the protection of women's rights only until the African Court begins to hear cases. The African Court has taken preliminary steps to become operational but it is yet to deal with any substantive case, as of 2009. Only time will tell what contributions it will make in the interpretation of women's rights.

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<sup>149</sup> 6<sup>th</sup> Extra-Ordinary Session of the African Commission 30 March - 3 April 2009, Banjul, The Gambia.

### 3. A Supra-National Court for Africa

The Protocol to the *African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol)* was adopted by the Assembly of Heads of State and Government (Assembly) of the OAU in 1998.<sup>150</sup> The African Court was conceived to supplement the enforcement mandate of the African Commission, whose power to implement and monitor the *African Charter* remains quasi-judicial in nature.

The *Court Protocol* was yet to enter into force when the OAU adopted the *Constitutive Act of the African Union (Constitutive Act)* by which the regional umbrella body was transformed into the AU.<sup>151</sup> The *Constitutive Act* provides for another regional court, the African Court of Justice, to serve as the judicial organ of the AU. Pursuant to this, the AU Assembly adopted the *Protocol of the Court of Justice of the African Union (Court of Justice Protocol)* which defines the statute, composition and function of the proposed new regional court.<sup>152</sup> By this instrument, provision was made for another regional court, making for the possibility of two separate regional courts with the same or a competing jurisdiction with overlapping functions.

As of July 2008, the African Court was still grappling with “teething” problems when the AU Assembly adopted the *Protocol on the Statute of the African Court on Justice and Human Rights (Merger Protocol)*.<sup>153</sup> The Merger Protocol seeks to fuse the African Court of Human

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<sup>150</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* [hereinafter *Court Protocol*], adopted by the Assembly of Heads of State and Government of the OAU on 9 June 1998, entered into force on 25 January 2004. As at 15 October 2007, 24 of the 53 AU member states had ratified the Court Protocol. For a background to the adoption of the Court Protocol see Resolution No. AHG 230 (xxx), OAU/LEG/EXP/AFC/HPR, September 1995.

<sup>151</sup> See the *Constitutive Act of the African Union*, OAU Doc CAB/LEG/23.15, adopted 11 July 2000, entered into force in 2001. Available online: [http://www.africa-union.org/root/au/AboutAU/Constitutive\\_Act\\_en.htm](http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm) [hereinafter *Constitutive Act*].

<sup>152</sup> The Court of Justice Protocol never entered into force.

<sup>153</sup> *Protocol on the Statute of the African Court of Justice and Human Rights* [hereinafter *Merger Protocol* and *Court Statute*], adopted 1 July 2008. Online: <<http://www.africa->

and Peoples' Rights with the African Court of Justice of the AU to create a single African Court of Justice and Human Rights (ACJHR). This Protocol will become operational upon deposit of the fifteenth instrument of ratification by State Parties.<sup>154</sup> Thereafter, the two earlier *Court Protocol* and the *Court of Justice Protocol* will be replaced by the *Merger Protocol* subject to the transitional provisions.<sup>155</sup> The ACJHR will then become the principal judicial organ of the AU, as well as the court empowered to enforce human rights on the continent.<sup>156</sup>

In the meantime, the African Court became operational with the election of its eleven judges who took the oath of office in 2006. The Bureau of the African Court was constituted during its first session held in Banjul, the Gambia from 3 to 5 July 2006.<sup>157</sup> Since then, the Court has taken preliminary steps to become operational, with the establishment of its seat of office in Arusha, Tanzania; the negotiation and conclusion of the Host Agreement; the holding of seven ordinary and one extra-ordinary sessions; the drafting of its Rules of Procedure; the preparation and approval of its draft budgets; the preparation of a draft structure and approval of the Registry; the recruitment of staff for the Registry; the adoption of a proposal for a remuneration system for Judges; the order for the purchase of equipment, materials or supplies from the Court budget; and the beginning of cooperation with some foreign partners, among other activities.<sup>158</sup>

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union.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf>, accessed 8 January 2009. Annexed to the Merger Protocol is the Statute of the African Court of Justice and Human Rights. The *Merger Protocol* will enter into force thirty days after deposit of the instrument of ratification by fifteen Member States: see Art. 9, *Merger Protocol*.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*, Article 1. Assembly Decision on the Merger of the African Court and the Court of Justice of the African Union, 5 July 2005, Assembly/AU/Dec.83 (V).

<sup>156</sup> Article 3, *Merger Protocol* and Article 2, *Statute to the African Court of Justice and Human Rights*.

<sup>157</sup> Mr Gerard Niyungeko and Mr. Modibo Tounty Guindo were appointed President and Vice President of the Bureau of the Court, respectively.

<sup>158</sup> Activity Report of the Court for 2006, Assembly/AU/8/(VIII) submitted to the 8<sup>th</sup> Ordinary Session of the Assembly of the AU 29-30 January 2007 [hereinafter 2006 Activity Report]. Addis Ababa, Ethiopia. See also, The Report of the African Court on Human and Peoples' Rights [hereinafter 2007 Activity report]. Ex. CL/445 (XIII) Available online: <[www.africancourtcoalition.org/content\\_files/files/ActivityReportoftheCourt\\_2007.doc](http://www.africancourtcoalition.org/content_files/files/ActivityReportoftheCourt_2007.doc)> Accessed 20 January 2009.

Despite this progress, internal and external challenges slow the ability of the African Court to perform its activities. The internal challenges arising from within the AU and its organs relate to its dependence on the AU for its budget; the strong reliance of the African Court on the AU and its Commission for implementation of its activities due to limited personnel and human resources; dependence on the finance department of the AU Commission to implement its budget; and reliance on the technical assistance of the AU Commission to recruit its staff.<sup>159</sup> In addition, the activity report of the African Court bemoans the failure of the AU Commission to appreciate the importance of the African Court. The external challenge relates to non-cooperation of Member States of the AU. The low level of ratification of the *Court Protocol* and especially the failure of Member States to subscribe to the declaration accepting the competence of the Court to receive cases from individuals and NGOs, effectively limits access to the Court.<sup>160</sup>

The relevance of the above process toward creation of a supra-national court for Africa to women cannot be ignored. The *Women's Protocol* unequivocally states that “the African Court on Human and Peoples’ Rights shall be seized with matters of interpretation arising from the application of this Protocol.”<sup>161</sup> It is therefore reasonable to ask: given the failures of the African Commission to address women’s rights within its protective mandate, can a supra-national African Court, by whatever title, do better? Will the African Court be better positioned to improve the protection afforded women?

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<sup>159</sup> *Ibid.*, at paras. 20 & 22.

<sup>160</sup> *Ibid.*, at para. 46. As of June 2008, twenty four Member states have ratified the *Court Protocol* but only one, Burkina Faso, has issued the declaration accepting the Court’s competence to receive cases from individuals and NGOs.

<sup>161</sup> Article 27, *Women's Protocol*.

There are compelling unresolved questions regarding provisions for implementing the *Women's Protocol*.<sup>162</sup> This makes allowance for amendment or revision in the *Women's Protocol* a welcome development. The *Women's Protocol* allows State Parties to propose amendments in writing, submitted to the Chairperson of the Commission of the AU.<sup>163</sup> Nevertheless, amendment of treaties is uncommon within the African regional human rights regime. The usual practice within the system is to add protocols rather than change existing ones.<sup>164</sup> For example, criticisms of the textual weakness of provisions relevant to women in the *African Charter*, rather than yielding an amendment, resulted in adoption of an additional protocol on the rights of women by the AU. Similarly, inadequacies identified concerning the protective mandate of the African Commission have been addressed not through the amendment of the *African Charter* but through expansive interpretative approaches adopted by the Commission to enhance its effectiveness, and eventually by adoption of a protocol establishing an African Court to complement the African Commission. The adoption of additional protocols requires fresh ratification which often trickle in slowly, as with ratifications of the *Court Protocol*.<sup>165</sup> However, this is not to say that there is no possibility of amendments to the *Women's Protocol* to better address the lacunae identified. More importantly, as would be shown subsequently, the effective domestication and domestic application would likely lead to the *Women's Protocol's* creative deployment by activist forces within domestic settings.<sup>166</sup>

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<sup>162</sup> Several scholars also point to problematic aspects of the *Women's Protocol*. For example, Rachel Murray, "Women's Rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa," *supra* note 12; and Martin Semalulu Nsibirwa, "A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" (2001) 1 Afr. Hum. Rts. L. J. 40 at 51.

<sup>163</sup> Article 30, *Women's Protocol*.

<sup>164</sup> The only exception known to this author is the *Amendment to the Constitutive Act of the African Union*.

<sup>165</sup> As of January 2009, there are 25 ratifications and 49 signatories to the Court Protocol. Online: <<http://www.africa-union/root/au/Documents/Treaties/treaties.htm>>.

<sup>166</sup> Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces, and International Institutions* (Cambridge: Cambridge University Press, 2007) at 34. Okafor suggests looking beyond the state centric/compliance-centric approach to assessing the effectiveness of a regional system to include other significant effects in the domestic sphere.

Despite the challenges identified through a critical review of provisions of the *Women's Protocol* and its implementation mechanisms, several positive practical moves have emerged under the system to further women's rights. The next section highlights these, followed by a summary of the chapter.

#### **IV. Practical Progression in the Advancement of Women's Rights**

The African regional human rights regime has undergone substantive and substantial changes since its inception. Apart from normative progress, a cursory examination is unlikely to reveal practical modifications within the continental body, the African Union, its institutions, mechanisms and procedures that may promote the practical realisation of women's rights. Nevertheless, such practical advancements are identifiable, first, within the AU through its organs, and especially through the AU Commission and its Women, Gender and Development Directorate and second, within mechanisms available to promote women's rights at the level of the African Commission. Similar advancements are often identifiable at both levels. This subsection highlights some practical moves undertaken by the African human rights regime to recognise women's rights.

##### **1. Working Group on Gender**

The Working Group on Gender emerged out of the consultative process held by the AU Commission to brainstorm with civil society organisations and other development partners.<sup>167</sup> It had the mandate to assist the AU Commission to define its gender agenda as well as strategies to

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<sup>167</sup> Yetunde Teriba, "Presentation on the AU Solemn Declaration on Gender Equality in Africa" at the Technical Consultative Meeting on the AU Solemn Declaration on Gender Equality in Africa, 24-27 May 2005, Addis Ababa, Ethiopia. Online at: <<http://www.africa-union.org/Gender/SOLEMN/Presentation.doc>>, accessed 11 November 2008.

be employed to make gender equality a part of the culture of the new AU.<sup>168</sup> Along with other Working Groups, the Working Group on Gender contributed to development of a long-term vision, mission and a strategic framework covering the work of each of the Portfolios in the AU Commission for four years.<sup>169</sup> The Director of the Gender Directorate of the AU, Mrs. Yetunde Teriba, observed that the two major tasks of the Gender Working group in March 2004 were to “(i) prepare the Summit Debate at the July 2004 Ordinary Session of the Assembly of Heads of State and Government; and (ii) make recommendations regarding the role of the Women, Gender and Development Directorate, its working modalities, and how it should interface with the various stakeholders.”<sup>170</sup> This process resulted in adoption of the Solemn Declaration on Gender Equality in Africa.<sup>171</sup>

The African Commission also employs Working Groups with regard to its human rights mandate.<sup>172</sup> The Commission has since established a number of Working Groups including the Working Group on Communications,<sup>173</sup> Working Group on Indigenous Populations/Communities,<sup>174</sup> Working Group on the Death Penalty<sup>175</sup> and the Working Group

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> Yetunde Teriba, Acting Director, Women, Gender and Development Directorate African Union Commission, Presentation on the Genesis of the Solemn Declaration on Gender Equality in Africa to Date at the Consultation and Preparation of PAWO Congress, 2 November 2006. Online: <<http://www.africa-union.org/root/ua/Conferences/novembre/GE/2-3%20oct/CSO%20Yetunde%20The%20genesis%20of%20the%20Solemn%20Declaration%20on%20Gender%20equality%20in%20Africa%20to%20date.doc>>.

<sup>171</sup> Adopted by the Heads of State and Government of the African Union at the Third Ordinary Session in Addis Ababa, Ethiopia, 6-8 July 2004.

<sup>172</sup> Article 46 of the African Charter provides that “the Commission may resort to any appropriate method of investigation, it may hear from the Secretary-General of the Organisation of African Unity or any person capable of enlightening it.” See also the Rules of Procedure of the African Commission, Rule 28 and Bahame Tom Mukirya Nyanduga, “Working Groups of the African Commission and their Role in the Development of the African Charter on Human and Peoples’ Rights” in Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986-2006* (Cambridge: Cambridge University Press, 2008) at 379- 404.

<sup>173</sup> Rule 115 of the Rules of Procedure of the African Commission, 1995 provides that the “Commission may set up one or more working groups; each composed of three of its members at most, to submit recommendations on admissibility [of communications] as stipulated in Article 56 of the Charter.”

<sup>174</sup> The 28th Ordinary Session of the African Commission, 23 October to 6 November 2000.

on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights.<sup>176</sup> Working Groups of the African Commission function predominantly on an *ad hoc* basis. According to Viljoen, Working Groups are more “exploratory and research-directed” and focus on internal matters of the commission.<sup>177</sup> They are often comprised of members of the Commission; in some cases independent experts and members of the civil society are appointed. A Working Group was created to assist the Special Rapporteur on the Rights of Women in Africa (SRRWA) in the drafting of the *Women's Protocol*.<sup>178</sup>

## **2. Directorate for Women, Gender and Development**

The establishment of the Directorate for Women, Gender and Development points to the practical evolution of the African regime with regards to women's rights. Formerly the Women's Unit of the OAU Secretariat, the Directorate worked to put women's issues on the OAU agenda.<sup>179</sup> The Women's Unit, prior to its transformation, drew on Article 75 of the Treaty Establishing the African Economic Community. By this article, “Member States agree to formulate, harmonize, coordinate and establish appropriate policies and mechanisms for the full development of the African woman through the improvement of her economic, social and cultural conditions” and “to take all measures necessary to ensure integration of women in

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<sup>175</sup> Although some members of what became the Working Group on the Death Penalty were appointed during its 37<sup>th</sup> Ordinary Session, it was at its 38<sup>th</sup> Ordinary Session that the African Commission adopted the Resolution on the Composition and Operationalisation of the Working Group on the Death Penalty, ACHPR/Res.79 (XXXVII) 05.

<sup>176</sup> Resolution on the Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights, ACHPR/Res.77 (XXXVIII) 05, the 37<sup>th</sup> Ordinary Session, 27 April to 11 May 2004, Banjul, the Gambia.

<sup>177</sup> Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007) at 400.

<sup>178</sup> Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999 – 2000. AHG/222 (XXXVI) at 4 para. 21.

<sup>179</sup> The Gender Unit was within the OAU Education, Science, Culture and Social Affairs Department of the OAU Secretariat.



development activities within the Community.”<sup>180</sup> As well, the Women’s Unit drew from the African Platform of Action for the Advancement of Women as the source of its main programmes.<sup>181</sup>

The Women’s Unit faced a number of challenges including marginalisation in the discharge of its mandate which led to calls for the Unit to be moved under the direct supervision of the Secretary-General’s office in order to give it added authority and visibility.<sup>182</sup> Hence, Article 12(3) of the Statutes of the AU Commission places the coordination of all activities and programmes of the Commission related to gender issues in a special unit to be established in the office of the chairperson of the Commission.<sup>183</sup> It also places responsibility for gender mainstreaming on the Chairperson of the Commission.<sup>184</sup> This special unit became the Directorate of Women, Gender and Development, with a mandate to:

promote Gender Equality within and throughout the Union as well as within Member States by translating policy agreements and instruments into measurable programmes and projects. It shall provide oversight by facilitating the development and harmonization of policy, facilitating co-ordination and initiating gender mainstreaming strategies.<sup>185</sup>

The Directorate is a step forward towards giving force to the principle of gender equality pronounced in the *Constitutive Act* as well as other documents of the AU. The Directorate addresses systematic problems faced by African women by mainstreaming gender into all policies and programmes of the AU Commission, the AU and its other Organs. It seeks to

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<sup>180</sup> Article 75 of the Treaty Establishing the African Economic Community, adopted in Abuja , Nigeria, 3 June 1991. Online: <[http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC\\_Treaty\\_1991.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf)>, (accessed 12 November 2008).

<sup>181</sup> See Chapter Two, footnote 120.

<sup>182</sup> Joyce Mends-Cole, Senior Regional Gender Advisor of the United Nations development Programme (UNDP), quoted by Patricia Made, “What’s She Doing There?” 8 June 1997. Online: <<http://www.hartford-hwp.com/archives/30/061.html>>, (accessed 12 November 2008).

<sup>183</sup> Statutes of the Commission of the African Union, *African Journal of International and Comparative Law* (March 2005), Vol. 13, No. 1 at 74-85.

<sup>184</sup> Article 8(1) (y) of the Statutes of the AU Commission.

<sup>185</sup> Report of the 3<sup>rd</sup> Ordinary Session of the Assembly of Heads of State and Government of the AU.

promote gender equality and women's empowerment within these institutions and encourages Member States to do the same.

### **3. Equal Gender Representation**

The AU, its organs and human rights institutions have taken giant strides towards attaining equal gender representation. Women now occupy leadership positions within its structures. At the Assembly of Heads of State and Government, the election of President Ellen Johnson-Sirleaf as the Executive President of Liberia in 2006 positions her as a member of this apex body. Within the Pan-African Parliament, Hon. Dr. Ambassador Gertrude Mongella serves as the current President and Hon. Mrs. Elise Ndoadounmgue Loum as one of the four vice-presidents as of 2009. In addition, the Commission of the AU has achieved equal gender representation in its leadership with the appointment of five female commissioners.<sup>186</sup>

Since 2007, seven of the eleven-member African Commission has been women,<sup>187</sup> as are two of the eleven judges of the African Court of Human and Peoples' Rights.<sup>188</sup> Even though increased representation of women in leadership positions does not guarantee gender sensitive policies and programmes or an improved status for women, it is a positive start towards realising the potential benefit of women's participation at all levels of decision-making.

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<sup>186</sup> These are H. E. Mrs. Julia Dolly Joiner, Commissioner for Political Affairs, H.E. Advocate. Bience P. Gawanas, Commissioner for Social Affairs, H.E. Dr. Elham M. A. Ibrahim, Commissioner for Infrastructure and Energy, H. E. Mrs. Rhoda P. Tumusiime, Commissioner for Rural Economy and Agriculture, and H.E. Mrs. Elisabeth Tankeu, Commission for Trade and Industry. Online: <<http://www.africa-union.org/root/AU/AUC/AUCleaders/AU%20commissioners%20flyer.pdf>>, (accessed 18 November 2008).

<sup>187</sup> For the list of commissioners see <[http://www.achpr.org/english/other/Commissioner\\_2007.pdf](http://www.achpr.org/english/other/Commissioner_2007.pdf)>, (accessed 18 November 2008).

<sup>188</sup> See, list of the judges of the African Court on Human and Peoples' Rights, elected by the 13<sup>th</sup> Ordinary Session of the Executive Council in July 2008. The female commissioners are Mrs. Kelello J. Mafoso-Guni of Lesotho elected for four years from January 2006 and Ms. Sophia A.B. Akuffo, elected for six years from July 2008.

#### 4. Special Rapporteur on the Rights of Women in Africa

The thematic mechanism of the Special Rapporteur constitutes a specific initiative of the African Commission to supplement its initial mandate.<sup>189</sup> The mandate of the Special Rapporteur on the Rights of Women in Africa (SRRWA)<sup>190</sup> includes carrying out studies on the situation of women's rights in Africa; carrying out activities to enhance the monitoring and implementation of the *African Charter* by the African Commission; working in collaboration with NGOs and other organisations to harmonise initiatives on women's rights; working towards drafting and ratifying of the Protocol on Women's Rights; and reporting to the African Commission, including making recommendations geared towards improving the situation of women.<sup>191</sup>

Like other Special Rapporteurs, the SRRWA faces a number of challenges in the discharge of her duties. The SRRWA works within a resource-challenged OAU/AU, as the African

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<sup>189</sup> M. Evans and R. Murray, "The Special Rapporteur in the African System" in M. Evans and R. Murray, *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (Cambridge: Cambridge University Press, 2002) at 281. The authors however observe that a close examination of the practice of appointing Special Rapporteurs by the African system reveals that their appointments came about as a "result of a combination of NGO lobbying, the impact of particular sets of circumstances and the Commission's desire to be seen to be doing something, rather than as the product of any well-thought-out programme or as a reflection of a belief that these areas represented the most pressing concerns that it faced." Franz Viljoen, "The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities" (2005) 27 Human Rights Quarterly 125 at 128.

<sup>190</sup> Resolution ACHPR/res.38 (XXV) 99 of the African Commission at its 25 Ordinary Session, held in Bujumbura, Burundi, 26 April to 5 May 1999. The recommendations for appointment of a special rapporteur on the rights of women was submitted to the African Commission at the end of a Seminar on women's rights organised by the African Commission in collaboration with Women in Law and Development in Africa (WILDAF), held in Lome, Togo, in March 1995. The decision to appoint a Special Rapporteur on the Rights of Women was adopted at the 19<sup>th</sup> Ordinary Session of the African Commission in April 1996. Other Special Rapporteurs appointed by the African Commission are the Special Rapporteurs on Extra-Judicial, Summary and Arbitrary Executions in Africa (1994), the Special Rapporteur on Prisons, the Special Rapporteur on Refugees and Internally Displaced Persons in Africa, as well as the Human Rights Defenders in Africa (2004).

<sup>191</sup> Commissioner Julienne Ondziel Gnelenga was appointed the first Special Rapporteur on the Rights of Women in Africa. See the Final Communiqué of the 23rd Ordinary Session of the African Commission on Human and Peoples' Rights. Para. 11, Online: <[http://www.achpr.org/english/communiques/communique23\\_en.html](http://www.achpr.org/english/communiques/communique23_en.html)>. The next appointee is Mrs. Melo Angela from Mozambique, appointed in 2001. "The legal basis for the creation of a post of the Special Rapporteur on the Rights of Women in Africa is stipulated under Article 45 (b) and 66 of the *African Charter* and in Chapter VI of the Rules of Procedure of the Commission, which governs establishment of subsidiary bodies of the Commission." Mandate and Resolution of the Special Rapporteur on Women's Rights. Online: <[http://www.acphpr.org/english/-infor/index\\_women\\_en.html](http://www.acphpr.org/english/-infor/index_women_en.html)>, (accessed 19 May 2005).

Commission often cannot adequately provide the financial resources required for the SRRWA to discharge her mandate. Evans and Murray, for example, suggest that before appointing individuals to the position of Special Rapporteurs, the Commission must determine whether it can provide the financial and logistical support to enable them to function effectively.<sup>192</sup> Also, the mandate of the SRRWA has been criticised as being too wide to be achievable.<sup>193</sup> The exclusively promotional role of the SRRWA serves to constrain any consequential assessment of her contribution especially given the enforcement and compliance mode of assessing effectiveness of international human rights institutions.<sup>194</sup> Additionally, the limited political will of Member States of the AU to fulfill their commitment to women's rights inhibits the SRRWA in the performance of this role.<sup>195</sup> Hence, the African Commission has often had to concede financial responsibility for the support and functioning of Special Rapporteurs, including the SRRWA, to NGOs.<sup>196</sup> The Centre for Human Rights at the University of Pretoria, South Africa and Interights (a foreign NGO) has provided funding in recent years. As with other areas where NGOs provide services, such as health, it is easy for the NGOs that provide the financial resources necessary for the work of the SRRWA to control her agenda. While there is no evidence of this being the case, it should be observed that the African Commission must find ways to live up to its responsibilities.

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<sup>192</sup> M. Evans & R. Murray, "The Special Rapporteurs," *supra* note 189 at 302, 345. Murray also points out that the decisions to appoint Special Rapporteurs are not products of any well-thought-out program, or as a reflection of a belief that these areas represented the most pressing concerns that it faced but as a result of NGO lobbying, impact of particular sets of circumstances and the Commission's desire to be seen to be doing something.

<sup>193</sup> *Ibid*, at 303.

<sup>194</sup> The common practice of assessing the potential of international human rights institutions in relation to its similarity with domestic (vertical) system of enforcement has been criticized: O. C. Okafor, *Activist Forces*, *supra* note 166 at 78-80.

<sup>195</sup> For example, despite the Solemn Declaration and other commitments to women's rights to date, less than half of the State Parties to the *African Charter* have ratified the *Women's Protocol*.

<sup>196</sup> M. Evans & R. Murray, "The Special Rapporteurs," *supra* note 189 at 301. Funding for the SRRWA has been provided by NGOs such as Centre for Human Rights in the University of Pretoria and Interights.

Until recently, there was a dearth of materials upon which to assess achievements of the SRRWA.<sup>197</sup> However the intersession activity reports now show that the SRRWA is making significant inroads in the promotion of women's rights in the region.<sup>198</sup> The SRRWA has been particularly instrumental in drafting, publicising and encouraging Member States to ratify the *Women's Protocol*.<sup>199</sup> She conducts meetings and organises conferences to promote the *Women's Protocol* and to secure its ratification and implementation. The SRRWA also undertakes promotional activities, studies, fact-finding and promotional missions to promote women's rights on the continent.

## V. Summary

Any claims that the African regional regime or its human rights system do not recognise women's human rights evidently lack support. Several textual and practice legal measures have been directed towards improving the human rights of African women. The *Women's Protocol* provides the normative framework. In conjunction with other regional treaties, the *Women's Protocol* plays both a norm-transforming and rights-enhancing role on the African continent. It is norm-transforming in the sense of providing a framework for domestic protection of rights and it is rights-enhancing by supporting concrete mechanisms through which women at the domestic level may find a voice and claim their stake in internationally protected rights.

In line with its Preamble, the *Women's Protocol* reaffirms the inalienability, interdependence and indivisibility of women's rights recognised by other international human rights treaties. Despite the ratification of such treaties and commitment to eliminate gender discrimination and harmful practices against women, African women continue to face discrimination. The *Women's*

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<sup>197</sup> *Ibid*, at 303.

<sup>198</sup> See the Intersession Activity report of the 41st Ordinary Session of the SRWA.

<sup>199</sup> See intersession activity reports of the SRWA 39<sup>th</sup>, 40<sup>th</sup> and 41<sup>st</sup> Ordinary Sessions of the African Commission. Online: <<http://www.achpr.org/english/-info/women-intersess.htm>>, (accessed 11 November 2008).

*Protocol* endeavours not only to address discrimination and violence in all spheres, but also to protect human rights and fundamental freedoms which enable women to enjoy civil, political, economic, social and cultural rights. With an expansive and interdependent interpretation of rights, African women stand to benefit from the *Women's Protocol* in spite of its shortcomings.

Therefore, despite limitations to promoting women's rights within the regime, the African system, along with its instruments, especially the *Women's Protocol*, provides a context-specific instrument for the protection of women. It provides a platform from which governments, non-governmental organisations, scholars, activists and advocates alike can develop projects to enhance women's rights and dignity in Africa. The next chapter therefore examines the role of diverse actors in protecting and promoting the rights of African women, especially through use of the *Women's Protocol*. It is only by making the best use of the *Women's Protocol*, along with other regional norms and institutions of the regional regime, that the required progress may be achieved.

## **CHAPTER FIVE: GENDER TRANSFORMATION: RECONCILING REGIONAL MECHANISMS WITH NATIONAL HUMAN RIGHTS OBLIGATIONS AND ACTIONS**

### **I. Introduction**

Doubtless, gender transformation using the mechanisms of the African system requires the contribution of more than a single actor. Yet, it is difficult to measure the influence of particular actors in activating the mechanisms of the regional system at the domestic level. This chapter attempts to sketch out the roles and relevance of certain principal actors involved with the African human rights regime. This inquiry is animated by the fact that in recent times, entities both external and internal to the region have shown considerable interest in the African human rights regime. These actors contribute to the development of human rights both at the regional and domestic levels. This chapter identifies such entities, examines how they perceive the regional regime and how such perceptions underlie their modes of interaction. It considers how these actors have or can influence and optimise the spaces available through the regional system to benefit African women at the domestic level.

As will be observed, the term “actors” is used broadly to encompass entities, institutions and individuals. The conglomeration encompasses the participation, involvement and actions of all stakeholders, whether international, regional and national and whether institutions, groups and individuals. International actors or the “international community” consist of foreign governments, international inter-governmental and non-governmental organisations, while regional actors consist of the AU, its organs (including the African Court), and the African Commission.<sup>1</sup> National actors include individual States Parties to the AU as well as non-state

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<sup>1</sup> Also relevant to this study is the role of sub-regional entities, such as the Southern African Development Community (SADC) and Economic Community of West African States (ECOWAS). However, due to the paucity of materials on formal interaction between the regional and sub-regional organisations for human rights, I merely make mention of their potential relevance here.

actors. This chapter inquires into the roles and responsibilities of each actor within the context of the African human rights regime as well as their actual and potential influence on women's rights' progress at the domestic level. It examines what these actors have done or are doing with regards to women's rights at the regional level and their impact on domestic application. It analyses the obstacles, if any, that hinder these actors from accomplishing their tasks. What are the consequences of these obstacles for the potential domestic applicability of the normative and institutional mechanisms of the regime? How have the actors addressed this or how may they mobilise available mechanisms to address such obstacles?

This chapter also analyses cooperation and contradictions in the interactions of these actors with the regional regime and proffers ways to minimise and possibly overcome limitations in order to pave the way for fuller interactions of mutual benefit. For the regional system to have substantial relevance for the lives of African women, this plurality of actors must exhibit clear goals in mutual cooperation. It is only then that the potential and creative spaces made available through the African regional system can make a difference at each domestic level.

## **1. Foreign Involvement**

External actors play significant, albeit ill-defined roles regarding the African regional human rights regime. Often indirectly, and sometimes directly, the activities of these actors have consequences for African women at the domestic level. These actors include predominantly foreign states located in the North (western hemisphere), sometimes working through state-funded institutions, international inter-governmental organisations including financial institution, and international non-governmental organisations. Of these international actors, European states have been most significant, representing a continuum from the colonial era.



European foreign relations with Africa date back to pre-colonial times. The primary rationale for interaction between Europe and African countries is the quest for international trade and economic exploration in the form of the extraction of labour, land, mineral and other resources.<sup>2</sup> In his depiction of the continuities between colonial domination and imperialism, Walter Rodney observes that “African economies are integrated into the very structure of the developed capitalist economies; and they are integrated in a manner that is unfavourable to Africa and insure that Africa is dependent on the big capitalist countries.”<sup>3</sup> The dependency and exploitation of African states, according to Rodney, characterise imperialism. This imperialism has continued through the international economic system dominated by countries in Europe and North America. In line with this argument, Filomena Steady observes that

Many African countries face economic challenges stemming primarily from an international economic system that has always undermined African economies, environments, and people. Corporate globalization, the debt burden, and Structural Adjustment Programs (SAPs) continue to increase underdevelopment, poverty, and armed conflicts, in keeping with the legacy of colonialism.<sup>4</sup>

This new imperialism and neo-colonialism support calls for democracy and human rights that are incidental to larger economic objectives of foreign relations,<sup>5</sup> intended to foster an environment conducive for foreign trade and investment. Indeed, it was only after the fall of the Soviet Bloc that Europe and the United States began to promote democracy and human rights in Africa, withdrawing earlier support of authoritarian regimes in parts of Africa. Human rights were essentially harnessed to a “development” agenda.

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<sup>2</sup> Walter Rodney, *How Europe Underdeveloped Africa* (Washington D.C: Howard University Press, 1982), who argues that societies, such as Egypt had improved textile, leather and metal industries even at the time.

<sup>3</sup> *Ibid* at 25.

<sup>4</sup> Filomena Chioma Steady, *Women and Collective Action in Africa: Development, Democratization, and Empowerment, with Special Focus on Sierra Leone* (New York: Palgrave Macmillan, 2006).

<sup>5</sup> Bonny Ibhawoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (Albany: State University of New York Press, 2007).

The European Union (EU) as well as individual foreign countries, such as the United States of America, Canada, Sweden, Germany, Norway and Denmark play key roles in aid and trade in Africa either directly or more often through their development agencies, such as the United States Agency for International Development (USAID), the Canadian International Development Agency (CIDA), the Danish International Development Agency (DANIDA) and the Swedish International Development Agency (SIDA).<sup>6</sup> In order to facilitate their activities, these countries also provide support towards human rights and democratisation in Africa. Part of this includes providing financial and material support to the AU and its institutions.<sup>7</sup>

The provision of aid and support for human rights and democracy by European and North American countries has thus been driven largely by strategic self-interested goals. A UN report observed that:

... in practice it [aid] has been heavily influenced by the commercial and political calculations of donors. Moreover, in the minds of many politicians and much of the public in donor countries, aid is seen less as a matter of accelerating economic development and more as a humanitarian gesture to less fortunate people.<sup>8</sup>

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<sup>6</sup> The EU provides the largest official development assistance (ODA) to Africa. In 2006, the EU and its member states provided 56% of all ODA to Africa from industrialised countries. Online: <[http://www.deljpn.ec.europa.eu/union/showpage\\_en\\_union.external.development.php](http://www.deljpn.ec.europa.eu/union/showpage_en_union.external.development.php)>. See also Joint Declaration, European Commission – African Union Commission, adopted 2 October 2006, Addis Ababa. Online: <[http://www.nepadst.org/doclibrary/pdfs/ec\\_au\\_declaration\\_2006.pdf](http://www.nepadst.org/doclibrary/pdfs/ec_au_declaration_2006.pdf)>. Direct support to the AU includes the €55 million programme for the AU's operational and institutional development. The EU also supports the African Commission and Court directly as well as through UN initiatives. See, Information Sheet No 2. Guidelines of the Submission of Communications, available in French and English to “inform people or groups of people, and states parties of the African Charter on Human and Peoples’ Rights on how they can denounce alleged violations of human and peoples’ rights within the African human rights protection system.” Online: <[http://www.achpr.org/english/information\\_sheets/ACHPR%20inf.%20sheet%20no.2.doc](http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.2.doc)>.

<sup>7</sup> The Danish Human Rights Institute and the International Centre for Human Rights and Democratic Development (Canadian), for example, assist to sponsor activities of the African Commission. For details of the contributions of some of these agencies, see for example the 23rd Activity Report of the African Commission November 2007, para. 117-119.

<sup>8</sup> United Nations Conference on Trade and Development: Geneva, *Economic Development in Africa: Doubling Aid: Making the “Big Push” Work* (New York and Geneva: UN, 2006) at 9. Online: <[http://www.unctad.org/en/docs/gdsafrika20061\\_en.pdf](http://www.unctad.org/en/docs/gdsafrika20061_en.pdf)>.

Moreover, the rationale for assistance by these external actors has been subject to criticisms, especially post-9/11. Some major Northern powers, especially the United States, have been willing to flout basic human rights standards in the name of combating terrorism. It has been observed that the U.S. post 9/11 human rights rhetoric does not always match its actions, necessitating the need to question the commitment to human rights.<sup>9</sup> For example, the focus on security has resulted in military aid trumping development and humanitarian aids to Africa.

Further, international inter-governmental organisations, such as United Nations and international financial institutions (IFIs), notably the International Monetary Fund (IMF) and the World Bank, and international organisations concerned with trade, such as the World Trade Organisation (WTO) also play crucial roles with respect to the African regional human rights regime. The UN, in furtherance of its *Charter* goal of achieving international cooperation in promoting and encouraging respect for human rights, was instrumental in establishing regional systems to supplement its human rights work.<sup>10</sup> It maintains ongoing technical and other cooperation with the AU. As well, the economic policies pursued by the international financial institutions and other international institutions, such as the WTO through its General Agreement on Trade in Services (GATS), impact human rights at the regional level.<sup>11</sup> Even though some of their actions critically constrain the provision of social services in the public sector, by virtue of the vertical nature of international obligations that envisage only state-individual relations, non-

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<sup>9</sup> The U.S. foreign policy on Africa centered on anti-terrorism since 9/11. Interest is geared toward in improving military and law and order capabilities of African countries to the neglect of economic development and the delivery of basic services. An example is the 2006 creation of a dedicated unified command for Africa, the United States Africa Command (AFRICOM).

<sup>10</sup> The *United Nations Charter*, 1 UNTS xvi. Preamble read together with art 1(3), 55 and 56. The UN was instrumental in establishing regional systems to supplement its human rights work. It has ongoing cooperation with the AU. For example, the African Centre for Democracy and Human Rights Studies, in collaboration with the UN, organised a Human Rights AU/UN Cluster Strategy Meeting on 6 May 2008. Report on the African Court on Human and Peoples' Rights 2006, para 42. See also the Activity Report of the African Commission, 2008 para. 6.

<sup>11</sup> Marjorie Griffin Cohen, "Collective Economic Rights and International Trade Agreements: In the Vacuum of Post-National Capital Control" in Margot Young, Susan B. Boyd, Gwen Brodsky and Shelagh Day (eds.), *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) at 185.

States Parties are not held directly accountable for human rights violations. The activities of these institutions accentuate the powerlessness of African states that rely heavily on them as well as negatively impact the most vulnerable groups in African societies.<sup>12</sup>

Another category of actors that cannot be excluded from any discourse of external involvement with the African regime are INGOs. INGOs refer to international NGOs headquartered in the “most powerful cultural and political capitals in the West.”<sup>13</sup> They engage in the development of processes and institutions, such as regional institutions for human rights. INGOs participate and contribute to the African human rights system in a variety of ways. INGOs, such as Amnesty International, the International Commission of Jurists (ICJ), Article 19 (Global Campaign for Free Expression), the International Centre for Legal Protection of Human Rights (Interights) and International PEN, engage with the complaint procedure of the African Commission by submitting complaints on behalf of victims of human rights violations. The high poverty level in most African countries, and the inability of most victims of human rights violations to cover the costs of engaging in such complaints, underscores the vital contributions of INGOs to the development of regional human rights jurisprudence. Other INGOs provide technical and other forms of support to the work of the regional regime.<sup>14</sup>

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<sup>12</sup> UNDP, Human Development Report (OUP, 2002) at 114. The report reveals that the IMF and World Bank lend exclusively to developing and emerging economies with their loans linked to conditions that impinge on the domestic policies of the state. Pamela Sparr (ed.), *Mortgaging Women's Lives: Feminist Critique of Structural Adjustment* (London: Zed Books Ltd, 1994); George, Susan, *The Debt Boomerang: How Third World Debt Harm Us All* (London: Pluto Press, 1992). Structural Adjustment Programmes have resulted in slower growth, increased poverty (over half of Africa's population lived below the poverty line of US \$1 a day in 2003, a 75 percent increase from the 1994 figure), increased debt burden, decreases in health care. World Health Organisation, Fact Sheet No. 251, June 2000. Of the 1.2 billion people living in poverty around the world, 70% are women, the majority living in Africa.

<sup>13</sup> Makau Mutua, “Human Rights International NGOs: A Critical Evaluation” in Claude Welch Jr. (ed.), *NGOs and Human Rights: Promise and Performance* (Philadelphia, University of Pennsylvania, 2000) at 151.

<sup>14</sup> AI Index: AFR 01/004/2007. This was a follow up to the “Guide to the African Charter on Human and Peoples' Rights (AI Index: IOR 63/005/2006). The Geneva-based ICJ, for example was instrumental in pointing attention to the fact that equality of the sexes was neglected by the African Commission. See, ICJ, *The Participation of NGOs in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents* (ICJ: 1996) and ICJ Workshop in Collaboration with The African Commission and The African Centre for Democracy

Despite their contributions, the paternalistic and sometimes contradictory practice by some external actors tends to diminish the potency of human rights as a vehicle for social transformation. For instance, INGOs generally work to foster and strengthen processes and institutions – rule of law, laws and constitutions, judiciaries, legislatures – to ensure protection of civil and political rights.<sup>15</sup> This initial focus on civil and political rights aligned with the primary objective of promoting liberal rights characteristic of the North. As Steiner rightly observes, INGOs failed to explore the underlying socio-economic and other factors causing human rights violations.<sup>16</sup> By neglecting economic, social and cultural rights and ignoring the human rights violations perpetrated through the actions of foreign states and intergovernmental agencies, INGOs encouraged the marginalisation of those who disproportionately suffer the consequences of these actions. INGOs initial disregard for economic, social and cultural rights violations and the violations imposed as a result of the unequal international economic order, have disproportionate consequences for women and their access to the regional mechanisms. Recent attempts by INGOs to acknowledge the indivisibility of rights has yet to be matched by action and practice.

## **2. Reflection on African Regional Entities' Obligations**

Apart from external actors, the AU and its organs play a pivotal role in influencing domestic recognition of human rights through the mechanisms of the regional human rights system. As

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and Human Rights Studies, 5-7 October 1991, ICJ, *The Participation of NGOs in the Work of the African Commission on Human and Peoples' Rights*, at 17. The workshop recommended the adoption of an affirmative action policy with regards to the appointment of women commissioners.

<sup>15</sup> Mutua, *supra* note 13 at 156.

<sup>16</sup> Henry J. Steiner, *Diverse Partners: Non-Governmental Organizations in the Human Rights Movement: The Report of Human Rights Activists* (Cambridge, Mass.: Harvard Law School Human Rights Program and Human Rights Internet, 1991) at 61-64.

the continental umbrella body of African States, the AU has primary responsibility to nurture and sustain its human rights system. The AU sets the standard for gender equality for the continent in its *Constitutive Act*.<sup>17</sup> By showing commitment to the gender equality expounded in its *Constitutive Act* and the Solemn Declaration on Gender Equality, the AU provides leadership to its regional mechanisms.

The AU, through its organs, also provides oversight functions as well as financial and material support to the regional human rights system. In furtherance of its oversight functions, Article 59 of the *African Charter* states that:

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Thus, the Assembly of Heads of State and Government of the AU exercise oversight over the African Commission. As well, through its Commission, the AU addresses administrative issues confronting the African human rights system – the African Commission and Court – including budgetary allocations. The Economic, Social, and Cultural Council (ECOSOCC), another AU organ, in part, aspires to “create a people-driven and community based partnership between governments and all segments of the civil society, particularly women, youth and the private sector in order to strengthen cohesion and solidarity among African people”.<sup>18</sup> This body, composed of different social and professional groups active in member states, has the potential

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<sup>17</sup> Articles 3(h) and 4 (l), the *Constitutive Act of the African Union*, adopted by the thirty-sixth Ordinary Session of the Assembly of Heads of State and Government of the African Union, 11 July 2000, Lome, Togo. The *Constitutive Act* seeks to promote human and peoples’ rights contained in the *African Charter* and other international human rights instruments in accordance with the principle of gender equality.

<sup>18</sup> African Union Template for Election into the ECOSOCC General Assembly.

to engage with women's rights seriously, using the regional mechanisms at their disposal.<sup>19</sup> The African Commission and Court, as institutions under the aegis of the AU, also have the responsibility and moral obligation to further the human rights objectives of the regime within which they are established. The African Commission follows the trend set by the African Union Commission with the election of more female commissioners.<sup>20</sup>

Notwithstanding the progress achieved, the AU and its institutions, including its human rights institutions, confront a series of challenges, the consequences of which negatively impact the ability of the African system to adequately address women's rights. For instance, the supervisory role of the AU has sometimes impeded the proper functioning of the human rights system. Commentators criticise the use of the oversight provisions in the *African Charter* to obstruct publication of reports on activities of the African Commission. With regards to its financial obligations, the African Commission and more recently the African Court constantly call on the AU to provide adequate financial resources in order to effectively engage with its processes and programs.<sup>21</sup> The weight of the financial difficulty experienced by the African Commission, for example, has the effect of limiting the capacity of the Special Rapporteur on the Rights of Women in Africa to perform her function.<sup>22</sup>

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<sup>19</sup> Article 22 of the *Constitutive Act*.

<sup>20</sup> Currently seven among the eleven commissioners of the African Commission are females, the highest number of females ever elected, with a female Commissioner, Justice Sanji Mmasenono Mongeng, as Chairperson.

<sup>25</sup><sup>th</sup> Activity Report, African Commission on Human and Peoples' Rights, EX.CL/490 (XIV) Executive Council 14<sup>th</sup> Ordinary Session 26-30 January 2009.

<sup>21</sup> Activity Report of the Court for 2006, Assembly/AU/8/(VIII) submitted to the 8<sup>th</sup> Ordinary Session of the Assembly of the AU 29-30 January 2007 [hereinafter 2006 Activity Report]. Addis Ababa, Ethiopia. See also The Report of the African Court on Human and Peoples' Rights [hereinafter 2007 Activity report]. Ex. CL/445 (XIII) Online: <[www.africancourtcoalition.org/content\\_files/files/ActivityReportoftheCourt\\_2007.doc](http://www.africancourtcoalition.org/content_files/files/ActivityReportoftheCourt_2007.doc)>. Accessed, 20 January 2009.

<sup>22</sup> <sup>25</sup><sup>th</sup> Activity Report *supra* note 20.

### **3. Domestic Involvement**

The ultimate measure for the relevance of the regional system relates to the extent to which its activities translate into concrete benefits at the domestic level. As one can deduce from the above analysis, international agents can only go so far in promoting human rights in Africa. There is no substitute for political will, government support and popular participation. The responses of government and the citizenry within each African country must determine the mode of human rights protection and the pace for growth. Individual states play a pivotal role in grounding the benefits of the regional regime at the local level. The collective role of African states under the umbrella of the AU differs significantly from the obligations of an individual autonomous State Parties in promoting and protecting rights, even though there is room for overlap. Yet, the roles and responsibilities for placing the regional mechanisms on the domestic agenda do not lie exclusively on any particular actor. Indeed, apart from States Parties, non-state actors also have a prominent role to play.

This chapter therefore focuses predominantly on the relevance and roles of national actors in promoting and protecting women's rights using the African regional system. It goes beyond the enforcement/compliance measure of assessing the influence of the regional system at the domestic level to examine both the individual and collective actions of these actors more holistically. National actors include governments, governmental and non-governmental agencies and organisations. Ordinarily, actors with important roles in this regard should include individual State Parties of the AU, National Human Rights Institutions established by State Parties, as well as domestic civil society organisations (CSO) – NGOs, professional associations, individuals – especially those Obiora Okafor generally refers to as “activist



forces.”<sup>23</sup> However, without any attempt to diminish the role of other actors but given the increasingly important status of civil society groups, such as human rights NGOs in international human rights law,<sup>24</sup> this chapter pays special attention to the influences of domestic NGOs. It is not unusual for commentators to commend the women’s movement as the most mature, developed and effective movement in Africa.<sup>25</sup> This chapter explores the role of women’s NGOs, as part of this movement, in influencing human rights at the domestic level, using the mechanisms of the regional system.

Among other things, the chapter undertakes a brief history of the development of the African women’s movement and the emergence of women’s NGOs. It examines how women’s NGOs navigate and engage with the regional mechanisms. How do they perceive the system? What obstacles do they confront and how may they address the challenges that may accompany the use of the African regional initiative? How can they better translate the norms and deploy institutions of the African human rights regime into practical benefits for women at the domestic level? These explorations reject the negative collective consciousness that permeates the study and use of African institutions and initiatives. How may these actors individually and collectively move beyond “Africa’s collective consciousness?”<sup>26</sup> Can we apply, for example, the regional mechanisms to begin this conversation? This chapter analyses the influences of

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<sup>23</sup> Obiora Chinedu Okafor, *The African Human Rights System: Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007) (hereafter *Activist Forces*).

<sup>24</sup> M. A. Olz, “Non-Governmental Organizations in Regional Human Rights Systems” (1997) 28 *Columbia Human Rights Law Review* 307-374. Olz alludes to the shifting state-centeredness and the status of NGOs in international human rights law; *Ibid.*, Obiora Okafor, *Activist Forces* at 94, arguing that the modest but significant feat achieved by the African system in Nigeria may be attributed to the alliance between activist forces, including civil society actors (CSAs) who have acted as the go-betweens, “brainy relays” or *intelligent transmission-lines* between the African system and various institutions and actors,” emphasis by the author.

<sup>25</sup> Joe Oloka-Onyango, “Modern-day Missionaries or Misguided Miscreants? NGOs, the Women’s Movement and the Promotion of Human Rights in Africa,” in W. Benedek, *et al.* (eds.), *The Human Rights of Women: International Instruments and African Experiences*. (London: Zeb Books, 2002) at 293.

<sup>26</sup> Connie Ngondi-Houghton, “Donors and Human Rights NGOs in East Africa: Challenges and Opportunities” in Mutua Makau (ed), *Human Rights NGOs in East Africa: Political and Normative Tension* (Philadelphia: University of Pennsylvania, 2008) at 166.

different actors at the domestic level and proffers strategies for transforming the benefits of the regional regime into actual gains for women at the local level.

## **II. Individual Member States: Actions and Influences**

The primary obligation to adhere to international human rights treaties rests upon State Parties. States activate their obligations to recognise, respect, promote, protect and fulfill prescribed rights by their voluntary acceptance of such obligations upon signing and ratifying a human rights instrument. Such instruments then oblige State Parties; to ensure that national laws and policies conform to the obligations undertaken; create and provide an environment in which respect for rights would thrive; and provide adequate mechanisms for implementing rights as well as make available and accessible remedies for redressing violations of treaty obligations. In accordance with their obligations, several African countries incorporate human rights principles enumerated in international human rights treaties into their constitutions, laws and policies;<sup>27</sup> and strengthen existing infrastructures, such as courts, that make pronouncements beneficial to uphold such rights.<sup>28</sup>

It is, however, difficult to assess the impact of the regional system, or any other international human rights system, at the domestic level. In his book, *The African Human Rights System: Activist Forces and International Institutions*, Obiora Okafor posits that the African human rights system exacts a “modest yet significant” level of influence on some specific African

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<sup>27</sup> *African Charter on Human and People's Rights (Ratification and Enforcement) Act* Cap. 10, Laws of the Federation of Nigeria 1990; See also the *Constitution of the Republic of South Africa*, Act 108 of 1996 as amended, by the Constituent Assembly, adopted on 8 May 1999. Online: <<http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1>>.

<sup>28</sup> See the decisions of the Constitutional Court of South Africa in *Bha v. Magistrate, Khayelitsha and others* [2004] Case No. 49/03. 2004 SACLR LEXIS 22; *Brink v. Ritshoff* NO (CCT15/95) 1996 (4)SA 197; 1996 (6) BCLR 752 available at <<http://www.saflii.org/cgi-bin/saflii/disp.pl/za/cases/ZACC/1996/9.html?query=%5e+discrimination>>.

States, such as Nigeria and South Africa.<sup>29</sup> Okafor reveals that beyond enforcement and compliance optics such influences may be measured through judicial decision-making and actions, executive actions and legislative actions of member states, among other actions.<sup>30</sup> Drawing from this mode of analysis, this section analyses the influence of the regional system on women's rights through executive, legislative and judicial decision-making and actions. The section makes no claim to a comprehensive analysis given the limitations of this study; rather it provides some analyses based on available information.

### **1. Government: Actions, Interactions and Influences**

The executive, legislative and judicial branches of individual State Parties are responsible for performing certain functions in order to fulfil treaty obligations.<sup>31</sup> Such functions apply within the context of democratic societies that presumes separation of powers and functions.

The executive branch of government signs, accedes to or ratifies regional treaties either wholly or with reservation. For example, as of 12 February 2009, twenty-seven States Parties have ratified the *Women's Protocol*.<sup>32</sup> The Gambia, Mauritius and South Africa entered reservations to specific provisions of the *Women's Protocol*. The Gambia, for example, initially entered reservations to Articles 6 on marriage and 14 on health and reproductive rights. These reservations were however removed in May 2006.<sup>33</sup> Similarly, South Africa entered reservations

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<sup>29</sup> Okafor, *Activist Forces*, *supra* note 23 at Chapters 4 and 5.

<sup>30</sup> *Ibid.*

<sup>31</sup> Human Rights Council, General Comment 31, para. 4; ESCR Committee, General Comment 3, The Nature of States Parties' Obligations (5<sup>th</sup> session, 1990), UN doc E/1991/23, annex III at 86 (1991), para 1.

<sup>32</sup> As at the same date, there were 45 signatories to the *Women's Protocol*. Online: <<http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf>>.

<sup>33</sup> The Gambia entered reservations with regards to Articles 6, 7, and 14 on marriage, separation, divorce and annulment of marriage, and health and reproductive rights, respectively during ratification in September 2005. See

to Articles 4(j) and 6(d) and (h) of the *Women's Protocol*. It also formulated an interpretative declaration to the definition of violence against women in Article 1(f) of the *Protocol*. By implication, a reservation excludes or modifies the legal effect of a treaty provision in its application to the State Party.<sup>34</sup> These are examples of executive actions by State Parties which may affect application or implementation of regional instruments at the domestic level. It is therefore crucial that State Parties' executive branches must avoid reservations "incompatible to the object and purpose"<sup>35</sup> of the *Women's Protocol*.

As well, multiple legal orders in most African states and the legal system of each state party determine its mode for domesticating treaties. Many Anglophone African countries operate the dualist system whereby unless a treaty is incorporated into domestic law by an act of parliament, it is not enforceable in domestic courts.<sup>36</sup> Other countries operate the monist system whereby once ratified, a treaty requires no additional legislation to take effect.<sup>37</sup> Even though State Parties' reasons for ratifying treaties are not always clear, ratification is a first step towards recognition and implementation of treaty obligations.

After ratification, often pending domestication and implementation, the executive may initiate law reform, and adopt policies and programs in compliance with its treaty obligations.<sup>38</sup>

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Special Rapporteur on the Rights of Women in Africa Online:  
<[http://www.achpr.org/english/\\_info/women\\_prot..htm](http://www.achpr.org/english/_info/women_prot..htm)>.

<sup>34</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 8 I. L. M. 79 entered into force 27 January 1980 (Hereinafter *Vienna Convention*) at Article 20 (2). A reservation may be an indication that the State Party may not wish to be bound by the provision to which it entered a reservation.

<sup>35</sup> See General Recommendation No. 4, Committee on the Elimination of Discrimination against Women (sixth session, 1987).

<sup>36</sup> Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> ed.) (Oxford: Clarendon Press, 2002). Anglophone African countries, such as Ghana and Nigeria operate a dualist system, while Francophone countries predominantly operate the monist system.

<sup>37</sup> *Ibid.*

<sup>38</sup> Okafor, *Activist Forces*, *supra* note 23 at 179, highlighting the influence of the *African Charter* on major policy documents relating to women in South Africa.

Ministries, such as justice, foreign affairs or women, have varying responsibilities towards grounding international human rights obligations at the domestic level.<sup>39</sup> Sometimes, ministries pay limited attention to regional obligations by choosing not to work with the regional treaties. For instance, a government expert on women indicated that the ministry in charge of women's affairs in Nigeria has yet to give much attention to the *Women's Protocol*.<sup>40</sup> In addition to this, coordination among state ministries empowered to activate treaties presents a challenge in many African countries. According to Mary Wandia, the regional coordinator for ActionAid in Kenya, there is often no connection between the ministries of justice (regarding the African Court), the ministries of foreign affairs (regarding the AU) and the ministries of women (to coordinate actions on women's rights). Without due attention to the regional treaties and proper coordination among the relevant ministries, states cannot effectively influence human rights using these mechanisms. These inadequacies are often exposed when states' periodic reports submitted to international human rights monitoring bodies are poorly prepared.<sup>41</sup> Inadequate coordination thus hinders the proper implementation and monitoring of State Parties obligations.

The state's legislative branch of government defines the scope of rights entitlement in the law in accordance with treaties. It translates this into adequate, effective and enforceable law, as well as providing structures for enforcement. This may be carried out by adopting new laws or the reform of existing laws. The Constitution of South Africa, for example, lists extensive

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<sup>39</sup> Irungu Houghton, "Reviewing the Protocol on the Rights of Women in Africa, Pambauka News, 24 May 2006. Online: <[http://www.newsfromafrica.org/newsfromafrica/articles/art\\_10688.html](http://www.newsfromafrica.org/newsfromafrica/articles/art_10688.html)>.

<sup>40</sup> This admission was made by a government expert within a Nigerian institution while obtaining clarifications on the interview questions.

<sup>41</sup> In the Concluding Observation of the African Commission to South Africa's First Periodic report, the African Commission observed the lack of involvement of state institutions in the promotion and protection of rights, paragraph 17.

guarantees on equality, and particularly values sexual and racial equality.<sup>42</sup> It guarantees justiciable social and economic rights, such as the right to health, including adequate food, water, social security, access to health care, including reproductive health care.<sup>43</sup> These are rights guaranteed by the *African Charter* to which South Africa is a signatory, thus enabling direct implementation of these rights in South African courts.

In some African countries, specific laws encourage the use of international law as a guide to interpretation within domestic courts.<sup>44</sup> Therefore, even in cases where international human rights law has yet to be domesticated, State Parties may translate and interpret these rights as incorporated into constitutions and other domestic legislation. It is not surprising that some States' judiciaries recognise the potential value of the African system by citing regional instruments in their interpretation of women's rights. Judicial decisions in some African states apply a human rights reasoning in their interpretation of women's rights, using regional treaties. In the Ghanaian case of *Abena Nyantakyi v Kwabena Mensah*,<sup>45</sup> the defendant, a customary successor of the deceased, asked the plaintiff (widow of the deceased who although divorced from the deceased before his death, lived with him prior to his death) to vacate a plot of land allocated to the children of the plaintiff after the death of the deceased. The court held that the plaintiff acquired an automatic easement to the property and a better title to the land than the defendant, citing Article 18(3) of the *African Charter*, among other international human rights

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<sup>42</sup> *Constitution of the Republic of South Africa*, 1996, approved by the Constitutional Court, 4 December 1996, took effect, 4 February 1997. Online: < <http://www.info.gov.za/documents/constitution/1996/index.htm>>. See generally Chapter Two – Bill of Rights.

<sup>43</sup> *Ibid.*, Section 27

<sup>44</sup> *Ibid.*, Sections 231(4) and 233, also the judicial colloquium held in Bangalore in 1988, the Bangalore Principles on the Domestic Application of International Human Rights Norms, 14 Commonwealth L. Bull. 1196.

<sup>45</sup> Shadow Report to Ghana's Third, Fourth and Fifth Reports on the Implementation of the CEDAW, WiLDAF-Ghana, 2006.

treaties, in support of this decision.<sup>46</sup> Similarly, in the South African case of *S v. Baloyi*,<sup>47</sup> the court observed that the legislature was acting in compliance with South Africa's international human rights obligation in seeking to remedy the injustice complained about in the case. The court also cited the *African Charter's* obligation to eliminate discrimination against women, among other international treaty obligations.

It would be impossible for courts to make any substantive pronouncement on women's rights without cases being brought before them. From a comparative continental perspective, it is evident that the most far-reaching advances in judicial pronouncements emanating from domestic African courts have been as a result of individual (sometimes poor) women who have dared to challenge issues relating to land rights, inheritance and other rights within their societies. In the South African case, *Bhe and Others v The Magistrate, Khayelitsha and Others*<sup>48</sup> and the Nigerian cases, *Mojekwu v Mojekwu* and *Mojekwu v Ejikeme*,<sup>49</sup> women challenged the male rule of primogeniture. In the Tanzanian case of *Ephraim v Pastory*, a woman's right to sell clan land was challenged. As well, the decision in *Magaya v Magaya*,<sup>50</sup> a Zimbabwean case, turned on a woman's right to inherit. These and other cases are indicative of the changes that can occur when women decide to take a stand regarding their rights.<sup>51</sup> According to a human rights scholar and activist with over ten years of practical engagement with the African Commission, the main problem facing women in relation to the African Commission is their

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<sup>46</sup> WiLDAF, *Effective Implementation of Women's Rights in West Africa: What are the Responsibility of Judicial and Extra Judicial Stakeholder?* March 2004. Online: <[http://www.wildaf-ao.org/eng/IMG/pdf/Effectivity\\_Women\\_Rights\\_Summary\\_ENG-2.pdf](http://www.wildaf-ao.org/eng/IMG/pdf/Effectivity_Women_Rights_Summary_ENG-2.pdf)>.

<sup>47</sup> 2000(2) SA 261 (CC).

<sup>48</sup> Case CCT 49.03 (South Africa)

<sup>49</sup> (1997) 7 NWLR (pt.512) and (2000) 5 NWLR (Pt. 657) at 402; [1999] ICHRL 168. Online: <<http://www.worldlii.org/int/cases/ICHRL/1999/168.htm>>.

<sup>50</sup> [1999] 3LRC 35(Zimb.)

<sup>51</sup> Other such cases include *Longwe v. Intercontinental Hotels* (1984, Malawi) and *Unity Dow v. Attorney General* (1992) 103 I. L. R. 128 (Bots. Ct. App.)

failure to place demands on the system.<sup>52</sup> This expert observes that cases relating to women have been framed in terms of civil and political rights rather than equality and discrimination resulting in missed opportunities by the African Commission to make pronouncements on women's rights under the *African Charter*.<sup>53</sup> Yet without making demands on both the domestic and the regional formal legal mechanisms, the above mentioned decisions could not have been reached.

It is clear that governmental action in influencing implementation of the regional mechanisms is burdened with challenges. For instance, many domestic courts within African States, as with the practice of the African Commission, more readily cite international human rights treaties and other international human rights cases rather than regional and African domestic equivalents. The domestic application and acceptance of international human rights norms supports recognising the universality of rights and the expansion of global human rights jurisprudence.<sup>54</sup> Nevertheless, to marginalise regional and other African domestic norms and jurisprudence fosters a predominantly Euro-centric approach that neglects the context in which human rights arise and are applied.<sup>55</sup> This hinders interaction and translation of regional human rights norms in national courts.

As well, even after regional treaties are domesticated by executive action, coordination among ministries to ensure effective implementation is often lacking. This is exacerbated by the

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<sup>52</sup> The interviewee's experience include working with Nigerian civil society groups as well as with international NGOs.

<sup>53</sup> For example in *Curtis Francis Doebller v Sudan* Comm. No. 236/2000 (2003) "The Complainant avers that the acts constituting these offences comprise girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and sitting and talking with boys." No only was the gender of the students omitted from the complaint, the complainant only alleged a violation of Article 5 of the *African Charter*, cruel, inhuman and degrading punishment.

<sup>54</sup> M. E. Adjami, "African Courts, International Law and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?" (Fall, 2002) 24 Mich. J. Int'l L. 103.

<sup>55</sup> Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 NYU Journal of International Law and Politics 501 at 506, arguing against this application.



minimal weight ascribed to such regional treaties. Rarely is such a treaty given elaborate publicity at the domestic level to show commitment to its provision. Nevertheless, incorporating regional norms, as with the legislative action of the South African Constitution, remains a first step towards grounding the regional norms in the domestic sphere, a step which other African states would do well to emulate.

## 2. National Human Rights Institutions

Commentators observe that National Human Rights Institutions (NHRIs) are “a mixed bag.”<sup>56</sup> They are state-sponsored, state-funded national institutions established by a Constitution, law or decree with a broad mandate and competence to promote and protect human rights.<sup>57</sup> Simultaneously, NHRIs are presumed to hold the status as an institution independent of government.<sup>58</sup> As will be shown subsequently, this status presents a challenge to the influence of NHRIs. Ordinarily, NHRIs are often established by African governments as part of constitutional change, as a show of a state’s commitment to human rights and/or as a defence to criticisms over its human rights record, among other reasons.<sup>59</sup> Notwithstanding the rationale for the establishment of NHRIs, these institutions may serve as a conduit for interaction between the regional and the national.

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<sup>56</sup> Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commission in Africa* (New York, Human Rights Watch, 2001) at 4. This comment was made with regards to the general performance of NHRIs.

<sup>57</sup> Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights (The Paris Principles), Commission on Human Rights, March 1992 (resolution 1992/54; General Assembly Resolution A/RES/48/134 of 20 December 1993. See, Rachel Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa* (Oxford: Hart Publishing, 2007) (*The Role of National Human Rights Institutions*) and O. Okafor and S. C. Agbakwa, “On Legalism, Popular Agency and “Voices of Suffering”: The Nigerian National Human Rights Commission in Context” (2002) *Human Rights Quarterly* 662-720.

<sup>58</sup> Effective Functioning of International Instruments on Human Rights, including Reporting Obligations under International Instruments on Human Rights. Note by the Secretary-General, 19 August 2005, A/60/278, para 31. See also the Paris Principles, *ibid* at paras. 2 and 3 Composition and Guarantees of Independence and Pluralism.

<sup>59</sup> Rachel Murray, *The Role of National Human Rights Institutions*, *supra* note 57 at 3. Examples of these three reasons are given as South Africa, Ghana and Nigeria, respectively.

For this reason the UN and AU, among other institutions, encourage the establishment of NHRI as an indication of a states' commitment to human rights.<sup>60</sup> The mandate of NHRIs encompasses the national, regional and international levels. As of 2007, over twenty NHRIs exist in Africa.<sup>61</sup> It is no surprise therefore that NHRIs in Africa, as elsewhere, are receiving increasing attention.<sup>62</sup> In the book, *The Role of National Human Rights Institutions at the International and Regional Level: The African Experience*, Rachel Murray examines how NHRIs fare at the international and regional levels, highlighting the problem inherent in attempting to classify NHRI into either state or non-state actors as it relates to the independence of their status. Okafor and Agbakwa, for their part, review the dominant conceptions of NHRIs. The authors argue that the ideal NHRI promoted by the UN is inadequate and insufficient to animate establishment of the kind of NHRIs that have the best chance of fundamentally transforming the human rights situation of individuals and groups in the societies in which they operate.<sup>63</sup> These scholars therefore call for a more compelling and a more holistic conception of NHRIs as well as a less legalistic and more cognitive or popular agency, more deeply connected to the "voices of suffering."<sup>64</sup>

The concerns raised by these scholars are relevant to this discourse, as the positioning of NHRIs may influence and strengthen the national protection of human rights using the regional

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<sup>60</sup> The AU Ministerial Conferences on Human Rights made this call by urging states to "establish national human rights institutions and to provide them with adequate financial resources and ensure their independence." Grand Bay (Mauritius) Declaration and Plan of Action, 12-16 April 1999, para. 15; also the Kigali Declaration, AU Ministerial Conference on Human Rights, 8 May 2003, para. 27.

<sup>61</sup> Rachel Murray, *The Role of National Human Rights Institutions*, *supra* note 57 at 2-3.

<sup>62</sup> *Ibid.*, O. Okafor and S. C Agbakwa, "On Legalism," *supra* note 57; A. Makubuya, "Breaking the Silence: A Review of the Maiden Report of the Ugandan Human Rights Commission" (1999) *East African Journal of Peace and Human Rights* 213; J. Hatchard, "A New Breed of Institution: The Development of Human Rights Commissions in Commonwealth Africa with Particular Reference to the Uganda Human Rights Commission" (1999) *Comparative and International Law Journal of South Africa* 28.

<sup>63</sup> O. Okafor and S.C Agbakwa, *ibid.*

<sup>64</sup> *Ibid.* According to these authors, the UN-driven NHRI prioritizes its court-like features over non-court like functions, such as education and the provision of policy advice. It also does not have adequate connection with persons requiring the most protection.

mechanisms. This idea is supported, to a circumscribed extent, by the Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights (The Paris Principles) that impose responsibilities on NHRIs to give advice to government, parliament and other competent bodies on any matters concerning the promotion and protection of human rights, promote and ensure harmonisation of national legislation, regulations and practices with international human rights instruments, encourage ratification of these instruments for their implementation, contribute to the reports pursuant to a state obligation under regional treaties, cooperate with regional and national institutions in the areas of promotion and protection of human rights, as well as teach and research as well as publicise human rights.<sup>65</sup> In relation to these responsibilities, the AU maintains an informal involvement through organising conferences specifically dedicated to NHRIs.<sup>66</sup> Beyond this, other involvements, such as whether NHRIs participate in other organs of the AU, such as the Economic and Social Council (ECOSOCC) of the African Union, remain unclear.

The African Commission formalised its interaction with NHRIs by granting affiliate status to those who meet specified requirements upon application.<sup>67</sup> As of May 2009, twenty-one (21) NHRIs hold affiliate status with the African Commission.<sup>68</sup> NHRIs with affiliate status before the African Commission have the right to attend the sessions of the Commission and participate in discussions, as well as submit proposals to it. They also have responsibilities to submit a report on their activities every two years and assist the African Commission in promoting and

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<sup>65</sup> The Paris Principles, *supra* note 57 at para 3, “Competence and Responsibilities”.

<sup>66</sup> First African Union Conference of National Human Rights Institutions, 18-21 October 2004, Addis Ababa; Draft Report. Murray, *National Human Rights Institutions*, *supra* note 57 at 46. A Gender expert within the Nigerian Human Rights Commission confirmed that the gender department has no formal relationship with the Gender Unit of the AU.

<sup>67</sup> Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa (1998) ACHPR/Res.31 (XXIV) 98 Online: <[http://www.achpr.org/english/\\_doc\\_target/documentation.html?../resolutions/resolution36\\_en.html](http://www.achpr.org/english/_doc_target/documentation.html?../resolutions/resolution36_en.html)>.

<sup>68</sup> Para 14, 26<sup>th</sup> Activity Report of the African Commission on Human and Peoples’ Rights, EX.CL/529(XV) Online: <[http://www.chr.up.ac.za/hr\\_docs/documents/26th%20Activity%20report%20of%20the%20ACHPR.pdf](http://www.chr.up.ac.za/hr_docs/documents/26th%20Activity%20report%20of%20the%20ACHPR.pdf)>.

protecting human rights at the national level.<sup>69</sup> While it remains uncommon, in a particular case, an NHRI has brought a communication before the African Commission.<sup>70</sup>

According to the African Commission, NHRIs:

serve as a basis for initiatives for human rights in their respective countries, and will help the Commission to disseminate the African Charter and to fulfil its educational mission on human and peoples' rights in general. They may also contribute to protective activities by providing the Commission with information on human rights violations and by assisting the victims of such violations. The Commission intends to set up a cooperation framework between national human rights associations and institutions in order to promote the exchange of information and experience thus assisting them to enhance their efficiency.<sup>71</sup>

The African Commission thus recognises the invaluable role NHRIs can play to facilitate correspondence between the regional and national levels. Efforts to crystallise this role have continued at the regional level with the establishment of the Network of African National Human Rights Institution in 2009, seven months before the 43<sup>rd</sup> session of the African Commission. The Network was established to “become a privileged and strategic partner of the African Commission in the promotion and the protection of human rights in Africa.”<sup>72</sup>

According to Mr. Gibert Sebihogo, the Executive Director, the objective of the Network:

is to promote cooperation and facilitate coordination of the activities of African NHRIs, encourage and advise governments on the establishment of new NHRIs in accordance with the Paris Principles, support governments towards democracy, good governance and the rule of law, enhance visibility and strengthen collaboration with regional and sub regional organisations so that they can do more and participate more actively in helping the Commission to achieve its mandate.<sup>73</sup>

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<sup>69</sup> Resolution on Granting Observer [or “Affiliate”] Status to National Human Rights Institutions in Africa.

<sup>70</sup> *Commission National des Droits de l’Homme et des Libertés v Chad*, Comm. No. 74/92 (1995) (African Commission)

<sup>71</sup> Mauritius Plan of Action 1996-2001, paras. 65, 67-68.

<sup>72</sup> 24<sup>th</sup> Activity Report of the African Commission para. 34.

<sup>73</sup> *Ibid.*, at para. 38.

Similarly, at the 43<sup>rd</sup> Session of the African Commission, the South African Human Rights Commission recommended establishing a NHRI Unit with the African Commission and to develop guidelines on cooperation between the Commission and NHRIs.<sup>74</sup>

Despite such developments, as well as the informal and formal interactions between NHRIs and the African regional regime, it is difficult to assess the influence of the African system on the work of NHRIs to promote and protect women's rights at the national level. Even though NHRIs may serve as a valuable resource at the domestic level, their formal prescription under the Paris Principle may limit their influence. As Okafor and Agbakwa observe, the Nigerian Human Rights Commission (NHRC) could serve as a valuable resource to an NGO as well as maintain adequate connection with the "voices of suffering." These refer to "persons or groups whose need for protection is greatest, who are the society's most vulnerable, and who survive at the bottom end of the scale of human freedom from want and deprivation." This can however only happen if the NHRI breaks from the limited vision of the Paris Principles to address contextual needs within its sphere of operation. As Okafor and Agbakwa point out, the Nigerian Human Rights Commission remains a valuable institution for promotion and protection of human rights in Nigeria.

On women's issues, the Gender Department of the NHRC participated in the compilation of the Nigerian Country Report on the AU Solemn Declaration on Gender Equality.<sup>75</sup> It also collaborates with the Federal Ministry of Women's Affairs especially in advocacy for domestication of international treaties, such as the *Women's Convention* and the *UN Convention*

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<sup>74</sup> *Ibid.*, at para. 61.

<sup>75</sup> Interview with a gender expert working with a national human rights commission.

*on the Rights of the Child*.<sup>76</sup> Even though the NHRC has conducted training sessions to sensitise target groups about the *African Charter*, not much has been done with regards to the *Women's Protocol*. Although NHRIs are potential vehicles and resources for applying regional norms and mechanisms to promote and protect human rights including women's rights at the domestic level, this potential is yet to materialise.

### **III. Non-State Actors: NGOs and the African Human Rights Regime**

Non-state actors comprise a broad category of civil society organisations, businesses and corporations, media outlets, educational and religious institutions, scholars, activists and individuals. For our purpose in this section, the primary categories of interest are civil society actors. In the African context, civil society emerged out of anti-colonial struggles during which Africans mobilised and fought against the abrogation of rights to self-determination and other civil, economic, cultural, social, and political rights by the colonisers.<sup>77</sup> Civil society has however evolved to its present nature as a result of democratic struggles in post-colonial Africa. Thus, civil society refers to not-for-profit actors distinct from the state. This section acknowledges that not all social and political forces are formally constituted as organisations.<sup>78</sup> Civil society would therefore ordinarily comprise social movements, non-governmental organisations, professional associations, grass roots movements, litigants, scholars and activists. However, without diminishing the important roles other civil society actors play, this section centres primarily on NGOs as a component of civil society.

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<sup>76</sup> *Ibid.*

<sup>77</sup> Makau Mutua, "African Human Rights Organizations: Questions of Context and Legitimacy" in Paul Tiyambe Zeleza and Philip J. McConaughay (eds.), *Human Rights, the Rule of Law, and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004).

<sup>78</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, A Feminist Analysis* (Manchester: Manchester University Press, 2000) at 90.

The *Encyclopedia of Public International Law* defines NGOs as “private organizations (associations, federations, unions, institutions, groups) not established by a government or by intergovernmental agreement, which are capable of playing a role in international affairs by virtue of their activities.”<sup>79</sup> NGO’s interactions in the international sphere have received considerable attention among political scientists as well as legal scholars.<sup>80</sup> Some commentators focus on the goals and performance of (international) human rights NGOs.<sup>81</sup> Others examine the role and relevance of NGOs to the development of human rights within regional systems.<sup>82</sup> Still others develop case studies of NGOs in specific countries or regions.<sup>83</sup> Few of these scholars however examine women’s NGO participation, actions or influence, especially regarding the African human rights system.<sup>84</sup> Before attempting to fill this gap by examining how women’s NGOs perceive the regional system and their role in moving the regional agenda forward in the domestic sphere, to set the stage, I undertake a brief study of the development of the women’s movement in Africa from which one may arguably assert that women’s NGOs emerged.

## 1. The African Women’s Movement

The origin of female solidarity in Africa defies a single explanation. Some commentators view it as an extension of the gender division of labour; rites of passage institutions; compensatory

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<sup>79</sup> Hermann Rechenberg, “Non-governmental Organisations’ in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law* (Published under the Auspices of Max Planck Institute for Comparative Public Law and International Law), Vol. III (Amsterdam: North-Holland Pub. Co., 1992) at 612.

<sup>80</sup> William Korey, *NGOs and the Universal Declaration of Human Rights: “A Curious Grapevine”* (New York: St. Martin’s Press, 1998); M. E. Keck and K. Sikkink, *Activists Beyond Borders* (Ithaca, Cornell University Press, 1998).

<sup>81</sup> Claude E. Welch, Jr., (ed.), *NGOs and Human Rights: Promise and Performance* (Philadelphia, University of Pennsylvania, 2000).

<sup>82</sup> Obiora Chinedu Okafor, *Activist Forces*, *supra* note 23; S. Gutto, *ICJ Workshops on NGO Participation in the African Commission on Human and Peoples’ Rights, 1991-1996: A Critical Evaluation* (Geneva: International Commission of Jurists, 1996); and M. A. Olz, “Non-Governmental Organizations in Regional Human Rights Systems” *supra* note 24.

<sup>83</sup> O. C. Okafor, *Legitimizing Human Rights NGOs: Lessons from Nigeria* (Trenton, NJ: Africa World Press, 2006); Ibhawoh, Bonny *Human Rights Organizations in Nigeria*, A Report published for the Danish Centre for Human Rights, 2001); and Makau Mutua, *Human Rights NGOs in East Africa*, *supra* note 26.

<sup>84</sup> J. Oloka-Onyango, “Modern-day Missionaries or Misguided Miscreants?” *supra* note 25.

mechanisms for the power differentials between men and women; movements for female liberation; and as groups promoting political, economic or religious interests.<sup>85</sup> While women's solidarity may have arisen as a result of any or all of the above, what is important is that African women have a long history of employing creative strategies to address the diverse condition under which they have found themselves. During the colonial period, women formed alliances to fight against colonial subjugation. The November 1929 Igbo Women's War saw thousands of women converge to protest attempts to introduce ideas of "native administration" through the imposition of arbitrary rule of warrant chiefs (representatives of the British),<sup>86</sup> a system which failed to take into consideration the previous system of diffused authority and informal leadership within the Igbo political organisation. Also in parts of Nigeria, there were other demonstrations and protests by women against the creation of forest reserves, market controls and taxes.<sup>87</sup> This leads some African feminists to observe that the women's movement in Africa devotes much of its time to confronting and trying to solve economic and political challenges rather than narrow western feminist preoccupations about gender equality alone.<sup>88</sup>

Women not only joined the anti-colonial struggles in different parts of Africa; they continue to challenge the legacy of colonialism and its newer version, corporate globalisation, as manifested in increasing poverty, underdevelopment and armed conflict. In the 1950s and 1960s, women's associations were concerned with independence from colonial rule and subsequently with promoting the welfare and progress of women. Such were the Sierra Leone Women's Movement and the Federation of Nigerian Women's Societies. In the 1970's, a number of

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<sup>85</sup> Filomina Chioma Steady, *supra* note 4 at 1. Nina Emma Mba, *Nigerian Women Mobilized: Women's Political Activity in Southern Nigeria, 1900-1965* (Berkeley: University of California, 1982) at 165.

<sup>86</sup> Judith Van Allen, "Aba Riots or the Igbo Woman's War? Ideology Stratification and the Invisibility of Women" in Hafkin and Bay (eds.), *Women in Africa* (Stanford University Press, 1976) at 12.

<sup>87</sup> Nina Emma Mba, *supra* note 83 at 98-164. Protests were most prevalent in parts of eastern and western Nigeria. For example, the Abeokuta Women's Union (AWU) struggled for the abolition of the flat rate tax and water rate for women in Abeokuta in 1948 and 1949 respectively.

<sup>88</sup> Filomina Chioma Steady, *supra* note 4 at 1.



international associations headquartered in Europe or the United States, such as Zonta International and the International Federation of University Women established branches in different parts of Africa largely to advocate for the improvement of educational and economic status of women.<sup>89</sup>

African women organise to counter exploitative development policies adopted by post-independence authoritarian regimes and also to take on civic, political and economic functions that would ordinarily be performed by governments and other agencies in more affluent societies.<sup>90</sup> The International Women's Year in 1975, the UN Decade for Women from 1976-1985 and the conferences on women resulted in changes in the women's movement in Africa. The 1980s witnessed a proliferation of women's associations, partly as a result of the momentum gained from the UN mid-Decade conference in Copenhagen in 1980.<sup>91</sup> Also, some first ladies, that is, the wives of incumbent African leaders, founded associations to promote their pet projects. Some of these associations were ostensibly formed with the aim of improving the status of women. For example, the Sierra Leone Women in Development Movement (SILWODMO) established by Mrs. Valentine Strasser provided credit training for women entrepreneurs.<sup>92</sup> Even though the high profile of the first ladies brought attention to women's issues, some of their associations are criticised for their tendency to co-opt the agenda of other associations and for their close alignment with government.<sup>93</sup>

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<sup>89</sup> *Ibid.*, at 31.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.* at 32-33.

<sup>93</sup> Hussaina Abdullahi, "Wifeism and Activism: The Nigerian Women's Movement" in Amrita Basu (ed.), *Challenge of Local Feminisms* (Boulder Colo: Westview, 1995). This accusation has been leveled against several first ladies during the reign of military dictators in Nigeria. The project of late Maryam Babangida, wife of President Ibrahim Babangida, Better Life for Rural Women, was so criticized as being too closely linked with the military government.

The Nairobi World Conference on Women of 1985 stimulated an increase in the number and variety of associations, especially among professional women. These included Women and National Development Association and the National Organization for Women in Sierra Leone. This trend continued in the 1990s stimulated by the preparations for the Fourth World Conference on Women held in Beijing in 1995. Grassroots associations, such as the Grassroots Gender and Empowerment Movement founded in Sierra Leone in 1992 emerged to promote the involvement of grassroots women in the process of development. Women's associations referred to as NGOs increased during this period, however, agenda setting hitherto based on local priorities set by women themselves increasingly became internationalized as their activities were increasingly funded by international donors leading to dependency on external funding and to priorities and agendas of donors. As will be shown, this trend continued into the 2000s despite diminishing donor funding associated with the international economic depression. The next section undertakes a more detailed examination of NGOs, especially women's NGOs.

## **2. Overview of the Relevance and Influence of National Human Rights NGOs**

Human rights NGOs generally seek to benefit society by responding to specific social needs within their societies.<sup>94</sup> They seek to participate more effectively in national economic and political decision-making by demanding greater accountability and transparency of their governments. NGOs in Africa, as with other parts of the world, have stepped up to fill the gap left by a state's retreat from social responsibility.<sup>95</sup> They identify and fill gaps in social provision, to strengthen democracy and provide flexible responses to needs. NGOs utilise the experience of activists on the ground to develop more democratic internal structures in order to

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<sup>94</sup> For an examination of the historical context in Africa, see J. Oloka-Onyango, *supra* note 25.

<sup>95</sup> Sheila Rowbotham and Stephanie Linkogle, "Introduction" in Sheila Rowbotham and Stephanie Linkogle (eds.), *Women Resist Globalization: Mobilizing for Livelihood and Rights* (London: Zed Books, 2001) at 6.

make visible and give voice to the needs and demands of the poor. NGOs assist to awaken rights awareness; they organise in extremely repressive situations and provide alternatives to social and other problems, such as poverty alleviation. In sum, NGOs play a pivotal role in the development of human rights in most parts of Africa.

Further, NGOs may push to make international law and policies a reality in the domestic sphere. Individually or collectively, NGOs may pressure states and international bodies to adapt and change to meet actual needs.<sup>96</sup> Their roles are therefore recognised in several treaties.<sup>97</sup> By its *Constitutive Act*, the AU seeks to “achieve greater unity and solidarity between the countries and peoples of Africa”<sup>98</sup> and also function in accordance with the principle of “participation of the African peoples in the activities of the Union.”<sup>99</sup> Although the *Constitutive Act* makes no express mention of NGOs, a formal role may be identified for NGOs in the establishment of the Economic, Social and Cultural Council (ECOSOCC) as an organ of the AU.<sup>100</sup> The ECOSOCC is defined as “an advisory organ of the AU composed of different social and professional groups of the Member States.”<sup>101</sup> As observed earlier, the ECOSOCC is a vehicle for building a strong partnership between governments and all segments of African civil society, NGOs inclusive,<sup>102</sup> to actualise the AU goal of creating a people-centred African community. However, it is still too early to determine how NGOs will fare within the ECOSOCC structure and what impact they will make at the domestic level as a result of their involvement at the AU.

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<sup>96</sup> *Ibid.*

<sup>97</sup> Article 71, *Charter of the United Nations*; Economic and Social Council resolution 1296 and 1996/31; and European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations (Legal Personality Convention) adopted by the Committee of Ministers of the Council of Europe in 1986.

<sup>98</sup> Article 3(a), *Constitutive Act of the AU*.

<sup>99</sup> *Ibid.*, Article 4 (c).

<sup>100</sup> *Ibid.*, Article 5 (h).

<sup>101</sup> *Ibid.*, Article 22

<sup>102</sup> The ECOSOC was launched on 29 March 2005 at Addis Ababa.

NGOs engagement with the regional level is most apparent at the African human rights system.<sup>103</sup> The *African Charter* empowers the African Commission to “cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.”<sup>104</sup> Rules 75 and 76 of the African Commission’s Rules of Procedure authorise NGOs with observer status to participate in its public sessions as well as specify NGOs relations with the African Commission.<sup>105</sup> In light of this, the African Commission has developed modalities for interactions among human rights stakeholders by adopting the Resolution on the Criteria for Granting and Enjoying of Observer Status to Non-Governmental Organisations Working in the Field of Human and Peoples’ Rights.<sup>106</sup> This resolution enables the African Commission to grant observer status to NGOs that fulfill certain requirements. NGOs applying for observer status before the African Commission should not only work in the area of human rights, but also have objectives and conduct activities in accordance with those enunciated in the *OAU Charter* (now the *Constitutive Act of the AU*) and the *African Charter*.<sup>107</sup> An application for observer status must be in writing, accompanied by statutes, proof of legal existence, a list of members, constituent organs, sources of funding, last financial statement, as well as a statement on activities of the NGO. The application is made to the Secretariat of the Commission at least three months prior to an ordinary session of the Commission.

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<sup>103</sup> See the Thematic Recommendation on the Situation of Women and Girls in Africa, adopted by the NGO Forum held during the 45<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples’ Rights, 9-11 May, 2009. (NGO/ TREC/00 -05-09).

<sup>104</sup> Article 45(1)(c), *African Charter*.

<sup>105</sup> Rules of Procedure of the African Commission on Human and Peoples’ Rights adopted 6 October 1995. Online: <[http://www.achpr.org/english/\\_info/rules\\_en.html](http://www.achpr.org/english/_info/rules_en.html)>. There is an ongoing process to revise the Rules of Procedure of the African Commission. See the Interim Rules of Procedure of the African Commission on Human and Peoples’ Rights

<sup>106</sup> Resolution of the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human and Peoples Rights ACHPR/ Res.33 (XXV) 99 adopted in 1999.

<sup>107</sup> *Ibid.*, (Now, *AU Constitutive Act* and the *African Charter*).

Obtaining observer status imposes obligations on both NGOs and the African Commission. An NGO holding observer status has an obligation to submit an activity report every two years to the African Commission. It may also submit shadow reports on the human rights situation of the countries in which the NGO is based.<sup>108</sup> An observer status entitles an NGO to receive public documents and to participate in the public sessions of the Commission and its subsidiary bodies.<sup>109</sup> NGOs granted observer status may distribute their documents, make oral interventions under agenda items considered in public session, and participate in working groups established by the Commission.<sup>110</sup> The Commission may consult with NGOs either directly or through committees set up for this purpose at the invitation of the Commission or the request of the organisation.<sup>111</sup> NGOs may also facilitate the work of the African Commission by lobbying governments to ratify international instruments at the domestic level.

NGOs' compliance with the responsibilities that accompany observer status however has been weak. A majority of the NGOs have not complied regularly with the obligation to submit their activity reports with the African Commission.<sup>112</sup> This may create obstacles to women's rights in the sense that by reviewing activity reports submitted by women's NGOs, the African Commission should be positioned to assess their participation and involvement with the African system and the correspondences that occur at the domestic level. In this way, the African

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<sup>108</sup> Resolution on the Co-operation between the African Commission on Human and Peoples' Rights and NGOs Having Observer Status with the Commission, online: <[http://www.chr.up.ac.za/hr\\_docs/african/docs/achpr/achpr34.doc](http://www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr34.doc)>.

<sup>109</sup> Rule 75 of the Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted 6 October 1995.

<sup>110</sup> Not only do Commissioners of the African Commission consult with NGOs representatives during Mission visits and promotional visits to individual African States, NGOs are also appointed into Working Groups of the African Commission.

<sup>111</sup> Rule 76, the Rules of Procedure of the African Commission, *supra* note 109.

<sup>112</sup> Out of the 403 NGOs with observer status, less than 200 have submitted their reports. Commissioner Musa Ngary Bitaye noted this at the opening of discussions at the 43<sup>rd</sup> Session of the African Commission. See, para. 60 of the 25<sup>th</sup> Activity Report of the African Commission on Human and Peoples Rights. The number of NGOs with Observer Status rose to Four Hundred and three (403) at the 45th session in May 2009.

Commission may be strategically placed to develop stronger ties of support and work toward a more collaborative engagement with such NGOs. Presently, the increasing numbers of NGOs with observer status has yet to reflect satisfactorily in their participation in the Commission's activities. In light of this, the interaction of women's NGOs with the regional system will be examined in further detail subsequently.

The interest in women's NGOs in this section is inspired by the fact that although multi-issue human rights organisations may press for women's rights in different ways, divided attention to women's issues and prioritising of other concerns may lead to a relegation of these issues to the margins within such organisations. Women's rights may therefore become incidental to more primary concerns within such organisations. In addition, developing unity of purpose on gender issues may become contentious within such organisations, while a duplication of functions may also arise between multi-issue organisations and women's NGOs. Hence, even though multi-issue human rights organisations may attempt to address women's rights violations, there is no substitute for women's NGOs and organisations.

Women's NGOs in Africa, like other human rights NGOs, have recorded considerable progress in mobilising for women's rights. These NGOs lobby at the regional and national levels to ensure the adoption of a regional treaty to coerce states to pay attention to women's issues. They apply political pressure and secure visibility of women's rights to ensure that concerns are placed at the forefront of African human rights agenda. Notwithstanding open access to the African Commission, NGOs, especially domestic NGOs (women's NGOs inclusive) face challenges such as scarcity of resources related to the often criticised donor dependence and an attendant subjection to the donor's agenda, inadequate internal cohesion linked to problems of

sustainability, and inadequate knowledge of the African system, which inhibits their participation. Added to this is the difficulty inherent in any attempt to measure the influence and effectiveness of NGO activities at both the regional and domestic levels.

### **3. Women's NGOs in Africa: Trans-National and National**

As earlier observed, women's collective action across Africa dates back to anti-colonial struggles; however, it was not until the 1990s that women's organisations and development groups experienced numerical growth in many parts of Africa.<sup>113</sup> The African women's movement, to which women's NGOs belong, is often commended as the most matured, developed and effective of the human rights movements in Africa.<sup>114</sup> This accolade emanates from the successes achieved from several initiatives, such as the pre-Beijing organising at country and continental levels and more recently, activities that led to adoption of the *Women's Protocol* and the appointment of the Special Rapporteur on Women's Rights.

These successes recorded by African women's NGOs are borne out of organising, advocacy and lobbying around proposed legislation or lobbying and campaigning for corrective actions.<sup>115</sup> Campaigns may arise from investigative monitoring activities that confirm breaches of rights or threats and destruction or from initiatives taken by the government or in response to issues that threaten individual and community rights, endanger the environment or negatively affect social and cultural relationships between people. In the earlier years of women's NGOs' existence, many of the key leaders were professionals such as lawyers, predisposing them to focus on law reform, providing legal services – legal clinics, some level of legal aid, legal literacy and para-

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<sup>113</sup> Filomena Chioma Steady, *supra* note 4.

<sup>114</sup> Joe Oloka-Onyango, *supra* note 25 at 292.

<sup>115</sup> See the mobilisation around the Kenyan Constitution in Mutua Makau, *supra* note 13.

legal training for women – in areas of human rights abuses, discriminatory practices, environmental degradation and other issues.<sup>116</sup> Later, other professionals, such as journalists, educationists, medical doctors and nurses joined to conduct human rights awareness and educational campaigns, and monitor the abuse of human rights and environmental destruction. In many African societies, women's NGOs mobilise their community and get people actively involved in the protection of human rights, land issues and the environment. Like the women's movement, many African women's NGOs do not focus narrowly on gender equality.

Women NGO's engagement with the African regional regime in general is beginning to generate interest among human rights scholars. Increased networking and lobbying among women's NGOs at the AU has resulted in recommendations for gender mainstreaming and women's participation in all structures of the AU. In this regard, the AU Assembly included gender on its agenda during its 2004 session which led to the adoption of the Solemn Declaration on Gender.<sup>117</sup> Women's NGOs also facilitated the launching of the ECOSOCC. This section attempts to fill the gap regarding discourse of the role of women's NGOs in relation to the AU's human rights regime, and especially the African Commission. As observed by Jacinta Muteshi, "[s]trategic coalition provides women with a promising means of ensuring that states implement their international commitments to women."<sup>118</sup> For this purpose, women's NGOs' struggles for rights in Africa in relation to the regional human rights system may be approached from two distinct configurations. First, women's NGOs collaborate to form trans-national regional networks, and second, individual and collective domestic women's rights NGOs undertake local activism efforts.

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<sup>116</sup> For example, women's NGOs in Nigeria led by legal practitioners include Legal Research and Resource Development Centre, Women Advocate Research and Documentation Centre, and Women's Aid Collective.

<sup>117</sup> See Chapter Two.

<sup>118</sup> Jacinta K. Muteshi, "Women's Advocacy: Engendering and Reconstituting the Kenyan State" in Makau Mutua, *Human Rights NGOs in East Africa* *supra*, note 26.



### **a) Trans-National Regional Women's NGO Network and Coalition**

Networks, whether international, continental or local, are mechanisms of communication and influence employed to mobilise energy and resources within civil society.<sup>119</sup> According to Keck and Sikkink, trans-national regional networks are composed of “relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.”<sup>120</sup> These networks generally work toward a common goal. As with women's NGOs, the 1990s also saw an increase in the number of trans-national regional women's networks. These may comprise coalition or collaboration among national women's NGOs from different African states, such as the International Federation of Women Lawyers (FIDA), which has chapters in several African countries. Others may be established with the direct objective of advocacy around a particular institution or theme. Such networks may comprise international and national NGOs, social movements, individuals in intergovernmental organisations and national governments. An example of this type of women's NGOs network is the Solidarity for African Women's Rights (SOAWR).

Notwithstanding their structural foundations or formations, these networks offer advocacy services ranging from pushing for treaty protection for women – norm-building – to lobbying for ratification, training and education to monitoring human rights of women in Africa – norm-enhancing or implementing. Several trans-national regional women's networks converge around issues relating to the regional human rights system and generally work together toward a common goal. These include Women in Law and Development in Africa/Femmes Droit et Developpement en Afrique (WiLDAF/ FeDDAF), Solidarity for African Women's Rights

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<sup>119</sup> Connie Ngondi-Houghton, *supra* note 26 at 176.

<sup>120</sup> Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders* *supra* note 80 at 2.

(SOAWR), African Women's Development and Communitarian Network (FEMNET) and International Federation of Women Lawyers/Federation Internationale des Avocates (FIDA).

As noted earlier, SOAWR represents an example of a regional women's network formed specifically to promote women's rights within the context of the regional system, in order to bring actual benefits to African women. SOAWR is an Africa-wide action network of thirty-two (32) civil society organisations and development partners working together for the endorsement and domestication of the *Women's Protocol*.<sup>121</sup> SOAWR works to achieve universal ratification of the *Women's Protocol* by lobbying countries that have yet to ratify it to do so. It encourages countries that have ratified to domesticate and implement the *Protocol* at the national level and persuades countries that have ratified the *Protocol* with reservation to remove the same.

SOAWR adopts several strategies to popularise the *Women's Protocol*. These include influencing public opinion and building constituencies to achieve its objectives, expanding its relationship with the AU and its organs, raising awareness among African states of the importance of the *Women's Protocol* as a tool for addressing the conditions facing women and girls, and strengthening the leadership capabilities of women's organisations. Other strategies adopted by SOAWR are writing petitions, direct advocacy with national and regional leaders, publications<sup>122</sup> and participating at AU pre-summit civil society forums, public forums, and conferences. Roselynn Musa observes that SOAWR creates "a platform for debate and dialogue

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<sup>121</sup> Several new members have joined the network since its inception. Members of SOAWR include African Women's Development and Communication Network (FEMNET), Equality Now – Africa Regional Office, African Center for Democracy and Human Rights Studies (ACDHRS), Women in Law and Development in Africa (WiLDAF), Akina Mama wa Afrika, Inter-Africa Network for Women, Media Gender and Development (FAMDEV) Fahamu, Oxfam GB, and the University of Pretoria Centre for Human Rights, among others. Online: <[http://www.soawr.org/en/about/us/about\\_soawr/](http://www.soawr.org/en/about/us/about_soawr/)>.

<sup>122</sup> Roselynn Musa, Faiza Jama Mohammed and Firoze Manji (eds.), *Breathing Life into the African Union Protocol on Women's Rights in Africa* (Nairobi: Solidarity for African Women's Rights) (Oxford: African Books Collective, 2006).

on the disjuncture between international instruments and their national implementation in Africa and identifies strategies to bridge the gap.”<sup>123</sup>

WiLDAF is another regional women’s network comprised of women’s NGOs and individuals. It emerged as the culmination of a series of international and continental meetings<sup>124</sup> and comprises over three hundred and fifty (350) organisations and one thousand (1000) individuals in thirty-one (31) African countries.<sup>125</sup> It has regional and country offices all over Africa.<sup>126</sup> WiLDAF applies a transnational strategy to achieve its goal of empowering African women using a rights-based approach. It provides legal rights education for women and offers technical assistance to new NGOs by running training workshops. According to WiLDAF-Ghana, its mission is to “increase women’s participation and influence at the community, national and international levels through initiating, promoting and strengthening strategies which link law and development.”<sup>127</sup> WiLDAF works in cooperation with other like-minded NGOs; for example it collaborated with other entities to form SOAWR.

WiLDAF participated in the group that formally recommended adoption of a protocol on women’s rights as a priority to supplementing the protection of women under the *African Charter*. The recommendation was made at a workshop organised by the African Commission in collaboration with WiLDAF and the ICJ in March 1995. Even though the *Women’s Protocol* now generates increasing interest and participation by numerous organisations, WiLDAF

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<sup>123</sup> Roselynn Musa, “Women, Equality and the African Human Rights System,” Chioke.org. Online: <[http://www.choike.org/nuevo\\_eng/informes/6060.html](http://www.choike.org/nuevo_eng/informes/6060.html)>.

<sup>124</sup> It emerged out of the United Nation’s Decade for Women (1975-1985) and was formed in 1990 in Harare, Zimbabwe. These meetings were held by the Women in Law and Development Project of OEF International, a private US donor agency in Washington.

<sup>125</sup> Women in Law and Development in Africa [WiLDAF] Online: <<http://www.wildaf.org.zw/default.cfm?pid=1>>.

<sup>126</sup> WiLDAF has members in Benin, Burkina Faso, Cameroon, Cote D’Ivoire, Ethiopia, Ghana, Guinea, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritius, Mozambique, Namibia, Nigeria, Senegal, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe.

<sup>127</sup> Mission Statement, WiLDAF –Ghana. Online: <<http://www.wildafghana.org/missionstatement.htm>>.

maintains a leading role in mobilising support for the *Women's Protocol*. Prior to adoption of the *Women's Protocol*, WiLDAF West Africa, for instance, developed a four phase program titled, "mobilization of women's rights and human rights organizations to contribute to the elaboration of the Protocol to the African Charter on Human and Peoples' Rights on Women's Rights."<sup>128</sup> This program involved organising meetings of women and of human rights organisations in seven West African countries to familiarise themselves with the content of the draft Women's Protocol in order to gather proposals to meet women's expectations and to enrich the text to harmonise strategies in the civil societies of all the Africa sub-regions, and to influence country positions at the First Governmental Expert meeting of OAU members on the *Women's Protocol*. WiLDAF and other women's pan-African networks continue to work for women's rights using the *Women's Protocol* in particular.

Factors adduced for the relative success achieved by these networks include their ability to build alliances with key actors of the regime, ability to participate in the decision-making process of the AU and its member states, and the fact that their goals overlap with the target institution's priorities.<sup>129</sup> The women's networks have been able to forge alliances with key gender sensitive African leaders, such as the past president of South Africa, Thabo Mbeki and President Abdoulaye Wade of Senegal in order to push for gender transformation at the regional level.<sup>130</sup> The transition from the OAU into the AU opened opportunities for changing institutional policies and norms of the AU, as women's networks seized the opportunity provided by the transition to secure greater commitments to gender equality from the AU through its

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<sup>128</sup> WiLDAF West Africa Newsletter, Contribution of Women and Human Rights Organisations to the Drafting of the Additional Protocol to the African Charter on Human and Peoples' Rights No. 01, January 2000. Online: <[http://www.wildaf-ao.org/eng/IMG/pdf/Newsletter\\_1\\_jan2000.pdf](http://www.wildaf-ao.org/eng/IMG/pdf/Newsletter_1_jan2000.pdf)>.

<sup>129</sup> Melinda Adams and Alice Kang, "Regional Advocacy Networks and the Protocol on the Rights of Women in Africa" (2007) 3 Politics & Gender 451.

<sup>130</sup> *Ibid.* at 465.

*Constitutional Act* as well as within the organs of the AU. This is exemplified by the appointment of women as Commissioners in the AU Commission. Moreover, the overall goals of the women's networks remain compatible with the institutional priorities of the AU that desire to build a people-centered continental body.

### **b) Domestic Women's NGOs**

Collaboration and coalitions within domestic NGOs enhanced the successes recorded by the regional transnational women's NGOs. Domestic women's NGOs work both individually and in coalitions with other entities, to conduct activities in order to influence women's rights at the domestic level using regional mechanisms. As noted, commentators recognise that women's NGOs, in part, have forced a critical re-conceptualisation of the notion of human rights, pushing women's concerns, such as domestic violence, rape and defilement, health and education, to the front of continental human rights debates.<sup>131</sup> Through advocacy and legislative activism, women's NGOs encourage ratification and domestication of international treaties. However, it is difficult to measure the influence of domestic NGOs in activating mechanisms of the regional system at the domestic level.

Many local NGOs adopt strategies aimed at helping women exercise their rights. Such strategies involve extending legal services to communities often with little or no knowledge of the legal system, as well as training of educators, judges (including magistrates and other lower court judges) and law enforcement agents. Civil Resource, Development and Documentation Centre (CIRDDOC), a Nigerian NGO, undertakes the above strategies.<sup>132</sup> CIRDDOC established

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<sup>131</sup> Joe Oloka-Onyango, *supra* note 25 at 293.

<sup>132</sup> Jacqui Patterson, *Together We Must... End Violence against Women and Girls and HIV/AIDS: A Review of*

Community Information Centres equipped with generators, televisions and video players – all scarce in regions without electricity – to facilitate access to new and legal information, legal information services and support.<sup>133</sup> “A team of paralegals, development information officers and civil educators works with women to demystify and simplify the law.”<sup>134</sup> CIRDDOC training programs include training legal and health services providers on the intersection of gender, violence and HIV and AIDS. Its work empowers women in its catchment area to exercise their rights and demand accountability.

At the regional level, several domestic women’s NGOs have observer status with the African Commission<sup>135</sup> and participate in sessions of the African Commission.<sup>136</sup> They also work to popularise the mechanisms of the regional system. In Nigeria, for example, the Women’s Aid Collective was instrumental for organising a seminar to which the Special Rapporteur on the Rights of Women in Africa was invited to speak on her activities.<sup>137</sup> Women’s Rights Advancement and Protection Agency (WRAPA) and Association of Malian Women Lawyers, (AJM) are domestic NGOs that joined other organisations in January 2003 to review the draft Protocol and to discuss other issues relating to the Protocol.<sup>138</sup> Nevertheless, women’s domestic NGOs have yet to activate the potential in the communications procedure of the African Commission for the benefit of victims of violence against women. Neither have they satisfactorily pushed the use of the regional mechanisms at the domestic level. Perhaps one may

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Promising Practices in Addressing the Intersection (UNIFEM and ActionAid, 2009). Online: <[http://www.unifem.org/attachments/products/TogetherWeMust\\_en.pdf](http://www.unifem.org/attachments/products/TogetherWeMust_en.pdf)>.

<sup>133</sup> *Ibid* at 27.

<sup>134</sup> *Ibid*.

<sup>135</sup> The percentage of women’s NGOs with observer status with the African Commission is low.

<sup>136</sup> See list of NGOs with observer status with the African Commission.

<sup>137</sup> Report on Intersession Activities of the Special Rapporteur on the Rights of Women in Africa, 39<sup>th</sup> Ordinary Session, African Commission on Human and Peoples’ Rights 11-25 May 2006, Banjul. para. 18.

<sup>138</sup> Melinda Adams and Alice Kang, *supra* note 129 at 461.

attribute their limited engagement to neglect of the African system whether by omission or commission, as will be discussed shortly.

### **c) Women's NGOs: Vehicles for Transformation or Stagnation?**

Women's NGOs, like other human rights NGOs, confront challenges with regard to activating the mechanisms of the African regional system. These include limited financial resources, unstable sustainability within organisations, elitist and urban-orientation, lack of or limited knowledge of the regional regime, and insufficient networking and collaboration among women's NGOs with other NGOs interested in gender issues.<sup>139</sup> How do such obstacles affect the use of the African human rights mechanisms at the domestic level?

Financial constraints are challenges identified by analysts of African NGOs generally, as well as women's NGOs. It is common to attribute the growth of women's NGOs, in part, to multilateral funding from development partners, due to the ability of such NGOs to bring attention to issues of human rights and good governance.<sup>140</sup> Apart from the shrinking of this source of funding, donor influence on NGOs, not excluding women's NGOs, has consistently been a source of criticism by human rights scholars.<sup>141</sup> According to Connie Ngondi-Houghton,

[d]onors define human rights NGOs as a unit of civil society; determine their reality and the outcomes of their transformation. Donor influence and advantage over human rights organisations determines the projects, strategies, engagement, identity and political consciousness of NGOs to the detriment of human rights work.<sup>142</sup>

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<sup>139</sup> Obiora Okafor, *Legitimizing Human Rights NGOs*, *supra* note 83.

<sup>140</sup> Valentine Moghadam, "Globalization and Feminism: The Rise of Women's Organizations in the Middle East and North Africa" (1997) 17 (2) *Canadian Woman Studies* 64 at 76.

<sup>141</sup> O.C. Okafor, *Legitimizing Human Rights NGOs*: *supra* note 83; Connie Ngondi-Houghton, *supra* note 26; Karuti Kanyinga, "Contradictions in Neoliberalism: Donors, Human Rights NGOs, and Governance in Kenya" in Makau Mutua (ed), *Human Rights NGOs in East Africa*, *supra* note 26.

<sup>142</sup> Connie Ngondi-Houghton, *ibid* at 158.

Due to their relative financial powerlessness, women's NGOs often operate within the framework in which agenda setting is dictated by the priorities of the international (donor) community.<sup>143</sup>

This has resulted in accusations that women's NGOs are representing "foreign" interests.<sup>144</sup> Several scholars flag the dangers of donor dependence and the fact that international alliances with African women's organisations may be a mixed blessing. The complexity of donor involvement is exemplified by the infamous Sharia court cases in Nigeria. While international attention may have had an influence on the eventual outcome of some of the decisions, some local women's groups in Nigeria criticised some of the foreign intervention. For example, Women Living under Muslim Laws requested Amnesty International and other international human rights organisations to stop petitioning Nigerian government officials.<sup>145</sup> Even though international alliances may promote networking, it may also not only detract from local priorities and exigencies, it may also attract conflicting attention.<sup>146</sup> The presumption of funders that they know what is best for domestic NGOs and the people they seek to benefit is driven by their self-perceived "superior knowledge" and the unequal and patronising relationship between international donors and domestic women's NGOs.

Related to funding issues is the general lack of sustainability of women's NGOs. Dependence on foreign, external donors make many women's NGOs neglect potential sources of internal

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<sup>143</sup> Filomena Chioma Steady, *supra* note 4.

<sup>144</sup> Melinda Adams and Alice Kang, *supra* note 129 at 452.

<sup>145</sup> Ayesha Imam and Sindi Medar-Gould, "Please Stop the International Amina Lawal Protest Letter Campaign – For Now" 2 May 2003. (Women Living under Muslim Laws News and Views Online: <<http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-4556>>).

<sup>146</sup> *Ibid.*



support through cultivating membership or financial drives from general local entities.<sup>147</sup> Moreover, the operational structures of these NGOs are such that they sometimes thrive on the expertise of a single individual, most often the founder or initiator, to initiate programs and secure funding. When such an individual becomes unavailable, usually due to illness or death, continuity becomes difficult and at times impossible. The operational structures are not set up to ensure transition and continuity, especially where the leading person(s) within the organisation becomes suddenly unavailable.

Challenges similar to those faced by domestic NGOs also confront women's NGO networks. Reduced donor funding can undermine the existence of such networks. Ngondi-Houghton, for example, observes that donors generally do not fund networks that they do not initiate and control, specifically an independent network.<sup>148</sup> Responsibility within networks is spread out among many constituents and is not as easily enforced as a contractual relationship with the grantee. This results in scarcity of funds and weak inconsistent networks that cannot engage in long-term programs.<sup>149</sup> Additionally, women's networks in Africa, whether donor initiated or independent, are more often sporadic, episodic, and short term.

Availability of funds also determines the priority and continuance of particular projects. Donors' desire for immediate outcomes results in prioritising short-term over long-term sustainable projects. Using the African regional system as an example, it is usual for the African Commission to decide a communication over a prolonged period of time. This may account for the limited or no use of the system by women's NGOs, since this may undermine women's

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<sup>147</sup> Chidi Anselm Odinkalu, "Why More Africans Don't Use Human Rights Language" (2000) Human Rights Dialogue 3 at 4.

<sup>148</sup> Connie Ngondi-Houghton, *supra* note 26 at 176.

<sup>149</sup> *Ibid.*

NGOs ability to secure funds required bring a petition for such a long-term single action process. Funding required to sustain such a process would include travel costs for an NGO representative and/or complainant to The Gambia or other African country in which the Commission may hold its session, cost of engaging in constant correspondence with the regional body, and other auxiliary expenses required to sustain the matter before the African Commission. The average communication of the African Commission takes considerable time, involving exchanges of correspondence among the Commission, complainant, and the respondent state to determine relevant facts of the communication, a decision on admissibility, and then a decision on the merits. This process may be subject to delays at each stage and by either party.

For instance, the communication filed by *Interights on Behalf of Safia Yakubu Husaini et al. v. Nigeria*<sup>150</sup> involved Ms. Safiya Hussaini, a Nigerian nursing mother sentenced to death by stoning by a Sharia Court in Gwadabawa, Sokoto state of Nigeria, for an alleged crime of adultery, along with other cases decided under Sharia penal legislation adopted in parts of northern Nigeria. The complaint alleged gross and systematic violations of fair trial and due process rights by the Sharia Courts. This communication was dated January 2002, but the Commission was not seized of the communication until October, 2003. The case was thereafter deferred severally before the Complainant informed the Commission of an intention to withdraw the communication in May 2005. Compared to other communications, one may argue that this case was not prolonged due to the controversy it generated internationally. However, it indicates the extended period a communication may take to become finally resolved. Although this communication was not brought before the African Commission by a women's

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<sup>150</sup> Communication 269/2003 (African Commission).

organisation, the implication remains that women's NGOs may have to look inward and locally to generate funds adequate for them to control and determine their priorities.

Related to the above communication is the fact that the complaint was brought in terms of civil and political rights violation rather than discrimination or violence against women in spite of the disproportionate impact of the enforcement of the sharia legal system on the poor, especially poor women. Women's NGOs should therefore initiate communications specifically to test violations specific to women in order to achieve the desired outcomes.

Another challenge to women's NGOs relates to criticisms that women's NGOs, like other human rights NGOs, are elitist, professional and middle-class oriented. This accusation has some validity since the majority of these NGOs are located in urban centres. Nevertheless, several scholars view such criticisms as debilitating and delegitimizing; rather, they argue that the mere existence of women's NGOs should be seen as a challenge to patriarchal order.<sup>151</sup>

According to Valentine Moghadam:

To the extent that women's organizations contribute to the democratization process, the creation of a democratic civil society and a civic culture, and to the extent that they seek to participate in the development process and in politics, the women's organizations are important in and of themselves. The opening up of political space and the diffusion of once centralized economic power and resources will allow for the articulation of more feminist demands, as well as women's perspective on economic policy and planning.<sup>152</sup>

The rationale for this argument is that, while a grassroots component to women's NGOs is desirable, women's NGOs may serve as a conduit to women's communities within grassroots organisations and constituencies. Partnerships, shared interests as women, and the need to

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<sup>151</sup> Valentine Moghadam, *supra* note 140 at 67.

<sup>152</sup> *Ibid.*

overcome gender subordination and class exploitation should engender interaction and bind women at all levels.

There is no doubt that women's access to, as well as appropriation of, the spaces available through the regional regime is increasing at the regional level and in influencing actions at the domestic level. Women's NGOs in collaboration with other stakeholders may further build upon these commendable achievements. The argument or reasoning that since African women have yet to efficiently activate national mechanisms to promote rights, it is pointless to add another inaccessible level in the form of regional mechanisms is no longer supportable given the evidence of the progress achieved thus far. A short-sighted vision of women's struggle in Africa should be replaced with an all-inclusive involvement and participation of women at all levels of decision-making, the regional level included. Women, both individually and collectively, must therefore actively push for legal provisions recognising affirmative action and quotas for women. They must monitor the implementation of such provisions. When women attain such positions, women's NGOs and other entities must not relent in working with such decision makers in order for their positions to be maximised for the benefit of women as well as other marginalised within their societies. This approach may foster interactions that may result in greater influence of the regional mechanisms with women's networks and NGOs as vehicles of transformation.

#### **IV. Summary**

This chapter suggests that the stakeholders of the African system must interact effectively to build the synergy necessary to optimise the creative spaces available through the African system. Collaboration among stakeholders must complement determination to promote and

protect women's rights using all the tools at their disposal. The OAU/AU human rights system itself must be seen as a positive first step towards propelling action at the domestic level. The contribution of the African human rights system to promoting and strengthening the culture of human rights domestically in Africa is not in doubt. This must be the driving force for further recognition and application of the system, and specifically by women.

The experience in Africa, as elsewhere, reveals that women's success depends on research and activism to mobilise support for change. Research involves collecting data on promising strategies and initiatives beneficial to women, organising and participating in popular media programs as well as writing and publishing articles, academic and non-academic. Activism involves campaigns and presenting feminist and women's positions to governments and relevant institutions. In 2002, the coalitions established among women in Kenya in support of a gender sensitive Constitution provide a successful example of strategies that combine research and activism.<sup>153</sup>

Diverse actors have taken significant strides to recognise and mobilise for women's rights at the regional level. Of these actors, civil society actors and particularly women's advocacy networks and NGOs, in collaboration with other human rights organisations, have successfully placed women on the regional agenda. The *Women's Protocol* and provisions guaranteeing gender equity written into various African regional instruments are testimonies to this acknowledgement of women's rights. Beyond recognition, however, effective strategies must be developed among the community of actors identified in this chapter in order to enable the mechanisms of the African human rights regime to become more beneficial to women.

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<sup>153</sup> Jacinta K. Muteshi, *supra* note 118.

Hence, along with adopting human rights norms, women's groups must intensify their engagement with the regional system through advocacy and lobbying Member States to ratify, contextualise and articulate treaties at the domestic levels. As well, resolutions,<sup>154</sup> concluding and general comments, and decisions of the system on gender issues need to be acknowledged and taken more seriously as channels for developing women's rights locally. Civil society's input is central to achieving the desired goal of using the regional mechanisms in this regard.

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<sup>154</sup> A list of the resolutions adopted by the African Commission regarding women's rights is available online: at [www.achpr.org/english/\\_info/women\\_C\\_res.html](http://www.achpr.org/english/_info/women_C_res.html).

## CHAPTER SIX: SUMMARY AND CONCLUSION

The African regional human rights regime exists as a framework for holding states accountable for their human rights obligations. It serves as a conduit through which international human rights norms and standards are transformed into regionally recognisable rights applicable at the domestic level. The mechanisms of the regime largely recognise the nuances within the context of African societies. This dissertation identifies problems confronting the regime especially in relation to women's rights, such as the initial (pre-protocol) approach to women's rights; the generally low level of commitment of African states and their leaders to human rights, resulting in slow ratification and non-domestication of human rights treaties, among other (in) actions; and the initial absence of a court. Despite these problems, this dissertation has also shown evidence of constructive engagement with the African human rights regime by diverse stakeholders.

On the one hand, some of the challenges confronting the African regime are being or have been addressed. For instance, the initial inattention has been overtaken progressively with formal recognition of women's rights in African regional treaties and the increasing involvement of women in decision-making positions within its institutions. This change symbolises a shift from limited acknowledgment to active recognition of equality and women's rights. The relatively short time within which the *Women's Protocol* gained sufficient ratifications to enter into force and the establishment of the African Court on Human and Peoples' Rights also buttress this shift. These actions address some of the major criticisms of the human rights system. On the other hand, other problems confronting the regime and women's access and participation persist.

This dissertation identifies the exaggerated misrepresentation of African initiatives as one underlying problem confronting African initiatives. The hierarchical categorisation, whether conscious or unconscious, of the African human rights system as subordinate compared to other regional and international counterparts falls within this negative perception. The historical, economic, social and political contexts within which the system emerged are often ignored in such analyses. As well, the negative perception of the regional regime, together with the conventional subordinate perceptions of African women predominantly as economically marginalised victims, victims of their culture or victims generally, creates hindrances to effectuating women's rights.

In line with this, a recurring theme with regards to the human rights of African women remains the tension between culture and women's rights. Without down-playing the location of culture as the bedrock of many African societies' social organisations and as a major determinant of the social rights and duties of many African women, culture simultaneously underlies the conundrum women encounter in their attempts to activate their human rights. This dissertation criticises the practice of locating the oppression of African women exclusively in their culture. For example, widespread poverty among African women discourages taking on the costs of accessing formal justice, especially in the face of competing economic needs. This discourages the use of litigation to redress wrongs or obtain justice. Poverty, ignorance and illiteracy or lack of knowledge play significant roles in sustaining negative practices which might otherwise have outgrown their relevance. This practice of prioritising culture as "the" problem obscures the multiple forms of discrimination and violations that give rise to and sustain women's oppression and also limit the potential solutions to their problem. The dissertation also criticizes the practice of positing "culture" as perpetually negative.



While caution may be required, this need not detract from the urgent need to develop human rights strategies as part of legal strategies to address continuing discrimination and inequalities that confront African women in various spheres of their existence. Whereas the term “rights” may not necessarily be employed by many women to deal with these issues, their general dissatisfaction and frustration with existing socio-economic, cultural and political situations in African societies remain irrefutable. Human rights, now a global language, serve as one valuable tool for addressing challenges that characterise the lives of many African women. Despite the fact that international human rights law and discourse have produced limited socio-economic transformation in African societies, this need not devalue the potential in a human rights approach to contribute to alleviating the plights of African women or producing significant gains through the African human rights regime.

In theory, the African human rights regime as exemplified by the African Commission, the primary human rights institution (until the recent establishment of the African Court), makes no distinction between women and men with regards to access to its processes and procedures. Its communication and state reporting procedures are equally available to both men and women. Yet in reality, considerable obstacles, such as poverty and lack of knowledge mentioned earlier, exist to inhibit women’s access. While a commentator, in part, attributes the neglect of women to activate the communication procedure of the African Commission to the fact that generally African women are not litigious and they resort to litigation only as last resort,<sup>1</sup> it is clear that the dominance of civil and political rights in the docket of the African Commission illustrates the preference of donors and litigants. This category of rights, considered justiciable and of

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<sup>1</sup> Interview held with a legal academic and human rights activist affiliated with a national women’s NGO. The interviewee has also made formal statements during the African Commission sessions. 28 November 2009.

immediate application and enforcement, attracts donor interest as well as that of other international organisations that support the work of the Commission.

By contrast, economic, social and cultural rights underlie the core needs of African women. These rights take a secondary position not only in the work of donor organisations but also that of many human rights NGOs and among African leaders. For this reason, women and women's organisation have resorted to engaging with the African regime and its human rights mechanisms primarily as an advocacy rather than a litigation tool. The *Women's Protocol* is instructive as an example of the advocacy and lobbying conducted by women's and other interested organisations. It is a powerful regional tool for advancing the rights of women. The analysis of the right to health under the *Women's Protocol* from the feminist TWAIL perspective indicates the need to pay closer attention to economic, social and cultural rights. The analysis reveals that the right to health protected by the *Women's Protocol* goes beyond earlier protections provided by other international instruments in some ways, but it also indicates that it could offer stronger protection if interpreted in a holistic expansive manner using the feminist TWAIL perspective.

Drawing from earlier analyses, the *Women's Protocol* falls short of capturing holistically the content of the right to health. In particular, since the HIV/AIDS pandemic imposes disproportionate consequences on African women while exacerbating their already precarious situation, the drafters of the *Women's Protocol* could have addressed this scourge in a more decisive manner. Current norms, standards and principles of international human rights providing the framework for respecting, protecting and fulfilling the rights of people living with

HIV and AIDS are largely non-binding.<sup>2</sup> The *Women's Protocol* could have reinforced and strengthened these international human rights instruments by creating binding obligations upon African states to fulfill, given the high HIV prevalence rate in Africa.

The *Women's Protocol* could have included specific provisions on non-discrimination, equal protection and the right to access healthcare and treatment provisions to protect women unfairly discriminated against on the basis of their HIV-status. Women's vulnerability to HIV in Africa does not stem only from their greater physiological susceptibility to heterosexual transmission, but also to the severe social, legal and economic disadvantages they confront. HIV affects all social and economic groups in Africa. In Lesotho, women and men in every income, education and migration strata had an HIV prevalence of 15% or higher in 2004.<sup>3</sup> In addition, a recent epidemiological review undertaken in connection with the modes of transmission study in Lesotho found that sexual and physical violence is a key determinant of the country's severe HIV epidemic. Recent surveys conducted indicate that 47% of men and 40% of women in Lesotho say women have no right to refuse sex with their husbands or boyfriends.<sup>4</sup>

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<sup>2</sup> Instruments adopted to protect people living with HIV/AIDS include the International Guidelines on HIV/AIDS and Human Rights developed in 1996 to specify how general human rights standards applied in the specific context of HIV/AIDS, OHCHR and UNAIDS, HIV/AIDS and Human Rights: International Guidelines – Second International Consultation on HIV/AIDS and Human Rights (1996) HR/PUB/98/1; the Declaration of Commitment on HIV/AIDS: Global Crisis – Global Action, U.N. GOAR, 26<sup>th</sup> Special Sess., 8<sup>th</sup> plen.mtg., Annex, Agenda Item 8, 6, U.N. Doc.A/RES/s-26/2 (2001). Others include the Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases and the Maputo Declaration on HIV/AIDS, Malaria and other Related Infectious Diseases adopted by the AU Assembly of Heads of State and Government in 2001 and 2003; the recognition of HIV/AIDS as a crosscutting issue in the New Partnership for Africa's Development (NEPAD) and the Millennium Development Goals. All of these documents have no binding force; they merely serve as guides to states.

<sup>3</sup> UNAIDS, AIDS Epidemic Update, 2009 cited M. Khobotlo *et al.*, *Lesotho: HIV Prevention Response and modes of Transmission Analysis*. (Maseru, Lesotho: National Aids Commission, 2009).

<sup>4</sup> UNAIDS, *ibid*, cited N. Andersson *et al.*, Risk Factors for Domestic Physical Violence: National Cross-Sectional Household Surveys in Eight Southern African Countries. BMC Women's Health, (2007) DOI:10.1186/ 1472-6874-7-11.

Moreover, in spite of the rapid scaling-up of antiretroviral therapy in parts of Africa, important access gaps remain. As of December 2008, 44% of adults and children (nearly 3 million people) in need of antiretroviral therapy in the region were estimated to be receiving such services, compared to the estimated 2% regional treatment coverage five years earlier.<sup>5</sup> Nevertheless, more than half of all people in need of treatment are still not receiving such services. Although Kenya was offering antiretroviral therapy to roughly 190, 000 adults in nearly 500 treatment sites in mid-2008, only 12% of the estimated 1.4 million HIV-infected adults who required daily co-trimoxazole were receiving it in 2007.<sup>6</sup> Swaziland is the country with the highest HIV prevalence in the world with an estimated adult HIV prevalence of 26% in 2007. Antenatal surveillance in Swaziland found an increase in HIV prevalence from 39.2% in 2006 to 42% in 2008 among female clinic attendees. Yet only 17% of total expenditures in 2008 supported HIV prevention programmes.<sup>7</sup>

If there were specific provisions protecting women living with HIV/AIDS in the *Women's Protocol*, a State Party would have been obligated to demonstrate that it has done its utmost within the constraints of its available resources to realise the right protected by indicating that it is taking steps to realise the rights in question progressively. In addition, domestic courts would be strengthened in their ability to make judicial pronouncements, such as the 2002 decision by the Constitutional Court of South Africa that required the government to provide the antiretroviral drug, Nevirapine, to HIV-positive pregnant women to prevent intra-partum HIV transmission.<sup>8</sup> In this case, the Treatment Action Campaign (TAC) challenged the government

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<sup>5</sup> World Health Organisation, United Nations Children's Fund, UNAIDS, 2009.

<sup>6</sup> Kenya Ministry of Health, 2009.

<sup>7</sup> UNAIDS, *supra* note 3 cited S. Mngadi *et al*, *Swaziland: HIV Prevention Response and Modes of Transmission Analysis* (Mbababe, National Emergency Response Council on HIV/AIDS, 2009).

<sup>8</sup> *Minister for Health v Treatment Action Campaign*, 2002 (10) BCLR 1033; CCT 8/02 (Constitutional Court of South Africa, 5 July 2002. Online: <<http://www.concourt.gov.za/courtrecords/2002/taccr.shtml>>).

policy that restricted access to the drug to 18 pilot sites providing access to only 10% of the population as violating a number of provisions in the Constitution, including the right to healthcare services. The Court held that this policy was unreasonable since it failed to address the needs of a significant segment of society, namely, mothers and their new born children who did not have access to the pilot sites and that reasonable measures should be taken so as to extend the drug, testing and counselling facilities throughout the public health sector.

A question remains whether the African regional human rights regime, in cooperation with other international, regional and national institutions, organisations and entities, can take the lead in confronting and holding member states as well as powerful non-states parties accountable for violation of women's rights. In line with the inequalities in the international economic order, the domination of the pharmaceutical industry by globalised transnational corporations, for example, has been an obstacle to the availability of effective anti-retroviral treatment in some cases.<sup>9</sup> In South Africa, multinational pharmaceutical companies challenged the validity of legislation enabling compulsory licensing and parallel importing, but the litigation was withdrawn in 2001 following pressure from national and international NGOs.<sup>10</sup> International efforts to confront the monopoly of transnational corporations, such as the Doha Declaration to the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) must be complemented by regional and other efforts. In *Smith Kline and French Laboratories Ltd v The Netherlands*, the European Commission of Human Rights held that the grant of a compulsory license in a patented drug under national law is not an interference with the right to the

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<sup>9</sup> John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 13.

<sup>10</sup> Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002) at 6.

protection of property because it encourages technological and economic development.<sup>11</sup> This is one way in which regional mechanisms can contribute to the efforts.

The integration of Africa as intended by the founding members of the regional organisation remains an essential aspect of the process of developing human rights on the continent. The fragmentation of the continent as a result of internal and armed conflicts, the disadvantageous economic system and the numerous social ills in most African societies ensures that violations of human rights thrive at the expense of peace and prosperity, further marginalising and subordinating women. Proper integration and building a strong Africa can only result from strengthening regional and national institutions that encourage a positive perception of Africa and African initiatives. Similarly, strengthening women's access and participation will encourage positive assumptions about women within societies and promote women's rights generally. The hitherto negative African collective consciousness must be replaced by a renaissance consciousness that views "things" African more progressively and positively.

In order to improve the potential of the African regime to benefit women as well as other vulnerable groups, there is a need to create greater awareness for the African human rights system within the legal community and the African populace in general. The African human rights system has yet to attain significant visibility within member states of the AU. Persons within the legal profession, who one would ordinarily expect to be knowledgeable in this regard, have limited knowledge of the existence and potential value of this African system. Some recently elected Commissioners confirm this assertion by admitting to not being previously well

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<sup>11</sup> Application 12633/87 (1990) 66 European Commission on Human Rights 70-80.

informed about the work of the African Commission.<sup>12</sup> Others observe that information acquired from personal research presented a negative vision of the African Commission's work.<sup>13</sup> These affirm the conventional position whereby the significance of the African human rights institutions is generally unacknowledged, frustrating efforts to promote its applicability, especially regarding women. Although international and regional human rights treaties for the protection of women are not in short supply, gaps remain between formal rights enunciated in treaties and their practical application in every sphere.<sup>14</sup> "Knowledge is power"; without the requisite knowledge, it is impossible to access the African human rights mechanisms, while negative knowledge works against the likelihood of improved access, participation or the influence of the system.

With the requisite knowledge of the system, litigants and legal practitioners may be willing to test the norms recognised and protected through submitting communications alleging violations of rights or through raising the rights protected by regional treaties before domestic courts. Women's NGOs have a vital role to play in this regard. The need to strengthen women's rights NGOs through provision of funds to petition against women's rights violations cannot be overemphasised. Greater efforts should be geared towards increasing demand for formal justice under national justice systems through human rights education and the provision of free legal services, as well as by setting up a women's fund to facilitate such demands.

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<sup>12</sup> Frans Viljoen, "Promising Profiles: An Interview with the Four New Members of the African Commission on Human and Peoples' Rights" (2006) 6 African Human Rights Law Journal 237 at 243.

<sup>13</sup> *Ibid.*

<sup>14</sup> This position was recently affirmed by Navi Pillay, the UN High Commissioner for Human Rights at the 11<sup>th</sup> Session of the Human Rights Council on a day set aside to discuss the human rights of women. Geneva 2-19 June 2009. <<http://www.ohchr.org/EN/NewsEvents/Pages/InequalityBeforeLaw.aspx>>.

Furthermore, the African system may be strengthened to better address the rights of women through adequate funding by the AU and the regular contributions of Member States. The actions of all human rights actors must reflect their commitment to women's rights. Gender sensitive Commissioners must be appointed to the African Commission and the Court; the *Women's Protocol* and other international treaties must be domesticated by State Parties; and there must be political will at national levels of government to utilise the norms and standards of the system to revise norms and practices at the formal and informal levels and to empower women as well as to strengthen the capacity of women's groups.

Although the African human rights system, like other regional systems, has several limitations, the solution does not lie in a blind copying of other systems. Rather, the African system must develop best approaches most suitable for its own development and growth. The cultural sensibility and the socio-economic and political situations of particularly vulnerable groups within African societies must be taken into consideration in developing home-grown approaches to rights. This dissertation asserts that notwithstanding the problems identified with the regional regime established for the promotion and protection of human rights in Africa, it has the potential, as yet untapped, to be a catalyst for accelerating effective protection of women's rights in Africa. This dissertation has argued that the shifts in assumptions about Africa and its initiatives and in the constructive consideration of women are welcome developments. It calls for conscious recognition of the progress made by these African initiatives and the need to build on these achievements.

Part of the responsibilities of the actors engaged with the African human rights regime is to publicise its mechanisms, especially at the domestic level. Institutional and normative



developments, such as the recent African Court of Human and Peoples' Rights complementing the work of the African Commission, and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)*, have gone a distance in generating greater interest and visibility for the system. Yet, institutional and normative progress alone cannot achieve the goal of strengthening access and influence for these regional mechanisms. This must be driven by actions and alliances between and among relevant actors. This dissertation asserts that more can be done using the regional apparatus of the regime by all stakeholders, individually and collectively, to eliminate discrimination and violence against women and to actualise women's rights on the continent, including the right to health. All stakeholders must adopt the expansive indivisible, interrelated and interdependent approach to women's rights in order to manifest the potential of the regional human rights mechanisms.

The textual and institutional mechanisms of the African regional human rights regime are potential mechanisms for improving the status of African women. However, this dissertation does not suggest that the realization of women's rights is possible only through more textually relevant human rights codes, or even through more creative use of these codes by stakeholders. Rather, it reveals women's rights in the African context as the outcome of ongoing dialogue, conflicts, politics and cooperation necessary in order to improve the situation of African women. Indeed, it recognises that improving the regional mechanisms for the protection of women cannot be isolated from other processes for improving the current situation within African states.

Both the local and global contexts surrounding the regime impose constraints on its ability to fully address the rights of women and to bring benefits to them. Given these constraints, several

questions remain: Can the African regime provide the framework and institutional structures to potentially foreground women's resistance against systemic and other violations of their rights engendered by international and other entities? Can the African regime provide the solid front through which African states may begin to collectively resist the corporate globalisation manifested in the policies and programme of the international financial institutions, such as the IMF and World Bank, and the domination of trans-national corporations, which disproportionately affect women? These are queries that would benefit from a feminist TWAIL analysis and are worthy of further inquiry in future.

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## APPENDIX A



*The University of British Columbia  
Office of Research Services  
**Behavioural Research Ethics Board**  
Suite 102, 6190 Agronomy Road,  
Vancouver, B.C. V6T 1Z3*

### CERTIFICATE OF APPROVAL - MINIMAL RISK

<b>PRINCIPAL INVESTIGATOR:</b> Karin Mickelson	<b>INSTITUTION / DEPARTMENT:</b> UBC/Law	<b>UBC BREB NUMBER:</b> H09-02949
<b>INSTITUTION(S) WHERE RESEARCH WILL BE CARRIED OUT:</b>		
<b>Institution</b>	<b>Site</b>	
UBC	Vancouver (excludes UBC Hospital)	
<b>Other locations where the research will be conducted:</b> Abuja and Lagos, Nigeria; Addis Abba, Ethiopia; and Banjul, the Gambia.		
<b>CO-INVESTIGATOR(S):</b> N/A		
<b>SPONSORING AGENCIES:</b> N/A		
<b>PROJECT TITLE:</b> Reconceptualising Women's Rights using the African Regional Human Rights Regime		

**CERTIFICATE EXPIRY DATE: November 23, 2010**

<b>DOCUMENTS INCLUDED IN THIS APPROVAL:</b>	<b>DATE APPROVED:</b> November 23, 2009	
<b>Document Name</b>	<b>Version</b>	<b>Date</b>
<b>Protocol:</b>		
Research Proposal	N/A	November 2, 2009
<b>Consent Forms:</b>		
Consent Form	N/A	November 10, 2009
Consent Form	N/A	November 20, 2009
<b>Questionnaire, Questionnaire Cover Letter, Tests:</b>		
Interview Script	N/A	November 10, 2009
<b>Letter of Initial Contact:</b>		
Letter of initial contact	N/A	November 10, 2009
<p>The application for ethical review and the document(s) listed above have been reviewed and the procedures were found to be acceptable on ethical grounds for research involving human subjects.</p>		

## **APPENDIX B**

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

The States Parties to this Protocol,

**CONSIDERING** that Article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the Assembly of Heads of State and Government of the Organization of African Unity meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa;

**CONSIDERING** that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

**FURTHER CONSIDERING** that Article 18 of the African Charter on Human and Peoples' Rights calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions;

**NOTING** that Articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter;

**RECALLING** that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights;

**NOTING** that women's rights and women's essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995;

**RECALLING ALSO** United Nations Security Council's Resolution 1325(2000) on the role of Women in promoting peace and security;

**REAFFIRMING** the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development;

**FURTHER NOTING** that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women;

**RECOGNISING** the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy;

**BEARING IN MIND** related Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between women and men;

**CONCERNED** that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices;

**FIRMLY CONVINCED** that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated;

**DETERMINED** to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights;

**HAVE AGREED AS FOLLOWS:**

## **Article 1**

### **Definitions**

For the purpose of the present Protocol:

- a) "African Charter" means the African Charter on Human and Peoples' Rights;
- b) "African Commission" means the African Commission on Human and Peoples' Rights;
- c) "Assembly" means the Assembly of Heads of State and Government of the African Union;
- d) "AU" means the African Union;
- e) "Constitutive Act" means the Constitutive Act of the African Union;
- f) "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;

g) "Harmful Practices" means 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;

h) "NEPAD" means the New Partnership for Africa's Development established by the Assembly;

i) "States Parties" means the States Parties to this Protocol;

j) "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;

k) "Women" means persons of female gender, including girls.

## **Article 2**

### **Elimination of Discrimination Against Women**

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

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.

## **Article 3**

### **Right to Dignity**

1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.

2. Every woman shall have the right to respect as a person and to the free development of her personality.
3. States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.
4. States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

#### **Article 4**

##### **The Rights to Life, Integrity and Security of the Person**

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.
2. States Parties shall take appropriate and effective measures to:
  - a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;
  - b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
  - c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
  - d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;
  - e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;
  - f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;
  - g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;
  - h) prohibit all medical or scientific experiments on women without their informed consent;
  - i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
  - j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women;

k) ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.

## **Article 5**

### **Elimination of Harmful Practices**

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

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

## **Article 6**

### **Marriage**

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

- a) no marriage shall take place without the free and full consent of both parties;
- b) the minimum age of marriage for women shall be 18 years;
- c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;
- d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;
- e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;
- f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;
- g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;

- h) 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;
- i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;
- j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

## **Article 7**

### **Separation, Divorce and Annulment of Marriage**

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:

- a) separation, divorce or annulment of a marriage shall be effected by judicial order;
- b) women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
- c) in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;
- d) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

## **Article 8**

### **Access to Justice and Equal Protection before the Law**

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- a) effective access by women to judicial and legal services, including legal aid;
- b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
- d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- e) that women are represented equally in the judiciary and law enforcement organs;
- f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.



## **Article 9**

### **Right to Participation in the Political and Decision-Making Process**

1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:

- a) women participate without any discrimination in all elections;
- b) women are represented equally at all levels with men in all electoral processes;
- c) women are equal partners with men at all levels of development and implementation of State policies and development programmes.

2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

## **Article 10**

### **Right to Peace**

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.

2. States Parties shall take all appropriate measures to ensure the increased participation of women:

- a) in programmes of education for peace and a culture of peace;
- b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;
- c) in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women;
- d) in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women;
- e) in all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation.

3. States Parties shall 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.

## **Article 11**

### **Protection of Women in Armed Conflicts**

1. States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.

2. States Parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.

3. States Parties 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.

4. States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

## **Article 12**

### **Right to Education and Training**

1. States Parties shall take all appropriate measures to:

a) eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;

b) eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;

c) protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;

d) provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;

e) integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.

2. States Parties shall take specific positive action to:

a) promote literacy among women;

b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology;

c) promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

## **Article 13**

### **Economic and Social Welfare Rights**

States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:

- a) promote equality of access to employment;
- b) promote the right to equal remuneration for jobs of equal value for women and men;
- c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;
- d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;
- e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;
- f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it;
- g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;
- h) take the necessary measures to recognise the economic value of the work of women in the home;
- i) guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors;
- j) ensure the equal application of taxation laws to women and men;
- k) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
- l) recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;
- m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

## **Article 14**

### **Health and Reproductive Rights**

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

- a) the right to control their fertility;
- b) the right to decide whether to have children, the number of children and the spacing of children;
- c) the right to choose any method of contraception;

d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;

e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;

g) the right to have family planning education.

2. States Parties shall take all appropriate measures to:

a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;

b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;

c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

## **Article 15**

### **Right to Food Security**

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;

b) establish adequate systems of supply and storage to ensure food security.

## **Article 16**

### **Right to Adequate Housing**

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

## **Article 17**

### **Right to Positive Cultural Context**

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.

## **Article 18**

### **Right to a Healthy and Sustainable Environment**

1. Women shall have the right to live in a healthy and sustainable environment.

2. States Parties shall take all appropriate measures to:

- a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;
- b) promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control;
- c) protect and enable the development of women's indigenous knowledge systems;
- d) regulate the management, processing, storage and disposal of domestic waste;
- e) ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.

## **Article 19**

### **Right to Sustainable Development**

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:

- a) introduce the gender perspective in the national development planning procedures;
- b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
- c) promote women's access to and control over productive resources such as land and guarantee their right to property;
- d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
- e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

## **Article 20**

### **Widows' Rights**

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

- a) that widows are not subjected to inhuman, humiliating or degrading treatment;
- b) that a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;

c) that a widow shall have the right to remarry, and in that event, to marry the person of her choice.

## **Article 21**

### **Right to Inheritance**

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

## **Article 22**

### **Special Protection of Elderly Women**

The States Parties undertake to:

a) provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;

b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

## **Article 23**

### **Special Protection of Women with Disabilities**

The States Parties undertake to:

a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;

b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

## **Article 24**

### **Special Protection of Women in Distress**

The States Parties undertake to:

a) ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs;

b) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

## **Article 25**

### **Remedies**

States Parties shall undertake to:

a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;

b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

## **Article 26**

### **Implementation and Monitoring**

1. States Parties shall 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 realisation of the rights herein recognised.

2. States Parties 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.

## **Article 27**

### **Interpretation**

The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

## **Article 28**

### **Signature, Ratification and Accession**

1. This Protocol shall be open for signature, ratification and accession by the States Parties, in accordance with their respective constitutional procedures.

2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission of the AU.

## **Article 29**

### **Entry into Force**

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.

2. For each State Party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession.

3. The Chairperson of the Commission of the AU shall notify all Member States of the coming into force of this Protocol.

## **Article 30**

### **Amendment and Revision**

1. Any State Party may submit proposals for the amendment or revision of this Protocol.

2. Proposals for amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the AU who shall transmit the same to the States Parties within thirty (30) days of receipt thereof.

3. The Assembly, upon advice of the African Commission, shall examine these proposals within a period of one (1) year following notification of States Parties, in accordance with the provisions of paragraph 2 of this article.

4. Amendments or revision shall be adopted by the Assembly by a simple majority.

5. The amendment shall come into force for each State Party, which has accepted it thirty (30) days after the Chairperson of the Commission of the AU has received notice of the acceptance.

#### **Article 31**

##### **Status of the Present Protocol**

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.

#### **Article 32**

##### **Transitional Provisions**

Pending the establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application and implementation of this Protocol.

**Adopted by the 2nd Ordinary Session  
of the Assembly of the Union  
Maputo, 11 July 2003**



## **APPENDIX C**

### **The African Charter on Human and Peoples' Rights**

#### **PREAMBLE**

The African States members of the Organisation of African Unity, parties to the present Convention entitled "African Charter on Human and Peoples' Rights

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights, providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organisation of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attitudes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organisation of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms and taking into account the importance traditionally attached to these rights and freedoms in Africa;

HAVE AGREED AS FOLLOWS:

## **PART 1**

### **RIGHTS AND DUTIES**

#### **CHAPTER I**

#### **HUMAN AND PEOPLES' RIGHTS**

##### **ARTICLE 1**

The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

##### **ARTICLE 2**

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

##### **ARTICLE 3**

1. Every individual shall be equal before the law
2. Every individual shall be entitled to equal protection of the law

##### **ARTICLE 4**

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

##### **ARTICLE 5**

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

## **ARTICLE 6**

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

## **ARTICLE 7**

1. Every individual shall have the right to have his cause heard. This comprises:

- a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
- c) The right to defence, including the right to be defended by counsel of his choice;
- d) The right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

## **ARTICLE 8**

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

## **ARTICLE 9**

- 1 Every individual shall have the right to receive information.
- 2. Every individual shall have the right to express and disseminate his opinions within the law.

## **ARTICLE 10**

- 1. Every individual shall have the right to free association provided that he abides by the law.
- 2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.

## **ARTICLE 11**

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

## **ARTICLE 12**

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country.

This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

## **ARTICLE 13**

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

2. Every citizen shall have the right of equal access to the public service of the country.

3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

## **ARTICLE 14**

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

## **ARTICLE 15**

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

## **ARTICLE 16**

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick

## **ARTICLE 17**

1. Every individual shall have the right to education
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

## **ARTICLE 18**

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 health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

## **ARTICLE 19**

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

## **ARTICLE 20**

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

## **ARTICLE 21**

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
- 2 In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.

State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

## **ARTICLE 22**

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

## **ARTICLE 23**

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, State Parties to the present Charter shall ensure that:

a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State Party to the present Charter;

b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.

## **ARTICLE 24**

All peoples shall have the right to a general satisfactory environment favourable to their development.

## **ARTICLE 25**

State Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present

Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

## **ARTICLE 26**

State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

## **CHAPTER II**

### **DUTIES**

## **ARTICLE 27**

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

## **ARTICLE 28**

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

## **ARTICLE 29**

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is strengthened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;

7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;

8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

## **PART II**

### **MEASURES OF SAFEGUARD**

#### **CHAPTER I**

#### **ESTABLISHMENT AND ORGANISATION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

##### **ARTICLE 30**

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa.

##### **ARTICLE 31**

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.

2. The members of the Commission shall serve in their personal capacity.

##### **ARTICLE 32**

The Commission shall not include more than one national of the same State.

##### **ARTICLE 33**

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the State Parties to the present Charter.

##### **ARTICLE 34**

Each State Party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the State Parties to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.



## **ARTICLE 35**

1. The Secretary General of the Organisation of African Unity shall invite State Parties to the present Charter at least four months before the elections to nominate candidates;
2. The Secretary General of the Organisation of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections;

## **ARTICLE 36**

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

## **ARTICLE 37**

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organisation of African Unity shall draw lots to decide the names of those members referred to in Article 36.

## **ARTICLE 38**

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

## **ARTICLE 39**

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary General of the Organisation of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organisation of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term, unless the period is less than six months.

## **ARTICLE 40**

Every member of the Commission shall be in office until the date his successor assumes office.

## **ARTICLE 41**

The Secretary General of the Organisation of African Unity shall appoint the Secretary of the Commission. He shall provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organisation of African Unity shall bear cost of the staff and services.

## **ARTICLE 42**

1. The Commission shall elect its Chairman and Vice Chairman for a two-year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The Secretary General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

## **ARTICLE 43**

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organisation of African Unity.

## **ARTICLE 44**

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organisation of African Unity.

## **CHAPTER II**

### **MANDATE OF THE COMMISSION**

## **ARTICLE 45**

The functions of the Commission shall be:

1. To promote human and peoples' rights and in particular:
  - a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments.

b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.

c) cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

### **CHAPTER III**

#### **PROCEDURE OF THE COMMISSION**

##### **ARTICLE 46**

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organisation of African Unity or any other person capable of enlightening it.

#### **COMMUNICATION FROM STATES**

##### **ARTICLE 47**

If a State Party to the present Charter has good reasons to believe that another State Party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This Communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the Communication, the State to which the Communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible, relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

##### **ARTICLE 48**

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

## **ARTICLE 49**

Notwithstanding the provisions of Article 47, if a State Party to the present Charter considers that another State Party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organisation of African unity and the State concerned.

## **ARTICLE 50**

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

## **ARTICLE 51**

- 1 The Commission may ask the State concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

## **ARTICLE 52**

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report to the States concerned and communicated to the Assembly of Heads of State and Government.

## **ARTICLE 53**

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

## **ARTICLE 54**

The Commission shall submit to each Ordinary Session of the Assembly of Heads of State and Government a report on its activities.

## **ARTICLE 55**

1. Before each Session, the Secretary of the Commission shall make a list of the Communications other than those of State Parties to the present Charter and transmit them to Members of the Commission, who shall indicate which Communications should be considered by the Commission.
2. A Communication shall be considered by the Commission if a simple majority of its members so decide.

## **ARTICLE 56**

Communications relating to Human and Peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter requests anonymity,
2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity,
4. Are not based exclusively on news disseminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter, and
7. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

## **ARTICLE 57**

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

## **ARTICLE 58**

1. When it appears after deliberations of the Commission that one or more Communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

## **ARTICLE 59**

1. All measures taken within the provisions of the present Chapter shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide.
2. However the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

## **CHAPTER IV**

### **APPLICABLE PRINCIPLES**

## **ARTICLE 60**

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the 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 Specialised Agencies of the United Nations of which the Parties to the present Charter are members.

## **ARTICLE 61**

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.

## **ARTICLE 62**

Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.

## **ARTICLE 63**

1. The present Charter shall be open to signature, ratification or adherence of the Member States of the Organisation of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organisation of African Unity.

3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the Member States of the Organisation of African Unity.

### **PART III**

#### **GENERAL PROVISIONS**

##### **ARTICLE 64**

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.

2. The Secretary General of the Organisation of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organisation within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

##### **ARTICLE 65**

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of the instrument of ratification or adherence.

##### **ARTICLE 66**

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

##### **ARTICLE 67**

The Secretary General of the Organisation of African Unity shall inform members of the Organisation of the deposit of each instrument of ratification or adherence.

##### **ARTICLE 68**

The present Charter may be amended if a State Party makes a written request to that effect to the Secretary General of the Organisation of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the State Parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the State Parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

**Adopted by the eighteenth Assembly of Heads of State and Government,**

**June 1981 - Nairobi, Kenya**