

(Conference Draft)

“Towards Gender-Sensitive Development in Africa: An Appraisal of the Role of
the African Court and the African Commission in the Promotion and Protection
of Women’s Rights”

Adebola O. Olaborede*

2017 Law and Development Conference

Cape Town, South Africa
September 2017

*University of Fort Hare

Towards Gender-Sensitive Development in Africa: An Appraisal of the Role of the African Court and the African Commission in the Promotion and Protection of Women’s Rights

Adebola O. Olaborede*

The situation of the violation and abuse of women’s rights within many African States remains critical and challenges the pathway to advancing women’s rights and development. Although there has been some progress in addressing the critical issues affecting women, however implementation and enforcement of women’s rights remains challenging. This article seeks to evaluate the role of the African Commission and the African Court in protecting and promoting human rights in a manner that advances gender-sensitive development. In making such an inquiry, the article considers the relationship between gender, human rights and development, the protective and promotional mandates of the African Commission and the African Court in relation to women’s rights and in the context of efforts to achieve gender-sensitive development. It also offers some suggestions for enhancing the mandates of the Commission and Court so they are better able to enforce women’s rights in Africa.

Keywords: Gender-sensitive; Development; African Court; African Commission; Women’s Rights.

* Post-Doctoral Research Fellow, University of Fort Hare

1. Introduction

In many African States, the violation of women’s rights remains a serious problem. This situation is largely attributable to the persistence of discrimination against women in family and cultural life, economic and social life, as well as public and political life, despite the increased recognition of factors impeding the realisation of women’s rights and gender equality.¹ Among the most common violations of women’s rights are gender inequality and discrimination, sexual exploitation and servitude, gender-based violence, harmful traditional practices, denial of sexual and reproductive rights, political marginalisation, inequitable access to economic resources and poverty.²

Although there has been some progress in addressing violations of women’s rights, the effective implementation and enforcement of women’s human rights remains challenging at both the regional and national level.³ In an effort to address this challenge a focus on gender-sensitive development of women’s rights is considered. Development in general, is aimed at the continuous improvement of the wellbeing of every individual.⁴ Currently there is focus globally on the Sustainable Development Goals (SDGs) aimed at transforming the wellbeing of every individual in the world.⁵ Achieving gender equality and empowerment of all women is one the Sustainable Development Goals, however gender inequality still persistent as the efforts implemented so far in addressing this challenge has not created much progress in addressing gender-based discriminations.⁶

In this context, the purpose of this paper is to evaluate the role of the African Commission on Human and Peoples’ Rights (the African Commission) and the African Court on Human Rights (the African Court) in protecting and promoting human rights in a manner that advances gender-sensitive development.

The African Commission and the African Court have made significant contributions to the developments in the African regional human rights system.⁷ The African Commission and the African Court have jurisdiction over human rights issues arising from the African Charter and any other relevant international human rights instruments ratified by State party

¹ Gooneskere S, A Rights Based Approach to Realising Gender Equality 1-22. Paper prepared in co-operation with the United Nations (UN) Division for the Advancement of Women, available at: <http://www.un.org/womenwatch/daw/news/savitri.htm>, accessed 29 May 2017.

² UN General Assembly, In-depth Study on all Forms of Violence against Women. Report of the Secretary-General, 6 July 2006, A/61/122/Add.1, p. 9-32, available at: <http://www.refworld.org/docid/484e58702.html>, accessed 29 June 2017.

³ African Union/ African Charter on Human and Peoples’ Rights (ACHPR), Status of Implementation of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa by Justice Lucy Asuagbor, Commissioner, Special Rapporteur on the Rights of Women in Africa at the 60th meeting-Commission on the Status of Women on 18 March 2016, p. 2, available at: <http://reliefweb.int/report/world/status-implementation-protocol-african-charter-human-and-people-s-rights-rights-women>, accessed 05 June 2017.

⁴ See the definition of development in the preamble to the UN Declaration on the Right to Development, adopted by the General Assembly on 4 December 1986, A/RES/41/128.

⁵ The SDGs known as “Transforming our world: the 2030 Agenda for Sustainable Development” is a plan of action to use 17 Goals to target and address areas of present challenge and of critical importance in the world. See UN General Assembly Transforming our world: the 2030 Agenda for Sustainable Development, (October 21, 2015), A/RES/70/1, available at: http://www.un.org/ga/search/view_doc.asp?symbol=E/2017/66&Lang=E, accessed 30 June 2017.

⁶ UN General Assembly Progress Towards the Sustainable Development Goals: Report of the Secretary-General, (May 11, 2017), E/2017/66, paragraph 9, available at: http://www.un.org/ga/search/view_doc.asp?symbol=E/2017/66&Lang=E, accessed 30 June 2017.

⁷ Manisuli Ssenyonjo “Preface” in Manisuli Ssenyonjo (ed) *The African Human Rights System: 30 Years After the African Charter on Human and Peoples’ Rights* (Boston: Martinus Nijhoff Publishers, 2012), p. ix.

concerned.⁸ This includes the regional instruments that relate to women,⁹ the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003 (African Women’s Protocol), as well as the African Charter on the Rights and Welfare of the Child, 1990 (African Children’s Charter).¹⁰ This paper recognises the African Commission and African Court as a part of the “African solutions to African problems.”¹¹ Of which violation and abuse of women's rights are at the fore. Therefore, both mechanisms would play important roles in advancing women's rights and providing appropriate remedies to women who are victims of human rights violation and abuse.¹² This paper questions whether both mechanisms have the potential to make positive contribution to the advancement of women’s rights or have factors that inhibit advancement of women’s rights? This paper argues for both mechanisms to apply their functions towards a gender-sensitive development or with a gender-sensitive approach.

The paper is organised as follows. Following this introduction, section 2 considers the relationship between gender, human rights and development. The section emphasises the centrality of gender equality to the realisation of human rights and development. Section 3 focuses on the protective and promotional mandates of the African Commission and the African Court in relation to women’s rights. The section locates this discussion in the context of efforts to achieve gender-sensitive development. Section 4 offers some suggestions regarding enhancement of the protective and promotional mandates of the Commission and Court to ensure that they are better able to enforce women’s rights and are better placed to make an effective contribution to the achievement of gender-sensitive development in Africa. Section 5 is the conclusion.

2. The Link between Gender, Human Rights and Development

⁸ Article 60 of the African Charter provides for the African Commission to draw inspiration for the application and interpretation of the African Charter from international law on human and peoples’ rights and particularly from provisions of African human rights instruments like African Women’s Protocol and African Children’s Charter and other human rights instruments adopted by the United Nations and their specialised agencies. While Article 3 and 7 of the Protocol to the African Court provides that the jurisdiction of the African Court shall extend to legal matters concerning interpretation and application of the provisions of the African Charter and any other relevant human rights instrument ratified by the States concerned. See also Makau Mutua, *The African Human Rights System: A Critical Evaluation*, Human Development Report, United Nations Development Programme (UNDP) (2000), 1-39, available at: <<http://hdr.undp.org/sites/default/files/mutua.pdf>>, accessed 17 May 2017.

⁹ Article 1 (k) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003 (hereafter African Women’s Protocol) defines ‘women’ as “persons of female gender, including girls. This paper adopts this definition of women to include girls. The African Women’s Protocol is a comprehensive legally binding legal instrument on women's rights adopted by AU in Maputo 11 July 2003 and entered into force 25 November 2005.

¹⁰ The African Children’s Charter was adopted by Organisation of African Unity (OAU) now African Union (AU) 11 July 1990 and entered into force 29 November 1999.

¹¹ This is a popular phrase that has been given different meaning and used in different context on issues in Africa. According to Mark Nyandoro, the idea of “African solutions to African problems” was first discussed at the Accra Summit of Heads of State and Government in July 2007 where it was formally agreed by African leaders that; “Africans possessed the necessary resources and knowledge to address the challenges the continent was facing”. See Mark Nyandoro, *Zimbabwe’s Land Struggles and Land Rights in Historical Perspective: The Case of Gowe-Sanyati Irrigation (1950-2000)*, 57.2 *Historia*, (November 2012), 298-349 299.

¹² According to Shelton, “remedies” can be understood in both a procedural and substantive context. Remedies in the procedural context “are processes by which arguable claims of human rights violations are heard and decided whether by courts, administrative agencies or other competent bodies”. While in the substantive context, remedies refer to “the outcome of the proceedings. The relief afforded the successful claimant.” This paper considers remedies within the context of these two concepts. See Dinah Shelton *Remedies in International Human Rights Law* (New York: Oxford University Press, 2005), p. 8.

Gender¹³ is an established tool often used for analysing women’s experiences and the factors that reinforce the human rights violation and abuse, especially within patriarchal and cultural African societies.¹⁴ It is also an important tool for identifying appropriate gender policies for intervention in order to foster gender equality, women’s rights and development.¹⁵ The historical development of women’s rights and the struggle to address the forms of inequality and discrimination within many societies has made the use of the term “gender” more associated with women than men.¹⁶ This relates especially to the enforcement of the roles and responsibilities between men and women which often place women in positions of inequality and subordination.¹⁷

Gender equality means “equal rights, responsibilities and opportunities of men and women”.¹⁸ In other words gender equality is providing fair rights, responsibilities and opportunities for both men and women without any distinction as to whether a person is male or female.¹⁹ Equality and non-discrimination are fundamental human rights principles available to all human beings, men and women without any “distinction as to race, sex, language or religion”.²⁰ These principles form part of the core elements of international human rights law. They are also affirmed and reaffirmed in various instruments like the United Nations Charter; Universal Declaration of Human Rights (UDHR) 1948;²¹ Convention on Elimination of All Forms of Discrimination against Women (CEDAW) 1979;²² African Charter;²³ United Nations Convention on the Rights of the Child (CRC) 1989;²⁴ African Children’s Charter and the African Women’s Protocol.²⁵ The principles of gender equality and non-discrimination is most important for correcting inequalities and for the achievement of the realisation of the rights of women.²⁶ Gender equality is also confirmed as a

¹³ Gender refers to the social and cultural characteristics of men and women within a society defined largely by existing norms, roles, responsibilities and relationships. See World Health Organisation (WHO) Gender Equity and Human Rights, available at: <<http://www.who.int/gender-equity-rights/understanding/gender-definition/en/>>, accessed 06 June 2017); Catherine Albertyn The Stubborn Persistence of Patriarchy? Gender, Equality and Cultural Diversity in South Africa, 2 *Constitutional Court Review (CCR)* (2009), 165-208 171.

¹⁴ Kin Anh Duong, *Engendering the Evaluation of Anti-Trafficking Policy: A Gender Sensitive Approach*, 6 (1) *Journal of Research in Gender Studies* (2016), 145-158 148; Bart Rwezaura *Protecting the Rights of the girl-child in Commonwealth Jurisdictions*, *Hong Kong Judicial Colloquium on Women’s Rights* 114- 118; Adebola O. Olaborede *The Cultural Practice of Child Marriage as a Challenge to the Realisation of the Human Rights of the Girl-child: A Comparative Study of South Africa and Nigeria* (LLD Thesis, UFH,2016).

¹⁵ *Ibid.*

¹⁶ Duong (2016), supra note 14, p. 146-148; Commonwealth Secretariat, *Gender and Human Rights*, 30 *Commonwealth Law Bulletin*, (2004) 673-699 673; Rebecca Amollo, *Women’s Socio-Economic Rights in the Context of HIV and AIDS in South Africa: Thematic Focus on Health, Housing, Property and Freedom from Violence*, (LLD-thesis: Pretoria) (2011) 31-35

¹⁷ Albertyn (2009), supra note 13.

¹⁸ UN Entity for Gender Equality and the Empowerment of Women, *Concepts and Definitions*, available at: <<http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>>, accessed 29 June 2017).

¹⁹ *Ibid.*

²⁰ Article 1 (3) of the United Nations Charter, 24 October 1945, 1 UNTS XVI.

²¹ Article 1 & 2 UDHR adopted by UN General Assembly Resolution 217A (III) of 10 December 1948.

²² See for example Article 1 and 2 of the CEDAW adopted UN General Assembly Resolution 34/180 of 18 December 1979, entered into force 3 September 1981.

²³ Article 2 of the African Charter.

²⁴ Article 2 of the CRC adopted by UN General Assembly Resolution 44/25 of 20 November 1989, entered into force 2 September 1990.

²⁵ Article 3 of the African Children’s Charter and Article 2 of the African Women’s Protocol.

²⁶ See Raymond A. Atuguba, “Equality, Non-discrimination and Fair distribution of the Benefits of Development” in United Nations Human Rights Office of the High Commissioner *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York and Geneva: United Nations, 2013) 109-116 110.

precondition for advancing women’s economic, social, cultural and political development in Africa.²⁷

The concept of development lacks a universally acceptable single definition and subject to different understanding and debates.²⁸ The preamble to the Declaration on the Right to Development defines development as a “comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”.²⁹ The persistence of inequality and discrimination against women limits advancement in the cultural, economic, social and political life of a woman and in the development process.³⁰ Development is also recognised as a right; “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised”.³¹ Therefore, development is a human right in itself and a condition to achieve other human rights.

In the context of this paper, development is focused on efforts at effective implementation and enforcement of women’s rights to improve their condition and wellbeing. As stated above achieving gender equality is at the core of the human rights normative framework, it is also fundamental for the advancement of development globally. This is recognised in the different adopted agendas, plans and projects for advancing development and women’s right achieving gender equality as a goal. Examples include the Beijing Platform for Action of 1995;³² the Millennium Development Goals (MDGs);³³ Sustainable Development Goals (SDGs);³⁴ and Agenda 2063.³⁵ In addition, women represent a large part of the world’s population and have “potential contributions” to developing or advancing the economic, social, political, and environmental sectors.³⁶ Therefore the achievement of gender

²⁷ United Nations Population Fund (UNFPA) Gender Equality, available at: <<http://www.unfpa.org/gender-equality>>, accessed 07 June 2017.

²⁸ This is confirmed by the Secretary-General in his report on the emergence of the right to development. He notes that; “The growing awareness of the complexity of the development process has served to underline the difficulty of describing it within the confines of a single definition”. See Report of the Secretary-General “The Emergence of the Right to Development” in United Nations Human Rights Office of the High Commissioner *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York and Geneva: United Nations, 2013) p7-16 at p.7.

²⁹ UN Declaration on the Right to Development, adopted by the General Assembly on 4 December 1986, A/RES/41/128.

³⁰ The focus of this paper is to briefly discuss the notion of development. Development is a broad term subject to different understanding and debates.

³¹ Article 1(1) of the Declaration on the Right to Development.

³² Office of Special Adviser on Africa (OSAA) Gender Equality and Women’s Empowerment in Africa, available at: <<http://www.un.org/en/africa/osaa/peace/women.shtml>>, accessed 04 June 2017.

³³ UN Millennium Development Projects (Goal 3: Promote gender equality and empower women). Available at: <http://www.unmillenniumproject.org/goals/> (accessed 05-06-2017).

³⁴ Sustainable Development Knowledge Platform “Sustainable Development Goals” Available at: <https://sustainabledevelopment.un.org/?menu=1300> (accessed 05-06-2017) (Goal 5: gender equality).

³⁵ Agenda 2063 adopted by African Heads of State and Government at the 24th Session of the African Union held in Addis Ababa, Ethiopia in January 2015. Agenda 2063 is a long-term plan for Africa’s structural transformation and development including gender equality and women empowerment The Summit also declared 2015 as “The Year of Women’s Empowerment and Development towards Africa’s Agenda 2063” In addition, the African Union designated 2016 as “The Year of Human Rights with Particular Focus on the Rights of Women”. AU “2016: The Year of Human Rights with Particular Focus on the Rights of Women” Available at: <https://www.au.int/en/pressreleases/19615/2016-african-year-human-rights-particular-focus-rights-women> (accessed 04-06-2017).

³⁶ Organisation for Economic Cooperation and Development (OECD), Gender and Sustainable Development Maximising The Economic, Social and Environmental Role of Women, (2008) 3, available at: <<https://www.oecd.org/social/40881538.pdf>>, accessed 16 June 2017.

equality is not only necessary for advancing the rights of women but a condition for making positive progress in the realisation of all the other SDGs.³⁷ Hence both legal and non-legal measures need to be employed to accelerate the realisation of gender equality and reduction in violation of women’s rights. It is hoped that the African Commission and the African Court can apply their functions towards a gender-sensitive development or advancement of women’s rights across Africa.

3. Towards Gender-Sensitive Development: Evaluating the Mandates of the African Commission and the African Court

3.1 The African Commission

The African Commission is made up of eleven elected members who must have high moral standing and be highly competent in matters of human and peoples’ rights.³⁸ The elected members are guided by the mandate and the Rules of Procedure of the African Commission.³⁹ The African Commission’s main functions as provided in Article 45 of the African Charter is mainly to promote human rights and ensure the protection of all human and peoples’ rights;⁴⁰ to also interpret the rights and obligations in the Charter at the request of States parties, institutions of the AU, or individuals⁴¹ and perform any other tasks assigned by the Assembly of Heads of State.⁴² In promoting human and peoples’ rights, the Commission shall:

...collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.⁴³

The Commission ensures protection of human rights through communications;⁴⁴ conducting appropriate investigations;⁴⁵ State reporting (including NGOs’ shadow reports);⁴⁶ conducting urgent appeals and overseeing the activities of special rapporteurs and working groups.⁴⁷ The Commission’s annual report⁴⁸ also known as Activity Reports submitted to the Assembly of Heads of State highlight these promotional and protective activities.⁴⁹

³⁷Supra note 27.

³⁸ Article 31 of the African Charter.

³⁹ *Ibid.*, Article 45. The Rules of Procedure was adopted by the ACHPR during its 2nd Ordinary Session in Dakar, Senegal in 1988 and revised during the 18th Ordinary Session on Praia Cao- Verde in 1995.

⁴⁰ Article 45 (1) & (2) of the African Charter.

⁴¹ *Ibid.*, Article 45 (3); African Commission on Human and Peoples’ Rights (ACHPR), Mandate of the Commission”, available at: <http://www.achpr.org/about/mandate/>, accessed 30 April 2017.

⁴² *Ibid.*, Article 45 (4).

⁴³ *Ibid.*, Article 45 (1).

⁴⁴ This relates to complaints of alleged human rights violation submitted by a State, Individual or NGOs. See Article 47-58 of the African Charter. In addition, with respect to communications submitted and deliberated on by the Commission, the attention of the Assembly is drawn to special cases that reveal serious violation of human rights. The Assembly may also request the Commission to conduct an in-depth study and investigation of the special cases and make a factual report with findings and recommendations. See Article 58 (1) & (2) of the African Charter.

⁴⁵ *Ibid.*, Article 46.

⁴⁶ Article 26 (1) of the African Women’s Protocol provides for periodic reports from State parties submitted to the African Commission.

⁴⁷ *Ibid.*

⁴⁸ Article 54 of the African Commission.

⁴⁹ An example is in the 40th Activity Report of the African Commission which highlights the status of submission of States’ periodic reports under the African Charter, status of communications submitted and considered, letters of urgent appeal and appreciation, just to mention a few. See Paragraph 12-14, 16-17 and 19-20. Report of the African Commission on Human and Peoples’ Rights for the period from December 2015 to

The jurisdiction of the African Commission applies to the interpretation and application of the provisions of the African Charter.⁵⁰ However, the Commission shall draw inspiration for the application and interpretation of the African Charter from international law on human and peoples’ rights, particularly from provisions of African human rights instruments like African Women’s Protocol⁵¹ and African Children’s Charter and other human rights instruments adopted by the United Nations and their specialised agencies.

The African Commission has been recognised for its positive contributions especially through its promotional function and activities to women’s rights and development in Africa.⁵² The functions of the Commission confirm its relevance to women’s rights and development. The Commission has worked independently and in collaboration and cooperation with other human rights bodies, different NGOs and civil societies.⁵³ This has helped strengthen its position and mandate in the region, as well as strengthen efforts at protecting and monitoring the implementation and enforcement of women’s rights and gender equality.⁵⁴

On a more critical level, the Commission is still faced with difficulties and challenges that limit the effectiveness of aspects of its functions. As noted above, State reporting is one of the key aspects of the Commission’s function under the African Charter and the African Women’s Protocol. Each State party is to submit a report every two years stating legislative and other measures adopted and progress made to give effect to the rights enshrined in the Charter, and the Protocol.⁵⁵ This is complemented with the Guidelines for National Periodic Reports under the African Charter, adopted at the Fifth Ordinary Session of the Commission in April 1989.⁵⁶

Over the years, reports have shown that not all State parties have submitted either the initial report or the subsequent periodic reports. For example, the 40th activity report of the African Commission for the period December 2015 to April 2016,⁵⁷ shows that 19 States have all reports submitted up to date,⁵⁸ 28 States have a number of reports that are overdue⁵⁹ and 6 States are yet to submit any report.⁶⁰ Magnus Killander confirms the problem with State reporting and states that:

April 2016, available at: http://www.achpr.org/files/activity-reports/40/actrep40_2016_eng.pdf accessed 01 May 2017.

⁵⁰ See Wundeh R. Eno, *The Jurisdiction of the African Court on Human and Peoples’ Rights*, 2 *African Human Rights Law Journal (AHRLJ)*, no. 2 (2002), p. 223-233 at p. 226.

⁵¹ Article 26 of the African Women’s Protocol also provides for State Party periodic report submitted to the African Commission in accordance with section 62 of the African Charter.

⁵² Ssenyonjo (2012), *supra* note 7; Mutua (2000) *supra* note 8, p.26.

⁵³ ACHPR Website, NGOs Statement, available at: <http://www.achpr.org/sessions/53rd/speeches/ngos-opening-statement/>, accessed 09 June 2017.

⁵⁴ *Ibid.*

⁵⁵ See Article 62 of the African Charter and Article 26 (1) of the African Women’s Protocol.

⁵⁶ Guidelines for National Periodic Reports 1989, available at: http://www.achpr.org/instruments/guidelines_national_periodic_reports/, accessed 04 June 2017.

⁵⁷ See 40th Activity Report of the African Commission on Human and Peoples’ Rights submitted in accordance with Article 54 of the African Charter on Human and Peoples’ Rights from December 2015 to April 2016, available at: http://www.achpr.org/files/activity-reports/40/actrep40_2016_eng.pdf, accessed 07 May 2017.

⁵⁸ The States include: Algeria, Burkina Faso, Côte d’Ivoire, Djibouti, Ethiopia, Kenya, Liberia, Mali, Malawi, Mauritius, Mozambique, Namibia, Niger, Nigeria, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, South Africa, Uganda.

⁵⁹ Gabon, The Sudan (1 report due); Angola, Burundi, Cameroon, Democratic Republic of Congo, Libya, Rwanda, Togo (2 reports overdue); Benin, Botswana, Congo, Madagascar, Tanzania (3 reports overdue); Cape Verde, Central African Republic, Chad, Egypt, Gambia, Ghana, Guinea, Kingdom of Lesotho, Mauritania, Seychelles, Swaziland, Tunisia, Zambia, Zimbabwe (more than 3 reports overdue).

⁶⁰ Comoros, Eritrea, Guinea-Bissau, Equatorial Guinea, Sao Tomé and Príncipe, Somalia.

In practice, states report less frequently. This is not necessarily a problem, considering that the Commission has a backlog of state reports to consider. More problematic is the fact that a few states have never reported at all, despite having ratified the African Charter decades ago.⁶¹

No doubt this is a challenge, however, in my view, the fact that not all the States are consistent and up to date with their reports is a critical problem just as much as it is a problem that there are still a few States that have never reported at all. This obviously limits efforts at confirming measures adopted and progress made with the implementation and enforcement of human rights and women’s rights in the States concerned.⁶² It will also limit efforts at creating a constructive dialogue between the Commission and the State party concerned over reports submitted.⁶³ Addressing gender inequality issues in order to achieve gender equality and women empowerment requires consistent and rigorous efforts of all States and individuals.⁶⁴ Without an up to date and consistent report efforts at advancing the realisation of women’s rights is limited. This in turn limits the progressive transformation which sustainable development aims to achieve.⁶⁵

Although it is quite surprising that the recent activity report still confirms a backlog of reports because according to Viljoen, in an attempt to encourage State reporting and reduce backlog, the Commission communicated to State parties in a *note verbale* that it was willing to consolidate all outstanding reports into a single report.⁶⁶ However, the Commission equally needs to make more concerted effort to address the challenge of backlog and any factor that may be limiting their effectiveness like limited staff and logistical problems. This is most important for creating a more consistent "channel for constructive dialogue" between the Commission and the State on human rights issues.⁶⁷

Another important aspect of the protective mandate of the Commission is the consideration of communications submitted by States, individuals, groups of individuals or NGOs alleging violation of human rights committed by a State or an organ of the State.⁶⁸ Article 47 of the African Charter provides for communications submitted by a State party alleging violation of the provisions of the Charter by another State party. While Article 55 provides for “communications other than those of States parties to the African Charter”. It is under this provision that individuals, groups and NGOs are considered to submit communications to the Commission.⁶⁹

According to Makau Mutua, the communications from individuals, groups and NGOs have a “larger potential which thus far has not been realised”.⁷⁰ This is considering that the African Charter places no restriction on who can submit a complaint or written communication before the Commission.⁷¹ Hence, individuals, groups and NGOs can be considered. Communications considered by the Commission also only need establish a

⁶¹ Magnus Killander, *Human Rights Developments in the African Union during 2014 15 African Human Rights Law Journal* (2015), p. 537-558, at p.540.

⁶² See paragraph 2 of the National Periodic Reports 1989.

⁶³ *Ibid.*

⁶⁴ UN, Progress Towards the Sustainable Development Goals: Report of the Secretary-General, 11 May 2017, paragraph 9.

⁶⁵ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015 1-3.

⁶⁶ Frans Viljoen *International Human Rights Law in Africa* (United Kingdom: Oxford University Press, 2012) 355. See also R. Murray The African Charter on Human and Peoples’ Rights 1987-2000: An Overview of its Progress and Problems *AHRLJ* (2001) 1-17 11.

⁶⁷ See paragraph 2 of the National Periodic Reports 1989.

⁶⁸ Articles 47-59 provides for communications from States and other communications. See also S Gumede, *Bringing Communications before the African Commission on Human and Peoples’ Rights*, 3 *African Human Rights Law Journal* (AHRLJ), (2003), p. 118-146 at p. 120.

⁶⁹ Article 55 of the African Charter. See also Supra note 69.

⁷⁰ Mutua (2000), supra note 8, p.17.

⁷¹ *Ibid.*

violation of human rights and not necessarily a series of serious and massive human rights violations.⁷²

Regrettably, in the context of addressing gender inequality and violation of the rights of women, this potential has not been realised. It was only in 2011, the Commission decided for the first time on the merit in a case concerning the violation of women’s rights in Communication 323/06, *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*.⁷³ This means it took the Commission about twenty-four years since its establishment in 1987 to realise this development in women’s rights. Not many cases of violation of women’s rights have been decided on merit.

Although it is important to point out that different factors might have contributed to this slow development or limited the effectiveness of this function in the context of women’s rights. The Commission has been faced with the problem of inadequate resources and personnel, and lack of awareness on the role and function of the Commission across the region.⁷⁴ More importantly, the submission of communications to the Commission is only for alleged violation of human rights committed by a State party to the Charter.⁷⁵ This means communications on alleged human rights violation committed by an individual or group of individuals is not considered. This limits efforts at advancing gender equality and women’s empowerment because violation of women’s rights is known to often take place in the private sphere, that is the family or community and by private individuals.⁷⁶

In general, it is the principle of international law that States have an obligation to protect human rights at the national level.⁷⁷ This is reflected in various international human rights instruments placing an obligation on State Parties to adopt legal measures and other measures to protect and redress the violation of human rights.⁷⁸ This would mean legal measures and other measures must first be considered at national level to remedy the violation of human rights or women’s rights before approaching international or regional enforcement bodies.⁷⁹

This is also indicated as one of the conditions for admissibility of communications in Article 56 (5) & (6) of the African Charter that communications shall be considered if they are “sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged” and if they “are submitted within a reasonable period from the time local

⁷² See paragraphs 41-42 of Communications 147/95- 149/96 *Jawara v The Gambia*. Available at: http://www.achpr.org/files/sessions/27th/communications/147.95-149.96/achpr27_147.95_149.96_eng.pdf, accessed 05 June 2017. See also Gumedze (2003) supra note 69.

⁷³The Commission in 2011 decided on Communication 323/06, *Egyptian Initiative for Personal Rights and Interights v Egypt*, available at: http://www.achpr.org/files/sessions/10th-10th/communications/323.06/achpreos10_232_06_eng.pdf, accessed 22 May 2017. See also Magnus Killander & Bright Nkrumah *Human Rights Developments in the African Union During 2012 and 2013* 14 *AHRLJ* (2014) 275-296 281; ACHPR Communications Procedure, available at: <http://www.achpr.org/communications/procedure/>, accessed 30 May 2017.

⁷⁴ U. O. Umzurike, *The African Charter on Human and Peoples’ Rights: Suggestions for More Effectiveness* 2007 13 *Annual Survey of International and Comparative Law* Issue 1, (2007), p. 179-190, p. 181.

⁷⁵ Article 60 of the African Charter provides for the Commission to draw inspiration for the application and interpretation of the African Charter from international human rights law instruments, particularly African human rights instruments like African Women’s Protocol and African Children’s Charter and human rights instruments adopted by the United Nations and their specialised agencies. See also Gumedze (2003), supra note 69, p.124.

⁷⁶ Gooneskere, supra note 1, p. 13.

⁷⁷ Minority Rights Group International “Guidance: Exhausting domestic remedies under the African Charter on Human and Peoples’ Rights” 21 April 2016. Available at: <http://minorityrights.org/publications/guidance-exhausting-domestic-remedies-under-the-african-charter-on-human-and-peoples-rights/> (accessed 02/05/2017).

⁷⁸ For example, Article 1 of the African Charter and Articles 2 & 5 of the African Women’s Protocol.

⁷⁹ Minority Rights Group International “Guidance: Exhausting domestic remedies under the African Charter on Human and Peoples’ Rights” 21 April 2016.

remedies are exhausted or from the date the Commission is seized of the matter.”⁸⁰ The rationale for exhaustion of local remedies is to ensure the States concerned have an opportunity to remedy the violation of human rights through their local systems and the Commission should be seen as a mechanism for last resort.⁸¹

Although, in my view, communications emanating from the individual, group and NGOs have an important role and potential to contribute positively to strengthening the position and protection of women’s rights in Africa. However, with the communications only for alleged violations committed by State parties; the condition of exhaustion of local remedies and the African Commission recognised as a mechanism of last resort. No doubt there a huge limit to women’s access to the potential that exists in the communications procedure. This I find quite challenging especially in an attempt to finding sustainable measures that can be used to address issues of gender inequality and violation of women’s right. In addition, it is also a concern that implementation of the Commissions decisions on communication is a challenge. This is indicated in the 40th activity report of the Commission that “the failure to report, by parties to communications, in particular, Respondent States on the implementation of the Commission’s decision” is of concern.⁸²

3.2 Accessibility of Individuals and NGOs to the African Court on Human and Peoples Rights

The African Court⁸³ is established to complement and reinforce the protective mandate of the African Commission.⁸⁴ The jurisdiction of the African Court is not limited to the interpretation and application of the African Charter alone, but extends to other human rights instruments. This is by virtue of Article 3(1) of the Protocol to the African Court which provides that jurisdiction of the Court shall “extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned”.⁸⁵ In addition, Article 7 also provides that: “The Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned”.⁸⁶

These provisions confirm the broad jurisdiction of the African Court when compared with the African Commission that may only interpret and apply the provisions of the African Charter drawing inspiration from other international human rights instruments.⁸⁷ It would seem this gives great opportunity for individuals who are victims of human rights violations to bring an action to court on the basis of other human rights instruments that adequately protect their rights instead of being limited to the African Charter.⁸⁸ For example, following the criticisms of the African Charter on its inadequate and vague protection of the rights of

⁸⁰ Article 56 (5) & (6) of the African Charter.

⁸¹ Paragraph 31 of Communications 147/95- 149/96 *Jawara v The Gambia*.

⁸² 40th Activity Report of the African Commission on Human and Peoples’ Rights, from December 2015 to April 2016, paragraph 27 (b).

⁸³ Article 1 of the Protocol establishing an African Court on Human and Peoples’ Rights (Protocol to the African Court) provides for the establishment of the African Court See Protocol to the African Court adopted June 1998, by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) (now African Union AU) and came into force 25 January 2004, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). See also African Court on Human and Peoples’ Rights website. Available at: <http://www.african-court.org/en/>, accessed 11 April 2017.

⁸⁴ See the preamble and Article 2 of the Protocol to the African Court.

⁸⁵ See also Eno (2002) *supra* note, 51 p. 226.

⁸⁶ *Ibid*.

⁸⁷ *Ibid*; Article 60 of the African Charter.

⁸⁸ *Ibid.*, 227. Mutua (2000) *supra* note 8, p. 27.

women, the African Women’s Protocol was adopted to supplement the provisions of the African Charter and enhance women’s rights and gender equality.⁸⁹ Therefore on an alleged violation of the rights of women, the African Women’s Protocol would be a very relevant human rights instrument for which cases can be brought before the African Court.⁹⁰

However, the Protocol to the African Court limits access of individuals and NGOs (who are mostly women or representatives of women) to bringing an action before the African Court.

Article 5 (a)-(e) of the Protocol to the African Charter directly provides that the African Commission; State parties and African intergovernmental organisations may have access to the court. The Protocol makes no express provision for individuals and NGOs to access the court, except when the court uses its discretion to grant access or where State party had made a declaration accepting jurisdiction of the court at the time of ratifying the Protocol to receive cases under Article 5 (3) of the Protocol.⁹¹ This shortcoming limits efforts to advance the rights of women. In addition, the conditions for admissibility of communications (in particular exhaustion of local remedies) highlighted in Article 56 of the African Charter equally applies to the conditions for admissibility of a case brought before the court by an individual or an NGO.⁹²

It is assumed that accessing mechanisms at the regional level for remedies to alleged claims would be easy. However, as stated above, regional mechanisms are recognised as last resort after exhaustion of local remedies. This would mean then that more strategic focus needs to be placed on ensuring State accountability and responsibility for implementation and enforcement of human rights or women's rights. This is because States have a responsibility of ensuring the fulfilment of human rights of all individuals.⁹³

4. Towards more gender-sensitive development: some proposals to enhance the effectiveness of the Commission and the Court

4.1 Developing Specific Periodic State Reporting on Gender Issues

Given that women’s rights and gender equality have gradually over the years received more attention at the regional level and recognised as very important condition for the achievement of development in Africa.⁹⁴ In relation to state reporting, it is suggested that a more specific periodic State report on women’s rights and gender equality issues be considered. A specific periodic report on women’s rights may encourage participation of all State parties and accelerate efforts at advancing the realisation of women’s rights and gender equality. This is not to state that the general periodic State report submitted to the Commission is not important. However, States parties report on different aspects of human and people’s rights

⁸⁹ Article 66 of the African Charter. See also D. Chirwa Reclaiming (WO)Manity: The Merits and Demerits of African Protocol on Women’s Rights, *Netherlands International Law Review (NILR)* (2006) 68-71; Adebola O. Olaborede “The Cultural Practice of Child Marriage as a Challenge to the Realisation of the Human Rights of the Girl-child: A Comparative Study of South Africa and Nigeria” (LLD Thesis, UFH,2016) 140; Eno (2002) supra note, 51 p. 226.

⁹⁰ *Ibid.*, 227.

⁹¹ See Article 5 (3) and Article 34 (6) of the Protocol to the African Charter. See also Mutua 2000 supra note 8, p. 29.

⁹² *Ibid.*

⁹³ Gooneskere supra note 1, p.3

⁹⁴ As stated above, the importance of women’s right and gender equality in Africa has been affirmed and reaffirmed in a number of platforms or projects like the Beijing Platform for Action of 1995; the Millennium Development Goals (MDGs) (Goal 3: Promote gender equality and empower women); Sustainable Development Goals (SDGs) (Goal 5: gender equality) and Agenda 2063.

and obligations. The Commission is also encouraged to consider consolidating State report on women’s rights with the African Committee of Experts on Rights and Welfare of the Child (ACERWC).⁹⁵

It is envisaged that providing a specific comprehensive report on women’s rights and gender issues will expedite addressing the critical contemporary issues affecting women. It will enable State parties to confirm the extent of implementation of various instruments that relate to women’s rights. This is in relation to legislative and other measures taken to protect the rights of women as well as difficulties and shortcomings limiting the States’ effort.⁹⁶ Although the recommendations of the Commission (Concluding Observations) has been criticised as not having a legally binding effect on State parties in order to ensure compliance.⁹⁷ However, it is hoped that a specific periodic report on women’s rights will enable that “channel of constructive dialogue”.⁹⁸ This will enable each State and the Commission to discuss on women’s rights as well as encourage implementation of the recommendations and suggestions (Concluding Observations) of the Commission.⁹⁹ Lastly, specific periodic reporting would be an approach towards gender sensitive development of women’s rights and reducing the likelihood of the continuous violation of women’s rights.

4.2 Reconsidering accessibility of individuals and NGOs to the African Commission and the African Court.

The challenge with the communications submitted to the Commission being only for alleged violations committed by State parties and not private individuals; the conditions for admissibility especially on exhaustion of local remedies and the African Commission recognised as a mechanism of last resort limits a woman’s access to the potential that exists in the communications procedure.

The principle of international law places obligation on States to protect human rights at the national level.¹⁰⁰ Focus should therefore be placed on State accountability and the legal and non-legal measures¹⁰¹ provided for ensuring effective implementation and enforcement of women’s rights. In addition, consideration should be given to providing a duration (i.e. 3years or 5 years) to which an individual may rely on exhausting local remedies before submitting communications to the African Commission and the African court especially where the case has potential to advance women’s rights and development.¹⁰² This is suggested in consideration of the fact that there is need to accelerate effort to address the persistence of gender inequality and violation of women’s rights in Africa.¹⁰³

4.3 Focus on awareness

⁹⁵ This consolidation is being considered in the context of the definition of ‘women’ as “persons of female gender, including girls provided in Article 1 (k) of the African Women’s Protocol.

⁹⁶ See Article 62 of the African Charter and Article 26 (1) of the African Women’s Protocol.

⁹⁷ Viljoen (2012) supra note 66, p. 414; Mutua (2000) supra note 8, p. 21.

⁹⁸ Paragraph 2 of the for National Periodic Reports.

⁹⁹ *Ibid.*

¹⁰⁰ Minority Rights Group International, Guidance: Exhausting domestic remedies under the African Charter on Human and Peoples’ Rights” 21 April 2016, available at: <http://minorityrights.org/publications/guidance-exhausting-domestic-remedies-under-the-african-charter-on-human-and-peoples-rights/> accessed 02 May 2017.

¹⁰¹ For example, Article 1 of the African Charter and Articles 2 & 5 of the African Women's Protocol.

¹⁰² Mutua (2000) supra note 8, p. 29.

¹⁰³ UN General Assembly Progress Towards the Sustainable Development Goals: Report of the Secretary-General, (May 11, 2017), paragraph 9,

Different scholars¹⁰⁴ have suggested that consideration should be given to revising the functions of the African Commission and remove its protective functions. The non-binding nature of the recommendations of the Commission, among other reasons contributes to this suggestion.¹⁰⁵ In my view, both the promotional and protective functions of the African Commission play very important role and complement each other. Both functions are “interrelated and indistinguishable”.¹⁰⁶ The recommendations provided are very useful, especially if in the context of accelerating efforts to achieve the realisation of the rights of women. This is not to state that the fact that the recommendations of the Commission are non-binding and do not enforce compliance on State Parties is not a problem. However, recommendations from State party reporting and communications (both non-admissible and admissible complaint) are information that are accessible to the public and useful for creating awareness and publicity as well as creating a constructive dialogue on various human rights issues.¹⁰⁷ Umozurike confirms this in his argument on the need for a more effective African Commission and note that: “The Commission should do more to advertise its work and disseminate its publications...Publicity is a potent weapon in the field of human rights, as without it, it is impossible to achieve the full effect from efforts expended.”¹⁰⁸ Publicity and awareness is not limited to the African Commission alone but to also the African Court. There is need to raise awareness on the role, mandate and legally binding power of the African court. There is also need for more effort on the part of the Commission to be consistent in disseminating its decisions particularly on women’s rights in time and across the region. Awareness will create a positive approach towards gender sensitive development of women’s rights.

5. Conclusion

The African Commission and the African Court are the enforcement mechanisms established to ensure the realisation and safeguard of the human rights in Africa. They play very important roles in the African regional human rights system. However, like all human rights mechanisms, the Commission and Court have shortcomings that limit the potential(s) of their mandate. There is the challenge with late submission and backlog of State party reports and accessibility of the individual to submit complaints to the African Commission and the African Court on alleged human rights violation. These shortcomings limits efforts at improving the condition of women, advancing women’s rights and sustainable development. Although some suggestions have made for the Commission to consider a periodic report focused on women’s rights and gender equality issues, to re-emphasise State accountability and responsibility in enforcing prompt local remedies to addressing violation and abuse of women’s rights. In addition, consideration should be given to how long (i.e years) should an individual consider local remedies in order to submit a complain to the Commission and the Court, as well as raising awareness on the mandate of the Commission and the Court and gender equality issues. No doubt different sustainable legal and non-legal measures are constantly needed in addressing contemporary issues of violence and inequality affecting women in Africa. However, to create a more effective system employing a gender sensitive approach is most important for more positive progress in the realisation of women’s rights.

¹⁰⁴ For example, Eno (2002), supra note 51, p. 228; Mutua (2000) supra note 8, p. 19-22.

¹⁰⁵ *Ibid*; Eno (2002), supra note 51, p. 228.

¹⁰⁶ Gumedze (2003), supra note 69, p.120.

¹⁰⁷ Mutua (2000), supra note 8, p. 19-22; Paragraph 2 of the for National Periodic Reports.

¹⁰⁸ Umozurike (2007), supra note 75, p. 189.

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