AN EVALUATION OF THE ROLE OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS IN THE PROTECTION OF WOMEN'S RIGHTS UNDER THE MAPUTO PROTOCOL

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DECLARATION

I, **MASORE PENINAH MOTABORI,** do hereby declare that this is my original work and that it has not been submitted for award of a degree or any other academic credit in any other University.

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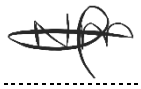
Signed  Date 13 November 2021

This research project has been submitted for examination with my approval as a University supervisor.

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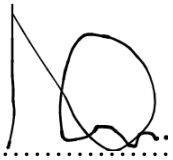
Signed  Date 12/02/2021

DEDICATION

To the loving and merciful Father, the God Almighty. To Him be all the glory, praise and honour.

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My sincere gratitude goes to Dr Nkatha Kabira for her guidance and supervision.

To my father Leo for his belief in me and his encouragement to go after my dreams. To my mother Rose for her support and my siblings and friends for cheering me on.

To my colleagues at Equality Now for their input and discussions on state accountability for women's rights in Africa.

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LIST OF ABBREVIATIONS AND ACRONYMS

African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Committee	African Committee of Experts on the Rights and Welfare of the Child
African Court	African Court in Human and Peoples' Rights
African Court Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of An African Court on Human and Peoples' Rights
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
UDHR	Universal Declaration on Human Rights
UN	United Nations

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ABSTRACT

This study investigates the extent to which the African Court has protected the rights of women and girls as enshrined in the Maputo Protocol. Despite the fact that in theory, the Court is empowered to interpret the application and implementation of the Maputo Protocol, nevertheless, in practice, it has adjudicated on a minimal number of women's rights cases. This study argues that this is because of three key reasons. First is that the writers of the Protocol establishing the African Court did not envision women's rights as beneficiaries of the Court. Second, historically, women were left out of the law-making process, and therefore, the development of human rights treaties and instruments were male-centric and did not provide for women's rights, which came much later after agitation by women's rights advocates. Third, founded on the principle of complementarity, the Court was founded on the assumption that it would complement the local mechanisms of African States, which themselves jeopardise the justiciability of women's rights under their domestic courts.

This study employs doctrinal research methodology to illustrate the disparity between the Court's mandate and role regarding women's rights and its minimal adjudication on women's rights issues. By reviewing case law, the legislative and institutional framework and the historical development of the Court, it demonstrates that not only was the all-powerful court with broad jurisdiction destined to be weak from the beginning, but that women were not the intended litigants or meant to benefit from its processes. This study adds to the body of knowledge on the human rights system in Africa and on women's rights. Using a feminist approach to international law, it uncovers problematic assumptions, structural biases and blind spots that existing approaches ignore. These include the apparent gender- blind and gender-neutral establishment of the African Court and its mandate, while the reality and effect of its workings and structure disproportionately impact women.

CHAPTER ONE

INTRODUCTION

1.0 Background

The Maputo Protocol[1] categorically places the mandate to interpret its application or implementation on the African Court.[2] Together with the African Court's broad jurisdiction to determine matters on any human rights treaties ratified by the State Party concerned, including CEDAW, this mandate makes the African Court critical for protecting and advancing women's rights in Africa. These two instruments contain a myriad of robust provisions whose rights aim to improve the gender equality situation Africa. However, women and girls in Africa continue to face numerous rights violations and gender injustice; many countries continue to have discriminatory laws and policies and are far from achieving gender equality.[3] Moreover, the implementation of legislation is discriminatory and domestic courts often interpret and apply international and regional human rights law inconsistently and fall short in protecting women against human rights violations fully.[4]

The African Charter's fifty-five member states have all ratified CEDAW except Sudan, Sahrawi Arab Democratic Republic and Somalia,[5] while forty-two have ratified the Maputo

[1] Article 27, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005) <https://au.int/sites/default/files/treaties/protocol_rights_of_women_in_africa_e.pdf.> accessed on 10/03/2020.
[2] Established under Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, http://www.african-court.org/en/images/Basic%20Documents/africancourt-humanrights.pdf. Accessed on 12/03/2020.
[3] See Equality Now's Words and Deeds: Holding Governments Accountable in the Beijing +25 Review Process, 5th Edition, March 2020 https://d3n8a8pro7vhmx.cloudfront.net/equalitynow/Report_EN.pdf?1582923378. Accessed on 13/04/2020.
[4] See African Women Still Not Getting Justice in National Courts, quoting Legal Grounds II: Reproductive and Sexual Rights in African Commonwealth Courts, Centre for Reproductive Rights, 2010 https://reproductiverights.org/press-room/african-women-still-not-getting-justice-in-national-courts.
[5] Status of Ratification of CEDAW https://indicators.ohchr.org/. accesses on 03/04/2020.

Protocol.[6] However, only six states[7] have made a declaration acknowledging the jurisdiction of the African Court to hear complaints from individuals and NGOs pursuant to Article 34(6) of the African Court Protocol. The disconnect between the African Charter's provisions and the Maputo Protocol on the one hand and the African Charter's demand for ratification of the African Court Protocol and an additional declaration under Article 34(6) creates a conundrum of untold proportions. Citizens and NGOs of only six states can approach the African Court on a women's rights issue. Strictly speaking, for the rest of Africans, there is no judicial avenue for redress and therefore no body holding governments accountable on women's rights under the Maputo Protocol and CEDAW.[8] Indeed, in many African states, some human rights matters, including the rights of women and constitutional matters, are not justiciable before the domestic courts, resulting in multiple exclusions for women and the need for supra-national forums. This situation may be getting worse, with no end in sight.

Three years after the Republic of Rwanda[9] deposited its Article 34(6) declaration, on 29 February 2016, it deposited its withdrawal to the said declaration. This decision came as the African Court was set to hear, on 4 March 2016, Ms Victoire Ingabire, a leading opposition leader, who claimed that Rwanda violated her freedom of speech, right to a fair trial and justice under the Constitution, UDHR, ICCPR and the African Charter. [10] Fortunately, the African

[6] List of countries that have signed, ratified/acceded to the Maputo Protocol https://au.int/sites/default/files/treaties/37077.pdf. Accessed on 09/04/2020.

[7] Burkina Faso 1998; Malawi 2008; Mali 2010; Ghana 2011; Tunisia signed in 2017 but is yet to deposit its declaration. Rwanda deposited in 2013 and officially withdrew it on 24 February 2016. Tanzania deposited in 2010 but issued a notice of withdrawal in November 2019. Côte d'Ivoire deposited in 2013 and Benin deposited in 2016. Both gave notice in 2020. https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf. Accessed on 23/05/2020.

[8] The focus here is on the judicial bodies and not quasi-judicial ones which do have the mandate to adjudicate on issues regarding women and girls rights.

[9] Ingabire Victoire Umuhoza V Rwanda, Application No. 3 of 2014, Judgement 24 November 2017 http://www.african-court.org/en/images/Cases/Judgment/003-2014-Ingabire%20Victoire%20Umuhoza%20V%20Rwanda%20-%20Judgement%2024%20November%202017.pdf Accessed on 04/05/2020.

[10] Ms Ingabire had lived in the Netherlands for seventeen years until the year 2010 when she returned to Rwanda, intending to participate in national-level elections through the Forces Democratiques Unifiees (FDU Inkingi) party. However, she was remanded by the police, detained and charged with various offences provided for and

Court ruled that Rwanda's withdrawal would come into effect only after the expiry of a one-year notice period and that it did not affect the six cases against Rwanda pending at the Court.[11] The Court heard and determined the case, in which it found in favour of the Applicant.

The United Republic of Tanzania similarly withdrew its Article 34(6) declaration in November 2019. Since the late former President John Magufuli Pombe took office in 2015, there has been a slow but steady decline in Tanzania's human rights situation.[12] Perhaps the most retrogressive undoing of the government was the ban against pregnant schoolgirls and teenage mothers attending school.[13] The right to education in Tanzania is not justiciable, hence the presidential order- turned- government policy cannot be challenged anywhere within Tanzania.[14] Advocacy and engagement efforts with the government have borne no fruit while statements and recommendations calling for lifting the ban by international and regional human rights bodies, including the African Commission[15] and the African Committee,[16] have fallen on deaf ears. Therefore, the only other recourse Tanzanians have is a court- a regional or international court that can issue a binding decision- the African Court.[17]

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punishable under Rwandan law, including terrorism and sectarianism, which she allegedly committed on various dates between 1997 and 2008.

[11] Supra note 1, Ruling on Jurisdiction, 3 June 2016 http://en.african-court.org/images/Cases/Ruling%20on%20Jurisdiction/Appl.%20003-2014%20Ingabire%20Victoire%20Umuhoza%20v.%20Rwanda%20Ruling%20on%20Jurisdiction%20ENG.pdf accessed on 07/05/2020.

[12] Press Statement of the African Commission on Human and Peoples' Rights on Tanzania's human rights situation (2021).

[13] On 3 August 2017, the Commissioner Rapporteur on the Human Rights Situation in the United Republic of Tanzania and the Special Rapporteur on the Rights of Women in Africa, together with the Chairperson of the African Committee of Experts on the Rights and Welfare of the Child, transmitted a Joint Letter of Appeal to the President of the United Republic of Tanzania regarding the ban. https://www.achpr.org/news/viewdetail?id=29. Accessed on 10/05/2020.

[14] The Constitution only recognises the right to education as a fundamental objective and directive principle of State policy (Part II) rather than as a human right https://www.tanzania.go.tz/egov_uploads/documents/Katiba%20ya%20Jamhuri%20ya%20Muungano%20wa%20Tanzania%20_English%20Version_%202009.pdf. Accessed on 24/05/2020.

[15] Supra note 15 https://www.achpr.org/pressrelease/detail?id=459. Accessed on 17/05/2020

[16] Concluding Observations and Recommendations of the 29th Session of the African Committee of Experts on the Rights and Welfare of the Child, 2-9 May 2017 https://acerwc.africa/wp-content/uploads/2019/07/Tanzania%20CO.pdf. Accessed on 14/05/2020.

[17] See article 30 of the African Charter (Organisation of African Unity, 1986).
Note that NGOs have filed communications challenging the ban at the East African Court of Justice and the African Committee of Experts on the Rights and Welfare of the Child.

In April 2020, Tanzania pledged through a public notice to enhance education for pregnant girls after receiving a controversial $500million World Bank loan, but this was done quietly compared to the late President's vehement public voicing of the ban.[18] NGOs and members of the public had cautious expectation, with the fear being that Tanzania would continue to deny pregnant girls the right to study in public schools and require them to study in a parallel system to be established using the loan.[19] Indeed, this policy has continued to be implemented throughout Tanzania mainland, driving human rights organisations, including Equality Now, to file a public interest litigation case against the United Republic of Tanzania, challenging the ban only days before the withdrawal took effect.[20] Since November 2020, the African Court cannot be accessed by any Tanzanian citizen meaning that the systemic, widespread, and discriminatory violation of girls and women's rights in Tanzania will have no binding avenue for redress.

The withdrawal of declarations under Article 34(6) of the African Court Protocol has proceeded on a downward spiral. While Rwanda's recognition of the Court's jurisdiction enabled the vindication of human rights conflicts between individuals and the State, the government lamented that genocide fugitives exploited the Court to obtain a forum for the re-invention and clean-up of the genocide.[21] For Tanzania, a combination of numerous undesirable rulings and the case of *Ally Rajabu versus the United Republic of Tanzania*[22] relating to the mandatory

[18] Alice McCool, Controversy over $500m loan that allows Tanzania to take pregnant girls out of their classroom, 10 April 2020, The Guardian https://www.theguardian.com/global-development//tanzania-ban-on-pregnant-girls. Accessed on 19/05/2020.
[19] Ibid.
[20] 'Court Case Filed against Tanzania to Overturn Ban on Pregnant Girls Attending School' (*Equality Now*, 19 November 2020) https://www.equalitynow.org/tanzania_african_court_pregnant_schoolgirls_nov2020?locale=en accessed 8 March 2021.
[21] Philomena Apiko and Faten Aggad-Clerx, 'The International Criminal Court, Africa and the African Union: What Way Forward?' 32.
[22] The Matter Of Ally Rajabu And Others V United Republic Of Tanzania [2019] African Court of Justice Application No. 007/2015.

death penalty for murder convictions instigated the withdrawal.[23] The Minister for Foreign Affairs stated that Article 34(6) was contrary to Tanzania's Constitution.[24]

On 20 April 2020, the African Court ordered the Republic of Benin to suspend the municipal polls scheduled for 17 May 2020 and the review of its Constitution in Benin pending the Court's decision in an application instituted by opposition politician Sebastien Ajavon.[25] Just a day later, Benin's Government wrote to the African Union informing it of its decision to withdraw its declaration.[26] Similarly, after the African Court ordered Cote d'Ivoire to suspend its warrant of arrest for former Prime Minister Guillaume Soro and release 19 of his imprisoned relatives, the government withdrew the declaration sanctioning citizens and NGOs to access the Court on 29 April 2020.[27] Both Benin and Cote d'Ivoire based their decisions on concerns on sovereignty and the African Court surpassing its mandate to interfere in domestic affairs.[28]

Declarations made by African States in compliance with Article 34(6) of the African Court Protocol

No	Country	Date of Signature	Date of Deposit	Date of Withdrawal
1.	Burkina Faso	14 July 1998	28 July 1998	
2.	Malawi	9 September 2008	09 October 2008	
3.	Mali	5 February 2010	19 February 2010	
4.	Tanzania	9 March 2010	29 March 2010	14 November 2019
5.	Ghana	9 February 2011	10 March 2011	
6.	Rwanda	22 January 2013	06 February 2013	24 February 2016
7.	Cote d'Ivoire	19 June 2013	23 July 2013	28 April 2020
8.	Benin	22 May 2014	08 February 2016	24 March 2020
9.	Tunisia	13 April 2017	-	
10.	Gambia	23 October 2018	02 February 2020	

[23]Nicole de Silva and Misha Plagis, A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court https://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/ accessed 20 February 2021.
[24] Patty Magubirs, Tanzania Sets in Motion its exit from rights court, https://www.kenyantribune.com/tanzania-sets-in-motion-its-exit-from-rights-court/ accessed 20 February 2021.
[25] Application No 062/2019 on provisional Measures Sébastien Germain Ajavon v Republic of Benin https://fr.african-court.org/images/Cases/Orders/Ajavon--ordonnance-measures-provisoires0001.pdf.
[26] Nicole de Silva, A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court, http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/. Accessed on 03/06/2020.
[27] Zoe Gujral, 'Ivory Coast Withdraws from African Human Rights and Peoples Court' <https://www.jurist.org/news/2020/05/ivory-coast-withdraws-from-african-human-rights-and-peoples-court/> accessed 21 July 2020.
[28] Supra note 23.

Table 1: Source: The African Court on Human and Peoples' Rights' website[29]

It is therefore not shocking that, despite the fifteern-year existence of the African Court, it is only in May 2018 that it delivered the first judgment interpreting the Maputo Protocol in *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v. the Republic of Mali*.[30] With this decision, the Court held that states are strictly obliged to uphold international human rights standards within the family law sphere, including by not applying religious and customary law.[31]

According to the CEDAW Committee, access to justice is an essential element of the rule of law and is critical to realising women's rights worldwide.[32] Access to justice includes justifiability, affordability, good consistency, accessibility, transparency of justice systems and the provision of redress for victims.[33] The application of international instruments and decisions relating to women's rights in regional and international systems is a significant feature of women's administration of justice.[34] Following these objectives, the CEDAW Committee calls on States to develop reliable oversight mechanisms individually or through international or regional collaboration.[35]

Admittedly, despite widespread ratification of the Maputo Protocol, the volume of expected litigation has been disappointing, especially given the severe violations faced by African girls

[29] 'Declarations entered by Member States' https://en.african-court.org/index.php/basic-documents/declaration-featured-articles-2 accessed 25 July 2020.
[30] IJRC, 'African Court Finds Mali's Family Law Violates Human Rights Obligations' (*International Justice Resource Center*, 29 May 2018) <https://ijrcenter.org/2018/05/29/african-court-finds-malis-family-law-violates-human-rights-obligations/> accessed 8 March 2021.
[31] Ibid.
[32] 'General Recommendation No' 10.
[33] Ibid.
[34] Ibid.
[35] Ibid.

and women, according to the African Court's President in 2016.[36] This study will critically explore the reasons for this unfortunate state of affairs.

1.1 Statement of Problem

Despite the fact that, in theory, the African Court is empowered to interpret the application and implementation of the Maputo Protocol, nevertheless, in reality, it has adjudicated on a minimal number of women's rights cases. In the fifteen years of existence of the African Court, it has adjudicated on less than a handful of cases in which it has applied the Maputo Protocol. This project seeks to investigate the extent to which the African Court has protected women's rights as enshrined in the Maputo Protocol.

1.2 Research Objectives

The objectives of the study are:

i) To locate the history of the African Court and its mandate, particularly regarding the Maputo Protocol and women's rights;

ii) To explore the international and regional framework for the protection of women's rights at the disposal of the African Court;

iii) To analyse the jurisprudence of the African Court and problematise the challenges hindering the protection of women's rights through judicial decisions;

iv) To make recommendations to ensure the effectiveness of the Court as regards women's rights.

[36] Honourable Justice Sylvain Oré, Final Communiqué of the 59th Ordinary Session of the African Commission on Human and Peoples' Rights, 21 October to 4 November 2016, Banjul, The Gambia, para 10 https://www.achpr.org/sessions/info?id=262. Accessed on 2/07/2020.

1.3 Research Questions

To understand why the African Court has adjudicated on a minimal number of cases and thereby has little jurisprudence on women's rights, the study will seek to answer the following questions:

i) What is the history and mandate of the African Court, particularly with regards to women's rights?

ii) What is the framework for the protection of women's rights regionally and internationally that the African Court has jurisdiction over?

iii) Why has the African Court adjudicated on a minimal number of women's rights cases, and what does its jurisprudence reveal about the factors that adversely impact the filing and adjudication of women's rights issues at the African Court?

iv) What recommendations can be drawn from this study?

1.4 Hypothesis

This study hypothesises that the reason why the African Court has only adjudicated a handful of women's rights cases is because:

i) Women's rights were not envisioned to benefit from the African Court.

ii) Historically, women's rights were not provided in human rights treaties and instruments.

iii) The Court was founded on the assumption that it would complement the local mechanisms of African States, which themselves jeopardise the justiciability of women's rights under their domestic courts.

1.5 Theoretical Framework

This study relies on the feminist approach to international law and the integrated theory of international law to appraise the protection of women's rights at the African Court and explore the reasons for the minimal adjudication.

1.5.1 The Feminist Approach to International Law

Conventional legal theory, far from being gender-blind, all share the assumption that all human beings are the same and ignore women's position and perspectives.[37] Feminism scrutinises the extent to which the legal structure reproduces and strengthens a masculine viewpoint and how legal rules do not reflect differences between men and women.[38] It strives to elucidate how the law supports women's subordination and oppression and to improve the status of women through adjusting the law and its approach to gender.[39] It is based on the concept that law is gendered and masculine and that society is patriarchal and, hence, men's dominance in all sectors.[40]

The feminist approach to international law propounded by Hilary Charlesworth, Shelley Wright and Christine Chinkin is a broad critique of international law using feminist analyses developed in the domestic context to demonstrate that the international legal system has a male organisational and normative structure.[41] It holds that the structures of international law-making and the content of the rules of international law privilege men and that international

[37] Michael Freeman Lloyds, *Introduction to Jurisprudence,* (Sweet and Maxwell 2014).
[38] Troy Lavers/Loveday Hodson, "Feminist Judgments in International Law", Völkerrechtsblog, 24 April 2017, doi: 10.17176/20170424-092937 https://voelkerrechtsblog.org/feminist-judgments-in-international-law/.
[39] Brian Bix, *Jurisprudence Theory and Context, (*Sweet and Maxwell) 7th Edition Page 243 -255.
[40] Raymond Wacks, *Understanding Jurisprudence, An Introduction to Legal Theory*, (UOP 2017).
[41] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' 85 The American Journal of International Law 613 (1991) <https://www.jstor.org/stable/2203269>

law is gendered.[42] This study relies on two major feminist criticisms of international law discussed hereunder.

1.5.1.1 The structure of international law reinforces a male perspective

Women are underrepresented in national and international decision-making processes since the power structures of their subjects, states and international organisations, were historically, and still are, overwhelmingly male.[43] States are patriarchal as they exclude women from top positions and decision-making roles, strengthened by principles of sovereign equality, political independence and territorial integrity, which contribute to women's exclusion and oppression.[44] International law over-protects states and governments based on the concept of state sovereignty, rejecting the individual and, as a result, it frequently ignores the rights and interests of women within states.[45] The core subject of international law, the life of states, fails to represent women's perspectives and protect their interests.[46]

Feminist international legal theory is an effort to segregate nations, pierce the sovereignty veil, and ask about the ties in society, including those between individuals and the State's government.[47] Lifting the veil of state sovereignty highlights the unfair treatment and rights violations that women face in a majority of the States.[48] This atrocity is exacerbated by the fact that it frequently occurs in areas beyond the reach of domestic and international law.

The long-standing control of bodies with political power locally and internationally resulted in issues of concern to men viewed as broad human concerns, while women's issues are an

[42] Ibid.
[43] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613.
[44] ibid.
[45] Fernando R. Tesón, Feminism and International Law: A Reply, 33 Va. J. Int'l L. 647 (1993).
[46] 'Fellmeth - 2000 - Feminism and International Law Theory, Methodology.Pdf'.
[47] Charlesworth, Chinkin and Wright (n 43).
[48] Ibid.

exceptional restricted class.[49] Law and politics would undergo fundamental changes if their foundations were truly human in creation, and their viewpoints would broaden to incorporate issues previously view as domestic, whether in the private sphere or at the national front.[50]

Consequently, the international law-making process refuses women access to and representation in law-making because women are underrepresented in international affairs, and as a result, men almost exclusively create international law.[51] Liberal feminists like Alisson Jagger hold that States are liable if they prohibit women from political participation or discriminate against women in their procedures for entry to the diplomatic service, as this is a prejudice and a breach of international human rights law.[52]

Radical feminists such as Catherine MacKinnon believe that States have a hierarchical structure based on gender that contaminates the process of legal reasoning.[53] There is a global inequality even where men are primarily elected in democratic States or where men mostly seek admittance to the diplomatic corps.[54] Women's underrepresentation as government agents can only be addressed while maintaining democratic ideals by imposing non-discrimination and equal opportunity duties on States, including affirmative measures where appropriate.[55] Regarding statism, Teson agrees and adds that a liberal theory of international law rejects statism and necessitates the limitation of absolute sovereignty to advance women's situation as women are dispossessed of dignity and equal respect.[56]

[49] Charlesworth, Chinkin and Wright (n 43).
[50] Ibid.
[51] Ibid.
[52] ibid.
[53] Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, in Feminism Unmodified,
[54] Fernando R Tesón, 'Feminism and International Law: A Reply' 40.
[55] Ibid.
[56] Ibid.

1.5.1.2 The normative content of international law is gendered and ignores women's issues

The second criticism is that international law's material content is gendered, favouring and advantaging the interests of men above women. Whereas the rules of international law for nationals should be universally applicable and gender-neutral, in reality, they apply differently to men and women, with the result that the experiences women have of the law is often repressed or discounted. For example, international law reproduces the public and private debate where the public sphere falls under international law while the private is left to domestic law, including customary law and cultural practices. Therefore, since international law descends from Western, masculine, liberal legalism, its structure is essentially patriarchal and oppressive.[57]

Catherine MacKinnon posits that the legal structure is grounded in maleness in form and substance and that the relationship between men and women in contemporary patriarchal society more closely approximates domination than equality. [58] She rejects entirely that there is anything consensual, neutral, objective or supra-political about the law: it is but a manuscript of the patriarchal imagination, which has constructed a reality that is deeply antithetical to women's equality.[59]

MacKinnon proclaims ' *'male dominance is perhaps the most pervasive and tenacious system of power in history, its point of view is the standard for point-of-view-ness, its particularity the meaning of universality, and its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy*.''[60] Male power

[57] Charlesworth, Chinkin and Wright (n 43).
[58] Richard F Devlin, 'Mapping Legal Theory' (1994) 32 Alta L Rev 602.
[59] Ibid.
[60] Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, (University of Chicago Press, 1983).

is established outside the State and controlled by the state; hence the State is not a source of power, but a tool that serves the power of men over women formed elsewhere.[61] In part through the law, the State institutionalises male power; thus, it cannot be the neutral arbitrator of liberal theory: it will consistently be the willing retainer of male power, and its actions will inevitably serve male supremacy, maintain and consolidate male power.[62] The rule of law is the standard of men.[63] Consequently, the State is masculine in the sense of feminism; it views and treats women the way men do, and it constitutes the social order using a coercive and authoritative approach in the interests of men through its legitimising standards, relation to society, and substantive policies.[64]

MacKinnon posits that being a woman is far from being human and that if women enjoyed the human standards of international law, they would not be subjected to the numerous injustices and inequalities that they have undergone since time immemorial.[65] The relatively close universality of women's second-class status is undeniable, and thus to claim equality by means of the law is to assert the realities of women.[66] Women's rights and human rights violations must include what occurs to women, and also those things that customarily or only face women, and not just what occurs to some men that may in some cases likewise happen to women.[67]

To counter the limitations of functionalism, feminists theorise that the State maintains and legitimises a patriarchal and capitalist society[68] and that conflicts regarding white supremacy

[61] Catharine A MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7 *Signs* 515; Catharine A MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Catharine MacKinnon, *Are Women Human? in* Reflections on The Universal Declaration Of Human Rights: A Fiftieth Anniversary Anthology 171.
[66] Catharine A. Mackinnon, *Toward Feminist Jurisprudence, in Toward A Feminist Theory of The State* 237, 249 (1989).
[67] Karima Bennoune, Why Does It Matter If Women Are Human: Catharine MacKinnon's Contributions to International Law, 46 Tulsa L. Rev. 107 (2013).
[68] Ibid.

point to the State's ability to act for the benefit of male dominance.[69] It is not just the elite's tool, but it is autonomous since the State is constrained to decide on differing interests and functions,[70] including white supremacy, patriarchy and capitalism.[71] Halley criticises MacKinnon's work as dogmatic, totalising, and so focused on male power that it cannot recognise the power of women and feminism.[72] She generally argues that feminism fails to acknowledge its power.[73]

Further, feminist plans have had restricted accomplishment in empowering women and improving their lives.[74] Charlesworth posits that while feminist commitments such as women's equality have contributed to the development of international law, they are only partially incorporated and implemented regardless of the context or sympathy to the intended beneficiaries.[75] She concludes that feminist messages have been influential in rhetorical terms while feminist methods have been ignored, and thus calls for women to be explicit about their historical and cultural background and perceptions, and recognise the complexities of the lives of other women.[76]

Carol Smart calls upon feminism to decentre law by investigating how the law exercises power and excludes the experiences of women.[77] She posits that feminism yields much by tolerating the terms of the law in order to challenge it and offered that feminists should adopt non-legal approaches instead of relying on the law or policy recommendations, but to resort to research

[69] Mary Mclntosh, 'The State and the Oppression of Women' in A. Kuhn.
[70] Ibid.
[71] Rhonda Sharp and Ray Broomhill, *Short Changed: Women and Economic Policies,* Sydney: Allen and Unwin, 1989.
[72] JE Halley, Split Decisions: How and Why to Take a Break from Feminism (Princeton University Press, 2005).
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] McNevin A, *Confessions of a Failed Feminist IR Scholar; Feminist Methodologies in Practice in Gender and Global Politics* (New Yourt, Palgrave Macmillan, 2009).
[77] Carol Smart, *Feminism and the Power of Law (1989).*

and feminist jurisprudence.[78] She proposed abandoning legal reform and including women with issues like legal logic, legal values, equity, fairness, neutrality, and objectivity.[79]

1.5.1.3 Other factors that curtail a proactive framework on women's rights

The criticisms to the feminist approach to international law point out that there are indeed other factors at play apart from patriarchy and male dominance that have contributed to an international framework that fails to advance and protect women's rights.

With regards to the first argument that the structure of international law reinforces a male perspective clothed in statism, Fellmeth contends that feminists exaggerate the importance of free and independent States in international law and that historical power dynamics explain the actuality of states and not gender bias.[80] Neither the concept of States nor their practical implications intrinsically represent a male voice or ignore women's interests.[81]

On the point that the law-making process excludes women, Teson argues that international law does not preclude domestic electoral affirmative action measures aimed at enhancing the prospect of electing women, but it cannot mandate specific democratic governance and non-discrimination.[82] Fellmeth opines that while gender parity in State governments and NGOs is undoubtedly a worthy outcome, international law does not preclude or discourage, but rather promotes equal representation, and women are always free to form NGOs and act as their representatives, and many have done so.[83]

[78] Ibid.
[79] Karin Van Marle We Exist, But Who Are We?' Feminism and the Power of Sociological Law, (2012).
[80] Aaron Xavier Fellmeth, 'Feminism and International Law: Theory, Methodology, and Substantive Reform' (2000) 22 Human Rights Quarterly 658.
[81] Fellmeth - Feminism and International Law Theory, Methodology.Pdf' (2000) (n 46).
[82] Tesón (n 54).
[83] Fellmeth (n 50).

The second argument that the normative content of international law is gendered and ignores women's issues is criticized by Gilligan, Dobrowolsky, Devlin[84], Chamberlain[85] and Pateman. MacKinnon's analysis of male supremacy disregards female agency and does not explain its actuality in the midst of male dominance.[86] Further, they criticise the State's functionalist analysis because it does not explain the obvious contradictions in State action, such as concessions granted by the State due to resistance or action for social change. [87] Another critique is that this analysis lacks a vision of social transformation and fails to expound on how it can be achieved.[88] Charlesworth points out that on the contrary, state-building demonstrates feminist positioning between resistance and compliance.[89] She claims that while women's rights are now a staple of state-building initiatives and gender mainstreaming is commonplace, women's rights are often traded away and their radical edge lost in bureaucratic institutions.[90]

On the point that the normative content of international law is gendered to favour men, Teson argues that positive international law is a broad and heterogeneous framework comprising technical general principles and rules of varying degrees that are gender-neutral. He refutes the claim that international legal rules and norms operate in any way to the disadvantage of women. He further argues that the claim that international law is inherently patriarchal and oppressive is unsustainable since it lumps all States regardless of the difference between oppressive and humane States. The situation of women is immensely improved in liberal

[84] Alexandra Dobrowolsky and Richard Devlin, 'The Big Mac Attack: A Critical Affirmation of MacKinnon's Unmodified Theory of Patriarchal Power' (1991) 36 *McGill Law Journal* 575.
[85] Lori Chamberlain, 'Consent After Liberalism: A Review Essay of Catharine MacKinnon's *Toward A Feminist Theory of the State.*
Carole Pateman's *The Sexual Contract'* (1991) 11 *Genders 111.*
[86] Ellen DuBois, Mary Dunlap, Carol Gilligan, Catharine MacKinnon and Carrie Menkel-Meadow,' Feminist Discourse, Moral Values and the Law -A Conversation' (1985) 34 *Buffalo Law Review* 11.
[87] Mary Heath, 'Catharine MacKinnon: Toward a Feminist Theory of the State' (1997) 9 Austl Feminist LJ 45
[88] Supra note 47.
[89] Hilary Charlesworth, Talking to Ourselves? Feminist Scholarship in international law.
[90] Ibid.

societies, while the societies with illiberal philosophies and institutions have the greatest gender discrimination.

Fellmeth argues that the claim that international human rights law is biased and unrepresentative of the interests of women ignores significant progress in the definition and protection of women's interests in customary and treaty law since 1945.[91] He believes that the focus of international law-making is distorted against pursuing the perceived commercial interests of states and corporations, which distracts attention and resources away from the implementation of the existing human rights standards.[92] As a result, international law is neither conceptually nor procedurally gendered, and the majority of its content is gender-neutral. Even though it does not perform this function perfectly, international law does explicitly provide for most of the human rights issues specific to women, and it has incredibly accounted for women's experiences in its creation and administration.

1.5.2 Integrated Theory of International Law

Oona Hathaway's integrated theory of international law builds on insights from law and political science to explain how treaty law shapes state decisions and state behaviour.[93] The theory expounds on why states commit to treaties that potentially restrain their behaviour and how once accepted, they either guide or do not influence government behaviour, depending on reciprocal influences with commitment and compliance.[94] It highlights two means by which treaties shape what states do: their enforcement by international actors and the rule of law

[91] Fellmeth Aaron Xavier, Feminism and International Law: Theory, Methodology, and Substantive Reform (2000). Human Rights Quarterly, Vol. 22, p. 658, 2000, Available at SSRN: https://ssrn.com/abstract=1404884
[92] Ibid.
[93] Oona A Hathaway, '*Between Power and Principle: An Integrated Theory of International Law*' The University of Chicago Law Review 68.
[94] Ibid.

organisations within states that ratify the treaty and the collateral anticipated consequences or benefits of treaty membership.[95]

The integrated theory of international law will be applied to decipher the conflict occasioned by the Maputo Protocol mandating the Court to interpret its application and implementation, while the African Court, which is an optional forum for signatories of the African Charter, has limited accessibility as States need to allow citizens to approach the Court and has a raft of admissibility requirements that lockout potential women's rights cases.

1.6 Literature Review

The bulk of the literature regarding the African Court, broadly speaking, covers narrow thematic areas, namely, the jurisdiction and mandate of the Court; challenges in accessing it by individuals and NGOs; and its jurisprudence generally. As this review highlights, little is written about the African Court and women's rights or the Maputo Protocol.

1.6.1 Jurisdiction and Mandate of the African Court

The African Court has made great strides and began to entrench itself as a formidable body for protecting human rights in Africa. Ssenyonjo opines that, although its contribution is modest, most of its judgments in contentious cases have found human rights violations.[96] Viljoen states that in the first ten years of working, the Court adjudicated more cases as compared to other supra-national human rights courts.[97] Rachovitsa asserts that the African Court's distinctive jurisdiction to interpret, apply and monitor human rights instruments ratified by State parties

[95] Ibid.
[96] Manisuli Ssenyonjo 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)' International Human Rights Law Review Volume 7: Issue 1 (2018) https://brill.com/view/journals/hrlr/7/1/article-p1_1.xml?language=en. Accessed on 12/08/2020.
[97] Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 *iclq* 63–98. https://repository.up.ac.za/bitstream/handle/2263/65342/Viljoen_Understanding_2018.pdf?sequence=1&isAllowed=y. Accessed on 23/07/2020.

give it a unique institutional design in judicial adjudication that enables it to determine diverse subject matter complaints, a role it has aptly taken up. [98]

1.6.2 Challenges in Accessing the African Court

The challenges that limit the African Court's effectiveness and efficiency are well agreed upon by jurists and scholars. One key criticism is that the African Court Protocol[99] limits direct access by individuals or NGOs unless a State Party, in addition to ratifying the Protocol, declares under Article 34(6) to provide the African Court with the requisite jurisdiction. This has predictably restricted the number of cases the Court has received and that are likely to be filed and led to a state of affairs that, whereas thirty States have ratified the African Court Protocol, only six have made this declaration.[100] Many cases filed before the Court have been dismissed due to want of jurisdiction or inadmissibility.[101]

Although Viljoen[102] submits that direct access to the Court has enabled it decide more cases than the other regional courts in its first decade; however, according to him, States accepting the discretionary direct access is an essential but inadequate requirement for actual access, and

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[98] Adamantia Rachovitsa, 'New 'Judicial Animals: The Curious Case of an African Court with Material Jurisdiction of a Global Scope' Human Rights Law Review, 2019, 19, 255–289 https://watermark.silverchair.com/ngz010.pdf?. Accessed on 10/08/2020.

[99] Article 5(3), Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf. Accessed on 10/09/2020.

[100] Burkina Faso 1998; Malawi 2008; Mali 2010; Ghana 2011; Côte d'Ivoire 2013; Benin 2016. Tunisia signed in 2017 but is yet to deposit its declaration. Rwanda deposited in 2013 and officially withdrew it on 24 February 2016. Tanzania deposited in 2010 but issued a notice of withdrawal in November 2019. https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf. Accessed on 14/08/2020.

[101] See Ssenyonjo (n2), Viljoen (n3), Ashwanee Budoo , 'Association Pour Le Progrès Et La Défense Des Droits Des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali (Afr. Ct. H.P.R.)' (2018) 57 International Legal Materials 1097 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/B1970D31213E9FFC98ECEEEDB9927D7D/S0020782918000517a.pdf. Accessed on 22/08/2020.

[102] Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 International and Comparative Law Quarterly 63 https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/understanding-and-overcoming-challenges-in-accessing-the-african-court-on-human-and-peoples-rights/B07DB215F5DB24E5A267098F92740240. Accessed on 01/09/2020.

averseness of the African Commission to refer its cases to the Court has hampered indirect access to it.[103]

The requirement to exhaust domestic remedies, lack of information about the capacity to reach the Court, the requirement for an NGO to have observer status with the African Commission under Article 34(6), and the Commission's unwillingness to forward cases to the Court are all factors that restrict access.[104] Further, the African Charter's claw-back clauses limit some rights, impeding their full realisation and watering down the efficacy and even application of human rights by states. Makau Mutua suggests that the clauses should be deleted and replaced with derogation clauses.[105]

Viljoen, Ssenyonjo, Windridge[106] and Chenwi[107] write extensively on strategies to circumvent the hurdles in accessing the Court, including having more States ratify the African Court Protocol, the AU causing the amendment of Article 34(6) of the Protocol to permit direct access for human rights cases, and a more proactive role of the African Commission in referring cases to the Court[108]. This will aid the amalgamation of a pan-African court to protect human rights for more than 1.2 billion Africans.[109]

1.6.3 Jurisprudence of the African Court

[103] Ibid.
[104] Viljoen, (n.3).
[105] Makau Mutua, 'The African Human Rights System, A Critical Evaluation' http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf%20pg%208. Accessed on 12/09/2020.
[106] Oliver Windridge, Necessary CheckPoints or Immovable Roadblocks? Accessing the African Court on Human and Peoples' Rights 35 Wis. Int'l L.J. 458 (2017-2018) https://heinonline.org/HOL/LandingPage?handle=hein.journals/wisint35&div=19&id=&page=.Accessed Accessed on 18/09/2020.
[107] Lilian Chenwi. 'Exhaustion of Local Remedies Rule in the Jurisprudence of the African Court on Human and Peoples' Rights'. Human Rights Quarterly 41 (2019): 374.
[108] Viljoen (n38).
[109] Jamil Ddamulira Mujuzi, 'The African Court on Human and Peoples' Rights and Its Protection of the Right to a Fair Trial' The Law & Practice of International Courts and Tribunals (2017) Volume 16 Issue 2 https://doi.org/10.1163/15718034-12341347. Accessed on 20/09/2020.

Hansungule notes that the African Court met the need to have an effective enforcement mechanism to protect human rights in Africa.[110] Mujuzi extensively discusses that the bulk of the Court's jurisprudence involves the right to a fair trial.[111] He examines the jurisprudence of the Court and discusses the following themes: the Court's elucidation of the elements of the right to a fair trial; to defend oneself and to be heard; to legal assistance, including legal aid; to be prosecuted in reasonable time; and the mandate of prosecutors with regards to the right to fair trial.[112]

1.6.4 The African Court vis-à-vis the Maputo Protocol

Scholars who discuss the Maputo Protocol and the African Court include Budoo and Rudmann. Budoo [113] argues that despite the Maputo Protocol's 50 signatures and 40 ratifications, the violation of women's rights is commonplace, implying that the Protocol's implementation faces challenges. She opines that one reason for the rights not being realised is that its monitoring bodies, such as the African Court, are not fulfilling their mandate.[114]

Moreover, although African Court has the potential to hold States fully liable for the infringement of the human rights of women, its requirements on access limit the ability of human rights advocates to employ it as a channel to monitor the Maputo Protocol's execution.[115] Often, applicants struggle to meet the mandatory requirements regarding admissibility, resulting in the dismissal of cases at the onset. In *Mariam Kouma versus Republic of Mali*,[116] despite the Court acknowledging jurisdiction, the case was dismissed as domestic

[110] Michelo Hansungule, An African Perspective on the protection of women's rights in international law (2012).
[111] Mujuzi (n110).
[112] Ibid.
[113] Ashwanee Budoo, 'Analyzing the monitoring mechanisms of the African Women's Protocol at the level of the African Union' African Human Rights Law Journal 2018, vol.18, n.1 pp.58-74. http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962018000100004&lng=en&nrm=iso. Accessed on 05/10/2020.
[114] Ibid.
[115] Ibid.
[116] Mariam Kouma & Another v Mali, Application 40/2016 African Court on Human and Peoples' Rights. (2018).

remedies had not been exhausted. Furthermore, the African Court stated that it lacked the mandate to provide an advisory opinion on the Maputo Protocol's Article 6(d) as AU-recognized institutions did not file the case.[117]

As a result, Budoo is concerned that, despite the African Court's demonstration that it is capable of deciding on violations of the Maputo Protocol in *IHRDA vs Mali*, such a positive step will not be repeated anytime soon.[118] She advocates for creating a body to supervise the Maputo Protocol's implementation, strengthening prevailing systems and forming working groups, experts, and special rapporteurs at the AU.[119]

Rudmann examines the consequences of Africa's lack of a body overseeing women's rights in light of the rule of law, accessibility of the African judicial structure, and the Maputo Protocol's implementation.[120] She argues that because the Maputo Protocol designates the African Court as the principal institution to deal with interpretation issues concerning its application or implementation, the African Court should be the first port of call. [121] The Court would then have jurisdiction over State parties to both the African Court Protocol and the Maputo Protocol under Article 3 of the African Court Protocol, and it would also apply the Maputo Protocol's provisions under Article 7 of the African Court Protocol.[122]

This research intends to build on the writings of Budoo and Rudmann, which were published before the landmark first judgment of the Court on women's rights, *APDF and IHRDA Vs. Mali* and explore in greater depth the unique role of the African Court in protecting women's rights in Africa. The Court is specifically tasked to interpret the Maputo Protocol and its

[117] Request for Advisory Opinion by the Centre for Human Rights & Others 001/2016 28 September 2017.
[118] Budoo (n52).
[119] Ibid.
[120] Annika Rudman, 'Women's Access to Regional Justice as a Fundamental Element of the Rule of Law: The Effect of the Absence of a Women's Rights Committee on the Enforcement of the African Women's Protocol' (2018) 18 African Human Rights Law Journal.
[121] Article 27.
[122] Ibid.

jurisdiction to give binding judgments on human rights instruments ratified by a state party, including CEDAW, unlike the African Commission, makes it the perfect women's rights body.

The research will analyse the landmark judgment with a feminist lens, different from Capone's analysis of the Court's material jurisdiction and the audacious application of its remedial power.[123] This research will explore the assertion that the Court in *IHRDA Vs. Mali* demonstrated an eagerness to adopt a liberal construction of procedural requirements to benefit effective human rights protection.[124]

The feminist approach to international and integrated theory of international law will be applied to decipher fresh insights and critique the absence of jurisprudence on women's rights notwithstanding the fifteen- year existence of the African Court. The research will further seek to link the challenges scholars agree the Court faces to the unique situation of women in Africa and also to establish whether this compounds the lack of jurisprudence on the Maputo Protocol. All in all, this study will address the concern of the President of the African Court that despite the massive ratification of the Maputo Protocol, expectation about the volume of litigation has been disappointing, especially considering the serious violations African girls and women suffer.[125]

1.7 Justification of the Study

This study seeks to understand the challenges facing the African Court that have led to the minimal adjudication and resultant jurisprudence on women's rights. Existing literature pays more attention to the general working of the Court and its shortcomings. This study will be

[123] Francesca Capone, 'APDH and IHRDA v Mali: Recent Developments in the Jurisprudence of the African Court on Human and Peoples' Rights' (2020) 24 The International Journal of Human Rights 580 <https://doi.org/10.1080/13642987.2019.1656612> accessed 30 March 2021.
[124] Alice Banens, *African Court issues its first judgment on women's rights,* 13 September 2018 https://ilg2.org/2018/09/13/african-court-issues-its-first-judgment-on-womens-rights/. Accessed on 04/03/2021.
[125] Honourable Justice Sylvain Oré, Final Communiqué of the 59th Ordinary Session of the African Commission on Human and Peoples' Rights, 21 October to 4 November 2016, Banjul, The Gambia, para 10. https://www.achpr.org/sessions/info?id=262.Accessed 02/03/2021.

more specific on women's rights in Africa and how the Court adversely affects, locks out and limits the filing and adjudication of women's rights issues. The study adds to the existing literature on the AU and human rights protection in Africa and assist the African Court, African States, and NGOs in identifying areas in need of intervention to translate paper rights into lived realities for African girls and women. This study adds to the body of knowledge in this area by uncovering problematic assumptions and by concentrating on structural biases and blind spots that disregarded by existing approaches.

The feminist approach to international law highlights that the structure of the international legal order replicates a male perspective and guarantees its sustained supremacy.[126] The international law-making process and the its content have historically excluded women and failed to cater for their interests, which means that women were not included during the development of international human rights. Further, the institution of the African Court, whose jurisdiction is dependent on State consent and further acceptance of access for NGOs and individuals, over-protects states and demonstrates that women were not envisioned to benefit from the Court's processes.

1.8 Research Methodology

This study's approach is doctrinal research undertaken through a textual, literature-based analytical examination of primary and secondary sources. It is descriptive, analytical and critical. The study draws from the benefit of formal and informal discussions with persons familiar with the work of the African Court to suggest ways and viable options by which the Court can effectively discharge its mandate. It relies on feminist research methodology, which

[126] Charlesworth, Chinkin and Wright (n 43).

involves conducting research from a gendered viewpoint where the experience of women is considered.[127]

Chapter two uses historical research methodology where primary historical data traces the background and establishment of the African Court. Chapter three documents international and regional human rights instruments that provide for women's rights and analyses them using feminist critiques. Chapter four reviews cases on women's rights filed and adjudicated upon by the African Court. Content analysis is used to analyse the texts of the cases by these two judicial bodies, which relate either to Article 18(3) of the African Charter or the Maputo Protocol. For the African Court, the cases of *Request for Advisory Opinion by the Centre for Human Rights,*[128] *Mariam Kouma Versus Republic of Mali*[129] and *APDF and IHRDA Versus the Republic of Mali*[130] are analysed. Since only three cases on women rights have been handled by the African Court, cases at the African Commission are highlighted since apart from States, individuals and NGOs, the Commission can refer cases to the African Court.

1.9 Chapter Outline

Chapter one presents the study and gives the background of the research.

Chapter two provides the history of the establishment of the African Court, its mandate and processes.

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[127] Gwendolyn Beetham and Justina Demetriades, 'Gender and Development' (2007) 2(15) JSTOR 199.

[128] African Court Case No. 1 of 2016; Judgment 2 September 2017 https://en.african-court.org/images/Cases/Judgment/001-2016-RequestforAdvisoryOpinion-28September2017.pdf. Accessed on 06/04/2021.

[129]Application No. 040/2016 Judgment 21 March 2018 '-040 - 2016 - Mariam Kouma and Ousmane Diabae Vs. Mali - Judgment 21 March 2018 - Optimized.Pdf' http://www.african-court.org/en/images/Cases/Judgment/-040%20-%202016%20-%20Mariam%20Kouma%20and%20Ousmane%20Diabae%20Vs.%20Mali%20-%20Judgment%2021%20March%202018%20-%20Optimized.pdf. Accessed on 12/04/2021.

[130] Ashwanee Budoo, 'Association Pour Le Progrès et La Défense Des Droits Des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali (Afr. Ct. H.P.R.)' (2018) 57 International Legal Materials 1097 <https://www.cambridge.org/core/journals/international-legal-materials/article/association-pour-le-progres-et-la-defense-des-droits-des-femmes-maliennes-apdf-and-the-institute-for-human-rights-and-development-in-africa-ihrda-v-republic-of-mali-afr-ct-hpr/B1970D31213E9FFC98ECEEEDB9927D7D> accessed 8 March 2021.

Chapter three explores the body of treaties at the regional and international level, which are at the African Court's disposal in its adjudication of women's rights cases.

Chapter four analyses the African Court's jurisprudence to discover any trends, successes and challenges, and problematizes the lack of jurisprudence.

Chapter five concludes the study and presents recommendations to the identified problems and lapses, exploring viable options and good practices in protecting and promoting women's rights in Africa.

1.10 Conclusion

This chapter has introduced the research topic, identified the research problem, provided the research's theoretical underpinning, and presented the hypothesis. The literature review has shown a conflict between the African Court and its role in applying and fulfilling the Maputo Protocol and women's rights in Africa.

CHAPTER TWO

THE HISTORY AND MANDATE OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS WITH REGARDS TO WOMEN'S RIGHTS

2.0 Introduction

This chapter locates the history of the African Court and its mandate, particularly with regards to the Maputo Protocol and women's rights. The first part will highlight its history and establishment from the first time a human rights court was championed in 1961, the reconsideration in 1994 due to the African Commission's inadequacies and its eventual establishment in 1998. It will also trace the involvement of women in the development of the African Court and the status of the African women's rights movement. The second part will explore the broad jurisdiction and mandate of the African Court to adjudicate on any human rights instrument ratified by State parties and precisely analyse the Court's role in protecting and promoting women's rights in Africa. The third part will introduce the Court's processes and workings, focusing on its accessibility criteria for individuals and NGOs based on the declaration under Article 34(6) of the African Court Protocol and admissibility requirements to assess their effect on the safeguard of women's rights.

2.1 Historical Development of the African Court

The establishment of a human rights court was initially debated during the 1961 African Conference on the Rule of Law at which the Law of Lagos was adopted.[131] One resolution of the conference, which brought together jurists from twenty-three African countries, was that

[131] Andreas O'Shea, 'A Critical Reflection on the Proposed African Court on Human and Peoples' Rights' (2001) <https://vpn.uonbi.ac.ke/proxy/007d2833/https/heinonline.org/HOL/Page?public=true&handle=hein.journals/afrhurlj1&div=23&start_page=285&collection=journals&set_as_cursor=2&men_tab=srchresults> accessed 3 April 2020.

African governments study the prospect of developing an African Convention of Human Rights to be shielded by a court and that the citizens of signatory States have a right to resort to it.[132]

When the OAU Charter was adopted in 1963, it lacked a human rights framework or mechanism.[133] Two decades later, the idea of a Court was deliberately omitted from the African Charter's draft text as it was thought to be premature and, in any event, a supplementary Protocol could establish one in future.[134] The African Charter[135] therefore established the quasi-judicial African Commission,[136] whose mandate includes advancing human and peoples' rights, safeguarding and interpretation of the articles of the Charter.[137]

The eventual reconsideration of the court in 1994 was a reaction to the inadequacy of the protection offered by the Commission.[138] The Assembly entreated the OAU Secretary-General to urge government experts to consider how to augment the effectiveness of the African Commission through the formation of an African Court.[139] This led to the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on 9 June 1998.[140] The Court was established to

[132]International Commission of Jurists, Report of the Proceedings of the African Conference on the Rule of Law Lagos, Nigeria 3 January-7,1961 https://www.icj.org/wp-content/uploads/1961/06/Africa-African-Conference-Rule-of-Law-conference-report-1961-eng.pdf. Accessed on 2/03/2020.
[133] Frans Viljoen, 'International Human Rights Law in Africa', Second Edition, Oxford University Press 2012
[134] Ibid. quoting 'Introduction of M'Baye Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/1.
[135] African (Banjul) Charter on Human and Peoples' Rights (Adopted by the eighteenth Assembly of Heads of State and Government of the OAU on 27 June 1981 and entered into force in October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986) https://www.achpr.org/public/Document/file/English/banjul_charter.pdf Accessed on 05/04/2020.
[136] Part II of the Charter.
[137] Ibid. Article 30 and 45.
[138] O'Shea (n 64).
[139] 30th Ordinary Session of the Assembly of Heads of State and Government of the OAU, June 1994, Resolution 230 https://au.int/sites/default/files/decisions/9539-1994_ahg_res_228-233_xxx_e.pdf. Accessed on 12/04/202.
[140] Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf. Accessed on 24/04/2020.

complement and reinforce the protective function of the Commission. The Court's decisions are final and binding on state parties.[141]

2.2 The Jurisdiction and Mandate of the Court with regards to Women's Rights

The African Court has broad jurisdiction in complaints filed before it on the usage of the African Charter, the African Court Protocol and any other relevant ratified human rights instrument.[142] This special jurisdiction surpasses that of other regional courts. The Inter-American Court of Human Rights[143] applies and interprets the Inter-American Convention on Human Rights only[144] and may give advisory opinions to member states on the interpretation of the Convention or other human rights treaties in the American states.[145] The European Court of Human Rights can only consider and apply the European Convention on Human Rights.[146]

To appreciate the role the African Court plays in women's rights, a brief history of women's rights in Africa is presented. The African Charter provides that every person is entitled to enjoy the rights and freedoms recognised in it, regardless of any distinction, including sex.[147], however, has one provision that specifically addresses women: Article 18(3) on the family provides that the State must eliminate all forms of discrimination against women and protect women's and children's rights as specified in international instruments.

The normative content of the Charter concerning the rights of women was inadequate in light of the context of the numerous human rights violations and gender inequality faced by women

[141] Article 28(2).
[142] Article 3.
[143]Statute of the Inter-American Court of Human Rights, OAS, 'OAS - Organization of American States: Democracy for Peace, Security, and Development (1 August 2009) <http://www.oas.org/en/iachr/mandate/Basics/statutecourt.asp> accessed 3 April 2020.
[144] 'Basic Documents - American Convention' <https://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm> accessed 30 April 2020.
[145] ibid. Article 64. Accessed on 11/04/2020.
[146] Article 32, European Convention on Human Rights, https://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed on 21/04/2021.
[147] Article 2.

in Africa. Further inadequacies of the Charter concerning women's rights included the failure to define discrimination against them explicitly; importance on cultural values and practices that in most cases hinder the progress of women and girls' rights in Africa, and lack of guarantees of the right to consent to, equality in marriage.[148]

It specifies that the African Charter's positive African values are founded on the premise of equality, peace, freedom, dignity, justice, solidarity, and democracy.[149] It goes into greater detail than CEDAW about the scope of socio-economic rights;[150] obliges domestic violence legislation and the criminalisation of marital rape; underscores corrective and specific positive action, electoral quotas for women;[151] and requires special measures to be put in place to mitigate against discrimination.[152]

The Maputo Protocol incorporates clear and expansive definitions of discrimination against women, including economic harm, harmful practices[153] such as female genital mutilation and sex and gender-based violence against women. It also recognises that women can be victims of multiple discrimination and intersectionality of violations and therefore recognises unique categories such as widows, elderly, women with disability and in distress such as nursing/pregnant women in detention.[154]

It is critical to note that the Maputo Protocol categorically placed the mandate to interpret its application and implementation not on the already-existing African Commission but on the yet

[148] 'Breathing Life into Maputo Protocol Case Digest-Jurisprudence on the Rights of Women and Girls in Africa.Pdf' http://www.soawr.org/sites/default/files/Breathing%20Life%20into%20Maputo%20Protocol%20Case%20Digest-Jurisprudence%20on%20the%20Rights%20of%20Women%20%20and%20Girls%20in%20Africa.pdf accessed 3 April 2020.
[149] Preamble, Maputo Protocol.
[150] Ibid. Articles 12 – 16.
[151] Article 9.
[152] Article 2.
[153] Article 5.
[154] See Articles 20, 22, 23, 24.

to be established on the African Court.[155] However, Article 32 provided that the Commission would be seized of this mandate pending the establishment of the African Court. This is different from other Protocols to the African Charter. The two Protocols to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa[156] and the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa[157] clothe the African Commission with the mandate to interpret their provisions in accordance with the African Charter, and the Commission may refer matters of interpretation and enforcement or any dispute arising from its application or implementation to the African Court.

2.3 The Workings of the African Court

From the preceding sections, the African Court has unmatched broad jurisdiction to apply human rights instruments. It is also explicitly mandated to monitor the implementation and enforcement of the Maputo Protocol. This part delves into the accessibility and admissibility requirements of the African Court to understand whether they enhance or limit the filing and adjudication of women's rights issues.

2.3.1 Accessibility

The African Court has two types of access: access as of right and discretionary access.[158] The Court can be accessed as of right by the African Commission, State Parties and African

[155] Article 27, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005) https://au.int/sites/default/files/treaties/37077-treaty-0027_-_protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa_e.pdf. Accessed on 02/05/2021.

[156] Article 34, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted by the thirtieth Ordinary Session of the Assembly on 29 January 2018 https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf. Accessed on 05/05/2021.

[157] Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, Adopted by the 26th Ordinary Session of the Assembly on 31 January 2016; https://au.int/sites/default/files/pages/32900-file-protocol_on_the_rights_of_older_persons_e.pdf. Accessed on 15/05/2021.

[158] 'Ebobrah Admissibility (2009).Pdf'.

Intergovernmental Organizations.[159] Individuals and NGOs with observer status before the Commission may institute case directly before the Court[160] only if member States who have ratified the African Court Protocol make a declaration accepting the Court's competence to receive such cases.[161]

It is important to note that of the thirty African States that have ratified the African Court Protocol, only seven have made a declaration under Article 34(6) accepting the African Court's jurisdiction to hear complaints by individuals and NGOs.[162] It has been argued that the basic genetic structure of the Court and restricted access to it staunchly protects state sovereignty, limiting its power to act so that from the outset, it was fated to be insufficient in its efforts regarding the protection and promotion of human rights.[163]

2.3.2 Admissibility

When determining the admissibility of a case instituted by an NGO or individual, the Court is guided by Article 56 of the African Charter that lays out seven requirements. First, the case needs to indicate the writers even if the latter applies for concealment. Second, it should be compatible with the OAU Charter or the African Charter. Third, it should not be written in scornful directed against the State concerned and its institution or the OAU. Fourth, it must not be based solely on the news publicized through the mass media.

Fifth, it should be sent after exhausting local remedies, if any, unless it is evident that this procedure is unduly prolonged. This is based on the fact that regional and international

[159] Article 5(1).
[160] Article 5(3).
[161] Article 34(6).
[162] Burkina Faso 1998; Malawi 2008; Mali 2010; Ghana 2011; Côte d'Ivoire 2013; Benin 2016. Tunisia signed in 2017 but has not yet deposited its declaration. Rwanda deposited in 2013 and officially withdrew it on 24 February 2016. Tanzania deposited in 2010 but issued a notice of withdrawal in November 2019. https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf. Accessed on 14/05/2021.
[163] Rebecca, Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights, Berkely Journal of International Law, Vol 24, no. 2, 2006, p. 463- 476.

mechanisms are not substitutes for the domestic implementation of human rights but are tools to assist the domestic protection of rights under the principle of complementarity.[164] The principle of complementarity stipulates that when a national body is capable of providing the necessary remedy, it should do so without the international body getting involved, thereby preserving the body's capacity and ensuring that national systems are given the primacy of place.[165]

The local remedies to be exhausted should be available, effective, sufficient and accessible. Additionally, the procedure for accessing the local remedies should not be unduly prolonged and complex. Where remedies are lacking in any of these, or where there are systemic violations, the requirement does not apply.[166]

The sixth criteria are that the case should be submitted within a reasonable period from when local remedies are exhausted or the Commission is seized with the matter. This does not apply where there is an exception to the rule to exhaust local remedies.[167] Each case is considered on its merit to ascertain the reasonableness of the time.

The seventh condition is that the case must not deal with cases that have been settled by the states involved in accordance with the principles of the Charter of the UN or the Charter of the OAU or the provisions of the Charter. [168] This is similar to the principle of *res judicata* and aims to prevent conflicting judgments and ensure that multiple separate bodies do not consider the same case. Under Article 56(7) of the Charter, the mechanisms envisaged must have the

[164] DR Congo v Burundi, Rwanda and Uganda (2004) AHRLR 19 (ACHPR 2004).
[165] International Federation for Human Rights, Admissibility of Complaints before the African Court: A Practical Guide, 2016 https://www.refworld.org/pdfid/577cd89d4.pdf. Accessed on 12/05/2021.
[166] Ibid.
[167] See the African Court case of Beneficiaries of Late Norbert Zongo et al. v. Burkina Faso,.https://en.african-court.org/images/Cases/Judgment/Nobert%20Zongo%20Judgment-%20English.pdf.Accessed on 04/05/2021
[168] Ibid.

capacity to grant declarations or compensation to victims and not mere political resolutions and declarations.[169]

2.4 Conclusion

This chapter laid out the broad jurisdiction the African Court has over any human rights instrument ratified by a State and its additional mandate under Article 27 of the Maputo Protocol to interpret its application and implementation. This, in theory, makes the African Court a powerful forum to hold state parties responsible for the violation of women's rights. However, despite this and despite the fact that to some extent it was the incompetence of the Commission in defending human rights in Africa that led to the creation of the Court, a closer look at its background, function, and structure suggests that it was destined to be weak from the beginning.[170] States are required to not only ratify the African Court Protocol but also make a declaration under Article 34(6). Only a handful of states have made this declaration despite 30 States having ratified the African Court Protocol. Therefore, the drafters of the Maputo Protocol were overly optimistic in mandating the African Court to oversee it, given its structural deficits. Although these treaty requirements and the limited accessibility and admissibility criteria apply to all Africans and appear to be gender-neutral and gender-blind, their result disproportionately affects and disadvantages women.

[169] Sofia Rajab-Leteipan and Mariam Kamunyu, Litigating Before The African Commission on Human and Peoples' Rights Developed by A Practice Manual (2017) https://d3n8a8pro7vhmx.cloudfront.net/equalitynow/pages/712/attachments/original/1537202856/Litigation_Before_ACHPR_Manual_FINAL.pdf?1537202856.

[170] Rebecca Wright, 'Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights (2006) Vol 24, no. 2, Berkeley Journal of International Law, p. 473.

CHAPTER THREE

THE INTERNATIONAL AND REGIONAL FRAMEWORK FOR THE PROTECTION OF WOMEN'S RIGHTS

3.0 Introduction

"The page of history teens with woman's wrongs, and it is wet with woman's tears. For the sake of my degraded sex everywhere, and for the sake of my brethren, who suffer just in proportion as they place woman lower, in the scale of creation than man, lower than her Creator placed her, I entreat my sisters to arise in all the majesty of moral power, in all the dignity of immortal beings, and plant themselves, side by side, on the platform of human rights, with man, to whom they were designed to be companions, equals and helpers in every good word and work." Sarah Grimke[171]

The notion of the rights of women can be traced back to the Grimes sisters in the 1830s, who fought and advocated for abolishing slavery and equality between men and women.[172] One and a half centuries later, at the UN Fourth Conference on Women in Beijing in 1995, Hilary Clinton emphatically repeated the solemn words that human rights are women's rights and women's rights are human rights.[173] Human rights instruments apply equally to men and women and generally include the principles of equality, non-discrimination based on any ground, including sex or gender and entitle women to the full and equal enjoyment of rights and freedoms contained in the treaties.

With the preceding, this chapter briefly and chronologically delves into the human rights framework for the protection of human rights at the international and regional levels that specifically provide for women and girls. It will locate the place of women, and specifically African women, to illustrate that human rights instruments did not explicitly provide for women's rights. Further, this will demonstrate that human rights instruments did not consider

[171] Sarah M. Grimke, Letters on the Equality of the Sexes and the Condition of Woman, Addressed to Mary S. Parker, President of the Boston Female Anti-Slavery Society, Isaac Knapp Publishing. Boston 1838, Harvard College Library https://ia802302.us.archive.org/2lettersonequali00grim.pdf. Accessed on 10/04/2021.

[172] Grimke Sisters Sarah Grimke (1792-1873) and Angelina Grimke Weld (1805-1879) - Notable Women's Rights Leaders https://www.nps.gov/wori/learn/historyculture/grimke-sisters.htm accessed 30 May 2020.

[173] First Lady Hillary Rodham Clinton, Remarks for the United Nations Fourth World Conference On Women, Beijing, China , 5 September 1995 https://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt. Accessed on 04/05/2021.

the realities of African women. In the end, this chapter will set out the unlimited arsenal available to the African Court on gender issues and set the stage to evaluate the jurisprudence of the Court, which has broad unfettered jurisdiction to adjudicate on any matters relating to any human rights instrument ratified by State parties.

3.1 The International Regime

3.1.1 The Charter of the United Nations (1945)

Gender equality was a radical idea when the United Nations was recognized in 1945 as less than one-half of all nations allowed women to vote, and discrimination against women was permitted in virtually all aspects of life.[174] The Preamble of the UN Charter reaffirms confidence in fundamental human rights, the dignity and value of the human person and the equal rights of men and women.[175] One of the purposes of the UN is the promotion and realisation of human rights and fundamental freedoms for all without distinction as to sex. [176] In addition, the Charter allowed for men and women to participate equally in all United Nations functions.[177] This, however, was the full extent of any protections of women's rights within the founding document of the UN.[178] The Charter's language embodied the liberal ideal of equality because it was basically gender-neutral and focused strictly on equal treatment under the law.[179]

3.1.2 The Universal Declaration of Human Rights (1948)

[174] Elizabeth F. Defeis, The United Nations and Women - A Critique, 17 Wm. & Mary J. Women & L. 395 (2011), https://scholarship.law.wm.edu/wmjowl/vol17/iss2/5. Accessed on 06/06/2021.
[175] Charter of the United Nations, Preamble.
[176] See Articles 1 para 3, 13(b) and 55, Charter of the United Nations and Statute of the International Court of Justice, adopted on 26 June 1945, entered into force on 24 October 1945 https://www.un.org/en/sections/un-charter/un-charter-full-text/. Accessed on 02/06/2021.
[177] UN Charter, Article 1(3).
[178] R Christopher Preston and Ronald Z Ahrens, 'United Nations Convention Documents in Light of Feminist Theory' 8 45.
[179] ibid.

The UDHR,[180] recognising the inherent dignity and the equal and inalienable rights of all members of the human family, sets out the rights and freedoms to which all men and women are entitled without any discrimination.[181] When the UDHR was adopted, only four sovereign African States had membership in the UN.[182] Ethiopia, Egypt and Liberia signed the declaration while South Africa abstained.[183] Other African populations were still under colonisation, and therefore the UDHR's espousal of inherent dignity, equality and inalienable human rights was a foreign, farfetched concept for Africans.

MacKinnon critiques the literal language of the UDHR, which, while proclaiming equality and prohibiting discrimination on the grounds of sex, also guarantees a person *his* rights and freedoms.[184] The term "man" is used as a general category throughout the UDHR, though human beings, person, and the male pronoun are consistently used.[185] Such word use has a significant impact on reinforcing gender hierarchies even though the drafters intended the language to be general. It is often unclear whether a writer's intention in using masculine terms is to signify a generic category; in either case, a man knows he is included; a woman is unsure.[186] Women are acknowledged in the UDHR, but only in limited ways, and only insofar

[180] Universal Declaration of Human Rights, adopted by the UN General Assembly resolution 217 A (III) in Paris on 10 December 1948 https://www.un.org/en/universal-declaration-human-rights/index.html. Accessed on 16/06/2021.
[181] The International Bill of Human Rights, Fact Sheet No.2 (Rev.1) https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf.
[182] 'Africa's Freedom Struggles and the Universal Declaration of Human Rights' (*Africa Renewal*, 7 December 2018) https://www.un.org/africarenewal/magazine/december-2018-march-2019/africa%E2%80%99s-freedom-struggles-and-universal-declaration-human-rights accessed 23 September 2020.
[183] ibid.
[184] Catharine MacKinnon, *Are Women Human?, in* Reflections on The Universal Declaration Of Human Rights: A Fiftieth Anniversary Anthology 171.
[185] Hilary Charlesworth, 'The Mid-Life Crisis of the Universal Declaration of Human Rights 17.
[186] Helen Bequaertl-olmes, A Feminist Analysis of the Universal Declaration of Human Rights, In Beyond Domination: New Perspectives on Women and Philosophy 250, 259 (Carol C. Gould ed., 1983).

as they are linked to men through depictions of women as wives, mothers, and vulnerable individuals.[187]

3.1.3 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)

The 1921 International Convention for the Suppression of the Traffic in Women and Children.[188] The International Convention for the Suppression of the Traffic in Women of Full Age[189] built up to the 1949 Convention, aims to eliminate prostitution and the accompanying evil of the traffic in persons for prostitution, which is incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.[190] State parties are required to put in place measures to protect women and children, immigrants, especially, and to prevent those persons seeking employment from being exposed to the danger of prostitution.[191] In 1949, most Africans were under colonisation and slavery, and women were exploited. This Convention did not cover these realities, and it did not oblige States to criminalise prostitution itself while criminalising acts associated with prostitution such as running or keeping brothels.[192] One reason was that the Convention's drafters feared that prohibition would drive prostitution underground, and the laws designed to punish both clients and prostitutes would be selectively enforced only against prostitutes.[193]

[187] Ibid. 161 See Article 16 on the right for men and women of full age to marry and to have a family and article 25 on the need for security in the event of widowhood and that motherhood and childhood are entitled to special care and assistance.
[188] International Convention for the Suppression of the Traffic of Women and Children, 30 September 1921.
[189] International Convention for the Suppression of the Traffic in Women of Full Age, 11 October 1933.
[190] Preamble, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, approved by General Assembly resolution 317 (IV) of 2 December 1949, entry into force 25 July 1951 https://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx. Accessed on 10/09/2020.
[191] Article 17(1) and 20.
[192] Article 2.
[193] N. Demleitner, 'Forced Prostitution: Naming an International Offence,' 18 Fordham International Law Journal (2000), 163–96, at 167.

This Convention declares prostitution incompatible with the dignity and worth of the human person and obliges States to criminalise all forms of procurement and exploitation for prostitution, with or without consent of the woman involved.[194]

3.1.4 The Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951)

The International Labour Organization (ILO) has championed women workers rights and equality throughout its history, including the principle of equal pay for work of equal value, asserted in its Constitution of 1919.[195] ILO acknowledges that women require special consideration, either through protective legislation or various promotional efforts.[196] Although these treaties sometimes profit women, they also reinforce specific stereotypes and opinions about women in the workforce, as they assume that male worker is the 'norm.[197] This reproduces the assumption that because women workers differ from the norm, they are not entitled to the same rights, remuneration and obligations as men.[198] Male workers thus benefit from this privileged position but also have not been included, until recently, in ILO legislation divorced from their role as workers. However, the ILO has begun to highlight the struggles of women's equality and to re-evaluate the impact their policies on women may have on their role in the family, workforce and society.[199]

[194] Marjan Wijers, Purity, Victimhood and Agency: Fifteen years of the UN Trafficking Protocol, Anti-Trafficking Review, issue 4, 2015, pp. 56—79, www.antitraffickingreview.org. Accessed on 23/10/2020.
[195] Shamier Ebrahim, 'Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom' (2016) 19 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad.
[196] Ibid.
[197] Amarildo Laci, Armela Maxhelaku and Ilir Rusi, 'Equality at Work and Discrimination in Employment and Occupation' (2017) 7 Journal of Educational and Social Research.
[198] Ebrahim (n 200).
[199] Ibid.

The equal pay for work of equal value without discrimination based on sex principle is guaranteed by this Convention.[200] Ratified by all African States except Liberia, South Sudan and Somalia, this Convention also did not have African women in mind, who was not only under slavery but faced limited options in terms of employment, let alone remuneration.[201]

3.1.5 Convention on the Political Rights of Women (1952)

The Convention guarantees women's right to run for political office without being discriminated against. Article 1 guarantees women the right to vote in all elections on an equal footing with men; article 2 states that women are eligible to serve on all publicly elected bodies, and article 3 states that women are entitled to hold public office and perform all public functions.[202] In 1952, a handful of democratic nations in Africa existed, with most grappling with colonisation and the struggle for sovereignty. In addition, women's suffrage in Africa had only been acquired in Liberia (1946), Niger (1948), Senegal (1945) and Cote D'Ivoire (1952). Even in those states, women had not achieved a status where they could freely run for elective offices and appointments of women by the states was rare.

3.1.6 Convention on the Nationality of Married Women (1957)

This Convention guarantees married women the right to retain their nationality during marriage and at its dissolution.[203] It has been ratified by Côte d'Ivoire, Estawini, Ghana, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritius, Rwanda, Sierra Leone, South Africa, Tunisia,

[200] Article 2, Equal Remuneration Convention, 1951 (No. 100) adopted by the General Conference of the International Labour Organisation, on 29 June 1951, entry info force 23 May 1953 https://www.ilo.org/wcmspen.pdf. Accessed on 12/08/2020.
[201] Sandra Whitworth, Gender, international relations and the case of the ILO, Review of International Studies (1994), 20, 389-405 *20(04), 389.* doi:10.1017/s0260210500118182.
[202] Ibid.
[203] Convention on the Nationality of Married Women adopted by the General Assembly resolution 1040 (XI) on 29 January 1957, entry into force 11 August 1958.

Uganda, Tanzania, Zambia and Zimbabwe.[204] Similar to the other treaties, this Convention was alien to African women, and even today, the nationality of married women remains one of the critical human rights challenges for African women.

3.1.7 Convention concerning Discrimination in Respect of Employment and Occupation (1958)

Discrimination is defined as any distinction, exclusion, or preference made based on sex that has the consequence of nullifying or impairing equality of opportunity or treatment in employment or occupation under this Convention.[205] It outlaws all forms of discrimination and requires member states to implement a national policy promoting equal opportunity and treatment in employment.[206] During the drafting and adoption of this Convention, African women lacked an explicit right to employment and faced discrimination in most professions.

3.1.8 Convention against Discrimination in Education (CADE) (1960)

The CADE is based on the UDHR's principle of non-discrimination and the right of every person to education and the role of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) in promoting universal respect for human rights and equal educational opportunity for all.[207] Article 1 defines discrimination to include any distinction, exclusion, limitation or preference that, being based on sex, has the purpose or effect of depriving education, limiting education to an inferior standard, or establishing or maintaining

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[204] 'United Nations Treaty Collection' https://treaties.un.org/PAGES/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVI-2&chapter=16&Temp=mtdsg3&clang=_en accessed 23 September 2020.

[205] Discrimination (Employment and Occupation) Convention, adopted by the 42nd ILC session on 25 June 1958, entry into force 15 June 1960 https://www.ilo.org/dyn/normlex/INSTRUMENT_ID:312256:NO. Accessed on 16/10/2020.

[206] Ibid. Article 2.

[207] Preamble, Convention against Discrimination in Education, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960, entered into force on 22 May 1962 http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html. Accessed on 12/08/2020.

separate educational systems or institutions.[208] Apart from colonisation, in the 1960s, education for girls and women was a preserve of a few lucky people. Girls were subjected to child marriage, and most communities did not value educating them as they would be married and leave; therefore, boys were educated. Today, many African nations continue to discriminate against girls, particularly pregnant girls, by either banning them from attending schools like in Sierra Leone until 2019 and Tanzania and many lack re-entry policies and support for teenage mothers to go back to school.

3.1.9 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)

This Convention is anchored on Article 16 of the UDHR, which entitles men and women of full age to enter into a marriage marrying the intending spouses' free and full consent and starting a family. It mandates states parties to take legislative action to specify a minimum age for marriage below which no person can marry, except where a competent authority has granted a dispensation as to age, for serious reasons, in the intending spouses' interest. [209] This is another treaty that completely lacked African women's realities. Apart from colonisation and the non-registration of marriages, child marriage and forced marriages by abduction in line with various African communities' culture was commonplace. The minimum age of marriage was non-existent, with puberty marking this stage for most girls, and consent was unheard of.

3.1.10 International Covenant on Civil and Political Rights (ICCPR) (1966)

[208] Ibid. Article 1.
[209] Article 2, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages adopted by the General Assembly resolution 1763 (XVII) on 7 November 1962, entry into force 9 December 1964 https://treaties.un.org/doc/Treaties/1964/12/19641223%2002-15%20AM/Ch_XVI_3p.pdf. Accessed on 15/10/2020.

ICCPR[210] enjoins state parties to respect and ensure the equal right of men and women to enjoy the rights in the Convention without distinction of any kind, such as sex or another status.[211] Even though states parties are permitted to deviate from their obligations under the Covenant during a public emergency under Article 4, these measures must not be inconsistent with other international law obligations and must not involve discrimination solely based on race, colour, sex, language, religion, or social origin.[212] Article 23 protects the right to marry and start a family and requires states parties to ensure that spouses' rights and responsibilities are equal before, during, and after marriage, while Article 24 provides that every child is protected without discrimination.[213] Article 26 proclaims that all persons are equal before the law and are entitled without discrimination to the equal protection of the law.[214]

3.1.11 International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

ICESCR[215] mandates state parties to guarantee the equal right of men and women to enjoy the rights in the Covenant without discrimination.[216] Article 7 evokes the Convention on Discrimination in Employment and Occupation (1958), which guarantees the right to just and favourable working conditions, including fair wages and equal remuneration for work of equal value without distinction of any kind, with women being guaranteed working conditions that are not lesser to that enjoyed by men, with equal pay for equal work.[217] The CADE (1960) on

[210] International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976 https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx. Accessed on 19/09/2020.
[211] Ibid. Article 2 and 3.
[212] Ibid.
[213] Ibid, Article 23.
[214] Ibid, Article 26.
[215] International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976 https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx. Accessed on 12/08/2020.
[216] Ibid. Article 2 and 3.
[217] Ibid, Article 7.

the right to education for all, which should be available and accessible, is echoed in Article 13.[218]

3.1.12 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)

CEDAW, the international bill of rights for women, was the first global instrument to comprehensively address women's human rights within all the spheres of life: political, social, economic and cultural. It is the second most ratified human rights instrument after the CRC, with 189 of 197 UN member states. It is anchored on the UN Charter and the International Covenants on Human Rights, being the UDHR, ICCPR and ICESCR, noting that extensive discrimination against women continues to exist despite these instruments. [219] It came after the Declaration on the Elimination of Discrimination against Women.[220]

It champions gender equality, expansively defines discrimination based on sex while recognising its root causes and systemic nature, mandating state parties to respect, protect, and fulfil women's rights. Prejudice against women is defined as any distinction, exclusion, or restriction based on sex that has the effect or purpose of impeding or nullifying the recognition, enjoyment, or exercise by women, irrespective of marital status, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other sphere,

[218] Ibid, Article 13.
[219] Preamble, Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly on 18 December 1979, entry into force on 3 September 1981. https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx. Accessed on 4/12/2020.
[220] The Declaration on the Elimination of Discrimination against Women is a human rights proclamation adopted by the General Assembly on 7 November 1967. It was an essential precursor to the legally binding 1979 CEDAW and was drafted by the Commission on the Status of Women in 1967 http://wwda.org.au/wp-content/uploads/2013/12/decdiswom1.pdf See also the Declaration on the Elimination of Violence against Women Proclaimed by General Assembly resolution 48/104 of 20 December 1993 https://www.un.org/en/declaration%20elimination%20vaw.pdf. Accessed on 04/07/2020.

based on equality of men and women. [221] Men and women have equality before the law, are entitled to equal protection and have equal legal capacity.[222]

Article 2 mandates state parties to condemn discrimination against women in all its forms and take measures to eliminate discrimination against women and guarantee men and women's equality. State parties should ensure the full development and advancement of women in the political, social, economic and cultural fields as a basis of equality with men according to Article 3 and further adopt temporary special measures to accelerate equality between men and women under Article 4. Article 5 calls for the modification of the social and cultural patterns to eliminate prejudices, customary and other practices based on the inferiority or the superiority of either sex or stereotyped roles for men and women. Article 6 echoes the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949) and mandates state parties to suppress all forms of traffic in women and exploitation of the prostitution of women.[223]

State parties are required to eliminate gender discrimination in public and political life, as well as ensure women have a right to vote and be eligible for election to all publicly elected bodies, as well as to take part in the planning and implementation of government policy, as well as to hold public office and perform all public functions at all levels of government.[224] Women should have the opportunity to represent their Governments at the international level and participate in the work of international organisations on equal terms with men and without any discrimination.[225]

[221] Supra note 20, Article 1.
[222]Ibid. Article 15.
[223] General recommendations made by the Committee on the Elimination of Discrimination against Women https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm. Accessed on 12/04/2021.
[224] Ibid. Article 7.
[225]Ibid. Article 8.

Women have equal rights with men to acquire, change or retain their nationality regardless of marriage[226] in line with the Convention on the Nationality of Married Women (1957). Women have the same right as men to enter into marriage and during family relations.[227]

CEDAW prohibits discrimination in education and calls for eliminating any stereotyped concept of men and women's roles and reducing female student drop-out rates and organisation of programmes for girls and women who have left school prematurely.[228] Likewise, discrimination in employment is prohibited while protecting the right to work, the same employment opportunities and treatment and married and pregnant women and mothers to work.[229] Women have the right to healthcare, including appropriate support during pregnancy and family planning.[230] States Parties are mandated to consider the specific problems faced by rural women and the significant roles that rural women play in the economic survival of their families, including their work in the non-monetised sectors of the economy.[231]

The Committee on the Elimination of Discrimination against Women is tasked with monitoring the progress of the implementation of CEDAW.[232]

Regrettably, reservations to human rights treaties, particularly the CEDAW, obstruct their effectiveness.[233] Reserving states justify their reservations on the grounds of religion, culture, tradition, and economics.[234] Notwithstanding the requirement that reservations be incompatible with the treaty's object and purpose, reservations to CEDAW have been tolerated to achieve

[226]Ibid. Article 9.
[227] Ibid. Article 16.
[228] Ibid. Article 10.
[229] Ibid. Article 11.
[230] Ibid. Article 12.
[231]Ibid. Article 14.
[232] Established under Article 17, CEDAW.
[233] Declarations, Reservations, and Objections to CEDAW, UNITED NATIONS, http://www.un.org/womenwatch/daw/cedaw/reservations-country.html. Accessed on 13/05/2020.
[234] Elizabeth F. Defeis, Women's Human Rights: The Twenty-First Century, 18 FORDHAM INT'L LJ 1748, 1751 (1995).

maximum adherence to the Convention.[235] The reservations demonstrate the incompetence of international law's current normative structure since the international community is willing to recognise the significant existing inequalities women face explicitly, but only if individual states are not forced to change patriarchal practices that oppress women as a result.[236]

The Convention's overall rationale is equality and non-discrimination to achieve equality of treatment in the public sphere between men and women.[237] Some have criticised this approach for requiring women to conform to a male-defined world while ignoring the root causes of inequality.[238] More recently, it has been suggested that gender equity, rather than equality, should be used as the criterion.[239]

CEDAW establishes much weaker implementation procedures than those of other human rights instruments of apparently universal applicability, such as the International Convention on the Elimination of All Forms of Racial Discrimination[240] and the ICCPR. More generally, CEDAW's specialised nature has been used by ''mainstream'' human rights bodies to validate disregarding or minimising the perspectives of women.[241] These bodies can comfort themselves that they are relieved from holding states accountable for women rights violations since these issues are analysed elsewhere, yet the effect on women and men are not the same, for example, under ICESCR and ICCPR.[242]

[235] Vienna Convention on the Law of Treaties art. 19, 23 May 1969.
[236] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' The American Journal of International Law, Vol. 85, No. 4 (Oct. 1991), pp. 613-645 http://www.jstor.org/stable/2203269 . Accessed on 10/03/2021.
[237] Marsha A Freeman, 'The Human Rights of Women under the CEDAW Convention: Complexities and Opportunities of Compliance' (1997) 91 Proceedings of the Annual Meeting (American Society of International Law) 378 <https://www.jstor.org/stable/25659151> accessed 7 March 2021.
[238] Ibid.
[239] Ibid.
[240] Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195, reprinted in 5 ILM 352 (1966).
[241] Charlesworth, Chinkin and Wright (n 43).
[242] ibid.

3.1.13 Convention on the Rights of the Child (CRC) (1989)

The CRC[243] is the most widely ratified treaty in history, boasting a membership of all 197 UN member states except the United States. Every person is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as sex[244] , and state parties should respect and ensure the rights in the Convention are enjoyed without discrimination.[245] All actions concerning children should have the best interest of the child as the primary consideration.[246]

State parties should ensure that education of the child is directed towards preparation for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples.[247]

3.1.14 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2003)

This is a Protocol to the UN Convention against Transnational Organized Crime. Similar to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), it aims to prevent and combat trafficking in persons, paying particular attention to women and children and also to protect and assist the victims of trafficking, with full respect for their human rights. [248]

[243]Convention on the Rights of the Child, adopted by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990 https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx. Accessed on 12/08/2020.
[244] Ibid. Preamble.
[245] Ibid. Article 2.
[246] Ibid. Article 3.
[247] Ibid. Article 29.
[248] Article 2 and 9, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, entry into force 25 December 2003.

3.2 The African Human Rights System

3.2.1 The African Charter on Human and Peoples' Rights (ACHPR) (1981)

The ACHPR builds on the foundation of international human rights instruments. Every individual is entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the ACHPR without distinction of any kind such as sex or any status[249] in line with the principle of equality before the law and equal protection of the law.[250]Each individual owes it to their fellow beings to respect and consider them without prejudice and maintain relationships aimed at promoting, safeguarding, and reinforcing mutual respect and tolerance.[251]

The African Charter is further tailored to the communal model that most African societies have, providing entitlement to the enjoyment of rights and duties and obligations, too, a combination that ensures the cohesion of their communities.[252] The ACHPR recognises group rights, which had been resisted in other parts of the world along the lines of ideological and jurisprudential division drawn during the Cold War with the Western emphasis on liberty, rights and competition while the East emphasised equality, duties and compulsion. The solidarity rights represented an African emphasis on fraternity, reciprocity and compassion, founded on the philosophy of African humanism. These include the rights of people to existence, equality, self-determination, sovereignty over natural resources, peace and security, development and a satisfactory environment.

However, the ACHPR was silent on women's rights specifically. Only one provision addresses women: Article 18 on the family. According to paragraph 3, the state must eliminate all forms

[249] Article 2, African (Banjul) Charter on Human and Peoples' Rights, adopted by the eighteenth Assembly of Heads of State and Government of the OAU on 27 June 1981, entry into force 21 October 1986 https://www.achpr.org/public/Document/file/English/banjul_charter.pdf. Accessed on 03/06/2020.
[250] Ibid. Article 3.
[251] Ibid. Article 28.
[252] Makau was Mutua: The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties, Virginia Journal of International Law No. 35 (1999) p. 339- 380. 51 F.

of discrimination against women and the protection of women's and children's rights as outlined in international declarations and conventions.[253] The normative content of the Charter concerning the protection of women's rights was inadequate in light of the context of the numerous human rights violations and gender inequality faced by women in Africa. Other shortcomings of the African Charter in terms of women's and girls' rights include the failure to define discrimination against women and girls explicitly; a lack of guarantees of the right to consent to, equality in marriage; and an emphasis on traditional values and practices, which in many cases impede the advancement of women's and girls' rights in Africa. [254]

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

The African women's bill of rights builds on human rights instruments including the UDHR, ICCPR, ICESCR, CEDAW, African Charter on the Rights and Welfare of the Child and strengthens the ACHPR's provisions on gender equality. The Maputo Protocol incorporates clear and expansive definitions of discrimination against women, including economic harm, harmful practices[255] such as female genital mutilation and sexual and gender based violence against women.

It was the first treaty to place domestic violence,[256] polygamy,[257] HIV/AIDS[258] and medical abortion[259] in a binding human rights framework. It provided specificity where vagueness

[253] Ibid.
[254] 'Breathing Life into Maputo Protocol Case Digest-Jurisprudence on the Rights of Women and Girls in Africa.Pdf'.http://www.soawr.org/sites/default/files/Breathing%20Life%20into%20Maputo%20Protocol%20Case%20Digest-Jurisprudence%20on%20the%20Rights%20of%20Women%20%20and%20Girls%20in%20Africa.pdf accessed 3 April 2020.
[255] Article 5 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf. Accessed on 3/05/2020.
[256] Ibid. Article 4(2).
[257] Ibid. Article 6(c).
[258] Ibid. Article 14(1)(e).
[259] Ibid. Article 14(2)(k).

prevailed in the African Charter,[260] describing the African Charter's "Positive African Values" as those based on the principles of equality, peace, freedom, dignity, justice, solidarity, and democracy.[261] It goes into greater detail about socio-economic rights than CEDAW, which is limited to rural women;[262] provides for the right to food security[263] and adequate housing;[264] electoral quotas for women;[265] emphasises corrective and specific positive action and requires special measures to be put in place to mitigate against discrimination.[266] It requires states parties to reduce military expenditure significantly in favour of spending on social development in general and promoting women in particular.[267]

The Maputo Protocol mandates states to protect civilians, including women, during armed conflict and prohibits any child, specifically girls under 18 years, from directly taking part in hostilities or being recruited as a soldier.[268] It also recognises that women can be victims of multiple discrimination and intersectionality of violations and therefore identifies unique categories such as widows, elderly, women with a disability and in distress such as nursing or pregnant women in detention and refugees.[269]

3.2.3 African Charter on the Rights and Welfare of the Child (ACRWC)

Drawing inspiration from the CRC, the ACRWC responds to the realities of the socio-economic, cultural, traditional and developmental circumstances of Africa in a bid to protect children, who occupy a unique and privileged position in the African society and should have

[260] Nega Ewunetie and Admasu Alemayehu, Protection for Women under African Human Rights System, https://www.abyssinialaw.com/item/371-protection-for-women-under-african-human-rights-system. Accessed on 04/07/2020.
[261] Preamble, Maputo Protocol.
[262] Ibid. Articles 12 – 16.
[263] Ibid. Article 15.
[264] Ibid. Article 16.
[265] Ibid. Article 9.
[266] Ibid. Article 2.
[267] Ibid. Article 10(3).
[268] Ibid.Article 11.
[269] See Articles 20, 22, 23, 24, Maputo Protocol.

full and harmonious development of personality in a family environment and in an atmosphere of happiness, love and understanding.[270] The Charter emphasises four distinguishable principles of child's rights protection: non-discrimination in the enjoyment of its rights and freedoms,[271] including during apartheid;[272] the best interest of the child;[273]the survival, development and protection of the child;[274] and freedom of expression.[275]

The ACRWC affirms the right to education and calls for particularly special measures to protect female, gifted, and disadvantaged children and pregnant children, who should be able to continue their education based on their individual abilities.[276] It requires state parties to eliminate harmful social and cultural practices that harm a child's welfare, dignity, normal growth and development, particularly those that endanger the child's health or life and those that discriminate against children based on their sex or other status.[277] It prohibits child marriage, specifies the minimum age of marriage to be 18 years and mandates parties to register all marriages in an official registry compulsory.[278]

3.2.4 African Youth Charter (2006)

The Charter draws inspiration from the international bill of rights, the African Charter, CEDAW and the Maputo Protocol. It enshrines non-discrimination in the enjoyment of the rights and freedoms recognised and guaranteed in it irrespective of race, ethnic group, colour,

[270] Preamble, African Charter on the Rights and Welfare of the Child, adopted by the OAU in 1990, entry into force in 1999 https://au.int/sites/default/files/treaties/36804-treaty-0014_-_african_charter_on_the_rights_and_welfare_of_the_child_e.pdf. Accessed on 11/02/2021.
[271]Ibid. Article 3.
[272] Ibid. Article 26.
[273] Ibid. Article 4.
[274] Ibid. Article 5.
[275] Ibid. Article 7.
[276]Ibid. Article 11.
[277] Ibid. Article 21(1).
[278]Ibid. Article 21(2).

sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.[279]

Under the right to education and skills development, individual states should include HIV/AIDS, reproductive health, substance abuse prevention, and cultural practices that are dangerous to human health of young girls and women in their education curricula;[280] ensure that girls and young women who become pregnant or married before completing their education have the opportunity to continue their education, and ensure that girls and young women who become pregnant or married before completing their education can continue their education.[281]

Article 23 requires states parties to eliminate discrimination against girls and young women in accordance with obligations outlined in various international, regional, and national human rights conventions and instruments aimed at protecting and promoting women's rights, while Article 25 calls for the abolition of harmful social and cultural practices that harm youth's well-being and dignity.[282]

3.2.5 African Charter on Democracy, Elections and Governance (2007)

The Charter embodies the principle of non-discrimination and demands that measures be taken to protect women's rights, ethnic minorities, migrants, people with disabilities, refugees and displaced people, and other social groups who are marginalised and vulnerable.[283] Recognising the critical role of women in the development and strengthening of democracy, states should create conditions for women's full and active participation in politics, decision-making

[279] Ibid. Article 2, African Youth Charter, adopted by the AU on 2 July 2006. entry into force 8 August 2009 https://au.int/sites/default/files/treaties/7789-treaty-0033_-_african_youth_charter_e.pdf, Accessed on 04/01/2021.
[280] Efem Ubi, 'African Youth Charter: Prospects for the Development of the African Youth' (2007).
[281] Ibid. Article 13(3)(f), (h) and(l).
[282] Ibid, Section 25.
[283] Article 8, African Charter On Democracy, Elections And Governance, adopted on 25 October 2011, entry into force 15 February 2012 https://www.achpr.org/legalinstruments/detail?id=29. Accessed on 06/03/2021.

processes, and structures and ensure gender parity in representation at all levels, including legislatures.[284] State Parties must provide free and compulsory basic education to all children, particularly girls, and ensure that citizens over the age of compulsory schooling, particularly women, rural residents, minorities, people with disabilities, and other socially marginalised groups, are literate.[285]

3.2.6 Gender Peace and Security Programme (GPSP) (2015 – 2020)

Between January 2015 and December 2020, the AU Commission ran the GPSP Programme to develop effective strategies for gender mainstreaming into the African Peace and Security Architecture to take into account men's and women's experiences and potentialities in building secured and stable societies.[286] It employed to research and tool development to contribute towards the development of long-term strategies and mechanisms to address gender mainstreaming, policy development and debate in the field of gender, peace and in-so-doing enhance the dialogue around gender, peace and security and contribute towards coordinated programming in this area by the AU, the UN, the RECs, INGO, CSOs and other multilateral and bilateral partners working on these issues in Africa.[287]

3.2.7 The African Union Strategy for Gender Equality & Women's Empowerment (GEWE) (2018-2028)

The Strategy, informed by the findings of the evaluation of the AU 2009 Gender Policy, lays out a plan to realise Aspiration 6 of the African Union's Agenda 2063, which aims for an Africa where development is people-driven, relying on the potential offered by people, especially its women and youth, and caring for children, as well as the principles enshrined in Article 4 (l)

[284] Ibid. Article 29.
[285] Ibid. Article 43.
[286] African Union Commission, Peace and Security Department, Gender Peace and Security Programme.
[287] Ibid.

of the AU's Constitutive Act on the promotion of women and youth.[288] The Strategy aims to reduce and eliminate significant roadblocks to gender equality and women's empowerment and jump ahead of the African Union in seizing new global momentum for this agenda. [289] Maximising economic outcomes, opportunities, and tech E dividends; dignity, security, resilience; effective laws, policies, and institutions; and leadership, voice, and visibility are the four pillars.[290]

3.3 Conclusion

The preceding discussion has highlighted the international and human rights instruments that protect women and girls' rights, most of which have been ratified by African states. During the development of these instruments, women were unrepresented in the law-making process as the majority of the heads of states, diplomatic representatives and heads of international organizations were male. Consequently, this long-term domination of the bodies involved in the development of human rights norms domestically, regionally and globally means that issues conventionally of concern to men were seen as general human concerns, while women's issues were a special limited category.[291] This is clearly demonstrated by the need to supplement the international and regional human rights regime through CEDAW and the Maputo Protocol, as women's rights were inadequately provided. Most of the instruments did not include women's rights, and even when they did, they failed to have the realities of African women in mind. A few of the instruments, such as from the ILO that seemingly championed gender equality and protected women workers in some way, reproduced the stereotypical role of women and the male standard or worker.

[288] The African Union Strategy for Gender Equality & Women's Empowerment (GEWE) for 2018-2028.
[289] Agenda 2063 and the Sustainable Development Goals.
[290] Ibid.
[291] Charlesworth, Chinkin and Wright (n 43).

Subsequent treaties have been gender-sensitive and have been alive to the different impact the law has on men and women and other special interest groups. Indeed, today, there are numerous initiatives and special procedures under the UN and the AU aimed at making gender equality a reality and addressing the bottlenecks that hold back its realization. All in all, treaties contain minimum standards and aspirational norms expected to inspire change in states and advance human rights. Therefore, they remain critical in the protection and promotion of women's rights. In addition to the general comments of the various monitoring mechanisms established under them, these treaties and charters afford a rich body of norms, standards, and jurisprudence available to the African Court in the adjudication of women's rights case. The next chapter will problematize why the African Court has adjudicated on a minimal number of cases and analyse its decisions on women rights issues.

CHAPTER FOUR

THE JURISPRUDENCE OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS WITH REGARDS TO WOMEN'S RIGHTS

4.0 Introduction

The preceding chapter discussed the various international and regional human rights instruments that specifically provide for women's rights available to the African Court. This chapter delves into the jurisprudence of the African Court on women's rights to appraise the Court's role as the interpreter of the application and implementation of the Maputo Protocol.[292] It problematizes why the African Court has adjudicated on a limited number of cases despite the continued widespread violation of women's and girls' rights in Africa. Due to the scarcity of this jurisprudence, the chapter will also highlight the communications handled by the African Commission that impact women's rights.

The chapter concludes that while the African Court is in theory the perfect human rights body for the protection of women's rights in Africa, its accessibility criteria and admissibility requirements hinder access by individuals and NGOs and thereby contribute to the little jurisprudence. This deals a double blow for women, since the Court is the interpreter *par excellence* of the Maputo Protocol. The international law-making process excluded women since they were underrepresented in international affairs, and as a result, men almost exclusively created international law.[293] This resulted in the international and regional framework being gendered in favour of the male and ignoring women's issues. The African Charter failed to recognize women's rights and interests, and the subsequent African Court

[292] Article 27, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005) https://au.int/sites/default/files/treaties/37077-treaty-0027_protocol_e_rights_of_women_in_africa_e.pdf. Accessed on 05/04/2021.
[293] Charlesworth, Chinkin and Wright (n 43).

Protocol over-protects states and the principle of sovereignty to the detriment of women's rights. On the other hand, the African Commission has had many missed opportunities to expound on women's rights issues through its communication procedure, and it showed apathy and insensitivity to gender issues. It replicated women's subordinate status[294] and applied the male standard when gauging human rights violations instead of including things that mostly or only face women, and not just what happens to some men that might sometimes also happen to some women.[295] However, the Commission has gradually become more gender-sensitive and is slowly but surely asserting itself as a worthy quasi-judicial protection mechanism.

4.1 African Court Cases

The African Court began its operations in November 2006 in Addis Ababa, Ethiopia, before it moved to Arusha, Tanzania, in August 2007. From 2006 to 2008, the Court handled administrative and operational issues, such as the Court's registry structure, preparation of its budget and drafting of Interim Rules of Procedure.[296] As of October 2021, it has received 335 applications: 300 instituted by individuals, 21 by NGOs and three from the African Commission. 116 of these have been finalised, four transferred to the African Commission, while 208 are pending.[297] The Court has also received 15 requests for advisory opinions, all of which have been finalised.[298]

The African Court has only adjudicated on three applications related to the Maputo Protocol, two of which were dismissed and one determined on its merits. These cases are discussed

[294] Catharine A. Mackinnon, *Toward Feminist Jurisprudence, in* Toward A Feminist Theory of the State 237, 249 (1989).
[295] Karima Bennoune, Why Does It Matter If Women Are Human: Catharine MacKinnon's Contributions to International Law, 46 Tulsa L. Rev. 107 (2013).
[296] African Court on Human and Peoples' Rights Clocks 10 Years, Year of Human Rights, with particular focus on the Rights of Women, AU Echo 2016 '31192-Wd-Au_echo_magazine_-_web.Pdf' <https://au.int/sites/default/files/newsevents/workingdocuments/31192-wd-au_echo_magazine_-_web.pdf> accessed 29 June 2020.
[297] 'Contentious Matters' <https://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#statistical-summary> accessed 28 June 2020.
[298] 'African Court Cases | Statistic' <https://www.african-court.org/cpmt/statistic> accessed 30 October 2021.

hereunder to decipher any trends and attempt to explain why, as noted by the President of the African Court in 2016, despite the massive ratification of the Maputo Protocol, expectations about the volume of litigation have been disappointing, especially given the serious violations experienced by African girls and women.[299]

4.1.1 Request for Advisory Opinion by the Centre for Human Rights University of Pretoria, Federation of Women Lawyers Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association[300]

The 5 Applicants were registered NGOs based in South Africa, Nigeria, Kenya and Zimbabwe working on women's human rights issues and with Observer Status before the African Commission. The advisory opinion, anchored on the principle of non-discrimination,[301] sought the African Court's enunciation with respect to Article 6(d) of the Maputo Protocol, which provides for the recording and registration of marriages.

The applicants submitted that unrecorded and unregistered marriages are common in Africa due the following: inadequate domestic law requirements for the compulsory registration of all forms of marriages; high cost and onerous requirements of registration; unequal gender relations; lack of awareness; and lack of legal frameworks regulating the consequences of unrecorded and unregistered marriages.[302] Consequently, women are rendered vulnerable as they are unable to provide proof of marriage, secure land and property rights, enforce the requirement that a woman's consent must be sought before a man takes a second wife in a

[299] Honourable Justice Sylvain Oré, Final Communiqué of the 59th Ordinary Session of the African Commission on Human and Peoples' Rights, 21 October to 4 November 2016, Banjul, The Gambia, para 10. https://www.achpr.org/sessions/info?id=262. Accessed on 03/07/2020.
[300] African Court Case No. 1 of 2016; Judgment 2 September 2017 https://en.african-court.org/images/Cases/Judgment/001-2016-RequestforAdvisoryOpinion-28September2017.pdf. Accessed on 16/02/2021.
[301] Article 2, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
[302] Request for Advisory Opinion by the Centre for Human Rights University of Pretoria and 4 Others (2017).

polygamous marriage, are easily divorced, and it makes it difficult for countries to collect, monitor and analyse vital information about the populace.[303]

The African Court was asked to expound on five issues. First, whether the failure to enact laws requiring and regulating marriage registration constitutes a violation of the Maputo Protocol. Second, the nature and scope of the State obligation under Article 6(d) of the Maputo Protocol in light of the broader duty of States to respect, protect and promote the rights of women as enshrined in the Protocol. Third, to confirm that Article 6(d) of the Maputo Protocol does not suggest or require that non-registration invalidate a marriage. Fourth, whether State parties are required to enact national laws that provide for condonation procedures to correct or remedy non-compliance with registration requirements. Finally, the legal consequences that flow from non-registered marriages, having regard to the overall purpose of the Maputo Protocol and the specific protections and commitments set out therein and in other relevant instruments.

With regards to the Court's jurisdiction, the Applicants posited that Article 4(1)[304] of the African Court Protocol[305] as read with Article 68(1) of the Rules of Court,[306] two types of organisations are envisioned: African Intergovernmental Organisations entitled to submit cases to the Court under Article 5(1)(e) and NGOs with observer status before the African Commission, which may be allowed by the Court to institute cases directly under Article 5(3).

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[303] Ibid.

[304] "*At the request of a Member State of the OAU [AU], the [AU], any of its organs, or any African organisation recognised by the AU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments…*"

[305] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 10 June 1998 https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and. Accessed on 4/02/2021.

[306] Article 68 of the Rules of Court https://en.african-court.org/Final_Rules_of_Court_.pdf "*Requests for advisory opinions pursuant to article 4 of the Protocol may be filed with the Court by a Member State, by the African Union, by any organ of the African Union or by an African Organization recognised by the African Union*."

The Court reiterated its earlier findings in the *Advisory Opinion of Socio-Economic Rights and Accountability Project (SERAP)*[307] that Article 4(1) of the African Court Protocol covers both NGOs and Inter-Governmental Organisations and that Observer Status before any AU organ does not amount to recognition by the AU, which is obtained only through the granting of Observer Status or the signing of a Memorandum of Understanding with the AU. Therefore, although the applicants were African organisations within the meaning of Article 4(1), they were not recognised by the AU and therefore, the Court could not issue the advisory opinion.

This case provided an opportunity for the African Court to pronounce itself on the registration of marriage, an issue that persists to this day and leaves African women disadvantaged. It has been criticised as the Court restrictively applied the rule concerning *locus standi,* excluding many NGOs from accessing the Court.[308] Indeed, Justice Rafâa Ben Achour, in his individual opinion,[309] despaired that the Court had no choice and could not have done otherwise as its hands were tied by the explicit terms of Article 4(1) of its Protocol and the restrictive practice of the AU in granting observer status to NGOs. The Honourable Judge pointed out that Article 4(1) of the Protocol on institutions entitled to seek the Court's advisory opinion is paradoxically more restrictive than Article 5(3)[310] on NGOs entitled to refer cases to the Court, which only require observer status before the Commission. The judge concluded with the hope that the AU would amend Article 4(1) of the Protocol to open up possibilities for referrals to the African Commission and relax the conditions required of NGOs to request advisory opinions or to

[307] Request for Advisory Opinion by Soci0-Economic Rights and Accountability Project (SERAP), Request No. 001/2013, Advisory Opinion of 26 May 2017.
[308] Tom Gerald Daly and Micha Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court' (2018) 14 International Journal of Law in Context 294.
[309] 'Opi_indivi_Avis_du_28_sept_2017._Eng.Pdf' https://en.african-court.org/images/Cases/Dissenting-Separate%20Opinions/Opi_indivi_Avis_du_28_sept_2017._Eng.pdf. Accessed on 12/08/2020.
[310] "The Court may entitle relevant non-governmental organisations (NGOs) with observer status before the Commission … to institute cases directly before it, in accordance with Article 34(6) of this Protocol."

broaden its criteria for granting observer status to include NGOs with similar status before the African Commission.

This case bring out one factor that could add to the volume of litigation before the African Court. NGOs play a critical role as apart from States and individuals, they can approach the Court as long as the State party concerned has made the declaration. There are 103 NGOs that have observer status before the African Commission across various African States and the fact that a handful of them have filed women's rights cases at the African Court shows a failure on their part. Based on this judgement, NGOs should also apply for recognition with the African Union to enable them request advisory opinions on women's rights matters.

4.1.2 Mariam Kouma and Ousmane Diabetè Versus Republic of Mali[311]

This case involved a sale of goods that were paid for but the purchaser asked for his money back and to return the goods and eventually assaulted the vendor. At the African Court, the Petitioners claimed the violation, *inter alia*, of the right to dignity and protection from all forms of violence and torture under Articles 3 of the Maputo Protocol, 5 of the African Charter, 7 of the ICCPR and 5 of the UDHR; the right to health under Articles 16 of the Charter, 14(1) of the Maputo Protocol, the right of access to justice and the right to reparation as provided under Articles 7 of the African Charter and 6 of the Maputo Protocol.

The Respondent's defence sought to have the application declared inadmissible for failure to exhaust local remedies.[312] This fact was admitted by the Applicants, who argued that the case pending before the Bamako Court was unduly prolonged, the Appeal was insufficient and that

[311]Application No. 040/2016 Judgment 21 March 2018 '-040 - 2016 - Mariam Kouma and Ousmane Diabae Vs. Mali - Judgment 21 March 2018 - Optimized.Pdf' http://www.african-court.org/en/images/Cases/Judgment/-040%20-%202016%20-%20Mariam%20Kouma%20and%20Ousmane%20Diabae%20Vs.%20Mali%20-%20Judgment%2021%20March%202018%20-%20Optimized.pdf. Accessed on 14/04/2021.

[312] See Article 56(5) of the Charter and Rule 40 (5) of the Rules of Court

the civil claim was void as the acts committed by the aggressor were underestimated. The African Court found no delay in the national court process, the Court of First Instance having taken eight days to render judgment and the Court of Appeal taking 25 days to render its decision on 24 March 2014. The Applicants occasioned the delay from the Court of Appeal ruling to the filing of the application at the African Court in July 2016 as they did not produce a medical report to assess damages.

Regarding the fear that the Appeal would be inadequate, the Court held that the applicants did not attempt to remedy the classification of the offence at the national level and only cast doubt on the sufficiency of a remedy that they deliberately refused to use. In response to the inefficiency of civil damages, the Court held that the Bamako Court of Appeal referred the matter back for a decision of damages and that the Applicants could later lodge an appeal; thus, it was premature to prejudge the efficiency of the remedy. Consequently, the Court upheld the objection based on the non-exhaustion of local remedies and declared the application inadmissible.

4.1.3 Association Pour le Progres et la Defense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) Versus the Republic of Mali[313]

This was the first substantive judgment on women's rights in which the Court applied the provisions of the Maputo Protocol.[314]

On 3 August 2009, the National Assembly of Mali adopted the Persons and Family Code, which, despite being popular and supported by human rights organisations, was not

[313]Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Mali, Application No. 046 of 2016, Judgment 11 May 2018 https://en.african-court.org/images/Cases/Judgment/APDFVsMaliJudgement.pdf. Accessed on 06/04/2021.
[314] Equality Now, Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of Women and Girls in Africa https://equalitynowattachments/original/Maputo_Protocol_Case_Digest.pdf?. Accessed on 18/07/2020.

promulgated due to widespread protests by Islamic organisations. A revised Code was adopted and promulgated in December 2011, which the Applicants alleged violated several international human rights instruments ratified by Mali. The Applicants thus prayed for the Court to order amendment of the Code for violating various international human rights standards that will be discussed later.

4.1.3.1 Admissibility

The Respondent filed a preliminary objection on three issues. First, that the application did not relate to the Charter's interpretation or any other human rights instrument, and therefore the Court lacked material jurisdiction. The Court held that it had the jurisdiction to determine the matter, which alleged the violation of rights guaranteed by the Charter and other instruments ratified by Mali based on Article 3(1) of the Court Protocol. It is important to note that this was the first case before the African Court that did not allege any violation of the African Charter.

The second objection was on admissibility on the ground that the Applicants failed to exhaust local remedies, a fact which the Applicants admitted as no remedies existed. The Court noted that the constitutionality of laws in Mali is challenged through a constitutional petition.[315] However, only the Prime Minister, the President of the Republic, and the President of the Senate, a tenth of the deputies in the National Assembly, the President of the High Council of Collectives, a tenth of the National Counsellors, or the President of the Supreme Court could file a petition. The Applicants therefore had no recourse because NGOs were not permitted to approach the Constitutional Court, thus the application was admissible.

The third objection was that the application was not filed within a reasonable time[316] since the Code was enacted on 30 December 2011, and the application filed on 26 July 2016. The

[315] Article 5 of the Constitution of Mali.
[316] Article 56(6) of the Charter, reproduced in Article 6(2) of the Court Protocol and Rule 40.

Applicants replied that the violations were ongoing, and that time began to run after the violations ceased. However, the Court held that time is counted from the date local remedies are exhausted or from the date that is set by the Court as the commencement of time. Since no remedy was available at the domestic level, the date for filing is when the applicants learned about the contested statute.[317]

The Court took into account the circumstances of the cases from the uncontested facts admitted by the two opposing parties. The Applicants needed more time to research the Code's compliance with the many applicable international human rights instruments ratified by the Respondent State, and, given the atmosphere of terror, coercion, and threats that existed in the period following the law's passage on 3 August 2009, the Court concluded that it was fair to expect the Applicants to be impacted by that climate.[318] As a result, the Court determined that the application was filed within a reasonable amount of time.

4.1.3.2 Merits

The Court proceeded to determine the merits of the case and the five issues alleged to violate the Maputo Protocol, the ACRWC and the CEDAW. The first problem was that the Persons and Family Code set the minimum age of marriage at 18 for boys and 16 for girls, with special exception for marriage at 15 with the consent of either the father or the mother for a boy and only the father's consent for a girl. The Plaintiffs contended that the 2009 version of the Code conformed with Mali's international obligations and that it was not promulgated as a result of a *force majeure* mass process movement that posed significant threat of social disruption, nation-wide disintegration, and an increase in violence, whose consequence could have been

[317] The Court relied on the European Court of Human Rights case in Dennis and Others V. United Kingdom (No. 76573/01; Judgment of 2 July 2002) where it was held that where it is clear from the outset that no effective remedy is available to the Applicant, the period runs from the date of the act at issue or from the date of knowledge of that act or its effect on or prejudice to the Applicant.
[318] Ibid.

damaging to peace, harmony and social cohesion.[319] Further, The State submitted that international rules should not overshadow social, cultural, or religious realities. However, the Court held that f*orce majeure* is incompatible with international law and that Mali violated Article 6(b) of the Maputo Protocol and Articles 2, 4(1), and 21 of the ACRWC by failing to ensure that the minimum age for marriage is 18 years old and that the right to non-discrimination is respected.

The applicants also argued that the Code allowed the continuation of marriage customs and rituals that did not require the parties' agreement. It authorised religious ministers and civil registry officials to perform marriages, but it made no provision for religious ministers to verify the consent of the parties.[320] Religious ministers who failed to execute the verification were not subjected to any penalties,[321] and there was no requirement that parties should give consent orally and in-person before religious ministers.[322] According to the Respondent State, when there is no consent, there is no marriage.[323] The conditions enshrined in the Code apply to any marriage publicly celebrated by a religious minister,[324] and he Code governed the validity of religious minister-officiated marriages, as well as the transmission of marriage certificates to the civil registrar and its entry into the Civil Register.[325] The Court found that the provisions allowing religious and customary laws to be applied to marriage consent were incompatible with Articles 2(1)(a) and 6(a) of the Maputo Protocol, as well as Articles 10 and 16 of CEDAW.[326]

[319] Ibid.
[320] Article 300, Persons and Family Code, Republic of Mali.
[321] Ibid. Article 287.
[322] Ibid. Article 283.
[323] Ibid. Section 283(1).
[324] Ibid. Section 300.
[325] Ibid. Sections 303 (3) and (304).
[326] Ibid.

The third point was that the applicable regime in matters of inheritance was religious and customary law and that the Code only applied where religion or custom had not been established in writing, through testimony, experience, or common knowledge, or where the deceased had not expressed his wish for his inheritance to be distributed in writing or before witnesses during his lifetime.[327] This amounted to legalising discrimination in inheritance against women and girls in violation of Article 21 of the Maputo Protocol, Article 4 of the ACRWC and Article 16(h) of CEDAW; and discrimination against children born out of wedlock, in violation of Article 3 of the ACRWC which prohibits all forms of discrimination.

The Respondent State stated that succession was entirely customary before 2009 and that the 2009 Code provided for an equal share for men and women and the inheritance of children born out of wedlock and legitimate children. However, as a result of the protests, the 2011 Code was made more flexible so that someone who did not want succession to be arranged according to customary or religious rules can simply express his preference for his inheritance to be devolved according to the Family Code or his will.

The Court ruled that Mali's Islamic law and customary inheritance practices violated Articles 21(1) and (2) of the Maputo Protocol, as well as Articles 3 and 4 of the ACRWC on the right to inheritance for women and children born out of wedlock.[328]

The Applicants' fourth argument was that by implementing the Code, the Respondent State showed a lack of commitment to abolish harmful cultural practices that threaten the rights of women, girls, and children born out of wedlock. The Court held that the Respondent State violated Article 2 (2) of the Maputo Convention, Articles 1(3) and 21 of the ACRWC, and

[327] Article 751 of the Family Code.
[328] n 297.

Article 5(a) of CEDAW by continuing discriminatory policies that jeopardised the rights of women and children.[329]

As a result, the Court found that the Respondent State violated Article 2 of the Maputo Protocol, Articles 3 and 4 of the ACRWC, and Article 16 (1) of CEDAW, which all deal with the right to non-discrimination for women and children, and ordered the Respondent State to:

i. Amend the contested law, harmonise its laws with international instruments, and take appropriate action to end the violations discovered;
ii. Declare that the above constitutes a form of reparation for the Applicants; and
iii. Meets its responsibilities under Article 25 of the Charter in terms of teaching, education, and sensitisation of the population.
iv. Within a reasonable time, not to exceed two years from the date of the judgment, send a report on the measures taken in relation to the above.

This judgment was a significant win for the women of Mali and Africa and set a landmark precedent regarding the rights of women in marriage and the family. The Court took ownership of its broad jurisdiction and found violations not only of the Maputo Protocol but also CEDAW and the ACRWC. The Court liberally applied the reasonable time requirement, finding that the more than four-year interval between the passing of the Code in Mali and the case's filing was a reasonable time.

The Court was silent and simply rejected the Respondent's arguments on *force majeure* and the adaptation of its legislation to social and cultural realities, which both pertain to derogation. While the Court correctly rejected Mali's force majeure claim, Kombo contends that elaborating on the Court's rationale would have advanced jurisprudence in this vital area.[330]

[329] Ibid.
[330] Brenda Kombo, Silences that Speak Volumes: The significance of the African Court decision in APDF and IHRDA v Mali for women's human rights on the continent, Africa Human Rights Year Book (2019) 'AHRY-

Furthermore, by answering Mali's point about social reality in a roundabout way, the Court avoided the thorny controversy about universalism versus cultural relativism.[331]

4.2 Jurisprudence of the African Commission

The African Commission was tasked with interpreting issues arising from the application and implementation of the Maputo Protocol while the African Court was being established.[332] This section explores the judgments that deal with women's rights under the Maputo Protocol and, before its adoption, under Article 2 of the African Charter on non-discrimination and Article 18(3) on the family. Additionally, a point to be made here is that since individuals and NGOs have limited access before the African Court, another avenue for channelling women's rights issues to the Court is the African Commission referring cases to it. Keeping in mind the landmark judgment in *APDF and IHRDA Versus Mali*, a running issue when discussing the Commission's jurisprudence is how different the findings would have been were the communications referred to the African Court.

4.2.1 Malawi African Association, Amnesty International & Others versus Mauritania[333]

These consolidated communications related to Mauritania's situation between 1986 and 1992 saw the marginalisation and wanton human rights violations meted against black Mauritanians. These included slavery, unlawful and arbitrary detention, unfair trial, denial of appeal, extra-judicial executions, violations of natural justice principles, and various appalling instances of

2019-Whole-Book.Pdf'<https://www.acerwc.africa/wp-content/uploads/2020/01/AHRY-2019-whole-book.pdf>. Accessed on 04/08/2020.

[331] Ibid.

[332] Article 32, Maputo Protocol.

[333] Communications 54/1991, 61/1991, 96/1993, 98/1993, 164/1997, 196/1997 and 210/1998: Malawi African Association, Amnesty International & Others Versus Mauritania (2000), ACHPR. https://www.achpr.org/public/Document/file/English/achpr_eng.pdf. Accessed on 10/05/2021.

cruel, inhuman and degrading treatment and punishment, including torture and harsh beatings. The Commission found violations of the African Charter as prayed by the Applicants.[334]

When giving a summary of the facts, the Commission stated:

"Whenever the villagers raised their voices in protest, they were beaten and forced to relocate to Senegal, or they were simply killed. A large number of villagers were detained and tortured. The term "Jaguar" was used to describe a common form of torture. The victim's wrists and feet are bound together. He is then pummelled on the soles of his feet while suspended from a bar and kept upside down, sometimes over a fire. Other torture techniques included beating the victims, burning them with cigarette stubs or a hot metal, and so on. The women, on the other hand, were simply raped."[335]

The Commission concluded that, because the government provided no counter-argument to these facts, they are evidence of widespread use of torture and cruel, inhuman, and degrading treatment and constitute a violation of Article 5 of the African Charter. The Commission did not go into further detail about the rape allegations, failed to find a violation specifically related to sexual violence under Article 18(3) of the African Charter, and did not attribute the alleged sexual violence to a violation of women's rights.[336] In essence, the Commission failed to demand accountability for sexual violence and failed to establish crucial jurisprudence in a straightforward case since the rape was not denied.[337]

[334] Articles 2, 4, 5, 6, 7, 9, 10, 11, 12, 14, 16, 18, 19 and 26.
[335] Ibid. Para 20.
[336] 'Litigation_Before_ACHPR_Manual_FINAL.Pdf' https://d3n8a8pro7vhmx.cloudfront.net/equalitynow/pages/712/attachments/original/1537202856/Litigation_Before_ACHPR_Manual_FINAL.pdf?1537202856. Accessed on 12/03/2021.
[337] Mariam Wambui Kamunyu, 'The Gender Responsiveness of the African Commission on Human and Peoples' Rights' 328.

4.2.2 Democratic Republic of Congo v Burundi, Rwanda and Uganda

This was an inter-state case in which the Applicant argued, among other things, that it had been the target of armed violence committed by the Respondent States in violation of the UN and OAU Charters' fundamental principles governing friendly relations between States. [338]

The Applicant claimed that the three Respondent States' armed forces had engaged in grave and widespread violations of human and peoples' rights in Congolese provinces where rebel activities had occurred since August 1998.[339] These included the murder of 138 police and army officers, the massacre of thousands of men, the deaths of many patients, including children, in hospitals as a result of the cut-off of electricity supply to incubated operating theatres and other respiratory equipment, and the massacre of over 856 people, primarily women and children.[340] The women had been raped before their murderers slashed them open from the vagina to the abdomen and cut them up with daggers.[341] Furthermore, the Applicant claimed that Rwandan and Ugandan forces intended to spread sexually transmitted diseases and commit rape and that approximately 2000 Ugandan soldiers claimed to have been HIV-positive were deployed to eastern Congo to rape girls and women in order to spread an AIDS pandemic among the local population.

The African Charter[342], ICCPR, CEDAW and Article 76 of the Additional Protocol to the Geneva Conventions relating to the Protection of Victims of Foreign Armed Conflicts were all found to have been in the case of the women and girls who had been raped,[343] which provides

[338] Communication 227/99: *Democratic Republic of Congo vs Burundi, Rwanda and Uganda* (2003) ACHPR https://www.achpr.org/sessions/descions?id=138. Accessed on 02/11/2020.
[339] Ibid.
[340] Ibid.
[341] Ibid.
[342] Articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22, and 23 of the African Charter.
[343] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977https://ihl-databases.icrc.org/ihl/WebART/470-750098?OpenDocument; See also the Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949. Accessed on 20/10/2020.

that women shall be the object of special respect and shall be protected particularly against rape, forced prostitution and any other form of indecent assault.

4.2.3 Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) Versus Sudan[344]

The Applicants accused Sudan of committing gross, widespread, and systematic human rights abuses against indigenous black African tribes in Darfur including extra-judicial executions, torture, abuse of women and children, arbitrary arrests, forced relocation, destruction of public facilities and infrastructure, and disturbance of life by military fighter jets attacking heavily populated areas. The Commission found a general breach of Article 5 on torture, but it did not elaborate or articulate on the multiple and unique abuses of women's rights that were raised not only by the complainants but also in the Commission's fact-finding report on the human rights situation in Darfur relied on this decision.[345]

4.2.4 Curtis Francis Doebbler v Sudan[346]

This application concerned female university students at a picnic who were beaten by police officers and arrested for purportedly violating public order by being improperly dressed and acting immorally. They were either convicted and fined or sentenced to lashes on the bare back using wire and plastic whips which left permanent scars, a punishment that was alleged to be grossly disproportionate, cruel, inhuman and degrading in violation of Article 5 of the African Charter. The Respondent State submitted that the lashings were justified as the women committed acts found to be criminal according to the Criminal Code of Sudan.

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[344] Communication 279/2003-296/2005, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) Versus Sudan*, (2009) ACHPR. https://www.achpr.org/sessions/descions?id=190. Accessed on 15/19/2020.
[345] 'Kamunyu - The Gender Responsiveness of the African Commissio.Pdf'.
[346] Communication 236/2000, *Curtis Francis Doebbler v Sudan*, ACHPR.

The Commission explained the nature of the right to dignity and held that corporal punishment violated Article 5 of the African Charter. The Respondent State was requested to amend the Criminal Code, abolish the penalty of lashes, and ensure the victims' compensation. Though commendable, the Commission once again failed to articulate women's rights issues and discrimination.

4.2.5 Zimbabwe Human Rights NGO Forum v Zimbabwe[347]

Political violence following the 2000 Constitutional Referendum in Zimbabwe and before the 2002 parliamentary elections aimed at white farmers, black farm workers, teachers, civil servants and rural villages led to torture, rape, kidnappings, killings, destruction of homes and businesses. The applicants claimed that war veterans were the main instigators of the conflict and that the State was involved through the Zimbabwe Republic Police (ZRP), the Zimbabwe National Army (ZNA), and the Central Intelligence Organisation (CIO). The ZPR were unconcerned about the violence perpetrated against white farmers and opposition members, and the police failed to intervene or prosecute the crimes committed by war veterans. The Complainant claimed that the African Charter had been violated.[348]

The Commission found the Republic of Zimbabwe in breach of only Articles 1 and 7(1) of the African Charter and requested that it create a Commission of Inquiry to establish the causes of the conflict, prosecute those responsible, and compensate victims. Yet again, the Commission refused to investigate abuses of women's rights.

[347] Communication 245/2002, *Zimbabwe Human Rights NGO Forum V Zimbabwe (2006),* ACHPR. https://www.achpr.org/sessions/descions?id=178. Accessed om 6/02/2021.
[348] Articles 1, 2, 3, 4, 5, 6, 9, 10, 11, and 13 of the African Charter.

4.2.6 Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) V Kenya [349]

This famed case involving the division of matrimonial property to the detriment of women's property rights in Kenya made it to the African Commission. The Complainant was married to a Kenyan diplomat, Mr Peter Echaria, from 1964 to 1990, when the marriage ended in divorce. In November 1987, she petitioned the High Court of Kenya requesting their matrimonial property to be equally divided between her and her husband, which prayer the Court granted in 1993 as she indirectly contributed to the acquisition of the property.[350] Mr Echaria's appeal at the Court of Appeal resulted in the setting aside of the High Court judgment and a reduction of the Applicant's share of the matrimonial property to a quarter of the property. There being no higher Court, the Applicant approached the African Commission alleging the violation of the African Charter[351] and praying that Kenya enacts legislation on married women's property rights.

The Respondent State objected to the Commission's jurisdiction on the ground that the Applicant failed to exhaust local remedies,[352] which included an application for review before the Court of Appeal, applications before quasi-judicial bodies such as the Public Complaints Standing Committee or the Kenya National Commission on Human Rights. The Commission held that the requirement to exhaust local remedies applies only to courts of a judicial nature and not quasi-judicial bodies. The Court of Appeal was the Court of final jurisdiction in Kenya and that it had handed down a final, binding decision without any possibility of appeal. Further, the Court of Appeal was not under any legal obligation to review its own decision; thus, the

[349] Communication 375/2009, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya*, (2011) ACHPR. https://www.achpr.org/sessions/descions?id=236. Accessed on 23/04/2021.
[350] Ibid.
[351] Articles 2, 3, 14, 1(3) and 19.
[352] Article 56(5) of the African Charter.

power to review was purely discretionary and not mandatory and could not be considered an available local remedy.

In an unprompted step that was not contested or raised by the Respondent State, the Commission, on its motion, proceeded to consider the requirement to submit applications within a reasonable period from the time local remedies are exhausted.[353] The Commission noted that the Court of Appeal judgment was delivered in February 2007 while the communication was filed in September 2009 and held that the unexplained 31-month interval was unreasonable. The Commission acknowledged that the African Charter does not provide a period within which applications should be filed, unlike the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, which both provide for six months. The Commission adopted this six-month period and therefore held the communication inadmissible.

Once again, the Commission passed up the opportunity to pronounce itself on a classic women's rights issue that continues to affect women in Africa and was only recently resolved in law in Kenya under the Constitution of Kenya, 2010 and the Matrimonial Property Act, 2013. The Commission's adoption of the rigid six-month rule is criticised as the Charter's drafters deliberately left out the time period despite it being in the two other regional treaties.[354] Additionally, the Commission has been inconsistent in applying what amounts to reasonable time, as it has admitted communications filed more than 16 months after the violation of exhaustion of local remedies.[355]

4.2.7 Egyptian Initiative for Personal Rights and Interights Versus Egypt[356]

[353] Article 56(6) of the African Charter.
[354] F Viljoen *International Human Rights Law in Africa* (2012).
[355] 'Kamunyu - The Gender Responsiveness of the African Commissio.Pdf' (n 219).
[356] Communication 323/06, *Egyptian Initiative for Personal Rights & Interights v Egypt, (2011)* ACHPR.

This was the first time the African Commission substantively adjudicated on women's rights. The Applicant NGOs represented four women journalists who were victims of sexual harassment and violence during an anti-government political protest at the hands of riot police and supporters of the ruling party. The first victim, a passer-by, was pushed to the ground, and her private parts fondled. When she reported the incident, the police refused to record statements from witnesses, she received threats from intelligence officers, was dismissed from her job at a newspaper, and her husband divorced her. The second and third victims who were covering the event were hit repeatedly in the face and stomach, and when they tried to escape via taxi, a senior police and intelligence officer pulled them out, and they were further subjected to more hitting, beating, biting, slapping, tearing of clothes, sexual assault and called abusive degrading names such as 'whore' and 'slut'. Investigators refused to pursue their complaints or record statements from witnesses, and they received threats to withdraw the complaint. The fourth victim was attending and covering the protest when she was severely beaten and kicked in the pubic area and clothes almost torn off while police officers watched, hindering her escape. She also faced threats to withdraw the complaint. All their cases were classified as misdemeanours, and the Public Prosecution decided not to prosecute the cases. Their appeal was further dismissed.

Egypt was accused of violating the African Charter, but since Egypt had not ratified the Maputo Protocol, the African Commission adjudicated the violation of women's human rights under Article 18(3) of the African Charter. The African Commission declared that sexual violence is a gross violation of women's rights, for which states must be held accountable. It noted that the violations were perpetrated on the victims because of their gender and that the differential treatment between men and women was not legitimate, justifiable and hence discriminatory in violation of Article 2 of the African Charter. The Commission held that Egypt violated Article

18(3) of the African Charter to eliminate discrimination against women as the assaults were gender-specific and discriminatory.

This decision substantively discussed sexual and gender-based violence and discrimination against women and strengthened the standards in holding States accountable for sexual violations.[357] Nonetheless, there has been criticism at the Commission's use of the sameness/difference model in reaching its finding of discrimination since it involves the utilisation of a male comparator or male standard in order to find that a woman has been discriminated, thus does not permit effective implementation of equality rights when their infringement arises from female-specific circumstances.[358]

4.2.8 Equality Now and Ethiopian Women Lawyers Association versus the Federal Republic of Ethiopia[359]

The applicant NGOs instituted this communication on behalf of Woineshet Zebene Negash, then-13years old, who was abducted from her home, repeatedly raped by Aberew Jemma Negussie and other accomplices and married by abduction. When the abduction was reported to the police, she was rescued, and the rape confirmed through a medical report. Aberew was arrested, and when released on bail, he again abducted Woineshet, held her for a month, and forced her to sign a marriage contract. After a month, she managed to escape and report the matter to the police, following which Aberew and his fellow accomplices were prosecuted for abduction and sentenced to 10 years and eight years, respectively, without parole.

Following this, Aberew and his accomplices launched an appeal that was allowed on the basis that the rape was consensual. Neither Woineshet nor EWLA were present at the appeal or

[357] 'Litigation_Before_ACHPR_Manual_FINAL.Pdf' (n 214).
[358] 'Kamunyu - The Gender Responsiveness of the African Commissio.Pdf' (n 219).
[359] Communication 341/2007, *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, ACHPR.

informed of it. The complainants made several appeals that were all dismissed until there was no further avenue for domestic recourse. The Applicants submitted that Ethiopia had violated its obligations under the African Charter and specifically articles 2, 3, 4, 5, 6 and 18(3).

The Commission found that there had been violations of articles 3, 4, 5, 6 and 7(1)(a) of the African Charter and ordered Ethiopia to pay US$150,000. Adopting a narrow interpretation of discrimination, the Commission found that violations of Article 2 and 18(3) of the Charter based on discrimination had not been established as there was no male comparator.

4.3 Conclusion

This Chapter has discussed the jurisprudence on women's rights at the African Court and the African Commission. The Commission has evidently suffered serious lapses, missed opportunities and an overall lack of zeal to advance women's rights through its communications procedure. [360] It has narrowly interpreted admissibility requirements such as what amounts to reasonable time and went out of its way to seek out technicalities *in Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) V Kenya*[361]**.** Even in communications where violations of human rights are not denied or supported by its own fact-finding missions, the Commission failed to find specific violations of women's rights or has passed up the opportunity to elucidate the violations.

[360]Equality Now, 'Litigation_Before_ACHPR_Manual_FINAL.Pdf' (n 214).
[361] Communication 375/2009, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya*, (2011) ACHPR. https://www.achpr.org/sessions/descions?id=236. Accessed on 20/07/2020.

In ***Malawi African Association, Amnesty International & Others versus Mauritania***[362]***and Zimbabwe Human Rights NGO Forum v Zimbabwe,***[363] although the Commission found that there had been violation against women, it failed to expound on them and hold the respondent states accountable.

It is only in ***the Democratic Republic of Congo v Burundi, Rwanda and Uganda***[364] that the Commission considered the women's rights violation.

The last two cases of the ***Egyptian Initiative for Personal Rights and Interights Versus Egypt***[365] *and* ***Equality Now and Ethiopian Women Lawyers Association versus the Federal Republic of Ethiopia***[366] are marked improvements that shine some hope along the Commissions' trajectory when it comes to the protection of women's rights. However, the Commission has narrowly constrained itself in requiring a male comparator to find discrimination, a dangerous precedent that limits the prospect for the achievement of substantive gender equality. The Commission should draw inspiration from international and regional human rights jurisprudence and adopt a more expansive definition of discrimination to advance women's rights in Africa truly.

On the other hand, one can argue that the African Court would have liberally interpreted what an organisation recognised by the AU is to allow the *Request for Advisory Opinion* to be determined on its merits Court admitted its shortcomings stemming from the African Charter and the African Court Protocol. Additionally, in the *Mariam Kouma case*, one can argue that

[362] Communications 54/1991, 61/1991, 96/1993, 98/1993, 164/1997, 196/1997 and 210/1998: Malawi African Association, Amnesty International & Others Versus Mauritania (2000), ACHPR. https://www.achpr.org/public/Document/file/English/achpr_eng.pdf. Accessed on 7/03/2021.
[363] Communication 245/2002, *Zimbabwe Human Rights NGO Forum V Zimbabwe (2006)*, ACHPR. https://www.achpr.org/sessions/descions?id=178. Accessed on 12/05/2021.
[364] Communication 227/99: *Democratic Republic of Congo vs Burundi, Rwanda and Uganda* (2003) ACHPR https://www.achpr.org/sessions/descions?id=138. Accessed on 24/06/2020.
[365] Communication 323/06, *Egyptian Initiative for Personal Rights & Interights v Egypt, (2011)* ACHPR.
[366] Communication 341/2007, *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, ACHPR.

the Court would have creatively gone around the exhaustion of local remedies requirement. The truth, however, is that these two decisions were fair and reasonable, and perhaps the best the Court would have gone given the restrictive circumstances.

In *APDF and IHRDA Versus Mali*, the Court has demonstrated its eagerness to adopt a liberal interpretation of procedural matters to benefit more effective human rights protection. The Court stepped into its role as the protector of the Maputo Protocol and fearlessly exercised its broad material jurisdiction and remedial power to ensure justice.

CHAPTER FIVE

FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Findings

This research set out to investigate why the African Court has little jurisprudence on women's rights despite the Maputo Protocol clothing it with the jurisdiction to interpret its application and implementation. The key findings of each chapter are laid out below.

5.1.1 History and Mandate of the African Court with Regards to Women's Rights

Chapter two of the research project traced the history of the African Court and African states' initial resistance to the establishment of a judicial oversight body, resulting in a compromise that requires not only ratification of the African Court Protocol but also an additional declaration allowing individuals and NGOs direct access. Although thirty African States have ratified the African Court Protocol, only ten out of the 55 member states to the African Charter have ever made the declaration pursuant to Article 34(6) of the African Court Protocol, and four have subsequently withdrawn, greatly restricting the number of cases that can be instituted at the Court. This study has confirmed that the basic genetic structure of the Court and restricted access to it staunchly protects state sovereignty, limiting the institution's power to act so that from the outset, it was destined to fall short in its efforts to protect and promote human rights.[367]

Hathaway's integrated theory of international law is insightful as it explains the behaviour of African States in signing but failing to ratify the African Court Protocol and the declaration allowing direct access and the subsequent withdrawals. Treaties shape what countries do through enforcement by transnational actors and the rule of law institutions within nations that

[367] Rebecca Wright, Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights, Berkely (2006)Journal of International Law, Vol 24, no. 2, p. 463- 476.

join the treaty or through the collateral anticipated consequences or benefits of treaty membership.[368] Although more than half of African States ratified the African Court Protocol, they had little inclination to allow their citizens to hold them accountable through it. This also explains why African States have widely ratified the core human rights instruments, but very few have ratified optional protocols that establish treaty-monitoring bodies.

Although the drafters of the Maputo Protocol may have wanted to avoid the challenges that were facing the African Commission that necessitated the establishment of the Court, they were overly optimistic. They did not foresee the difficulties occasioned by state parties' failure to the African Court Protocol to make the declaration allowing individuals and NGOs to institute cases under Article 34(6). This demonstrates that women's rights were not envisioned to benefit from the African Court. The limited access to the African Court, coupled with the strict admissibility requirements, significantly limit the institution and hearing of cases on their merit. Although these treaty requirements and the limited accessibility and admissibility criteria apply to all Africans and appear to be gender-neutral and gender-blind, their result disproportionately affects and disadvantages women. From the history of the Court, it is undeniable that men negotiated and adopted the African Charter and the African Court Protocol, and they not only excluded women in this process, but they paid no attention t the interests or perspectives of women. The regional legal system thus reproduced and reinforced a male viewpoint; it did not reflect the differences between men and women[369] and supported women's subordination and oppression.[370] Mandating AU States to ratify the African Court Protocol and further make a declaration under Article 34(6) allowing direct access to the Court

[368] Oona A. Hathaway, Between Power and Principle: An Integrated Theory of International Law, HeinOnline -- 72 U. Chi. L. Rev. 469 2005 https://digitalcommons.law.yale.edu/cgi/viewcontent.fss_papers. Accessed on 03/07/2021.
[369] Troy Lavers/Loveday Hodson, "Feminist Judgments in International Law", Völkerrechtsblog, 24 April 2017, doi: 10.17176/20170424-092937 https://voelkerrechtsblog.org/feminist-judgments-in-international-law/. Accessed on 3/05/2020.
[370] Brian Bix, *Jurisprudence Theory and Context, (*Sweet and Maxwell) 7th Edition.

protects absolute sovereignty. This is greatly detrimental to women's rights as the Maputo Protocol places the mandate to oversee it on the African Court. Further, since many African States have numerous reservations to CEDAW and the Maputo Protocol, the admissibility requirements are a hurdle as many women's rights issues are not justiciable before domestic courts, and further cannot be vindicated at the African Court as a result of the limited access. One can, therefore, not but agree that, to some extent, the content of the regional law privilege men and that it is gendered in favour of men and to the detriment of women.[371]

5.1.2 The International and Regional Framework for the Protection of Women's Rights

The African Court's broad jurisdiction to interpret any human rights instrument ratified by a State Party and issue binding decisions makes it an unparalleled all-powerful institution for protecting and advancing human rights. The regional and international framework for women's rights was laid out to demonstrate that historically, women's rights were not provided for human rights instruments. Further, the realities of African women were not in the minds of the drafters of these treaties. The framework also went to show the vast body of work available to the African Court in its adjudication.

The material content of international law is gendered and champions the interests of men above women. Whereas international law norms directed at individuals within states should be universally applicable and neutral, in reality, they apply differently to men and women, with the result that women's experiences of the laws tend to be silenced or discounted.[372] The overall rationale of equality and non-discrimination requires women to conform to a male-defined world while ignoring the root causes of inequality. [373] The reservations to CEDAW and the

[371] Ibid.
[372] Charlesworth, Chinkin and Wright (n 43).
[373] Marsha A Freeman, 'The Human Rights of Women under the CEDAW Convention: Complexities and Opportunities of Compliance' (1997) 91 Proceedings of the Annual Meeting (American Society of International Law) 378 <https://www.jstor.org/stable/25659151> accessed 7 March 2021.

Maputo Protocol demonstrate the incompetence of international law's normative structure since the international community is willing to recognise the significant inequalities women face explicitly, but only if individual states are not forced to change patriarchal practices that oppress women as a result.[374]

5.1.3 Jurisprudence of the African Court on Women's Rights

An analysis of the jurisprudence of the African Court and the African Commission unearthed the blow dealt to a few potential women's rights cases on account of these necessities. Although the African Commission has adjudicated on more cases on women's rights issues, it suffered from a lack of zeal, apathy and gender insensitivity that led to jurisprudence that mirrors the gender inequality and the subordinate role that women continue to be victim of in most African nations. These unfortunate cases and missed opportunities stamped the perception that women were objects but not subjects of human rights. However, some recent cases have shown improvement in the Commission's attitude towards women's rights. However, the Commission has chosen to limit itself by restrictively applying the reasonable time principle and narrowly defining discrimination by requiring a male comparator.

The feminist approach to international law explains that the legal system reproduces and strengthens a male viewpoint and that legal rules do not reflect the differences between men and women. Thus, the law, which has supposedly neutral principles and procedures, plays a role in women's subordination and oppression.[375] The challenges for African women are

[374] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law'. (1991) Vol. 85, No. 4The American Journal of International Law, pp. 613-645 http://www.jstor.org/stable/2203269. Accessed on 3/05/2020.
[375] Brian Bix, *Jurisprudence Theory and Context, (*Sweet and Maxwell) 7th Edition.

compounded as they deal with multiple oppressions based on patriarchal societies that disregarded women. [376]

The study demonstrates that the law is male and that it sees and treats women the way men do, and that it constitutes the social order in the interests of men through its legitimising norms, relation to society, and substantive policies.''[377] Indeed, being a woman is far from being human, and if women truly enjoyed the human standards of international law, they would not be subjected to the numerous injustices and inequalities that they have undergone since time immemorial,[378] especially African women and girls.

The findings of this study confirm that, indeed, the African Court is a superb unmatched avenue to hold state parties to account for women's rights violations. Despite its structural weaknesses and its gendered history, the Court is acutely gender-sensitive and is alive to the complexities and exclusions that the law has historically imposed on women. Its landmark decision in *APDF and IHRDA Versus Mali* demonstrated that it is fearless in the exercise of its broad jurisdiction and remedial power to ensure justice and that it is enthusiastic about embracing a liberal interpretation of procedural matters for the benefit of more effective protection of human rights. However, in actuality, it is difficult for human rights activists to use the accessibility and admissibility criteria as a channel for monitoring the implementation of the Maputo Protocol. This further confirms the fear that even though the African Court has proved worthwhile making a decision in *IHRDA Vs. Mali*, on violations of the Maputo Protocol, a positive stride could quickly be repeated.[379]

[376] J. Akihire, 'African Feminism in Context; Reflections on the Legitimate Nattle, Victories and Reversals' (2014) 19 Africa Gender Institute.
[377] Ibid.
[378] Catharine MacKinnon, *Are Women Human?, in* Reflections on The Universal Declaration Of Human Rights: A Fiftieth Anniversary Anthology 171.
[379] Budoo (n 44).

5.2 Conclusion

In March 2020, the Commission on the Status of Women expressed concern that progress has not been fast or deep enough, that progress has been uneven in some areas, that significant gaps remain, and that obstacles, such as structural barriers, discriminatory practices, and the feminisation of poverty, continue to exist.[380] The Commission recognised that no country had fully achieved gender equality and women's empowerment 25 years after the Fourth World Conference on Women, significant levels of inequality persist, that many women and girls experience multiple and intersecting forms of discrimination, vulnerability, and marginalisation across their lives, and that they had made significant progress.[381]

In light of the various violations that women in Africa face, there is a need to hold states accountable for fulfilling and protecting women's rights. The African Court, which is mandated to interpret the application and implementation of the Maputo Protocol, suffers from structural shortcomings that hinder the filing and adjudication of women's rights cases. Indeed, the only case it has handled was marriage and inheritance, a slight drop in the ocean of the spectrum of women's rights violations in African States, which are still dominated by patriarchy and deep inequality. Courts have an essential role in ensuring conformity to human rights standards and promoting equality between men and women. Therefore, there is a need to overhaul to monitoring and judicial protection of women's rights in Africa to ensure that States are held accountable for any violations.

[380] Commission on the Status of Women, sixty-fourth session, 20 March 2020 https://au.int/sites/default/files/documents/38226-doc-csw64-politicaldeclaration.pdf.
[381] Ibid.

5.3 Recommendations

In order to be impactful, institutions established to interpret progressive women's rights instruments such as the Maputo Protocol and CEDAW, must aid in transforming international and regional law into action on the domestic level.[382] An important mechanism through which international human rights law becomes operative and accessible is through the interpretation and application of the law by regional human rights courts.[383] The judgements of these courts send a message to African states on how they should realize their obligations to protect women And therefore they have an important role to play in the enforcement of the human rights norms.

5.3.1 Short-term recommendations

Most of the African Court's challenges are structural and inherent, based on state sovereignty, state consent, and the constitutive instrument. However, some of these challenges may be circumvented by existing mechanisms. Firstly, Article 4(1) of the Protocol to the African Court states that any African organisation recognised by the AU may seek, inter alia, consultative opinions. Advisory opinions are less confrontational and more acceptable to States than binding judgments in a contested case, and this might persuade states to make domestic changes without embarrassing them as violators of human rights.[384] NGOs can use this provision to bring contentious matters against States under the guise of seeking advisory opinions.[385] Therefore, NGOs that already have observer status before the AU should seek advisory opinions on the Maputo Protocol concerning African women's issues. The NGOs with observer status before the African Commission and which have instituted women's rights issues across various

[382] Annika Rudman, A Feminist Reading of the Emerging Jurisprudence of the African And ECOWAS Courts Evaluating their Responsiveness to Victims of Sexual and Gender-Based Violence (2020) 31 Stell 424
[383] Ibid.
[384] Viljoen (n 7).
[385] Van der Mei 'The Advisory Jurisdiction of the African Court on Human and Peoples' Rights' (2005) 5 African Human Rights Law Journal 27,36.

regional courts should additionally apply for observer status before the AU to ensure they have the requisite *locus standi*. Further, the AU should relax the Article 4(1) definition of African organisations to allow more NGOs to seek advisory opinions.

Human and women's rights NGOs have been critical in establishing and adopting various human rights instruments, guidelines, and initiatives, including the adoption of the Maputo Protocol and its subsequent wide ratification. The NGOs should embark on intensive advocacy to have the AU urge member states to ratify and make the declaration under Article 34(6) of the African Court Protocol. The NGOs should also use state reporting procedures and voluntary mechanisms such as the African Peer Review Mechanism, Universal Periodic Review and the UN High-level Political Forum for Sustainable Development to lobby African states to submit themselves to the African Court.

Another existing mechanism and powerful vehicle used to channel cases to the African Court is through the African Commission. The Commission should be more proactive and aggressively refer cases, especially on women's rights, to the Court. Additionally, under its promotional mandate, it should undertake widespread sensitisation campaigns to raise awareness of the African Court and the Maputo Protocol and call on states to lift reservations on the Protocol and CEDAW.

5.3.2 Long-term recommendations

The AU should amend Article 34(6) of the African Court Protocol and not require a declaration from State Parties for individuals and NGOs to file human rights cases. This would allow the operation of Article 27 of the Maputo Protocol, which gives the African Court oversight and makes the Court more accessible to women. As earlier discussed, in a number of African States, women’s rights are not justiciable domestically; hence regional and international courts fill in the critical gap with regards to access to justice. Since one admissibility criterion on the Court

mandates the exhaustion of local remedies which are unavailable, amending Article 34(6) will open up the Court to women from at least the thirty-one African states that have ratified the African Court Protocol as opposed to the six that have made the declaration allowing direct access.

The AU should explore the possibility of establishing another human rights monitoring mechanism specifically for women's rights in Africa. Reporting on the Maputo Protocol is done along with the African Charter, and many states have not made any state party reports on the Maputo Protocol. Having a separate body just as the CEDAW Committee will greatly enhance the monitoring of women's rights and ensure their protection and promotion.

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