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Legal protection of women's rights in Africa: The case of Tanzania

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Culture does not make people.

People make culture.

If it is true that the full humanity of women is not our culture,

then we can and must make it our culture.

Chimamanda Ngozi Adichie

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Abstract

L'obiettivo che si pone questa tesi è quello di offrire una visione d'insieme del quadro normativo relativo alla protezione dei diritti delle donne in Africa. Negli ultimi decenni sono stati compiuti notevoli progressi nello sviluppo di strumenti sia internazionali che regionali per la protezione di tali diritti, tra cui spicca l'adozione nel 2003 del primo trattato interamente dedicato alla tutela dei diritti delle donne nel continente. Si tratta di un sistema giovane ed in continuo evolversi, che dispone oggi di stabili radici giuridiche, ma che deve ancora dare i suoi frutti. Per avvalorare questo studio viene presa in esame l'attuazione di tali norme in Tanzania, fornendo un esempio concreto del ruolo delle corti nazionali nella tutela dei diritti delle donne nel continente africano.

Mentre a livello mondiale i primi passi verso la protezione giuridica dei diritti umani sono stati mossi nel secondo dopoguerra, in Africa il percorso è stato più lungo e complesso, soprattutto per quanto riguarda il riconoscimento dei diritti delle donne. Trattati internazionali come la Convenzione sull'eliminazione di ogni forma di discriminazione della donna (CEDAW) del 1979 hanno ricevuto notevole resistenza da parte degli stati africani, poiché i diritti stabiliti da tali strumenti venivano percepiti come un'imposizione di valori occidentali. Il primo strumento dedicato alla protezione dei diritti umani adottato dall'allora Organizzazione dell'unità africana (oggi Unione africana) fu la Carta africana dei diritti dell'uomo e dei popoli, entrata in vigore nel 1986. Per la prima volta venne fatto cenno alla necessità di combattere qualsiasi forma di discriminazione, tra cui quelle nei confronti delle donne. Si dovette tuttavia aspettare il 2003 per l'adozione del Protocollo alla Carta africana dei diritti dell'uomo e dei popoli sui diritti delle donne in Africa, altresì detto Protocollo di Maputo. Questo trattato è stato concepito per contrastare specifici problemi che affliggono le donne nel continente, includendo quindi disposizioni assenti in trattati internazionali precedenti. È stato accolto come uno degli strumenti più avanzati e progressisti non solo nel continente, ma anche a livello internazionale. La prima parte di questa tesi si occupa di presentare gli sviluppi che hanno portato alla creazione di

un sistema africano di protezione dei diritti umani e successivamente dei diritti delle donne, prestando particolare attenzione alla CEDAW, ma soprattutto al più recente Protocollo di Maputo, con un'analisi delle sue caratteristiche, i suoi punti di forza e le opposizioni ricevute.

A seguito della presentazione degli strumenti giuridici esistenti per la protezione dei diritti umani e delle donne, vengono presi in esame i principali attori responsabili della loro applicazione. La Commissione africana dei diritti dell'uomo e dei popoli è l'organo quasi-giudiziario istituito dalla Carta africana, le cui funzioni principali sono garantire la protezione dei diritti umani e dei popoli, la loro promozione e fornire interpretazione della Carta africana. Questo elaborato dedica tuttavia maggiore attenzione alla Corte africana dei diritti dell'uomo e dei popoli, che ha iniziato a svolgere le sue funzioni nel 2006 ed ha sede ad Arusha, in Tanzania. Viene presentato il processo che ha portato alla creazione della Corte, le sue funzioni e la complementarità con il mandato della Commissione. Per esplorare le potenzialità della Corte africana, viene stabilito un paragone con gli altri sistemi regionali di protezione dei diritti umani: quello europeo e quello interamericano. La Corte africana possiede delle potenzialità insite nel suo mandato che rappresentano una solida base per sviluppare un efficiente ed onnicomprensivo sistema di protezione dei diritti umani. Queste potenzialità devono tuttavia ancora essere messe a frutto, in particolar modo nell'ambito dei diritti delle donne. Per questa ragione, la seconda parte della tesi si occupa anche di svolgere un'analisi degli attuali casi pendenti presso la Corte africana in materia di diritti delle donne e di ricavare degli esempi utili per la futura giurisprudenza della Corte, anche per mezzo di un parallelo con la Corte interamericana.

Il ruolo delle corti nazionali è fondamentale nella protezione dei diritti umani e, nello specifico di questa tesi, dei diritti delle donne. Altrettanto fondamentale è la volontà politica dei singoli stati di applicare i relativi strumenti giuridici regionali ed internazionali ed accettare la giurisdizione della Corte africana. La terza parte di questo elaborato si propone di presentare l'esempio della Tanzania e l'applicazione a livello nazionale delle norme e disposizioni presentate nei capitoli precedenti. Viene innanzitutto delineato il quadro costituzionale per la protezione dei diritti delle

donne, i numerosi trattati sui diritti umani ratificati dallo stato e le attuali politiche attuate per ottemperare alle disposizioni di tali trattati. Infine vengono analizzate tre aree in cui le donne tanzaniane ancora oggi subiscono forti discriminazioni, nonostante le leggi vigenti e i progressi fatti negli ultimi anni. Innanzitutto il matrimonio di minori, pratica che implica anche la negazione del diritto a ricevere un'istruzione. Nonostante la legge che permetteva il matrimonio di ragazze già a partire dai 15 anni sia stata dichiarata incostituzionale nel 2016, il fenomeno è largamente diffuso e l'attuale governo sta attuando in questi mesi delle politiche fortemente discriminatorie nei confronti delle minori in stato di gravidanza. In secondo luogo viene affrontato il tema delle mutilazioni genitali femminili, proibite sia da numerosi trattati internazionali adottati dalla Tanzania, che dal Codice penale dello stato, anche se quest'ultimo le vieta solo al di sotto dei diciotto anni. Infine si affronta la complessa situazione della disparità di genere nel diritto fondiario, includendo un'analisi dei più recenti casi giuridici in materia e l'intervento del comitato CEDAW nella giurisprudenza delle corti tanzaniane a tal riguardo.

Questa analisi dimostra come il quadro giuridico per la protezione delle donne in Africa sia solido ed esauriente e molti casi analizzati testimoniano l'efficacia e il potenziale di questo giovane sistema. Sono numerosi i trattati internazionali e regionali che affrontano la tutela di tali diritti sotto diversi punti di vista, e tra questi spicca il Protocollo di Maputo, strumento di fondamentale importanza nella difesa dei diritti delle donne africane. La recente creazione della Corte africana dei diritti dell'uomo e dei popoli ha inoltre aggiunto un ulteriore importante tassello al sistema africano di protezione dei diritti umani. Ciononostante, quello che emerge è un sistema con delle forti potenzialità che non vengono ancora sfruttate ed accettate. Come osservato nell'esempio della Tanzania, spesso le disposizioni dei trattati internazionali non vengono applicate sul piano nazionale e non si traducono in una concreta realizzazione e protezione dei diritti delle donne. Per quanto concerne la Corte africana, il suo potenziale è arginato dalla scarsa adesione degli stati africani al protocollo che ne sancisce la creazione, e l'ancora più limitata accettazione da parte degli stati della procedura che riconosce la facoltà di Organizzazioni non governative e singoli individui di adire direttamente la Corte. Questo limita notevolmente l'utilità

dei trattati presentati in questa tesi ed il campo d'azione della Corte, la cui sfida maggiore resta quindi la sua incapacità di affrontare efficacemente molti casi di violazione dei diritti umani e delle donne, dovuta alla mancanza di volontà politica da parte degli stati africani di accettare la sua giurisdizione.

Le donne africane sono ancora vittime di innumerevoli violazioni dei loro diritti. Oggi però dispongono degli strumenti giuridici necessari per la loro difesa. Sta in particolar modo agli stati il dovere di rinforzare il sistema domestico di protezione dei diritti umani in conformità delle prescrizioni internazionali.

List of abbreviations

ACHPR	African Charter on Human and Peoples' Rights; African Commission on Human and Peoples' Rights
ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AEC	African Economic Community
APDF	Association pour le Progrès et la Défense des Droits des Femmes Maliennes
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination Against Women
CEJIL	Centre for Justice and International Law
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CHRAGG	Commission of Human Rights and Good Governance (Tanzania)
CLDO	Local Customary Law Declaration Orders (Tanzania)
CNMW	Convention on the Nationality of Married Women
CPRW	Convention on the Political Rights of Women
CSW	Commission on the Status of Women
DEDAW	Declaration on the Elimination of Discrimination against Women
DHS	Demographic Health Survey (Tanzania)
DPP	Director of Public Prosecution (Tanzania)

DRC	Democratic Republic of Congo
ECOSOC	Economic and Social Council (of the United Nations)
ECOWAS	Economic Community of West African States
FGM/C	Female Genital Mutilation/Cutting
FIDH	Fédération Internationale des Droits de l'Homme
GA	General Assembly (of the United Nations)
GBV	Gender based violence
HRC	United Nations Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDPs	Internally Displaced Persons
IHRDA	Institute for Human Rights and Development in Africa
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
Maputo Protocol	Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa
Marriage Convention	Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages
NGOs	Non-Governmental Organizations
NPA-VAWC	National Plan of Action to end Violence Against Women and Children in Tanzania
OAS	Organization of American States
OAU	Organization of African Unity
OAU Charter	Charter of the Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
SADC	Southern African Development Community
TAWJA	Tanzania Women Judges' Association
TLR	Tanzania Law Reports
UDHR	Universal Declaration of Human Rights

UN	United Nations
VAC	Violence against children
VAW	Violence against women
VCLT	Vienna Convention on the Law of Treaties
VICOBA	Village Community Banks
WHO	World Health Organization
WILDAF	Women in Law and Development in Africa

Table of contents

Introduction

This research is the result of my deep interest in the field of women's rights and my experience in Tanzania. I have done an internship at the Embassy of Italy in Dar es Salaam, in the field of development cooperation. One of my first tasks has been the organization of a seminar on female genital mutilation, which introduced me to the issue of women's rights protection in Tanzania. Thus, I started widening my Western-based feminist point of view with the study of African feminism and the challenges Tanzanian women are facing. This experience has been the primary inspiration for this thesis, the main purpose of which is to display the current developments of the legal protection of women's rights in Africa, taking as example the case of Tanzania.

During my research I used mainly African sources, not to be driven only by a Western perspective. A feature of this thesis, that made the process of researching and writing extremely interesting, is that it deals with recent and currently developing situations, institutions and legal cases. Therefore, sources and literature are not always available, and a key part of the research has been collecting information from other sources, for instance thanks to NGOs and friends working in the field, or transcribing recordings of public hearings at the African Court, given the lack of written information.

The first chapter presents the development of a human rights system in Africa, particularly in the field of women's rights. Following an excursus on the creation of a human rights system, both internationally and in the African continent, the main legal instruments for the protection of African women are presented. Within these, emphasis is placed on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted in 2003, it is a legally binding instrument developed by Africans for Africans, which reinforces the status of women's rights in a vast and deeply progressive way.

The second chapter presents the main actors in the legal protection of human rights in Africa, namely the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. The latter is exhaustively analysed, both in its history and functions, and in its potential in the protection of women's rights. Since the African Court is relatively young (it issued its first judgement in 2009), to explore its possible developments a comparison with the other regional human rights systems is presented. Particularly, a case concerning women's rights currently pending at the African Court and a comparable case faced by the Inter-American Commission on Human Rights are placed side by side. To conclude, the challenges and possible developments of the African Court are highlighted.

The third chapter moves to the case study of Tanzania. It presents the constitutional framework for the legal protection of women's rights in the country, the international treaties ratified by Tanzania, the current plan of action to end violence against women and children, before moving to three areas in which women's rights are threatened. Firstly, child marriage and the consequent access to education, including recent developments in the fight against child marriage, as well as setbacks caused by the current government. Secondly, the practice of female genital mutilation, still widespread in Tanzania. Thirdly, the issue of women's land right, source of many legal battles to reach equality and non-discrimination.

Thanks to this research and its focus on the process of creation and evolution of a legal framework for the protection of women's rights in Africa, and thanks to the case study, it has been possible to highlight the potential and main achievements attained, together with the challenges posed for its effective implementation.

1 The development of a Human Rights system in Africa: a feminist analysis

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."

African Charter on Human and Peoples' Rights, Article 2

1.1 Introduction

The legal protection of human rights in Africa is a relatively recent development, having been fostered only after the decolonization. Nevertheless, in this environment women's human rights represented a secondary issue, and only in 2003 a comprehensive and binding instrument on women's rights has been adopted: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

The fight to protect women's human rights, not only in Africa, has always faced different obstacles. Firstly, as feminist scholars argue, international human rights law is male-dominated: it is formulated by man and for this reason it fails to take into account the position of women. As written by Charlesworth and Chinkin, a feminist analysis of international law puts in evidence that *"the absence of women in the development of international law has produced a narrow and inadequate jurisprudence that has, among other things, legitimated the unequal position of women around the world rather than challenged it"*.[1] Women are hence silent and invisible, their participation in public life is limited in many countries and their rights

[1] Hilary Charlesworth and Christine Chinkin, *The boundaries of international law: A feminist analysis* (Manchester: Juris publishing; Manchester university press, 2000), 1

in the private sphere, where violations against women are more likely to occur, are not protected.

Secondly, within this unbalanced international and national law system, women from the global South suffer doubly. The reason is that the human rights system has always been based on a western model, which rejects non-western cultures and nonetheless is imposed to them, demanding to conform with an alien ideal. On the issue of gender Mutua points to the problem that Eurocentric human rights display the African societies as "savage", where women are only seen as "victims" that need to be saved. According to him, the human rights system risks to be conceived as a struggle between the "universal" Western culture and non-Western cultures.[2]

Murray merged these two aspects, stating that:

> *"international human rights law is not only male biased, but also Western biased, created by European states. As a result, their dominant position has ensured that the voice of women, and of Africa, is not considered relevant or valid to the debate or development of human rights law".*[3]

It emerges that black African women are subject to multiple intersecting issues of exclusion and discrimination. Firstly, because they are African, secondly because they are women.

Thus, being considered male biased and Western biased, some fundamental women's rights instruments have been criticized and not fully accepted in African countries. They were considered as a Western imposition, lacking an African perspective. This critique has been addressed not only to international instruments as the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), but also to African-made instruments as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The

[2] Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights," *Harvard International Law Journal*, no. 42 (2001)

[3] Rachel Murray, "A Feminist Perspective on Reform of the African Human Rights System," *African Human Rights Law Journal* (2001): 223, http://heinonline.org/HOL/Page?handle=hein.journals/afrhurlj1&collection=journals&id=213&startid=213&endid=232

latter has been criticized as being un-African and simply reflecting the Western perspective of CEDAW, because it ignores the traditional African values and therefore cannot be easily accepted by African states. On this matter, Chirwa argues that the Protocol risks giving the wrong message that women's rights are antithetical to African values and by so doing, places itself in a weak position for acceptance. Thus, it fails to promote traditional notions of human rights, which could be successfully used to promote women's rights.[4]

Despite persistent inequalities and discriminations, a *de jure* human rights framework does exist in Africa, and this chapter will provide an overview on the development, operation and weak points of this system.

1.1.1 Women's human rights: an international perspective

At an international level, the first international agreement dealing directly with the issue of discrimination on the basis of sex was the United Nation Charter, adopted on 26 June 1945. This Charter represented the blueprint for the development of a human rights system, identifying non-discrimination and equality as central principles.[5] As a matter of fact, Article 1 states the aim of *"promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".*

The milestone document for the protection of human rights is the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948. This historic document consists of thirty articles affirming and formally recognizing the individual's rights and, although not legally binding, they have been the basis for the writing of the subsequent human rights instruments. The UDHR confirms the principle of non-discrimination and uses a gender-neutral language, recognising the enjoyment of human rights for all, men and women.

[4] Danwood M. Chirwa, "Reclaiming (WO)Manity: The Merits and Demerits of the African Protocol On Women's Rights," *Netherlands International Law Review* 53, no. 01 (2006): 92
[5] ibid.

These provisions have been transformed in legally binding norms thanks to two other instruments: The International Covenant on Civil and Political Rights (ICCPR)[6] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[7] These instruments continued the dual focus on the right to equal-treatment and non-discrimination in the enjoyment of human rights, found first of all in the UN Charter and secondly in Article 2 of UDHR. Specifically, these concepts are underlined in Articles 2(1) and 3 of ICCPR and in Articles 2(2) and 3 of ICESCR. Additionally, Article 26 of ICCPR goes further, stating the equality before the law and free-standing prohibition of discrimination, including on the basis of sex.[8]

The aforementioned human rights instruments have been formulated mostly by men, without taking into deep account women's specific needs. Thus, the importance of gender specific instruments became evident and a specialist women's commission within the UN framework started giving its contribution: by 1946, the Commission on the Status of Women (CSW) was a separate functional commission of the ECOSOC under UN Charter Article 68.[9] Thanks to the contribution of CSW, the following gender specific conventions have been adopted: The Convention on the Political Rights of Women (CPRW) in 1952, which was the first international legislation to protect the equality of men and women in the exercise of political rights: it guaranteed the rights of women to vote, be eligible for election to all publicly elected bodies, and hold public office. The Convention on the Nationality of Married Women (CNMW), adopted in 1958, which was the first legislation protecting married women's rights to retain their nationality or change it during the marriage or after its dissolution. It was adopted to address the conflicts of law deriving from provisions on the loss or acquisition of nationality by women following marriage, divorce or change

[6] International Covenant on Civil and Political Rights. Adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966. Entered into force 23 March 1976, in accordance with Article 49 (ICCPR). Status of ratification: 169 states parties.

[7] International Covenant on Economic, Social and Cultural Rights. Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. Entered into force 3 January 1976, in accordance with Article 27 (ICESCR). Status of ratification: 166 states parties.

[8] Christine Chinkin, Beate Rudolf and Marsha A. Freeman, *The UN Convention on the elimination of all forms of discrimination against women: A commentary* (Oxford: University Press, 2012), 4

[9] ibid.

of nationality of the husband. To conclude, the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages (Marriage Convention), adopted in 1962 to prohibit marriages contracted without the consent of both Parties and obligating States Parties to take legislative action to specify the minimum age of marriage.[10]

These developments led to the achievement of more specific instruments dealing directly with the issues of discrimination against women. The first step was the adoption of the Declaration on the Elimination of Discrimination against Women (DEDAW) in 1967.[11] This declaration describes discrimination against women as an offence against human dignity (Art. 1) and identifies a list of areas in which women are discriminated, calling for States to take appropriate measures to address them.[12] Subsequently, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979. CEDAW further developed the principle of non-discrimination, going beyond any previous human rights instrument. A detailed description of its content and importance is to be found in Chapter 1.2.

1.1.2 The protection of women's human rights in Africa

At a regional level in Africa, the historical context had a great influence on the realisation of human rights. Having suffered the colonial-era, the indigenous African people has been subject for decades to oppression, exploitation and denial of human rights by the colonial powers.

In 1948, the formal recognition of human rights with the UDHR strengthened the liberation struggles in the African continent. In the post-colonial era, many African countries developed their legal systems with awareness of human rights standards:

[10] Chirwa, "Reclaiming (WO)Manity": 66
[11] Proclaimed by the GA Res. 2263(XXII) of 7 November 1967.
[12] Chinkin, Rudolf and Freeman, *The UN Convention on the elimination of all forms of discrimination against women*, 5

they modelled their constitutions on the colonial powers' ones but including provisions of the UDHR.[13]

In 1963, at a time when newly founded states were trying to stabilize their independence, the Charter of the Organization of African Unity (OAU) was adopted. Considered the historical and political situation, the OAU was formed primarily to preserve the territorial integrity of the new states and to foster an accelerated decolonisation of the continent.[14] For this reason, the OAU Charter had a conservative approach, aimed at preserving the existing order, and it was considered firstly a tool for organizing the continent around political independence and emancipation of African countries. Consequently, little reference to human rights was integrated in the Charter, and only the preamble is mentioning this area.[15] There are hence neither express commitments to the protection of human rights nor to the achievement of gender equality. As Frans Viljoen notes, beside minimizing the importance of human rights, the OAU Charter:

> *By prioritizing the sovereign equality and respect for sovereignty and territorial integrity of new member states, the OAU Charter provided a very heavy anchor to stabilize and solidify the position of fledging African states in the sea of international relations. To this should be added the principle of non-interference in the international affairs of states. It should come as no surprise that the Charter did not explicitly include human rights as part of the OAU's mandate. The OAU member states were only required to have "due regard" for the human rights set out in the Universal Declaration. Bolstered by the principle of non-interference, the OAU in subsequent years turned a blind eye to allegations of human rights violations in member states.*[16]

[13] Rashida Manjoo, "Women's Human Rights in Africa," in *The African Regional Human Rights System*, ed. Manisuli Ssenyonjo, 137–54 (Brill, 2011), 138

[14] Chirwa, "Reclaiming (WO)Manity": 67

[15] Charter of the Organization of African Unity, adopted 25 May 1963, entered into force 13 September 1963, 479 U.N.T.S. 39, reprinted in 2 I.L.M. 766 (1963) preamble. ("Convinced that it is the inalienable right of all people to control their own destiny, Conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples")

[16] Frans Viljoen, *International human rights law in Africa*, 2nd ed. (Oxford, U.K.: Oxford University press, 2012)

Hence, the concern for human rights was not within the driving forces that led to the establishment of the OAU, and eighteen years more were needed to start the first major attempt by African leaders to establish a regional system for the protection of human rights in Africa, with reference to women's rights as well: the African Charter on Human and Peoples' Rights.[17]

The African Charter on Human and Peoples' Rights (African Charter or ACHPR, also known as the Banjul Charter) was adopted in 1981 and entered into force in 1986.[18] It is the result of a long series of seminars and conferences essentially driven by African jurists, with the persistent support of NGOs, the United Nations, non-African observers and the crucial role of the OAU Secretary-General.[19] The ACHPR affirms the commitment of African leaders for the protection of human rights and freedoms, as articulated in the UDHR and in other international instruments. It has been widely endorsed by African countries: all of them have signed and ratified the Banjul Charter, except for South Sudan.[20]

Although most of the African states have ratified the ACHPR and other international instruments, many authors agree that women on the continent continue to be victims of discrimination and harmful practices.[21] As a matter of fact, the ACHPR contains only two specific references to women, in Articles 2 and 18(3).

Article 2 prohibits the infringement of rights on the ground of different kinds of discrimination, amongst which sex:

> *Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind*

[17] Rashida Manjoo, "Women's Human Rights in Africa" in *The African Regional Human Rights System*, 139

[18] Christof Heyns and Magnus Killander, *Compendium of key human rights documents of the African Union*, 5. ed. (Pretoria: Pretoria University Law Press, 2013)

[19] Germain Baricako, "The African Charter and African Commission on Human and Peoples' Rights," in *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006*, ed. Malcolm Evans and Rachel Murray, 2. ed., 1–19 (Cambridge: Cambridge University Press, 2008), 8

[20] http://www.achpr.org/instruments/achpr/ratification/

[21] Chirwa, "Reclaiming (WO)Manity": 71

such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.[22]

Article 18(3) requires States parties to act against discrimination against women:

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.[23]

Because of this limited reference to women's rights, the ACHPR has been criticized for extending inadequate protection to women. For instance, Murray blames the African Charter of providing women with "dismal protection"[24] and asserts that, until recent times, legal instruments of the African system have often ignored women's rights. Moreover, although Article 18(3) invites states to eliminate every form of discrimination against women, this provision appears alongside provisions affirming the family as "the natural unit and basis" of African societies, and as "the custodian of morals and traditional values".[25] Furthermore, the African Charter imposes additional duties to every individual in respect of the family[26] but without making any reference to marriage-related rights nor to the relationship within custom and women's rights. Some scholars argued that these omissions, coupled with the African Charter's apparent juxtaposition of women's rights on the one hand with family rights, individual duties and African customs on the other hand, place women's rights in a 'legal coma'.[27]

On the other hand, other scholars depict the African Charter as a tool allowing a wider recognition of women's rights. This is possible with a different interpretation of Article 18(3), as suggested by Chirwa.[28] This article implies that States are bound to

[22] Organization for African Unity (OAU), *African Charter on Human and Peoples' Rights* Reprinted in 1982 (1981)
[23] ibid.
[24] Murray, "A Feminist Perspective on Reform of the African Human Rights System": 205
[25] Art. 18(1): "The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral". Art. 18(2): "The State shall have the duty to assist the family which is the custodian of moral and traditional values recognized by the community".
[26] Articles 27(1) and 29(1)
[27] Chirwa, "Reclaiming (WO)Manity": 68
[28] ibid., 70

implement international declarations and conventions to which they are parties or not, as well as declarations adopted before, but also after, the adoption of the African Charter.[29]

In her feminist analysis on reform of the African human rights system, Murray recognises that the African Charter, despite being vague on women's rights, has another merit:

> *unlike many international human rights instruments, from a feminist perspective, the African Charter indicates a more holistic approach which is not grounded in opposing dichotomies which are […] the result of a system dominated by the male perspective. It thus has gone beyond the public/private divide and other divides which open the possibility of women's rights being taken seriously.*[30]

As already mentioned in the introduction to this chapter, human rights instruments in the African continent have often faced opposition, because they have been considered as Western imposition, not reconcilable with the African culture. On this matter, the African Charter managed to overcome these critiques. As observed by Chirwa:

> *There is wisdom in promoting African cultural values, which have been under threat from many sources since the colonial era. More importantly, the idea of human rights could lose its legitimacy in the African context if it were not grounded in traditional values of African societies. The African Charter deserves acclaim for blending Western notions of human rights with African perspectives. In so doing, it makes the vital point that the idea of human rights is not a foreign concept as is often made out.*[31]

The Charter was hence welcomed as the first legal instrument made by Africans and for the African peoples, without external impositions and alien influence.

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[29] ibid.
[30] Murray, "A Feminist Perspective on Reform of the African Human Rights System": 222
[31] Chirwa, "Reclaiming (WO)Manity": 69

The African Charter has been a useful tool for women's rights since its adoption, despite the critiques and although the scarce reference to women. A prime example of its importance has been the *Unity Dow* case.[32] Unity Daw, a lawyer married to an American citizen with whom she had three children, brought the case against the government of Botswana. She challenged the 1984 Citizenship Act, which provided that children had to acquire the nationality of the father and not of the mother, and that a Tswana man could pass his nationality to his alien wife, while the contrary was not allowed. Two of Dow's three children were born after the marriage, and according to this act they were not Tswana citizens. Dow claimed that these provisions were discriminatory on the ground of sex and in contravention to both constitutional and international law. The Government admitted the discrimination implied by the Act, but argued that Botswana was a patrilineal society, and therefore women were expected to follow their husband and children to belong to the father's line. At the time of this case, Botswana had already adopted the African Charter and was a signatory of CEDAW. For these reasons, the High Court was able to recall the commitment to non-discrimination on the basis of sex, as stated in Article 2 of the African Charter. Finally, after losing two major court decisions, the Government granted citizenship to Dow's children and the same treatment was granted in other similar situations as well.[33]

Successively, the first specialized human rights instrument in the continent was adopted: it was the African Children's Charter, in 1990. As the African Charter it was a gender-neutral instrument, protecting both boys and girls.[34] Nonetheless, it included also specific rights concerning the girl child and women.[35]

[32] *Unity Dow v Attorney General of Botswana* 1991

[33] Sylvia Tamale, "Think Globally, Act Locally: Using International Treaties for Women's Empowerment in East Africa," *Agenda: Empowering Women for Gender Equity*, no. 50 (2001): 101, http://www.jstor.org/stable/4066411

[34] Chirwa, "Reclaiming (WO)Manity": 67

[35] E.g., Art. 3, prohibiting discrimination based on sex; Art. 11(3), requiring states to 'take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community'; and Art. 21(2), prohibiting child marriages and the betrothal of girls and boys. Art. 14(2)(b), requiring states to 'ensure appropriate health care for expectant and nursing mothers'; Art. 18(2), enjoining states 'to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution'; and Art. 30(1), obligating states

Considering that although most of the African states had ratified the aforementioned human rights instruments many violations were still occurring, African women and girls were still facing major discriminations and were subject to harmful practices, it became clear that a more specific instrument addressing women's rights was needed. For this reason, in 2003 the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) was adopted.

The Maputo Protocol represents one of the most comprehensive human rights instruments for African women, expanding the scope of the African Charter, covering the entire spectrum of civil and political, economic, social and cultural as well as environmental rights and going beyond what could be achieved just through the interpretation of previous instruments. Its adoption is so important, that it has also been called "the African Bill of Rights of Women's Human Rights".[36] The Maputo Protocol will be then further analysed in chapter 1.3.

Following the Maputo Protocol, in July 2004 the African Union Assembly adopted the AU Solemn Declaration on Gender Equality in Africa.[37] This Solemn Declaration, which is non-binding, asks states to commit to ensure progress towards the protection and promotion of women's rights in numerous areas, as gender-based violence, conflict prevention and management, education and HIV/AIDS. Furthermore, states are urged to ratify the Maputo Protocol, in order to accelerate its entry into force. This brought to a concrete acceleration of the process: as a matter of fact, at the time of this Declaration only three states had ratified the Protocol, but before the end of 2005 the number increased to 15, allowing its entry into force.[38] Subsequently, AU member states committed themselves to reporting annually about their progress in fulfilling the requirements made by the Solemn Declaration. Although this obligation is valid for all AU states, irrespective of the treaties they are bound to, many of them

'to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law'.

[36] African Union Commission, "2016: African Year of Human Rights: with a focus on the Rights of Women," (July 2016), 4

[37] See *AU Solemn Declaration on Gender Equality in Africa*, in Heyns and Killander, *Compendium of key human rights documents of the African Union*

[38] Frans Viljoen, "An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa," *Wash. & Lee J. Civil Rts. & Soc. Just*, no. 16 (2009): 15

have not been fulfilling this requirement, as it also happens with other reporting mechanism that are not fully respected, for example in the case of CEDAW.

The AU kept on embracing gender issues in its policies and activities, and after the Solemn Declaration, a Gender Policy has been adopted in 2009. The AU Gender Policy identifies eight commitments, encompassing the creation of a political environment respecting the 50/50 gender parity principle, the implementation of gender mainstreaming in all sectors, the mobilization of resources for this implementation and the legislation on legal protection against discrimination.[39] The Gender Policy also refers to the Protocol, encouraging all AU members to ratify it.

Other developments have been achieved institutionally as well: the AU Commission established a Women and Gender Development Directorate, and at the sub-regional level most of the sub-regional economic communities have established Gender Units. One of the prominent decisions has been the adoption by the Southern African Development Community (SADC) of the SADC Protocol on Gender and Development, signed in August 2008 and entered into force in February 2013.[40] This document, adopted by 13 out of 15 Southern African states, aims at the empowerment of women, the elimination of discrimination, the development of gender responsive legislations and policies and additionally, it aims at harmonizing the different regional, continental and international gender equality instruments which have been subscribed by member states.

[39] http://www.un.org/en/africa/osaa/pdf/au/gender_policy_2009.pdf
[40] http://www.sadc.int/issues/gender/

1.2 The Convention on the Elimination of All Forms of Discrimination against Women

1.2.1 Introduction

The UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international treaty described as the United Nations' "landmark treaty in the struggle for women's rights", and as constituting "an international bill of rights for women".[41] Thus, it is a human rights instrument of fundamental importance and the first one in its kind, addressing exclusively women.

There are various similarities between the UN Convention on the Elimination of All Forms of Discrimination against Women and the African Charter. These two instruments recognize the importance of both socio-economic and cultural and civil and political rights, as well as their interdependence.[42] Some of the rights protected by the Charter have been developed in the CEDAW, which has been extensively ratified in Africa, even if this commitment is not always transposed into domestic implementation.

CEDAW has been adopted in 1979 by the UN General Assembly and entered into force on 3 September 1981. It has been ratified by 189 countries worldwide and by all African states, except for Somalia and Sudan.[43]

[41] United Nations, *The United Nations and the Advancement of women 1945-1996: Revised and update to include the results of the fourth world conference on women held in Beijing in 1995* (New York: UN, 1995)
[42] Fareda Banda, *Women, law and human rights* (Oxford: Hart, 2005)
[43] From http://indicators.ohchr.org/

1.2.2 Structure

The Convention is constituted by a preamble and thirty articles, divided into six parts. The first part (Articles 1-6) starts by giving the definition of discrimination against women:

> *Article 1*
>
> *For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.* [44]

Discrimination is hereby described widely, prohibiting not only sex-based discrimination, but expressly the discrimination that is affecting women, irrespective of their marital status. This distinction implies the nature of CEDAW as a tool which is not gender-neutral, but instead aims to protect women. As a matter of fact, the Committee has noted in the General Recommendation 25 that *"the Convention goes beyond the concept of discrimination used in many national and international legal standards and norms. While such standards and norms prohibit discrimination on the grounds of sex and protect both men and women from treatment based on arbitrary, unfair and/or unjustifiable distinctions, the Convention focuses on discrimination against women, emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women."*.[45]

The first part of CEDAW continues with five other articles, including a list of state obligations[46] and provisions on temporary special measures and on the suppression of trafficking and exploitation of prostitution of women.

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[44] United Nations, "Convention on the Elimination of All Forms of Discrimination against Women," (1979)
[45] ibid.
[46] CEDAW art 2

The second part of CEDAW (Articles 7-9) addresses discrimination against women in public and political life, in the representation of their Governments at the international level, and regarding their nationality and its transmission to the children.

The third part of the Convention (Articles 10-14) requires States parties to take the appropriate measures to face discrimination against women in the fields of education, employment, health care, different areas of economic and social life, and in the rural sector.

Part IV (Articles 15-16) concerns the equality before the law, legal capacity, freedom of movement and discrimination within the family.

Part V (Articles 17-22) of the Convention deals with its implementation, through the establishment of the Committee, which shall act as an independent monitoring mechanism. This Committee, which is also called CEDAW, is composed by 23 members representing different regions of the world, forms of civilization and legal systems. Beside the elections and membership of the Committee, this part describes also the procedure of reporting by States parties, the adoption by the Committee of its rules of procedure, its meetings, its reporting obligations to the ECOSOC[47] and UNGA[48] and its interaction with specialized agencies.

To conclude, part VI of the Convention (Articles 23-30) provides different concluding provisions; for example, in case of more conducive national or international provisions, these shall prevail (Art. 23) and reservations are permitted only if compatible with the object of the Convention and may also be withdrawn (Art. 28).[49]

[47] Economic and Social Council
[48] United Nations General Assembly
[49] See: Chinkin, Rudolf and Freeman (2012), *The UN Convention on the elimination of all forms of discrimination against women: A commentary.* Oxford: University Press.

1.2.3 Reservations and lack of implementation in Africa

Despite most of African states have ratified the Convention, there are many aspects that are still not fully respected. For instance, states are required to submit one initial report one year after the ratification of the Convention, and successively every four years[50]. Many countries do not meet punctually their obligation, and they eventually present a compound of reports at the same CEDAW session, including the years they skipped.

In addition to this, some articles of CEDAW have received more resistance by African countries. Many reservations have been made especially on article 9, concerning the nationality of children, and article 2 and 16 on family relations. This resistance came especially by mostly Islamic countries. For instance, Algeria expressed its reservations "concerning the provisions of article 9, paragraph 2, which are incompatible with the provisions of the Algerian Nationality code and the Algerian Family Code"[51] and Egypt presented a reservation on article 16, which aims at eliminating discrimination against women in matters concerning marriage and family relations, stating that " This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question", in accordance with the *Sharia.*[52] The high occurrence of reservations instils the doubt that CEDAW is not sufficiently implemented in Africa. Banda[53] makes a comparison between CEDAW and CERD (International Convention for the Elimination of All Forms of Racial Discrimination), on which the former is based, and which received a wide support in Africa: within CERD a reservation is not acceptable if two-third of states parties opposed it, while within CEDAW there is no regulation. Banda sees this as a possible evidence of the higher importance given to discrimination that is affecting men, while in case on gender-based discrimination, "particularly that justified by 'culture' or religion and occurring in the family, tends to be a 'woman's issue' and is therefore seen as less important".[54] This shows how

[50] CEDAW art. 18
[51] http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm
[52] Ibid
[53] Banda, *Women, law and human rights*
[54] ibid., 64

reservations impact mostly women's rights, in particular in those articles protecting the rights within the family, which are the most subject to reservations by states parties.

Moreover, despite the majority of African states has ratified the Convention without reservations, the lack of domestic implementation and the scarce enjoyment of women's rights at a domestic level show the discrepancy between the ratification of human rights treaties in Africa and their effective implementation. [55]

1.2.4 The Optional Protocol to CEDAW

The original competence of the Committee was limited to the consideration of States Parties' reports, according to Article 18 of the Convention, and it was not mandated to hear inter-state or individual complaints concerning the non-compliance of CEDAW's obligations.[56] To strengthen this role of the Committee, the General Assembly adopted on 6 October 1999 the Optional Protocol to CEDAW, calling for States parties to ratify it as soon as possible.

The Optional Protocol includes two procedures: a communication procedure, which gives women the right to complain with the Committee about violations of the Convention; an inquiry procedure, which enables the Committee to inquiry into situations of violations of women's rights.

By ratifying the Optional Protocol, States parties recognize the competence of the Committee on the Elimination of Discrimination against Women to receive and consider complaints from individuals or groups within its jurisdiction. The purpose of this Protocol is hence to improve the existing enforcement mechanism for women's rights, to improve States' and individuals' understanding of CEDAW, to encourage States to implement CEDAW, to stimulate changes in discriminatory laws and practices, to enhance existing mechanisms for implementation of human rights

[55] ibid., 66
[56] Chinkin, Rudolf and Freeman, *The UN Convention on the elimination of all forms of discrimination against women*, 13

within the UN system and to foster public awareness on human rights standards related to discrimination against women.[57]

The Optional Protocol entered into force on 22 December 2000, after the tenth State party to the convention ratified it. As underlined by UN Women, the entry into force of this Protocol is significant, since it "puts it on an equal footing with International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, which all have communications procedures. The inquiry procedure is the equivalent of that under the Convention against Torture".

As of February 2018, 109 States are parties to the Optional Protocol.[58]

1.3 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

1.3.1 Introduction

Despite the existence of the African Charter, of CEDAW, despite their widespread ratification, and although these instruments were already addressing the issue of women's rights, at the African regional level these rights were not sufficiently considered and these major developments at international level were not reflected in the African states. The African Charter on Human and Peoples' Rights has been for example criticized for making little reference to women's rights, namely only in articles 2 and 18. Thus, the necessity for a more effective instrument on this field was becoming pressing.[59] It was fundamental to have a specific treaty on women's rights,

[57] http://www.un.org/womenwatch/daw/cedaw/protocol/

[58] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en

[59] Grace T. Malera, "Women, Reproductive Rights and HIV/AIDS: The Value of the African Charter Protocol," *Agenda: Empowering Women for Gender Equity*, no. 72 (2007): 129, http://www.jstor.org/stable/27739286

since not enough attention was being paid to the interpretation of existing instruments and additionally this new treaty would have underlined the issues that are disproportionately affecting women, leading existing mechanisms and states to a more gendered interpretation of human rights.[60]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (also called Maputo Protocol) was the result of this need and of a consequent complex drafting process, which will be described hereafter. It has been welcomed as one of the most progressive legal instruments for African women and was adopted by African Heads of State in July 2003, at the Maputo summing of the African Union, in Mozambique. It came into force in 2005 and it is nowadays ratified by 39 African countries out of 53.[61] Figure 1 shows in what countries the Maputo Protocol has been both signed and ratified, only signed or none of them.

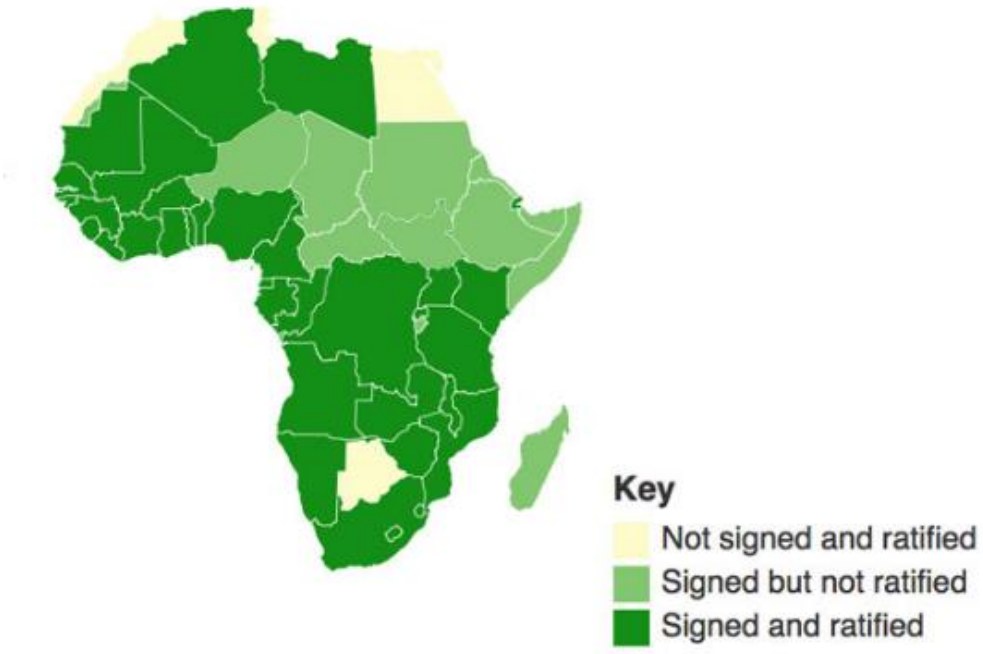

Figure 1: Ratification of Maputo Protocol in Africa

[60] Malcolm Evans and Rachel Murray, eds., *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006*, 2. ed. (Cambridge: Cambridge University Press, 2008), 445
[61] https://au.int/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa.pdf

1.3.2 History and drafting

In the 1990s various events brought the attention to the need of a higher protection of women's rights by the African Commission: the appointment of a Special Rapporteur on the Rights of women in Africa, a meeting between the Commission and a group of NGOs to start the drafting of the Protocol and the adoption of CEDAW reporting guidelines in the Commission's reporting requirements.[62]

The first input of the long process that brought to the creation of the Protocol has been a joint initiative within NGOs and the African Commission in 1995, to discuss the situation of women in Africa. This meeting has been encouraged by a regional women's NGO, Women in Law and Development in Africa (WILDAF). It was hence noted that, despite a widespread ratification of human rights instruments in the continent, the conditions of women enjoyed no significant improvement, and their rights were not enforced. On this matter, a lack of political will by states has been underlined by the NGO movement. As a matter of fact, at the time of the meeting, the African Commission had never dealt with any complaints regarding women's rights.[63]

Recognizing these shortcomings, the African Commission agreed to the appointment of a Special Rapporteur. The Special Rapporteur is a figure that has been adopted many times within the UN human rights machinery to explore the human rights situation on a particular area or in a particular state.[64] The Special Rapporteur on the Rights of Women in Africa has been appointed in 1996, at the 19th session of the African Commission and established at the 23rd ordinary session held in Banjul, The Gambia.[65]

The Special Rapporteur had the key function of leading the first drafting of the Protocol. This first draft was meant to identify the areas and situations in which

[62] Fareda Banda, "Protocol to the African Charter on the Rights of Women in Africa," in *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006*, ed. Malcolm Evans and Rachel Murray, 2. ed., 441–74 (Cambridge: Cambridge University Press, 2008), 444
[63] Fareda Banda, "Blazing a trail: The African Protocol on Women's Rights comes into force," *Journal of African Law* 50, no. 01 (2006): 73
[64] Evans and Murray, *The African Charter on Human and Peoples' Rights*, 344
[65] ibid., 360

African women are discriminated, covering issues related to many different fields, such as family law, violence against women and refugee women.[66] The first draft noted in its preamble that despite the existence of articles 2 and 18 of the African Charter and many other human rights instruments existing, women rights were still not defended. As in the preamble of CEDAW, the need for a gender-oriented approach is underlined. The Draft Protocol is also inspired by the definition of discrimination given by CEDAW: the two are almost identical[67]. Furthermore, beside incorporating civil and political and social, economic and cultural rights, the Draft Protocol faced issues not present in CEDAW, as violence against women, rights of widows or inheritance rights.[68]

This Draft was submitted for consideration to the African Commission, which adopted the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in November 1999 at the Kigali 26th Ordinary Session[69]. It was then forwarded to the OAU, which suggested to include in the discussion governments officials and experts, NGOs and the OAU Women's Unit, with the last one being a valuable contributor to the drafting.[70] For instance, the Women's Unit suggested to include in the preamble the Addis Ababa Declaration on Violence against Women and subsumed in the Protocol its Draft Convention on Harmful Traditional Practices[71]. Being the participation to the drafting still not considered comprehensive enough, during the following meetings other contributors collaborated, offering the point of view of the civil society, SADC and other African states.[72] This new Draft strengthened the provisions on violence, on temporary special measures and proposed a ban on the making of reservations. After being presented to government experts in

[66] Fareda Banda, "Protocol to the African Charter on the Rights of Women in Africa" in *The African Charter on Human and Peoples' Rights*, 446
[67] Article 1 of CEDAW and art. 1 of the Draft Protocol
[68] Banda, *Women, law and human rights*, 69
[69] Draft Protocol to the African Charter on the Rights of Women in Africa (Kigali, 15 November 1999) DOC/OS (XXVII)/159b
[70] ibid., 74
[71] OAU Draft Convention on the Elimination of All Forms of Harmful Practices Affecting the Fundamental Human Rights of Women and Girls 2000
[72] ibid., 75

November 2001 and following numerous discussions on delicate issues and new suggestions, the final version of the Protocol was finally ready.

On 11 July 2003, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was finally adopted by the African Union Assembly of Heads of State and Government during its Second Ordinary Summit in Maputo, Mozambique.[73]

The Protocol entered into force thirty days after the date of the deposit of the fifteenth instrument of ratification or accession, on 25 November 2005.[74]

1.3.3 Innovations, achievements and criticism

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is composed by a preamble and 32 articles, covering many different fields, as education, voting rights, nationality laws, employment, rights in marriage and divorce, health care, reproductive rights, and equality before the law.

The Protocol presents in its text many innovations and significant achievements. It faces controversial issues that have been source both of recognition and critics. In the following paragraphs some of the most discussed articles will be presented, with specific attention to their innovative value, and to their criticalities as well. Particularly, the domains of family and reproductive rights will be analysed in a deeper way, in light of the fact that these are the area in which women are most likely to experience discrimination and violations of their rights.

The preamble of the Protocol starts by recalling the recommendation made by the African Commission to elaborate a Protocol on the Rights of Women in Africa, also considering Article 66 of the African Charter, which states that *"Special protocols or agreements may, if necessary, supplement the provisions of the present Charter."*[75]

[73] Amnesty International, "The Protocol on the Rights of Women in Africa: Strengthening the promotion and protection of women's human rights in Africa," (June 2004)
[74] Malera, "Women, Reproductive Rights and HIV/AIDS: The Value of the African Charter Protocol": 130
[75] Organization for African Unity (OAU), *African Charter on Human and Peoples' Rights*

The preamble goes on by considering Articles 2, 18, 60 and 61 of the African Charter, which enshrine the principles of non-discrimination, the protection of women's rights and recall the importance of regional and international human rights instruments as references for the application and interpretation of the African Charter. Many Declarations, Conventions and Resolutions in which women's rights are recognized are then cited, before stating that, despite the ratification of many of these human rights instruments by African states, *"women in Africa still continue to be victims of discrimination and harmful practices"*.

As CEDAW did, also the Protocol provides in Article 1 a definition of discrimination against women, which follows that given by CEDAW.

> *"Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life"*[76]

Nonetheless, some minor differences are worthy of noting.[77] For instance, compared to the CEDAW, there is not a phrase stating that the enjoyment of rights shall be "on a basis of equality of men and women". Then, there is no list of contexts in which discrimination could occur, while CEDAW itemises "political, economic, social, cultural, civil or any other field": In the Protocol instead there is a general "in all spheres of life". Important is also the inclusion of girls in the definition of women in the following paragraphs of Article 1[78] and a comprehensive definition of violence against women, comprising different forms of violence: psychological, physical, sexual and economic harm.[79]

In comparison with CEDAW, the Protocol deepens some issues that are of concern to African women: it adapts some CEDAW characteristics to the African context,

[76] African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Art. 1(f)
[77] Banda, Fareda. *Women, Law and Human Rights*. Oxford: Hart, 2005. Print.
[78] ibid., Art. 1(k)
[79] ibid., Art. 1(j)

expanding the scope of some protected rights and dealing with some rights already protected by CEDAW in a more specific way. An important addition is that the Protocol emphasizes the private sphere as a domain in which rights need to be protected and it underlines the need for "positive action" in Article 2. Through this approach, the Protocol expands the protective scope that until 2003 could be found in other instruments as CEDAW, addressing various issues which are peculiar of African women, but still needed to be considered.[80]

Article 5 is one of the provisions facing discriminations against women that are more likely to occur in the African continent than in other countries: the issue of the elimination of harmful practices, such as female genital mutilation/cutting, which is a procedure involving the total or partial removal of female external genitalia. In compliance with Article 5, States Parties shall fight these practices, create public awareness on this issue, assist the victims, ensure effective access to legal services and protect women at risk. Article 5 also condemns the performance of this practice in a medical environment. This article has a valuable importance, since practices as female genital mutilations involve more than 200 million girls and women alive today, mainly in African countries, and are recognized as violations of women's rights [81]. Moreover, by including both the fight of this practices and the protection and prevention, Article 5 adopts a holistic approach, considering every woman that could be affected at every stage, but also raising awareness within men.

In the field of family rights, article 6 on marriage posed a challenge to many African states. It requires States Parties to ensure that women enjoy equal rights as their husbands, for example by guaranteeing that no marriage takes place without the consent of the two parties, that the minimum age of marriage shall be 18 years, encouraging monogamy, calling for the registration of the marriage in order to be legally recognized and allowing the wife to maintain her maiden name, her nationality and to have equal rights as the man regarding the nationality of the children. By addressing the inequalities in marriage with respect to decision making,

[80] Viljoen, "An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa": 21

[81] http://www.who.int/reproductivehealth/topics/fgm/prevalence/en/

inheritance of property and parental rights, the Protocol reinforces the provisions made by CEDAW.[82]

This Article has been source of many oppositions by States Parties. One of the most problematic issues has been the provision on polygyny (Art. 6(c)). The first Draft Protocol stated that polygyny needed to be prohibited, but the government experts opposed this for three different reasons: this practice was recognized in Islamic customary and religious law as a right of men; the abolition of this practice would have left women already part of a polygynous marriage unprotected; thirdly, it was suggested to allow this practice in case both parties agree. Because of this opposition, the final Protocol simply states that "monogamy is encouraged as the preferred form of marriage". [83]

Equally controversial in Article 6 was the provision stating that unregistered marriages are not considered valid (Art. 6(d)). The reason is that the clear majority of the marriages in Africa are not registered, and there is little state involvement, as marriage is often considered as a family agreement. Nonetheless, the utility of this provision is that registration would ensure the consent of the parties, the respect of the minimum age for marriage and its legal certainty. A suggestion made by Banda to strengthen the efficacy of this provision is to promote the registration without penalizing those who fails to register. By so doing, the risk of legal disempowerment of women could be diminished.[84]

Linked to Article 6 is Article 7 on separation, divorce and annulment of the marriage. It provides that in these situations women and men shall enjoy the same rights, shall have reciprocal rights and responsibilities towards the children, and towards the joint property's sharing. These provisions have been contrasted especially by North African Islamic states, on the basis of incompatibility with the *Shari'a*, which gives men more rights than women in case of divorce. For instance, Egypt objected this

[82] Gawaya, Rose and Rosemary Semafumu Mukasa, "The African Women's Protocol: A New Dimension for Women's Rights in Africa," *Gender and Development*, Vol.13, No. 3 (2005): 44, http://www.jstor.org/stable/20053162

[83] African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Art. 6(c)

[84] Banda, "Blazing a trail": 76

Article exactly how it did with the similar Article 16 of CEDAW, not agreeing with the provision of equitable sharing after the divorce.[85]

In the context of marriage, women experience discrimination also on the allocation of property after the death of the spouse. For this reason, the Protocol encompasses this matters in Articles 20 (Widow's Rights) and 21 (Right to Inheritance), including for instance the widow's rights to remarry, to have the custody of the children, and to have an equitable share in the property inheritance. Moreover, also brothers and sisters shall have the same right to inherit their parents' properties. In this case as well, the articles have been objected by some Islamic countries as Egypt, arguing they are in contrast with the *Shari'a*.[86]

In the arena of health and reproductive rights, one of the biggest innovation introduced by the African Protocol on Women's Rights in Africa is Article 14. It is the first instrument in international law which explicitly enshrines women's sexual and reproductive rights and makes reference to the right to abortion.[87] Article 14 calls on states to ensure the respect and promotion of the right to health of women from many points of view, as the right to control their fertility, to decide whether to have children, to choose any method of contraception, to protect themselves against sexually transmitted infections and be informed about their and their partner's health status (ex. HIV/AIDS), and have access to medical abortion in specific circumstances.

Article 14 has been welcomed for many reasons. For instance, given the high incidence of HIV/AIDS in Africa, the provision on the protection of women from this disease could help to improve their conditions, since for example activist would have a legal basis, rather than just welfare-focused arguments, to request more specific action by the states.[88] It is also important to notice that the contraction of HIV is a gendered issue: in sub-Saharan Africa, 56 per cent of new infections affects women, and the proportion is even higher among young women (15-24), who made up 66 per

[85] ibid., 77
[86] ibid., 78
[87] Gawaya, Rose and Rosemary Semafumu Mukasa, "The African Women's Protocol: A New Dimension for Women's Rights in Africa": 42
[88] ibid., 46

cent of new infections among young people.[89] Women are more likely to contract the virus because they have for example less control on the use of condoms and they are more susceptible to infections when they are affected by other sexually transmitted diseases.[90] With this background, the Protocol represents a tool for self-protection, because this Article asks States Parties to ensure:

> *The right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS;*[91]
>
> *The right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices.*[92]

Nevertheless, the efficacy of this last provision could be questioned, since it is hard to believe that women would feel safe in asking the HIV status of the partner, in mainly chauvinist societies.

One of the most discussed and opposed parts of Article 14 is the following:

> *[States Parties shall take all appropriate measures to] Protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.*[93]

With this Article the Protocol made a landmark provision concerning the issue of abortion, transcending restrictive laws in numerous African countries, which result in high rates of unsafe abortion and serious risks for the woman, often leading to

[89] http://www.unwomen.org/en/what-we-do/hiv-and-aids/facts-and-figures
[90] Malera, "Women, Reproductive Rights and HIV/AIDS: The Value of the African Charter Protocol": 132
[91] African Protocol, Art. 14(1)(d)
[92] Ibid., Art. 14(1)(e)
[93] African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Art. 14 (2) (i)

maternal death or long-term health problems.[94] As a matter of fact, 99% of unsafe abortion takes place in the developing world; unsafe abortions are the cause of 13% of maternal mortality; an estimated 47000 women die every year because of unsafe abortions; 29000 of them are African women, which are disproportionately affected (62% of the global total).[95] It has been reported that four million of unsafe abortions occur in Africa every year, where 20-29 per 1,000 women of reproductive age have unsafe abortions[96].

Considering this data, it clearly comes to light that more needs to be done to protect African women's reproductive rights. Thus, the importance of Article 14 emerges again. The denial of access to abortion can be considered as a form of violence against women, putting in risk their lives and health, and often forcing them to unsafe and risky terminations; in addition to this, victims of rape who are not allowed to access abortion, may likely suffer psychological pain and other side effects are poverty, worsening of one's social status and loss of education.[97]

Access to safe abortion would then have many positive effects. In his analysis of Article 14(2)(c), Ngwena identifies three main areas in which this provision has the potential to implement regional abortion law, policy and practice.[98] Firstly, it would enhance the global consensus in combating unsafe and unlawful abortion: as widely demonstrated, restrictive abortion laws are within the main causes of the widespread resort to unsafe and illegal abortion practices and thus, liberalization and decriminalization of abortion laws are considered fundamental steps to protect the fundamental rights of women, as rights to life, health and non-discrimination. The potential of the Protocol is that, by imposing this obligation to African states, it contributes to the enhancement of the global consensus on reforming restrictive

[94] Malera, "Women, Reproductive Rights and HIV/AIDS: The Value of the African Charter Protocol": 132

[95] Department of Reproductive Health and Research, World Health Organization, *Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008* (Geneva: World health organization (WHO), op. 2011)

[96] http://news.bbc.co.uk/2/hi/africa/3139120.stm

[97] *The impact of the protocol on the rights of women in Africa on violence against women in six selected Southern African countries: An advocacy tool* (Pretoria: Centre for Human Rights, 2009), 69

[98] Charles G. Ngwena, "Protocol to the African Charter on the Rights of Women: Implications for access to abortion at the regional level," *International journal of gynaecology and obstetrics: the official organ of the International Federation of Gynaecology and Obstetrics* 110, no. 2 (2010)

laws. The second potentiality of the Protocol in regional abortion laws is that it represents a legal imperative for African countries to reform their laws, and not simply a recommendation. African abortion laws are normally based on European colonial laws, which criminalized abortion, and many countries are still wedded to these legal systems, to the detriment of women's rights. By ratifying the Protocol, these states would need to liberalize their jurisdiction on this subject to comply with their international obligations and could fill the lack in transparency that undermines women's enjoyment of their rights. To conclude, the third development this Article of the Protocol can facilitate is the transformation of abortion law from a crime and punishment model to a reproductive health model. Abortion laws have been historically contained in penal codes, with the aim of punishing its procurement. On the contrary, the Protocol describes for the first time abortion as a human right, and asks states not only to protect this right, but also to fulfil it: it means that states shall go beyond decriminalizing this practice, and guarantee the full accessibility to abortion services for women.

Certainly, as highlighted by Ngwena, the effectiveness of the Protocol in these three areas still depends on the political willingness at a regional level to fulfil these obligation, and not limiting themselves to ratify without really implementing the provisions of the Protocol.

Unfortunately, despite many African states ratified the Protocol without entering reservations on Article 14, at the domestic level the legal impact of this Article is still not visible. A rare example of compliance with the Article is Rwanda, which initially ratified the Women's Protocol with reservation to art 14(2)(c), but in August of 2012 lifted the reservation, and amended its Penal Code to align with the grounds for abortion under art 14.[99] Nonetheless, the widespread lack of reformation of domestic abortion laws in African countries evidences the disconcerting indifference to treaty obligations.

[99] Charles G. Ngwena, "Access to Safe Abortion as a Human Right in the African Region: Lessons from Emerging Jurisprudence of UN Treaty-Monitoring Bodies," *South African Journal on Human Rights* (2013): 401

To comply with their treaty obligations, African states can receive the assistance of the African Commission: indeed, under Article 45 of the African Charter,[100] the Commission has the mandate to adopt General Comments. General Comments are authoritative interpretive guidance issued by the UN or regional treaty bodies to aid states in the interpretation and implementation of human rights treaties.[101] They are quasi-judicial guidance which, even if non-binding, are invaluable in promoting the objectives of a treaty and clarify obligations and provisions. On Article 14 of the Protocol, the African commission provided two General Comments. The first one in 2012 on Article 14 (1) (d) and (e) of the Protocol[102], and the second one in 2014 on Article 14 (1) (a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Protocol.[103]

General Comment No.2 originates from the observation that women in the African region have a low access to contraception when compared with other regions. The direct consequence is a high number of unwanted pregnancies, including adolescent pregnancies, which often lead to unsafe abortions, resulting in the risk of maternal mortality.[104] In this context, General Comment No. 2 seeks to clarify state obligations in a delicate and urgent sphere. The General Comment No. 2 is a comprehensive instrument composed by 5 sections and 63 paragraphs. It does not set out new jurisprudence, on the contrary, it clarifies obligations of the state on the base of existing international human rights law. On the issues faced by Article 14 of the Protocol clarifications were still needed, since as stated before, despite widespread ratification, women's reproductive rights were still not adequately protected, also

[100] Organization of African Unity. African Charter on Human and Peoples' Rights. http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf. Published 1981.

[101] Charles G. Ngwena, Eunice Brookman-Amissah and Patty Skuster, "Human rights advances in women's reproductive health in Africa," *International journal of gynaecology and obstetrics: the official organ of the International Federation of Gynaecology and Obstetrics* 129, no. 2 (2015): 2

[102] African Commission on Human and Peoples' Rights. General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. http://www.achpr.org/instruments/general-comments-rights-women/.

[103] African Commission on Human and Peoples' Rights. General Comment No 2 on Article 14 (1) (a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the African Commission on November 28, 2014. http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf

[104]http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf

because of lack of awareness by policymakers, civil society, courts and human rights defenders.[105] Moreover, this instrument also displays the African Commission willingness to continue to engage for the protection of women's human rights.

Although the demonstrated invaluable importance of the Protocol, and particularly the innovation of Article 14, the latter has been strongly opposed. One of the main reason of discord is based on religion. As a matter of fact, within the main opponents of Article 14 we found the Catholic church and Catholic organizations, which are traditionally against abortion, and consider Article 14 an attack to human life and a practice not compatible with Christian morality.[106] This is one of the reasons why, even if ratified, the implementation of this article and its effectiveness are hard to achieve: as the Special Rapporteur on violence against women affirms, "*the cultural, religious and other moral arguments against the termination of pregnancies in many African countries challenge the effective realization of this right*".[107]

Furthermore, despite a wide reference to different health and reproductive rights, some gaps remain. For instance, even if Article 14 faces the issue of HIV and AIDS, their impact on women has not been analysed in a detailed manner, and only in 2008, with the SADC Gender Protocol, this matter is addressed in a meaningful way.[108] Another example of lack of accuracy in this field is the total absence of reference to other marginalized women, namely lesbian and bisexual, sex workers, and women belonging to indigenous minorities.[109] These are of course really delicate issues, since for example homosexuality is illegal in the majority of African countries. Nonetheless, women belonging to these groups are still facing strong discriminations.

Another key issue in the interpretation of women's rights and consequently of the Protocol is culture. As recalled in the preamble of the Protocol, women have a crucial

[105] ibid.
[106] See Address of Pope Benedict XVI to diplomatic corps at http://w2.vatican.va/content/benedict-xvi/en/speeches/2007/january/documents/hf_ben-xvi_spe_20070108_diplomatic-corps.html; see also Human Life International at http://maputoprotocol.com/the-fight-against-the-maputo-protocol.
[107] Human Rights Council, "Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo," (10 June 2015)
[108] Viljoen, "An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa": 29
[109] ibid.

role in the preservation of African values. Furthermore, Article 17 states the right of women to live in a positive cultural context and to participate in the determination of cultural policies. It is remarkable that the Protocol goes further than the African Charter on this topic, that would otherwise risks being underestimated. Nevertheless, the Protocol has been criticized for simply reflecting CEDAW's provisions. Since CEDAW is not an African tool, this implies for opponents that the Protocol is "westernized" and un-African.[110] The lack of an African approach and of a clear definition of traditional African values poses a threat: the Protocol could be perceived as a foreign tool and a Western imposition based on different values, not applicable to the African context; this can undermine its effectiveness. This risk is described by Chirwa as follows:

> *"…it sends the wrong message that women's rights are fundamentally and intrinsically antithetical to African values and that the only way these rights can be realised is by overhauling the social fabric of African societies. In so doing, it commits a double fault – it advocates for some concepts, which are quite alien to African societies and fails to invoke and promote traditional notions of human rights that are consistent with and can be used to advance women's rights"*[111]

Article 17 has also been criticized for limiting the application of the right to culture to the public sphere, beside assuming that culture is created at a formal level.[112] On the contrary, culture in Africa is tightly bound to the private sphere and to family and community life, while the governments often do not have official positions or policies on these matters. Also, personal and family affairs are often governed by customary and religious laws in Africa and can prevail over civil law. With this Article, the Protocol provides a tool for African women to address the difficult coexistence of civil law and customary/religious laws, which are often discriminating against women.[113]

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[110] Rashida Manjoo, "Women's Human Rights in Africa" in *The African Regional Human Rights System*, 147

[111] Chirwa, "Reclaiming (WO)Manity": 92

[112] ibid., 85

[113] Gawaya, Rose and Rosemary Semafumu Mukasa, "The African Women's Protocol: A New Dimension for Women's Rights in Africa": 44

To conclude, one of the main sources of concern regarding the effectiveness of the Protocol on Women's Rights is the absence of a monitoring body as an independent committee on women's rights to assess its implementation in the States Parties. This absence could be seen as recognising the competence of the African Commission in this regard, but the need of a separate body, as for the African Charter for the Rights and Welfare of the Child (ACRWC), appears urgent. In its absence, the reports that States Parties are required to present are revised by the African Commission, while the African Court on Human and Peoples' Rights is charged with the interpretation of the Protocol.[114] However, the Commission has been often criticized for not committing enough in the promotion and protection of women's rights: as Murray notes, while almost every State has ratified the African Charter, not all States will ratify the Protocol, and this would involve a difficult position for the Commission concerning the interpretation of the Charter in respect of women. The lack of a monitoring body put in risk the effective implementation of the Protocol, and for this reason the creation of such a body is considered necessary.

[114] Rashida Manjoo, "Women's Human Rights in Africa" in *The African Regional Human Rights System*, 148

2 Who defends women's human rights in Africa?

The purpose of this chapter is to present the main legal actors responsible for the protection of women's rights in Africa. The first regional body established for the protection of human rights, and consequently also of women's rights, is the African Commission on Human and Peoples' Rights. Secondly, this chapter will present the young African Court on Human and Peoples' Rights, its functions and, thanks to a comparison with the other regional human rights systems, its potentiality.

2.1 The African Commission on Human and Peoples' Rights

2.1.1 Origin and structure

The African Commission on Human and Peoples' Rights (ACHPR) is a quasi-judicial international body established in Africa for the realization of human rights. The Commission monitors the situation of human rights in all the 55 member states of the African Union (AU) through its three main functions: the protection of human and peoples' rights, the promotion of human and peoples' rights and the monitoring of implementation and interpretation of the African Charter on Human and Peoples' Rights.[115]

The ACHPR was established in virtue of Article 30 of the African Charter:

> *An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.*[116]

The first members of the Commission have been elected by the Organization of African Unity (OAU) Assembly following the entry into force of the African Charter in

[115] www.achpr.org/about
[116] Organization for African Unity (OAU), *African Charter on Human and Peoples' Rights*, Art. 30

1986 and the first meeting of the Commission was held in Addis Ababa on 2nd November 1987.

As indicated by Article 31 of the African Charter[117], the members of the Commission are 11. They are nominated by States parties to the Charter for a six-year term and are eligible for re-election. There has been a substantial improvement in the election of the Commission: equitable geographical and gender representation shall be guaranteed, and while at the beginning the members were all men, nowadays there are 6 women and 5 men. Moreover, in 2005 the AU issued a note verbale stating the guidelines for the nomination of members of the Commission, to exclude senior civil servants and diplomatic representatives, and hence ensure the Commission's independence.[118]

The Bureau of the Commission includes a Chairperson and Vice-Chairperson, and supervises the work of the Commission, as well of the Commission's Secretariat.

The Secretariat of the Commission is appointed by the Chairperson of the AU Commission and is in charge of providing administrative, logistical and technical support to the Commission.[119]

The headquarters of the Commission was established in Banjul, in the State of The Gambia, and inaugurated on 12 June 1989 by the former Head of State of the country, Sir Dawda Kairaba Jawara.

[117] ibid. Art. 31(1): "The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience."

[118] http://www.achpr.org/about/structure/

[119] Ibid.

2.1.2 The mandate

The mandate of the Commission is set out in Article 45 of the African Charter. Article 45(1) mandates the promotion of Human and Peoples' rights, through initiatives as undertaking studies, organizing seminars, giving recommendations to governments, laying down principles and rules and cooperating with African and international institutions.

To conform with the Charter's requirements, some actions taken by the Commission have been for instance granting the status of observers to many NGOs, producing human rights documents and reports, engaging in promotional activities, appointing special rapporteurs to research and gather information on thematic issues.[120]

The promotion activities of the Commission long suffered from a limited budget. Finally, after discussions with the Conference of Heads of State and Government of the AU, the Commission budget has been significantly increased: from USD 1 million in 2007 to USD 3.6 million in 2009. This allows a proper organization of activities such as seminars, conferences and meetings.[121]

Another improvement for the Commission's effectiveness has been to progressively affirm its independence, through a different election of the commissioners. Following the pressure made by NGOs, the candidates cannot hold both functions at the Commission and within the executive branches of their countries or as external representation of their countries. This change has been made to ensure the independence of the Commission from external political influences, in compliance with Article 31 of the Charter.[122]

Another important function of the Commission is conferred by Article 45(2): it requests to ensure the protection of human and peoples' rights under the conditions establishes by the Charter. Thus, it shall be guaranteed that States are not violating these rights, and in case of violation the victims shall be reinstated in their rights.

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[120] http://www.achpr.org/about/history/

[121] International Federation for Human Rights, "Practical guide: the African Court on Human and Peoples' Rights: towards the African Court on Human and Peoples' Rights," (April 2010), 23

[122] ibid., 24

To facilitate this purpose, the Charter provides the Commission with the "communication procedure", which is a complaint system made for NGOs or individuals to petition to the Commission about the violations of their rights or those of others by a State party to the Commission, on the condition of exhaustion of domestic remedies. A communication can be made by a State party as well, if it believes that another State party has violated some Charter's provisions. However, inter-State complaints have not been popular[123], and also communications coming from individuals and NGOs have not been as much as expected. The reasons for the low number of cases taken to the Commissions are several, but the most influencing are the requirement of exhaustion of local remedies and the lack of confidence in the potential impact of the Commission's decisions.[124] However, through this process, the Commission has been able to condemn torture in Mauritania, the general's regime in Nigeria, inhumane practices in Sudan.

Recommendations and remedies can also be coupled with requirements to the respondent on the follow-up and implementation. For example, in *Lawyers for Human Rights v. Swaziland*, the Commission asked the Government of Swaziland to inform within six months on the measures undertaken to comply with the Commission's requirements.[125]

To ensure the compliance with the requirement made by Article 45(2), the Commission can conduct fact-finding missions to investigate allegations of human rights violations and make recommendations to the States concerned. Examples of these missions are those undertaken to Darfur, Sudan and Zimbabwe.[126]

Additionally, the Commission can designate Special Rapporteurs in charge of protecting a certain duty and respond adequately to urgent situations, which can be contacted by NGOs and can publicly condemn the violation of rights. There are for

[123] The first inter-state communication has been published in July 2006: Communication 227/99, *Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda, Twentieth Activity Report 2006, Annex IV.*

[124] Magnus Killander, "The African Commission on Human and Peoples' Rights," in *The African Regional Human Rights System*, ed. Manisuli Ssenyonjo, 235–48 (Brill, 2011), 239

[125] Communication 251/2002, *Lawyers for Human Rights v. Swaziland*, Eighteenth Activity Report 2004-2005, Annex III.

[126] ibid., 242

instance Special Rapporteurs on women's rights, on refugees, asylum seekers, displaced persons and migrants, on human rights defenders, etc.[127]

Beside the Special Rapporteurs there are also Working Groups, formed by Commissioners to develop the guidelines on the protection of specific rights. Nowadays there are for instance Working Groups on economic, social and cultural rights, on indigenous populations/communities in Africa, on rights of older persons and people with disabilities.[128]

In conformity with its protective mandate and as provided by Article 62 of the African Charter[129] States are required to submit every two years a report, describing the initiatives and legislative measures undertaken to implement the provisions of the African Charter, and the Commission has the duty to consider these reports. Unfortunately, this States' task is not respected, and as of January 2018 only 7 States submitted all the due reports: 17 States are late by one or two reports, 23 are late by three or more and 7 States have never submitted a report.[130] The work of the Commission in analysing the states reports is also driven by the shadow reports provided by NGOs, and conclusions and recommendations are nowadays available on the website of the Commission, for a higher transparency and a better monitoring of the implementation.

Article 45(3) of the African Charter gives the African Commission the function of interpreting the provisions of the Charter, but to date any State party, institution of the AU or African Organization has request the Commission to perform this function. However, some NGOs have obtained the interpretation of some provisions of the Charter through draft resolutions.[131]

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[127] http://www.achpr.org/mechanisms/

[128] Ibid.

[129] Organization for African Unity (OAU), *African Charter on Human and Peoples' Rights*, Art. 62: "Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter."

[130] http://www.achpr.org/states/. Comoros, Equatorial Guinea, Eritrea, Guinea-Bissau, Sao Tome and Principe, Somalia and South Sudan have not submitted any report.

[131] http://www.achpr.org/about/history/

To conclude, Article 45(4) mandates the Commission to perform any other task demanded by the Assembly of Heads of State and Government.

2.1.3 The shortcomings in the protection of Human Rights

Some shortcomings of the African Commission have been underlined by NGOs monitoring its work and engaging for the protection of human rights, as the International Federation for Human Rights. What emerges from these critics are the following issues:[132]

- There are few resolutions condemning human rights violations by states;
- The number of field inquiries by the Commission is insufficient due to the unwillingness of States;
- The average processing time is too long to review individual communications by the Commission (between 2 and 8 years);
- The procedure to compel States to implement the recommendations of the Commission is complex, and results most of the time in no enforcement or follow-up by States;
- Lack of visibility of the Commission's work;
- Allocated budget by the AU too low for the Commission.

Moreover, the decisions of the Commission are recommendations, which are not legally binding. Because of these deficiencies, the establishment of a real court enforcing the African Charter with decisions binding on states has been welcomed.

The following chapter will display the establishment and characteristics of the African Court on Human and Peoples' Rights.

[132] International Federation for Human Rights, "Practical guide: the African Court on Human and Peoples' Rights", 27

2.2 African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights plays an important role within the African system of human rights' protection, and its establishment represents a step forward in the effective realization of this system. The Court strengthen the existing structure established by the African Charter, discussed in Chapter 1 of this thesis, and complements the African Commission, discussed above.

2.2.1 How and why the African Court was created

The first event starting the process leading to the establishment of a Court can be traced back to 1961, when at an African Conference on the Rule of Law in Lagos, Nigeria, the African jurists taking part to the Conference urged the African governments to consider the adoption of an African Convention on Human Rights and a Court in charge.[133] Nonetheless, as the OAU Charter was adopted in 1963, little reference was made to human rights and no mechanism or framework for their protection was established. As explained in chapter 1.1, the priority of the OAU was to strengthen the independence of African countries and foster the decolonization.

Only in June 1994 the drafting process for the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights was launched, during the Assembly of Heads of State and Government of the OAU in Tunis. The political situation was favourable to this process: the end of the Cold War and the democratization which involved many African countries lead to multi-party elections and the establishment of reliance on domestic constitutional courts.[134] With this background, the acceptance of a continental court was facilitated.

On September 1995, the first draft protocol was adopted in Cape Town, South Africa. This draft has been discussed at numerous meetings and consultations in the

[133] Viljoen, *International human rights law in Africa*, 411
[134] ibid., 412

following years.[135] The Protocol establishing the African Court was finally adopted during the meeting held in Ouagadougou, in Burkina Faso, during the 34th Ordinary Session of the Conference of Heads of State and Government of OAU on 10 June 1998.

In October of the same year, the African Commission meeting in Banjul, The Gambia, noting that only two of the Member states already ratified the Protocol, and considering the precarious situation of human rights in Africa, urged the African states to ratify the Protocol "within the shortest possible time".[136]

As prescribed by Article 34 of the Protocol, 30 days after the fifteenth instrument of ratification the Protocol was set to enter into force. This finally happened on 25 January 2004. As of January 2018, the states which have both signed and ratified are 30 out of 53.[137]

The entry into force of the Protocol had to be followed by the immediate establishment of the Court, and the process for the election of the judges began. However, at a summit held in Addis Ababa, Heads of States and Governments decided to merge the African Court with the Court of Justice.[138] The main reason for this decision was economic: it was acknowledged that the AU did not have the necessary means to establish and operate both Courts.

In January 2005, during a summit in Abuja, Nigeria, the Heads of State and Government recognized that the process of merging the two courts would have taken a long time, and for this reason they decided to operationalise the African Court. This

[135] In Nouakchott, Mauritania in 1997 the draft included the provision stating that the Court can receive petitions from individuals if the state accepted an optional declaration, rather than considering this possibility a direct consequence of the ratification (Art6(5)).

[136] Resolution on the Ratification of the Additional Protocol on the Creation of an African Court on Human and Peoples' Rights, adopted at the Commission's 24th session, October 1998.

[137] http://en.african-court.org/index.php/news/press-releases/item/64-chad-becomes-30th-au-member-state-to-ratify-the-protocol-on-the-establishment-of-the-african-court-on-human-and-peoples-rights. The 30 countries which have both signed and ratified the Protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon and The Gambia, Ghana; Kenya, Libya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Mozambique, Nigeria, Niger, Uganda, Rwanda, Arab Saharawi Republic, Senegal, South Africa, Tanzania, Togo and Tunisia.

[138] The African Court of Justice is the judicial organ of the AU.

decision has been successively confirmed in Sirte, Libya, in July 2005, as the participants to the summit declared that "all measures necessary for the functioning of the African Court on Human and Peoples' Rights must be taken, including particularly the election of the judges, the determination of the budget and the operationalization of the Registry".[139]

The elections of the judges eventually took place at the Assembly held in Khartoum, Sudan, in January 2006. In July 2006, the choice of the Court's seat fell on Arusha, in Tanzania.

On 15 December 2009, the Court issued its first ruling, becoming thus operational.[140]

2.2.2 Work of the Court in complementarity with the Commission

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights requires in its preamble "the establishment of an African Court on Human and Peoples` Rights to complement and reinforce the functions of the African Commission on Human and Peoples` Rights".[141]

The African Court is a judicial complement to the quasi-judicial mandate of the African Commission and is a supplement to the difficulties associated with the Commission, mainly caused by its quasi-judicial status.

Some of these difficulties highlight the potential of the African Court as a complementary body.[142] The first problem faced by the Commission is the nature of its findings, which are simply recommendatory: since they are non-binding, states tend not to act in compliance with them. This weak impact can be strengthened by

[139] Assembly/AU/Dec.83 (V)
[140] International Federation for Human Rights, "Practical guide: the African Court on Human and Peoples' Rights", 29–32
[141] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, available at http://www.achpr.org/instruments/court-establishment/
[142] Viljoen, *International human rights law in Africa*, 414–20

the Court, as its decisions are explicitly binding and not subject to appeal, as determined by Article 30 of the Protocol.[143]

Secondly, considered that the lack of remedies is the main reason for the existence of supranational recourse, is necessary to have a body that can ensure appropriate remedies. The Court is based on a clear legal basis for this provision, which can fix the lack of certainty of the Commission's remedies.

Another field in which the Court can have an important complementary role with the Commission is the implementation of the findings. The Commission, due to its non-binding nature, has not a strong implementation mechanism and no follow-up system. On the contrary, based on Article 30, State parties to the Protocol establishing the Court undertake to implement its finding and additionally they have accepted an elaborate system of follow-up. Thus, findings of the Court can be effectively implemented.

On the issue of accessibility, the Court can effectively complement the work made by the Commission: while with the latter confidentiality and secrecy were obscuring the work done and undermining the awareness of the Commission in Africa, the Court follows the principle of openness and its decisions are also available on the official website.[144]

Improvements are also possible in the management of urgent cases. The Commission has been ineffective in this field, since the African Charter does not provide for provisional measures, and the ambivalence about the legal status of the Commission's decisions on interim measures undermines its efficiency in urgent cases. On the other hand, the Court Protocol provides the Court with a wide mandate in case of urgent cases. Article 27(2) states: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such

[143] Ibid., Art.30: "The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."
[144] Court Protocol, art. 28(5): "The judgment of the Court shall be read in open court, due notice having been given to the parties." And Art. 29(1): "The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States of the OAU and the Commission."

provisional measures as it deems necessary." The Court's findings are judgements, hence binding on state parties.

A successful example of complementarity between these two actors is the Commission's referral to the Court of the situation in Libya in 2011. Once referred, the Court promptly ordered provisional measures against the state. In this case, an urgent situation has been faced effectively and shows how the Court may contribute to accelerate the inadequate and slow response.[145]

The sixth difficulty often faced by the Commission is that it has not been fully effective in the dissemination of information about its existence and case law, and for this reason it has also been reached by very few communications. On the contrary, a continental Court can have a greater impact and recognition, establishing a high profile through transparent procedures, the quality of the judgements and the fairness of its findings.

To conclude, a potential of the Court in rectifying the Commission's deficiencies is to speed up the pace of the process. There are indications that this is possible: for example, once the Court has deliberated on a judgement, it must render the written opinion within three months, and it shall impose state parties time-frames for compliance. Moreover, according to the Court Protocol, cases can be submitted directly to the Court, thus bypassing the Commission,[146] which can also refer a matter to the Court at any stage of its consideration.[147]

The power of the Commission of being able to bring a case to the Court, involving a violation of the rights of the African Charter by a State party is particularly significant: it allows NGOs and individuals who can't appeal directly to the Court to refer a matter to the Commission, with the purpose of reaching the Court through its mediation. Hence the Commission can serve as a shortcut to the Court, when the offending State

[145] Application 002/2013, *African Commission v. Libya*, 3 June 2016

[146] This is possible only in respect of the conditions asked by Art. 34(6) of the Court Protocol: "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration."

is not bound to Article 34.6 of the Protocol, that allows direct appeal to the Court by NGOs and individuals but needs the states to make a declaration accepting it.

Article 34.6 says that at the time of the ratification, a State should also make a declaration accepting the competence of the Court to receive cases and direct appeal by individuals and NGOs. Once the authorization is given, any individual or NGO with the Observer Status before the African Commission may refer to the Court to challenge human rights violations perpetrated by a State.

Unfortunately, States are reluctant to allow this possibility of direct appeal. As of today, only 8 countries have made the declaration under Article 34.6: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali and Tanzania and Tunisia, with the last declaration being that of Tunisia in April 2017.[148] Considering this scarce number of declarations, the African Commission represents the sole way for referral to the Court by individuals and NGOs.

On 24 February 2016, the government of Rwanda send a note verbale officially withdrawing its article 34(6) declaration. The main reason given was the fact that the Court had allowed access by persons convicted by national courts of serious crimes. This was referred to the *Ingabire Victoire Umuhoza* case.[149]

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148 http://www.african-court.org/en/index.php/news/press-releases/item/145-republic-of-tunisia-signs-african-court-declaration-to-allow-ngos-and-individuals-to-access-the-human-and-peoples-rights-court-directly

149 This case concerned Ms Ingabire Victoire Umuhoza, a Rwandan citizen. She contends that when the genocide in Rwanda started in April 1994 she was in the Netherlands to further her university education. She became the leader of a political party known as Rassemblement Républicain pour la Démocratie au Rwanda. In the year 2010, after spending nearly seventeen years abroad, she decided to return to Rwanda to contribute in nation building. On 21 April 2010, she was remanded by the police and placed under detention. She was accused of having committed crimes of spreading ideology of genocide, abetting terrorism, undermining state security, spreading rumours which may incite the population against political authorities, attempted recourse to terrorism and the establishment of an armed branch of a rebel movement. She was then sentenced to 8 and later 15 years imprisonment by the High Court and the Supreme Court of Rwanda, respectively. She contends that the African Charter has been violated in relation to her conviction and sentence. See http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court.html

This has been the first time a State withdrew from a declaration made under the Protocol, in which there is no prescription regulating this possibility. For this reason, the rules to be applied are the general rules in treaty interpretation, as set out in the Vienna Convention on the Law of Treaties (VCLT).[150] Rwanda acceded to the VCLT in 1980.

Although the withdrawal has been accepted, it has been agreed the it cannot be retroactive. Therefore, the Government of Rwanda cannot attain its main objective to escape from the Court's jurisdiction in respect of the cases pending before the Court.[151]

The Rwanda's decision has been strongly criticized. Its justification would assume that there are categories of persons who should not be able to access the Court: this is discriminatory, and moreover it goes against the mandate of the Court, which shall guarantee the protection of human rights irrespective of the persons seizing. Furthermore, this decision also undermines the accountability of African institution and the effectiveness of African human rights instruments, giving a bad precedent for other member states.[152]

Another relationship within the African Court and the African Commission is that the Court may seek the opinion of the Commission before ruling on a complaint, and the latter shall give that opinion as soon as possible.[153]

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[150] VCLT, Art. 56: "Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal "1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1".

[151] See Centre for Human Rights' report on Rwanda's withdrawal, at http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court.html.

[152] Michael G. Nyarko, "Human rights developments in the African Union during 2016," *African Human Rights Law Journal* 17, no. 1 (2017)

[153] Court Protocol, Art. 6.1: "The Court, when deciding on the admissibility of a case instituted under article 5 (3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible."

Moreover, the Court may also decide not to hear a case and refer it back to the Commission.[154] Finally, the Court may ask an advisory opinion on a case to the Commission.

As underlined by the International Federation for Human Rights, the articulation of the relationship between these two bodies is crucial for the effectiveness of the Court and of its mandate.[155] A concluding comparison within the two bodies is shown in Figure 2.

	AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS (in its role of protection via communications)	AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS (in its litigious role)
Founding document	The African Charter on Human and Peoples' Rights, adopted 27 June 1981, entry into force 21 October 1986	The 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, entry into force 25 January 2004
Composition	11 Commissioners	11 Judges
Jurisdiction	- interpretation and application of the Charter by State parties - friendly settlement - advisory opinion	- interpretation and application of the Charter and every other relevant instrument to human rights by State parties - friendly settlement - advisory opinion - interpretation and revision of cases
Procedure	Communications	Applications
Referral	- State parties - individuals and NGOs	- the Commission - the State party which has lodged a complaint to the Commission - the State party against which the complaint has been lodged at the Commission - the State party whose citizen is a victim of a human rights violation - African inter-governmental organisations - individuals and NGOs granted observer status by the Commission, pursuant to Article 34(6) of the Protocol
Decisions	Incentive	Mandatory

Figure 2: Comparison between the African Commission and the African Court[156]

[154] Ibid., Art. 6.3: "The Court may consider cases or transfer them to the Commission."
[155] International Federation for Human Rights, "Practical guide: the African Court on Human and Peoples' Rights", 33
[156] ibid.

2.2.3 Functions of the African Court

Article 4 of the Protocol establishing the African Court on Human and Peoples' Rights presents the first function of the Court, which is to provide advisory opinions:

> *"At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission."*[157]

This function can then be performed on the request of any AU Member State, any AU organ as the Assembly of Heads of State and Government or the ECOSOC, or any organization recognized by the AU, such as the Regional Economic Communities.

This broad advisory jurisdiction is important to ensure an appropriate analysis of the African Charter, the Protocol and their compatibility with domestic legislation and regional initiatives, and moreover, this function of the Court is discretionary. Although the Court is obliged to give reasons for its advisory opinion and the judges may dissent, there are no established guidelines in the Protocol to determine when to exercise the advisory jurisdiction. Furthermore, the advisory opinions are non-binding, but since the Court is a judicial organ, they derive their value as legal authority.[158]

The Commission as well has the competence of giving an opinion on matters concerning the instruments of promotion and protection of human rights. However, no conflict of jurisdiction arises between Court and Commission, thanks to the aforementioned Article 4, which provides that the former may receive a request of this kind only if not related to a request pending before the Commission. In case of a

[157] Court Protocol, Art. 4.1.
[158] Githu Muigai, "From the African Court on Human and Peoples' Rights to the African Court of Justice and Human Rights," in *The African Regional Human Rights System*, ed. Manisuli Ssenyonjo, 265–82 (Brill, 2011), 275

request for an advisory opinion, the Court shall also send a copy to the Commission and inform the States parties which can be interested on the matter.[159]

Another function of the Court is its contentious jurisdiction, as stated in Article 3 of the Court Protocol. It is a dual jurisdiction, since the Court can be called upon and then judge any matter concerning interpretation and application of human rights instruments:

> *"1. The 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.*
>
> *2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."*[160]

Furthermore, the Court has the function of attempting to amicably settle a case, when asked to consider a violation of a rights by a State party, by finding a solution for reconciliation that satisfies both parties and complies with the provisions of the Charter. This is provided by Article 9 of the Court Protocol:

> *"The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter."*[161]

Finally, the Court can interpret its judgements for their execution and revise them if needed. This is possible on request of any party concerned in the case and within 12 months after the date of issuing of the ruling. In this case, the Court invites the other parties to the case to submit their comments, and the application is assessed by the same judges who reviewed the case. Any party may also ask the Court to review its ruling, if new elements unknown before the jurisdiction emerge. Both the request of

[159] International Federation for Human Rights, "Practical guide: the African Court on Human and Peoples' Rights", 50
[160] Court Protocol, Art. 3.1 and 3.2.
[161] Ibid., Art.9.

interpretation and that of revision does not suspend the execution of the decision, unless different decision of the Court.[162]

The rights protected by the African Court are numerous: it contrasts the violations of the rights provided by the African Charter on Human and Peoples' Rights, the Protocol to the Charter and any other human rights instrument ratified by the States concerned.

The African Charter, unlike the European and American Conventions on Human Rights, provides a really wide range of rights: not only civil and political, but also social, cultural and economic rights and the rights of peoples. The following list presents the rights protected by this Charter, and consequently by the African Court.

Civil and political rights, from Article 2 to 14 of the Charter:

- the right to non-discrimination (art. 2)
- the right to equality before the law (art. 3)
- the right to life and physical and moral integrity (art. 4)
- the right to respect for the inherent human dignity of the person, prohibition of all forms of slavery, trafficking in persons, physical or mental torture and cruel, inhuman or degrading treatment (art. 5)
- the right to liberty and security of person and prohibition of arbitrary arrest or detention (art. 6)
- the right to have one's case heard by the judicial branch, the right to a fair trial, the right to presumption of innocence, the right to defence, the right to be tried within a reasonable amount of time by an impartial tribunal and the principle of non-retroactivity of criminal law (art. 7)
- freedom of conscience and religion (art. 8)
- the right to information and freedom of expression "under the law" and the right to free exercise of religion (contains a reservation clause) (art. 9)
- the right to freedom of association under the rules laid down by the law (contains a reservation clause) (art. 10)

[162] Ibid., 53

- the right to freedom of assembly (contains a reservation clause) (art. 11)
- the right to freedom of movement within a State, the right to leave any country, including one's own, the right to asylum, the prohibition of collective expulsion (art. 12)
- the right to freely participate in public affairs and equal access to public service, the right to equal access to public goods and services (art. 13)
- the right to property (art. 14)

Economic, social and cultural rights, from Article 15 to 18 of the Charter:

- the right to work under equitable and satisfactory conditions; the right to equal pay for equal work (art. 15)
- the right to the highest attainable standard of physical and mental health (art. 16)
- the right to education and the right of individuals to take part in the cultural life of the Community (art. 17)
- the rights of the family, women, elderly and disabled to special measures of protection (art. 18)

Peoples' rights, from Article 19 to 24 of the Charter:

- the right of peoples to equality (art. 19)
- the right of peoples to existence, self-determination and the right of peoples to liberate themselves from the bonds of domination by resorting to any means recognized by the international community; the right to assistance in their liberation struggle against foreign domination, whether political, economic or cultural (art. 20)
- the right of peoples to freely dispose of their wealth and natural resources (art. 21)
- the right of peoples to economic, social and cultural development (art. 22)
- the right of peoples to peace and national and international security (art. 23)
- the right of peoples to a general satisfactory environment favourable to their development (Article 24)

Moreover, the Court is also responsible of dealing with violations of any other Human Rights instrument, both African (as for example the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa or the AU Convention on the Protection of and Assistance to Internally Displaced Persons in Africa) and international (as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment).

2.3 The future African Court of Justice and Human Rights

The African Court of Justice was already foreseen as an institution of the newly founded African Economic Community (AEC) in 1991. The Protocol of the African Court of Justice of the African Union (ACJ Protocol) was adopted in 2003, mandating the African Court of Justice to administer matters of interpretation arising from the application of the AU Constitutive Act.[163]

Although the ACJ Protocol entered into force on 11 February 2009, the Court has never been established.

The reason is the intention of merging this Court with the African Court on Human and Peoples' Rights. This idea first emerged in 2003, during the negotiations for the draft Protocol of the Court of Justice, but it was initially rejected.

The main justification for the merge of the two Courts was the lack of human and especially financial resources to sustain both Courts. Another argument supporting the merge was that both had the jurisdiction to examine human rights cases.[164]

[163] Viljoen, *International human rights law in Africa*, 448–49

[164] International Federation for Human Rights, "Practical guide: the African Court on Human and Peoples' Rights", 142

However, this decision found many opponents: the financial issue was not considered an appropriate argument in favour of the merger, since financial restrictions were affecting all AU institutions, but the issue of affordability was not heard in relation to the many other political institutions created by the AU. For instance, at that time the African Commission had never been adequately resourced by the AU and needed to rely on financial support from non-African donors.[165] Moreover, one of the main matters of concern regarding the merge of the two Courts was also the risk of relegating human rights issues to a less important level, possibly perceived as less significant than the other matters which would occupy the general section of the Court. Another issue of concern regarding the merged Court was the chaotic beginning of the Africa's human rights machinery, with two separate regional courts established at the same time, contributing again to the risk of relegating human rights issues to a secondary position.[166]

Since in 2003 neither the meeting of the AU Member States, nor the AU Ministerial Conference could reach an agreement on the issue of the merger, the decision was referred to the Executive Council of the African Union, which asserted that the African Court of Human and Peoples' Rights shall remain a separate institution from the Court of Justice of the AU (Doc. EX/CL/59 (III)).[167]

Nonetheless, although the Protocol creating the African Court on Human and Peoples' Rights had come into force on 25 January 2004, and although the process establishing the Court was already started, the Heads of State and Government, at the initiative of the president of the AU Conference, the Nigerian President Obasanjo, decided at the Addis Ababa (Ethiopia) Summit in July 2004, to merge the two Courts. This decision was perceived as not only undermining the previous decision of the

[165] Kane, Ibrahima and Motala, Ahmed C., "The Creation of a New African Court of Justice and Human Rights," in *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006*, ed. Malcolm Evans and Rachel Murray, 2. ed., 406–40 (Cambridge: Cambridge University Press, 2008), 416
[166] Githu Muigai, "From the African Court on Human and Peoples' Rights to the African Court of Justice and Human Rights" in *The African Regional Human Rights System*, 282
[167] Kane, Ibrahima and Motala, Ahmed C., "The Creation of a New African Court of Justice and Human Rights" in *The African Charter on Human and Peoples' Rights*, 413

Executive Council, but also pointing to a failure to consider its legal and political implications.[168]

Despite this decision, considering the long process of creating and implementing the instruments necessary for the joint Court, during the Assembly in Abuja, Nigeria, in January 2005, the Chiefs of State decided to activate anyway the African Court on Human and Peoples' Rights. This decision was then confirmed at the Syrte Summit, in Libya, in July of the same year, when it was decided to proceed with the drafting of a legal instrument establishing the merged Court, and it was established "that all necessary measures for the functioning of the African Court on Human and Peoples' Rights must be taken"[169]

The merger of the two Courts required the drafting of a new Protocol, and after preliminary proposals a working group charged with drafting this single judicial instrument worked from the 21st to the 25 of November 2005 in Algiers, Algeria. This document was then presented to the AU Summit in Khartoum, Sudan, in January 2006. As noted by FIDH, these first drafts were quite progressive, for instance when indicating which entities were eligible to petition the merged Court: NGOs and individuals could do it with no prior authorization of the State concerned, despite the existence of this condition with the African Court on Human and Peoples' Rights, as mandated by Article 34.6 of its Protocol. The new Protocol hence provided the opportunity to remedy some shortcomings of the African Court Protocol, in particular the issue of the conditional access by NGOs and individuals.[170]

Finally, the draft Protocol for the single Court was adopted in July 2008 by the Conference of Heads of State and Government at the Sharm El Sheikh Summit, Egypt.

[168] ibid.
[169] Assembly/UA/Dec.83(V))
[170] International Federation for Human Rights, "Practical guide: the African Court on Human and Peoples' Rights", 143

The Merging Protocol will enter into force when 15 states have ratified it.[171] By January 2018, only six states have ratified the Protocol: Benin, Burkina Faso, Congo, Libya, Liberia and Mali.[172]

Once it will enter into force, it will replace both the Court Protocol and ACJ Protocol, and the two courts will be merged in one single court: The African Court of Justice and Human Rights.[173] Until this Protocol will come into force, the African Court on Human and Peoples' Rights will continue to exist and perform its duties.

The new merged Court will be composed by 16 judges, nationals of the States Parties, divided in two sections: The General Affairs Section and the Human and Peoples' Rights Section, both composed by 8 judges. The Court shall never have more than one judge coming from the same country and each geographical region of the Continent shall be represented.

Article 5 of the Merging Protocol provides that once it comes into force, the cases pending before the African Court will be transferred to the Human Rights Section of the Single Court and will be assessed according to the former Protocol. Secondly, a transition period is planned after the entry into force of the Protocol, to allow the African Court on Human and Peoples' Rights to take all the appropriate measures to transfer its work to the new Court.

Only when the Protocol of the merged Court will be in force, and the transition period will be over, with hearings of pending cases before the African Court on Human and Peoples' Rights concluded by new judges on the Single Court, the Protocol of the African Court on Human and Peoples' Rights will be abrogated. From this moment, the African Court of Justice and Human Rights will exist fully in its own right.[174]

[171] Merging Protocol, art 9(1).
[172] African Union, List of the countries which have signed, ratified/acceded the Protocol on the Statute of the African Court of Justice and Human Rights, 15 June 2017.
[173] Merging Protocol, Art. 2.
[174] International Federation for Human Rights, "Practical guide: the African Court on Human and Peoples' Rights", 144

2.4 Comparison between the African Court and the European and Inter-American Courts

There are three regional systems for the protection of human rights, namely the African, the European and the Inter-American human rights systems. They have the function of interpret and apply the general regional instruments for the protection of Human Rights.

- For the African Court: the African Charter on Human and Peoples' Rights;
- For the European Court: the European Convention on Human Rights and Fundamental Freedoms;
- For the Inter-American Court: the American Convention on Human Rights.

This chapter will provide a comparison between the African Court on Human and Peoples' Rights and the other two regional systems.

2.4.1 The potentiality of the young African Court

The African Court has a great potentiality, due to three aspects of its jurisdiction: the rights which can be protected, the human rights instruments which can be applied and the subjects which can file a complaint.[175] Thanks to these characteristics, the African Court could have the capability to enforce the protection of human rights in an even more comprehensive way than the other regional courts. Nevertheless, the way towards its effective enforcement is still long.

Firstly, the African Court bases its jurisprudence on the African Charter, a relatively young instrument in comparison with the other two regional instruments for the protection of human rights. The African Charter has been adopted in 1986, while the European Convention came into force in 1953 and the American Convention was adopted in 1969.

[175] On this issue, it is more developed only in comparison with the Inter-American Court.

The African Charter appears to be progressive and with a much greater scope than the other two regional instruments. As a matter of fact, while the European and the Inter-American Courts protect civil and political rights, the African system protects also social, economic, cultural rights, and peoples' rights. This wide scope gives the Court a great potentiality, that still needs to be fully employed.

Secondly, complaints brought to the African Court can be based both on a breach of the African Charter, but also of any other human rights instruments which has been ratified by the state in question.[176] This includes for instance at an African level the Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on the Rights of Women in Africa passed in 2003. In addition, on a universal level, it includes many instruments as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention against Torture. The possibility of pursuing a breach of human rights through all these treaties represents a wide degree of implementation. Also, this represents for people who have been outraged an advantage, since they can turn to a single judicial body, competent on different issues and different treaties.

Finally, the African Court foresees a wide range of subjects which can submit cases to the Court: the African Commission on Human and Peoples' Rights, International African Organizations, the States whose citizens have been victims of human rights violations. In addition to these, also individuals and NGOs with observer status before the African Commission can seize the Court, but only against a state which has made a declaration under article 34.6, authorizing such a petition.

These three aspects are not the same in the other regional bodies. As already said, the European and Inter-American Courts make use of legal instruments which have a narrower scope and protect only civil and political rights. Secondly, their jurisdiction is based on the interpretation and application of a more limited set of instruments: the European Court bases its jurisdiction on the European Convention on Human Rights. On the other hand, the Inter-American Court can apply the Inter-American

[176] Ibid., 58.

Convention on Human Rights and a number of regional human rights instruments.[177] Thirdly, in the Inter-American system only States parties and the Inter-American Commission on Human Rights can submit cases to the Court: as for the African Court, individuals and NGOs have the possibility to submit allegations of human rights violations to the Commission. On the contrary, the European Court gives this opportunity to all States parties, individuals, NGOs and groups which have been victims of violations of the rights protected by the European Convention.[178]

Thus, the potentiality of the African Court is not inferior to that of the other Courts, and it has what it takes to effectively tackle human rights violations, and within these women's rights violations. Nonetheless, the Court has not taken advantage of this capacity yet, and the results obtained until today are still not fully satisfying, since the Court is still in its early stages. One of the main issues of concern is for example that only eight States have made a declaration under Article 34.6. Consequently, the right of individuals and NGOs to protect their rights in front of the Court is constrained. Nonetheless, despite the African Court suffers certain weaknesses, it has the potential to develop into an important instrument for the protection of human rights in Africa.

[177] For instance, the American Declaration of the Rights and Duties of Man, and the Inter-American Convention of the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para).

[178] Since the adoption of the Protocol N.11 in 1998 to the Convention on Human Rights and Fundamental Freedoms, available at: http://www.echr.coe.int/Documents/Library_Collection_P11_ETS155E_ENG.pdf

2.4.2 Women's rights protection in the African Court: still in its early stages

The establishment of the African Court has been slow: although the Protocol entered into force in 2004, the Court became fully operational only 5 years later, when it issued its first decision in December 2009.[179]

The African Court, in compliance with Article 31 of the Protocol, shall submit a report on its work to each regular session of the Assembly.[180] The last Activity Report submitted in January 2017 describes the activities of the Court from January to December 2016. In this year, the Court registered 59 Applications and 2 requests for Advisory Opinion. In the same period, it issued 17 Orders for Provisional Measures, it delivered 6 judgements and issued 24 Orders, examined 90 Applications and 4 requests for Advisory Opinion.[181] This numbers evidences an increasing effort by the Court to comply with its mandate, even if in Comparison with the other regional Courts, the crop of judgements is still meagre. The European Court on Human Rights decided in 2016 38,505 Applications and delivered 993 judgements concerning 1,926 applications.[182] In the same year, the Inter-American Court on Human Rights, less prolific than the European counterpart, received the submission of 16 cases and delivered 21 judgements.[183]

Women's rights are mentioned and protected both in the three Courts' general regional instruments for the protection of human rights and in international human rights instruments, the more widespread being the CEDAW.

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[179] Application 001/2008, *Matter of Michelot Yogogombaye vs. The Republic of Senegal:* Yogogombaye seized the Court to intervene in a legal matter against the former Chadian president, pending in Senegal. The Court dismissed the petition because Chad did not enter the declaration allowing the Court to hear individual petitions.

[180] Court Protocol, Art. 31: "The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgement."

[181] African Union, *2016 Activity Report of the African Court on Human and Peoples' Rights*, Thirtieth Ordinary Session, 22-27 January 2017, Addis Ababa, Ethiopia.

[182] European Court on Human Rights, *The ECHR in facts & figures, 2016*, March 2017. Available at http://www.echr.coe.int/Documents/Facts_Figures_2016_ENG.pdf

[183] Inter-American Court of Human Rights, *Annual Report 2016.* Available at http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2016.pdf

The experience of the African Court in this field is still not solid as that of its counterparts. Until today, only two cases regarding women's rights have been brought before the Court and one request for advisory opinion has been received.

One of the mentioned cases is Application 046/2016: 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.[184]

The applicants are a Malian association on women's rights with observer status before the African Commission (APDF) and a pan-African non-governmental organization which assist victims of human rights violations (IHRDA). The respondent is the Republic of Mali, which is party to the African Charter, the Protocol to the African Charter establishing the African Court, the Maputo Protocol, the Charter on the Rights and Welfare of the Child and deposited the declaration under Article 34.6 of the Court Charter, allowing individuals and NGOs to directly access the Court. The National Assembly of Mali promulgated a law amending the former Marriage and Guardianship Code 1962, which was containing obsolete provisions. The Applicants brought this Application before the Court because they assert that the above-mentioned law was violating the international human rights treaties ratified by Mali. The rights considered violated by the Applicants are the minimum age of marriage for girls, the right to consent to marriage, the right to inheritance and the obligation to eliminate traditional practices and attitudes which undermine the rights of women and children. These rights are protected by the Maputo Protocol (Art. 6, 21.2, 2.2), by CEDAW (Art. 16.a and b, 5.a) and by the Charter on the Rights and Welfare of the Child (Art. 1, 2, 3, 4 and 21).

This first case regarding women's rights has been heard by the African Court on 16 May 2017 at its seat in Arusha, Tanzania.[185] Nonetheless, the decision is still pending.

[184] African Court on Human and Peoples' Rights, Application 046/2016*, APDF & IHRDA v. Republic of Mali*

[185] Public hearing available at the YouTube channel of the African Court: https://www.youtube.com/user/africancourt/videos

The second case concerning women's rights protection is *Mariama Kouma and Ousmane Diabaté vs Mali*.[186] This case was brought to the Court by IHRDA against Mali and concerns a case of violence against women. The Applicants alleged the failure of the State to conduct an accurate investigation, thus violating Article 3(4) of the Maputo protocol which obliges states to take all measures to protect women from all forms of violence. Additionally, the State was accused of violating the right to dignity enshrined in article 3 of the Maputo protocol, because it did not hold accountable the perpetrator. The failure to assist victims also amounts to a violation of the right to health and the failure to provide victims with appropriate remedies constitutes a violation of Article 8 (a) of the Maputo protocol which obliges state to take all appropriate measures to ensure effective access by women to judicial and legal services, including legal aid. This case is still pending as well.[187]

The request for Advisory Opinion received by the Court dates to January 2016 and has been considered by the Court on the 28 September 2017. It has been presented by the Centre for Human Rights of the University of Pretoria, the Federation of Women Lawyers (Kenya), the Women's Legal Centre, the Women Advocates Research and Documentation Centre and the Zimbabwe Women Lawyers Association.[188] The Applicants state that they are all African-based NGOs working on women's human rights, and that they have observer status with the African Commission. Therefore, this qualify them for the purposes of Article 4(1) of the Court Protocol and Article 68(1) of the Rules of Court. Thus, their application falls within the jurisdiction of the Court.

The Applicants demand an Advisory Opinion on the interpretation of Article 6(d) of the Maputo Protocol[189] and the consequent States' obligations. The request is anchored on Articles 2(1) (a-e) and 2(2) of the Maputo Protocol[190], which require

[186] *Request 040/2016 Mariama Kouma and Ousmane Diabaté vs Mali*
[187] Information about the case provided personally by IHRDA.
[188] Request No 001/2016, *The Centre for Human Rights, Federation of Women Lawyers, Women's Legal Centre, Women Advocates Research and Documentation Centre, Zimbabwe Women Lawyers Association*.
[189] Maputo Protocol, Art. 6(d): "every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised".
[190] Ibid, Art 2: "1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall: a) include in their

Member States to prevent all forms of discrimination against women. The Applicants' underline that Article 6(d) imposes on Member States the obligation to guarantee the registration of every marriage by enacting national legislative measures: this impose a positive obligation on states to facilitate marriage registration, and provides that marriages shall be recorded in writing and registered to be considered legal. They confirm the importance of this article in combatting all forms of discrimination against women in the field of marriage, but they also stress how this provision, if misinterpreted, could be cause of further dangers and discrimination. The reason is that unregistered marriages are common in Africa, and this non-registration renders women vulnerable under many points of views, e.g. in proving the existence of the marriage in case of forced divorce or polygamous marriage and in securing land and property rights. The Applicants assert that the language used in Article 6(d) of the Maputo Protocol could be interpreted as meaning that unregistered marriages are invalid and should not be granted recognition. Therefore, this would be unjust to African women. Moreover, this interpretation should be considered contrary to the objectives of Article 2 and of the Protocol itself.

The Court is asked to clarify the interpretation of Article 6(d) and the obligations of State parties; it is asked to confirm that this Article does not require or suggest that non-registration invalidates the marriage; to advise if States should enact national laws for condonation procedures to correct non-compliance with registration requirements; to advise on the legal consequences deriving from non-registered marriages.

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national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application; b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those 5 harmful practices which endanger the health and general well-being of women; c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist; e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women. 2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."

On 28 September 2017, the African Court provides its position. It recalls Article 4(1) of the Protocol, which provides that "At the request of a Member State of the OAU[191], the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments…". The Court examines if the Applicants are part of these categories and are hence allowed to request an Advisory Opinion under Article 4(1). The Court notes that the Observer Status before the African Commission does not directly amount to recognition by the African Union. This recognition can be granted only through recognition of Observer Status in the AU or through the signing of a Memorandum of Understanding with the Union. Therefore, the Court finds that the Applicants, despite being African organizations, lack the condition of being recognized by the AU. For this reason, the Court "finds that it is not able to give the Advisory Opinion which was requested of it".[192]

On the other hand, at a regional level some important achievements have been reached: on 12 October 2017, the ECOWAS Court (Community Court of Justice of the Economic Community of West African States) delivered its first judgement in favour of plaintiffs in a case of gender-based violence. In the case *Dorothy Njemanze and 3 others v The Federal Republic of Nigeria*[193], four women have been assaulted sexually, physically, verbally and they were unlawfully detained by some government agencies, namely the police and the military. They have been arrested and accused of being prostitutes, simply because they have been found walking on a street at night. The Court judged that this arrest was unlawful and was violating numerous rights and articles of the Maputo Protocol, of CEDAW, ICCPR, CAT and UDHR. This case is remarkable, because it represents the first time an international Court has pronounced on the Maputo Protocol in defence of women's rights.[194] It represents a valuable precedent for the jurisprudence of the other Courts, and particularly of the African Court on Human and Peoples' Rights. The efficacy of the Maputo Protocol has

[191] This is nowadays referred to the African Union (AU), which replaced the OAU in 2001.
[192] African Court, Request No. 001/2016, 12.
[193] ECOWAS Court, Dorothy Njemanze & 3 Others v. Federal Republic of Nigeria, suit no: ECW/CJ/APP/17/14, judgement No. ECW/CCJ/JUD/08/17
[194] http://www.ihrda.org/2017/10/ecowas-court-makes-first-pronouncement-on-maputo-protocol-rules-in-favour-of-plaintiffs-in-case-of-dorothy-njemanze-3-ors-v-federal-republic-of-nigeria/

been proved, and this example can be extremely useful for the current pending cases the African Court is facing.

As of January 2018, the ECOWAS Court is facing two other cases related to the Maputo Protocol. Both have been brought by IHRDA, one against Mali and one against Nigeria. These cases are still pending and waiting for another judgment in favour of the protection of women.[195]

To conclude, in the few situations in which the African Court was asked to give its judgement on matters related to women's rights, not much has been achieved. The cases are still pending after the public hearings in 2017, and the request for Advisory Opinion has been rejected.

Along with these outcomes, questions arise on the reason why the Court is not receiving Applications regarding women's rights. One of the reasons can be found in the scarce possibility of access to the Court by individuals and NGOs. There are numerous African NGOs engaged in the protection of women, but they are denied access to the Court if they need to seize a State which has not made a declaration under Article 34.6 allowing this process.

Furthermore, this meagre presence of women's rights issues in the Court's proceedings underlines once more the fact that these rights are still of secondary importance, although women's rights violations are a widespread problem in the Continent. Two of the three issues faced by the Court concern rights related to marriage. Therefore, issues regarding family law and situations in which women are considered only as part of a family unit. This underlines once more what has been presented in the first chapter of this thesis: issues on marriage-related rights are often within the more debated. As a matter of fact the Articles of CEDAW and of the Maputo Protocol which received more opposition were those on family and marriage. Secondly, in the African context family is considered "the natural unit and basis", and "the custodian of morals and traditional values".[196] Therefore, to protect

195 Information provided by the Executive Director of IHRDA.

[196] African Charter, Art. 18(1): "The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral". Art. 18(2): "The State

women's rights within the most important nucleus of the African society could represent the right beginning to ensure firstly the basic rights for women, and then hopefully moving further, to the protection of rights disentangled from family law.

2.4.3 The African Court on the current pending case on women's rights

The case *APDF & IHRDA v. Republic of Mali*, at present still pending at the African Court on Human and Peoples' Rights, is of paramount importance for the protection of women's rights in Africa. Being the first case in which the Court is called to give its judgement on matters related to women's rights and considering the reference to key human rights instruments as the Maputo Protocol, CEDAW and ACRWC, this case represents the first chance for the Court to give a concrete example of its potential in the protection of African women's rights.

As mentioned, the issue concerns the Malian revision of the Family Code, first approved in 2009 to revise old provisions which were discriminating against women. It represented a good opportunity to improve women's rights in the country, for example establishing equality between boys and girls, and between children born within or outside the marriage. Because of the disagreement received, mainly by Muslim organizations, the Code underwent a second reading. The points of disagreement between women's rights activists and Muslim organisations were multiple. For instance, Article 56 concerning the choice of domicile, which according to the first proposal of the revised Code had to be based on the professions of either of the spouses, while before it was only decided by the man, obliging the wife to adapt to his choices and losing her job opportunities and income sources. Another cause of dispute with the Muslim religious organizations has been Article 281, related to the secularism of marriage. Islamic marriages do not have a contract, therefore, in case of divorce or death of the husband, women can hardly claim their rights in front of the law. It is reported that in Mali 35% of women are dispossessed and must leave the house because they do not have a civil marriage certificate. Also Article 282,

shall have the duty to assist the family which is the custodian of moral and traditional values recognized by the community".

setting the minimum age for marriage at 18 years for both men and women, has been contested, as well as the replacement of the concept of obedience of the wife with that of mutual respect in Article 311. [197]

Following these protests by conservative forces, the result of the second reading was a regression on fundamental Articles improving Malian women's rights. Human rights organizations have been fighting and made various calls during the drafting to prevent such a result.[198] Nonetheless, their calls have been ignored, and the new Code, at the beginning considered a paramount opportunity to improve women's rights in Mali and eliminate discrimination and harmful practices, became a further source of discrimination against women.

For this reason, the African Court has been asked to pronounce its judgement on this issue. The public hearings have been held on 16 May 2017[199], at the presence of the judges of the Court, the Defendants of the Republic of Mali and of APDF and IHRDA.

From the very beginning of the hearing, the Defendant of the Republic of Mali does not display any sign of agreement or understanding with the Applicants (APFD and IHRDA). The Respondent sustains the Court does not have the jurisdiction to pass a judgement in this matter. He asserts that the African Charter, as well as the other human rights instruments mentioned, have been ratified by Mali, and are part of the internal jurisprudence of the State; therefore, the case had to be domestically considered. Secondly, the Respondent claims that the Applicants did not respect Article 56.6 of the African Charter, which states that application shall be considered only if submitted within a reasonable period,[200] while the Family Code has been adopted in 2011 and the Applicants waited until 2015 to seize the Court.

These allegations are opposed by the Applicants, which sustain the jurisprudence of the Court on this matter, since the issue concerns international instruments as the

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[197] Interview released by Djingarey Ibrahim Maiga, the President of Femmes et Droits Humains, to AWID. Available at https://www.awid.org/news-and-analysis/new-family-code-mali-and-why-its-promulgation-has-been-delayed

[198] See https://www.fidh.org/en/region/Africa/mali/Mali-s-new-Family-Law-women-s, and https://www.fidh.org/fr/regions/afrique/mali/Mali-Deuxieme-presentation-du

[199] Public hearing available at the YouTube page of the African Court: https://www.youtube.com/watch?v=EvbPjgehyXw

[200] African Charter on Human and Peoples' Rights, Art. 56.6.

Maputo Protocol. Furthermore, they complain that since the Family Code had already been adopted, it was impossible for them to do an appeal, and they display also their adherence to every paragraph of Article 56 of the African Charter. The request of the Applicants to the Court is to condemn the violation by the Republic of Mali of the Maputo Protocol, of CEDAW and of the ACRWC, to ensure the elimination of every discrimination emerging from the Family Code.

According to the Applicants, the new Code violates many provisions. It states that women must obey their husbands and men are considered the heads of the family. Article 6 of the Family Code is inconsistent with the Maputo Protocol, since it provides that the legal age for marriage is not the same for males and females: the latter can marry since they are 16, and in certain cases marriage can be permitted even from 15 years.

Additionally, Articles 283-287 of the new Code give the competence to conduct marriages to agents of state registration offices and to clergymen. The Applicants raise their concern on the validity of the marriages, as in the Family Code there is neither the obligation to verify the consent of the parties, nor a provision about punishment for the clergymen who fail to verify this consent: since the presence of the spouses is not compulsory for the celebration of marriages (Art. 283), its validity is hard to prove. The Applicants underline that in Mali the majority of marriages is carried out by clergymen, and forced marriages are unfortunately common.

Furthermore, an issue of concern is Article 751 of the Family Code: it provides that Islamic law or customary law shall be applied in case of inheritance, in case of absence of a will on the distribution. In these situations, Islamic law gives a woman the right to inherit 1/8 of her husband's property, and Islamic and customary laws exclude out of wedlock children from inheritance and in case of children born in the marriage, provide that the female receives half of the part awarded to the male. At the public hearing, the Applicants make the judges aware of the fact that in Mali more that 50% of the population is analphabetic, there are around 40 notaries for around 15 million inhabitants, and these are concentrated in cities, difficult to reach for most of the people. Clearly this situation, added to the scarce awareness on the use of wills and

the high price of notary services, results in the application of Islamic and customary law on inheritance as the only available option. This results in acting against Article 21 of the Maputo Protocol, which provides that women have the right to inherit "an equitable share in the inheritance of the property of her husband" and that "Women and men shall have the right to inherit, in equitable shares, their parents' properties".[201]

The Defendant of the Republic of Mali opposes all these accuses, stating that the Family Code is the result of a social compromise, adopted after considering the opinions of all the parties taking part to the drafting. Furthermore, beside rejecting the critics made by the Applicants, the Respondent stresses the fact that the African Court should not consider the case. He repeats that it should have been considered domestically, at all levels of the Malian domestic jurisprudence, and with a concrete case of citizens which have been victims of human rights violations on this matter. Moreover, he asserts that IHRDA has not the mandate to represent the APDF, subsequently it has not the rights to seize the African Court.

As of January 2018, the case is still pending, and the Court has not pronounced its opinion yet. Women's rights activists and NGOs are vigilant, because the judgment of the Court on this matter is of course important for Malian women, but not only.

It is one of the first African Court cases explicitly considering women's rights, and it is also the first African Court case which alleges the violations of different international instruments (Maputo Protocol, ACRWC, CEDAW), but makes no reference to the violation of the African Charter on Human and Peoples' Rights.[202] Although the African Court Protocol provides the Court with the faculty of considering applications dealing not only with the African Charter, but also with other relevant human rights instruments,[203] it has been common use until now to allege firstly violations of the

[201] Protocol to the African Charter on Human and Peoples' Rights in the Rights of Women in Africa, Art. 21(a)(b).
[202] http://www.acthprmonitor.org/not-a-charter-article-in-sight-the-case-of-apdh-and-ihrda-v-mali/
[203] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art. 3.1

African Charter and in addition to this of other international human rights instruments as well.

The paramount importance of this case is hence bound to its significance for women's rights, but also to its significance for the development of the Court: for the first time a case not bound to the African Charter is considered, and the Court is thus developing its jurisprudence and pushing it further in international law.

Waiting for further developments of the case, the first hope is that the Court will demonstrate to have the jurisdiction to pass a judgement and will confirm that the Applicants fulfil the conditions to seize the Court. Secondly, a judgment in favour of the Applicants, prescribing the State to conform its National Family Code to international human rights treaties, would represent a milestone in the protection of women's rights in Africa and in the role of the African Court in this battle.

2.4.4 The Inter-American system on women's rights

How do other regional human rights systems act in similar cases? A parallel can be made with the Inter-American system. There are many similarities between this and the African system. Both are the products of colonial histories, they cover enormous geographic areas comprising extremely different populations, customs, languages. Both have been the stage of massive human rights violations, which unfortunately in many cases continue to exist, and have slowly developed a system for the protection of human rights. The Inter-American Commission has been created in 1959 by the Organization of American States (OAS), while the Inter-American Court on Human Rights has been installed in 1979; these two institutions compose the Inter-American system for the protection of Human Rights.[204]

[204] http://www.oas.org/en/iachr/mandate/what.asp

On January 2001, the Inter-American Commission on Human Rights ruled on the case *Marìa Eugenia Morales de Sierra vs. Guatemala*.[205] The petition was presented on 22 February 1995 by the Centre for Justice and International Law (CEJIL) and Marìa Eugenia Morales de Sierra. An individual victim has been identified to allow the Commission to initiate the procedures and advance its decision.[206] The Petitioners alleged that Articles 109, 110, 113, 114, 115, 131, 133, 255 and 317 of the Civil Code of the Republic of Guatemala create discriminatory distinctions between men and women within the institution of marriage and therefore violate the terms of the American Convention on Human Rights and of CEDAW as well.

The allegations of the Petitioners are the following: the designated victim, Marìa Eugenia Morales de Sierra, is placed in a position of juridical subordination to her husband, which prevents her from exercising control over many aspects of her life. The cited articles create distinctions between single women, married women and married men. The victim is a married woman living in Guatemala, a mother and worker. Article 109 provides that representation of the marital unit corresponds to the husband, which, according to Article 131, administers the marital property. Articles 115 and 133 provide exception only where the husband is absent. By virtue of Article 255, the husband represents and administers the property of minors and by virtue of Article 317 the wife may be excluded from exercising custody. The victim's right to work is also menaced, since Article 110 provides that she has the duty to take care of the home and children, and Articles 113 and 114 prescribe that she can carry on activities outside the home only if this does not influence her roles of mother and wife.

The result of these provisions is an illegitimate and unjustified discrimination on the basis of sex and civil status, which prevents the victim to legally represent her interests and those of the family and makes her dependent on the husband.

[205] Inter-American Commission on Human Rights, Report No. 4/01 Case 11.625 Marìa Eugenia Morales de Sierra vs. Guatemala.

[206] Inter-American Court of Human Rights, Advisory Opinion OC-14/94 of December 9, 1994, *International responsibility for the promulgation and enforcement of laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights*), par. 49: "the contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions".

Additionally, the right to work of the wife is undermined. The petitioners note that these provisions are contrary to the principle of equality between the spouses, nullify the juridical capacity of the wife and do not allow the spouse to exercise her rights. These consequences are in contradiction with Articles 1, 2, 11, 17 and 24 of the American Convention, as well as Articles 15 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women.

The State of Guatemala does not controvert the allegations of the petitioners and acknowledges that aspects of the challenged articles are inconsistent with the provisions of the Constitution, the American Convention and CEDAW. The State informes that it is then prone to modify the aforementioned Articles of the Civil Code.

The Inter-American Commission organizes an on-site visit to Guatemala in August 1998, observing that despite the willingness of the State to amend the Civil Code, no action has been taken and the relevant articles are still in force.

In its analysis of the rights of the petitioner to equal protection of and before the law[207], the Commission starts by reminding how differences in treatment are not necessarily discriminatory, and a distinction based on objective criteria pursues a legitimate aim, and subsequently recalls the definition of discrimination given by CEDAW, to which Guatemala is a State Party.

On the other side, despite the State did not controvert to the distinction based on sex made by the cited Articles, the Court of Constitutionality underlines the validity of some articles. It notes that the legal attribution of representation to the husband is justified by reason of “certainty and juridical security” and is not causing discrimination against the woman. On the same basis, the Court justifies also Article 115. Similarly, the Court stated the validity of Articles 131 and 133. With respect to Article 110, which gives the husband the responsibility to sustain the home and the wife that of caring for children and the home, the Court asserted that the division of roles is not discriminating; on the contrary, it protects the mother and the children. Concerning Articles 113 and 114, regulating the possibility of a woman to work

[207] Inter-American Commission on Human Rights, Report No. 4/01 Case 11.625 Marìa Eugenia Morales de Sierra vs. Guatemala, Par. 31

outside the home, the Court states again that this provision is envisaged to protect the children and does not contain limitations to the woman's rights.

The observations of the Inter-American Commission on these assertions are critical: it underlines the paramount importance of guaranteeing non-discrimination, and how the Court of Constitutionality is making no effort to probe the validity of its assertions, which are strongly contested by the Commission. The terms of the Civil Code are proved to be depriving the victim of, *inter alia*, legal capacities, access to resources, ability to administer jointly property and invoke judicial recourse. Recalling the Articles of the American Convention and of CEDAW which protect the principles of equality and non-discrimination, and recalling the consequences deriving for the spouses from the Civil Code's Articles, the Commission stresses how the cited provisions of the Code are institutionalizing imbalances in the rights and duties of the married couple.

In the case of Ms. Morales de Sierra, the Commission concludes that the Guatemalan State has failed in ensuring equal rights within the marriage and is contravening Article 17(4) of the American Convention, together with the requirements of Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women.[208]

In its judgement, the Commission recalls the failure of the State of Guatemala to fulfil the obligations under Article 1(1) of the American Convention:

> *"The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of [inter alia] sex..."*[209]

Secondly, it further mentions the discrimination and violation of the victim's rights emerging from Article 109, 110, 113, 114, 115, 131, 133, 255 and 317. It is underlined how the enjoyment of equal protection and recognition before the law empowers a

[208] Ibid, Par. 45
[209] American Convention on Human Rights, Art. 1(1).

person to ensure other rights, and conversely, gender-based discrimination nullifies the ability of women to fully exercise their rights, sometimes causing other consequences as gender-based violence.[210]

Thirdly, the Commission recognizes that the protection of human rights rests mostly with the domestic system, but in this case the State failed to modify the mentioned articles and through the Court of Constitutionality it failed to conform with the norms of the American Convention. Furthermore, the Commission obliges the State to repair the consequences of the violations established, also providing the victim with an effective remedy and the restitution for the injury suffered.

On 1 October 1998, the Commission adopts Report N. 86/98, containing the Commission's analysis, the explanation of the finding that Guatemala was responsible for the violation of Ms. Morales de Sierra's rights, for the failure to respect the Convention and CEDAW and the request of legislative measures to solve the conflict. This Report was then transmitted to the State of Guatemala on 6 November 1998, with a deadline of two months to comply with the recommendations.

The response of the State on 6 November 1998 contains the acknowledgment of the discriminatory norms and the acceptance to address these issues. Nonetheless, the State does not consider the victim of being personally injured. The State also informs the Commission on ongoing measures undertaken by the Congress to reform the Civil Code.

The Commission and the petitioners note that the reforms indicated by Guatemala are addressing only 7 of the 9 provisions challenged in this case, thus do not completely resolve the issue of discrimination. During a subsequent hearing, the petitioners add also that the State has yet to provide reparations and has not addressed Articles 113 and 317.

[210] Inter-American Commission on Human Rights, Report No. 4/01 Case 11.625 Marìa Eugenia Morales de Sierra vs. Guatemala, Par. 52.

Following a series of extensions of time, working meetings and hearings with both parties, on 2 September 1999 the State finally informs the Commission that it has complied with the recommendations issued in Report 86/98 and asks for the case to be archived. The petitioners, although congratulating with the State for having reformed most of the provisions they challenged, request the Commission to issue a report stating the partial compliance of the State of Guatemala. As a matter of fact, it did not derogate Article 317. The opinion of the State was of accurate compliance with the requests, and that Art. 317 does not constitute a form of discrimination.

The Commission, on its part, recognizes the reforms enacted by the State and the importance of this compliance for the protection of women's rights in Guatemala. Nonetheless, the Commission is not in the position to recognize a full compliance with the recommendations, since an imbalance within the spouses is still present in the legislation, resulting in stereotyped notions about gender roles. Furthermore, the State has provided no reparation for the victim.

The conclusion of the Commission is that the State of Guatemala has complied with the recommendations in important measure. However, it has not discharged its responsibility with Marìa Eugenia Morales de Sierra. The State is considered responsible for having failed to uphold its obligations under Article 1 and 2 of the Convention. The State is then asked to balance the legal recognition of the married couple's duties, by adapting the pertinent provisions and amending Article 317 of the Civil Code. Finally, the State is asked to compensate Ms. Morales de Sierra.

This case has been of great importance in the Inter-American Human Rights system. It represented a key step towards the deconstruction of gender-based stereotypes in the family and it fostered the strengthening of the right to equality and non-discrimination of women in the American continent. Moreover, it has been an important example of how the Inter-American system for the protection of human rights can succeed in different fields: through the protection of the right to non-discrimination, it can also enforce other aspects, as social rights and the right to work.

2.4.5 Parallel between the African and the Inter-American cases

The successful result obtained by the Inter-American Commission in the case presented could constitute a good example for the African system. Both the case *Morales de Sierra v. Guatemala* and the case *APDF & IHRDA v. Republic of Mali* challenge a national law which is discriminatory against women. In both cases, the field of discrimination is the family and the marriage. In both cases, a violation of international human rights instruments has been acknowledged.

The potentiality of the African pending case is enormous, since it would represent the first effort by the African Court in the protection of women's rights. Being this a first attempt, the horizontal judicial dialogue can be a useful tool in the judgement. The Inter-American Commission did the same in the case against Guatemala, by citing the European Court.[211]

It is shown how the international human rights instruments as the CEDAW can successfully determine the result of a case. The African Court has also another regional instrument available: the Maputo Protocol. As accurately explained in the first chapter of this thesis, this Protocol is an innovative instrument in which numerous women's rights are enshrined and can be a powerful tool in the hands of the Court's judges. Also, the pending case presented involves a State, the Republic of Mali, which ratified the Maputo Protocol, as well as the other instruments recalled. This gives the chance to the Court to exploit all the possibilities given by these instruments, both protecting Malian women and potentially African women in general, by creating a precedent.

Nonetheless, the African case mentioned appears to be thornier than the Inter-American case presented. In the latter, the State acknowledged from the very beginning the inadequacy of the contested articles of the Civil Code, and even if it did not promptly comply with the request of the Commission, it displayed its willingness to act. On the contrary, the Republic of Mali during the public hearings shew no sign of agreement with the Applicants and no willingness to consent. Also, while the Inter-

[211] Ibid, par. 36.

American Commission was dealing with out-of-date provisions of the Guatemalan Civil Code, the African Court is facing a recently adopted Family Law, which have just been discussed by the Republic of Mali.

What seems to be a thorny issue in the African case is the involvement of cultural, religious and customary issues. The second draft of the Family Code has been made and approved following the pressure made by the civil society and in particular by Muslim groups. This is an evidence of how religion and culture have a massive influence in African politics. Nonetheless, the role of the African Court is also to guarantee that, although respecting these branches of the Malian society, human rights, and in this case women's human rights, must have a primary importance and protection.

If the Court will judge in favour of the Petitioners, to review the Malian Family Code and amend the discriminatory provisions, a challenge will be the execution of its decision by the State. In the African system, the judgements rendered by the judges are binding, and the execution is obligatory, but voluntary. A reason of concern is that, even in case of condemnation by the Court, the State will not comply with its obligation and the Court remains passive in respect of the consequences of its findings. However, the Court has some methods to oversee this compliance. Under Article 30 of the Court Protocol[212], States Parties officially undertake to implement the findings of the Court. Moreover, institutional control over the enforcement is provided: the Executive Council must be notified of judgements and monitor over their implementation. In this process, the African Court follows the example of the European Court for the monitoring function. On the other hand, in the Inter-American system, the same Court has the role of monitoring over States' compliance with its judgements. Then, according to Article 31 of the African Court Protocol[213], the Court must provide the Assembly with an annual report, in which it shall also

[212] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art 30: "The States parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution".

[213] Ibid., Art. 31: "The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgment".

indicate the instances of non-compliance by states. Unfortunately, as shown in the last report presented by the African Court, States rarely comply with the Court's decisions.[214]

As already said, one of the Court's main challenges is the effective implementation and domestic enforcement of its decision. In the current pending case, the Court could adopt the same path taken by the Inter-American Commission in respect to Guatemala. The Commission organized on-site visit to the State, to gather information and evidences regarding the case and the actions undertaken. It then solicitated the State to comply with its requests. In the African context, the Court is already organizing missions to States Parties, and as envisaged by Article 26 of the Court Protocol, it is allowed to hold enquiries.[215] This can be a way to put pressure on the State and monitor its compliance.

The crucial importance of the case *APDF & IHRDA v. Republic of Mali* should push the African Court to take all the necessary measures to confirm its jurisdiction to pass a judgment and to contrast the discriminatory provisions of the new Family Code, in accordance with the requests of the Applicants. This would represent a successful beginning in the protection of women's rights by the African Court, and a hope for the future enforcement of women's rights in the entire continent.

[214] African Union, 2016 Activity Report of the African Court on Human and Peoples' Rights, Thirtieth Ordinary Session, 22-27 January 2017, Addis Ababa, Ethiopia.

[215] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art. 26.1: "The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case."

2.4.6 Challenges and possible developments of the African Court

Having started operating in 2009, the African Court on Human and Peoples' Rights has not yet marked ten years of jurisprudence. The crop of judgments is still scant and as emerged, in the field of women's rights only now the first steps have been taken.

One of the challenges already identified in this thesis is the limited direct access to the Court by individuals and NGOs, constrained by the fact that only eight states out of 53 have made article 34.6 declarations. Additionally, in those states where the declaration has been made, the process of exhausting local remedies before seizing the Court is a hurdle. This, together with the scarce awareness among NGOs and the lack of universal regional acceptance, results in a dearth of cases submitted to the Court. The European system was similar before 1998. Individuals could seize the Court only if the States made a declaration allowing them to bring action in front of a supra-national institution. This changed with Protocol N. 11 of the European Convention, which abolished this condition, giving the victims direct access to the Court.[216] The African Court should consider a way to increase the possibility for NGOs and individuals to defend their rights in front of it. A positive trend already started are the sensitisation missions to Member States, inviting them to make this declaration. However, as criticized by the Vice-president of the Court, these States often promise to comply with this request, but hardly honour their promises.[217] A future possibility might also be to follow the example of the European Court: eliminate the obligation to make a declaration to allow NGOs and individuals to seize the Court, considering this right implicit in those countries which ratified the Court Protocol.

Another big challenge faced by the Court is that of numerous intra-continental divides. Africa is extremely heterogeneous not only between different countries, but also within the same countries. The internal fragmentation of the states, caused for

[216] ibid., 114

[217] Al Jazeera interview to the Vice-president of the Court in *Talk to Al Jazeera – Africa's human rights court and the limits of justice,* available at https://www.youtube.com/watch?v=Gry3MuYAzBg&t=4s

example by the colonial imposition of borders, compacting different ethnic, linguistic and cultural groups in the same territorial unit, results in a lack of national integration. There are in African countries never-ending differences in culture, religion, language, legal systems, political governance and so on. The legal systems are mostly based on the colonial inheritance: for instance, anglophone countries adopted the common low tradition, while francophone countries the civil law one. Also the religious pluralism impacts on constitutional matters. For example, religious values imply different positions for women in the society, and the inter-relationship between law and religion determines to what extent they are considered separated.[218] In this context, it can be considered utopic to realize a continental human rights system. By the way, this unification should not be considered as an equalization of legal systems. Cultural and historical differences are a richness of this continent, not a burden; inevitably, they are also source of disagreement and conflicting views about the resolution of disputes, and in this context, the Court faces a challenging role: ensure a better human rights protection, overcoming the hurdle of the African heterogeneity. Considered this, it is important to remember that the Court's findings are binding only for the states parties to the case, and not automatically to all other ratifying states.[219]

With this background, the potentiality of the African Court in the protection of women's rights is still to be discovered. However, the Court, even if it has no experience yet in this field, dispose of important instruments as the brand-new Maputo Protocol, an invaluable tool still to be taken advantage of. We wait now to see the further developments of the pending cases *APDF & IHRDA v. Republic of Mali*, and *Mariama Kouma and Ousmane Diabaté vs Mali* and the hopefully positive future developments of the African Court in the protection of African women.

[218] Viljoen, *International human rights law in Africa*, 463
[219] ibid., 464

3 The protection of women's rights by domestic courts in Africa: the case of Tanzania

"The women in traditional society were regarded as having a place in the community which was not only different, but was also to some extent inferior. This is certainly inconsistent with our socialist conception of the equality of all human beings and the right of all to live in such security and freedom as is consistent with equal security and freedom from all other. If we want our country to make full and quick progress now, it is essential that our women live in terms of full equality with their fellow citizens who are men."[220]

Julius Nyerere

3.1 Tanzania's constitutional framework for the legal protection of women's rights

3.1.1 Introduction

The African Charter on Human and Peoples' Rights prescribes that before seeking international remedies, as the African Commission or the African Court, local domestic remedies have to be generally exhausted by complainants.[221] Even if this could be seen as a burden to the accessibility of international courts, it shall be considered that domestic remedies play an important role in the protection of human rights, since they are normally quicker, cheaper and more effective than international ones. Moreover, domestic remedies are particularly important for vulnerable and disadvantaged groups, since the access to domestic courts is easier. This is also due to the fact that, as explained in Chapter 2 of this thesis, the access to the African

[220] Julius Nyerere, first president of Tanzania and "Father of the Nation", *in Socialism and Rural development*, 1967

[221] Organization for African Unity (OAU), *African Charter on Human and Peoples' Rights*, Art. 56(5)

Court is not open to everybody, but it is subjected to acceptance by States of the competence of the Court in accepting petitions from individuals and NGOs. Considered that nowadays only eight African States made a declaration allowing this process, the Court lacks jurisdiction to carry on part of its mandate. For this reason, domestic courts are more accessible for individuals and NGOs seeking to protect women's rights and play an essential role.

Beside the regional system, to have a complete overview of the current situation in case of women's rights violations, a focus on a single country is extremely important. Thus, following the analysis of the legal instruments and actors for the protection of women's human rights in Africa in the first two chapters of this thesis, this third chapter provides a case study on Tanzania, its domestic system in developing human rights jurisprudence protecting women, and three areas in which discriminatory laws and practices have been addressed in the last years.

3.1.2 Constitution of the United Republic of Tanzania

The Constitution of the United Republic of Tanzania was adopted in 1977. Before the current Constitution, Tanzania had three others, starting from the end of the British rule: The Independence Constitution (1961), the Republican Constitution (1962), and the Interim Constitution of the United Republic of Tanganyika and Zanzibar (1964).

The first president of Tanzania, Julius Nyerere, governed the nation from the founding of Tanzania in 1964 and until his retirement in 1984. In 1967 Nyerere presented the Arusha Declaration, a strong political statement of African socialism, self-reliance and *Ujamaa*, which is a concept of brotherhood at the base of his politics. The Arusha Declaration explicitly embraces the principles of the Universal Declaration of Human Rights, stating as first principle "That all human beings are equal".[222]

[222] Tanganyika African National Union, Julius Nyerere (1967): The Arusha Declaration and TANU's Policy of Socialism and Self-Reliance.

On the question of human rights, the Constitution of 1977 recalls the principles of the Arusha Declaration and confirms the pursuit of socialism and self-reliance to build a nation of equal and free individuals. In Article 9, the Universal Declaration of Human Rights is recalled as model for the protection of human rights,[223] and reference is made to the guarantee that both men and women shall enjoy the same rights.[224]

Part III of the Constitution deals with the basic rights and duties of the citizen. Article 12 states that "All human beings are born free, and are all equal" and "Every person is entitled to recognition and respect for his dignity", and the following Article 13 enshrines the right to equality before the law and freedom from discrimination. Moreover, a definition of the expression "discriminate" is given, and discrimination based on sex is also encompassed. It reads:

> *(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.*
>
> *(2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.*
>
> *(3) The civic rights, duties and interests of every person and community shall be protected and determined by the courts of law or other state agencies established by or under the law.*
>
> *(4) No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.*
>
> *(5) For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life […].*

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[223] *The Constitution of the United Republic of Tanzania*, Art. 9(f): "that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights".

[224] ibid., Art. 9(g): "that the Government and all its agencies accord equal opportunities to all citizens, men and women alike without regard to their colour, tribe, religion, or station in life".

(6) […]

The above provisions clearly prohibit discrimination, committed by public or private actors, and based on a wide range of grounds, including "sex". It is interesting to note that discrimination on the basis of gender has been included with the thirteenth Constitutional amendment in 2000,[225] and Article 20, which enshrines the person's freedom of association, states that "it shall not be lawful for any political party to be registered which according to its constitution or policy (a) aims at promoting or furthering the interests of […] any tribal group, place of origin, race or gender".[226] After Article 13, no more reference is made to discrimination based on sex and women are mentioned successively, when it comes to political participation.

All the Articles of this part of the Constitution state that "every person" is entitled to enjoy these rights, thus implying that no kind of discrimination is accepted, consequently also discrimination against women. To define the concept of discrimination in the Constitution, the description made in Article 13(5) and cited above should be considered as reference. Thus, Article 13 is crucial to the full implementation of the Constitution, since it identifies the nature of the general legal obligation of the State to guarantee the same rights to all Tanzanian citizens and eliminate discrimination, inter alia between women and men. Thus, the obligations of Article 13 are tightly linked with all other provisions of Part III of the Constitution, dealing with basic rights and duties of the citizen.

Having been written in a socialist mono-party system, this Constitution gives also wide breath to the duties of the citizens toward the society and particularly to one of the key issues of Nyerere's policy: work. Articles 22 to 28 provide again that "every person", thus both men and women, have the right to work, to just remuneration, to own property and at the same time the duty to participate in work for the well-being of the people and the society, to observe the laws of the country, to safeguard public property and defend the nation.

[225] CEDAW, "Draft concluding observations of the Committee on the Elimination of Discrimination against Women: United Republic of Tanzania," (16 July 2008); CEDAW/C/TZA/CO/6, 3
[226] *The Constitution of the United Republic of Tanzania*, Art. 20(2)(a)

Chapter three of the Constitution concern the legislature of the United Republic. When the composition of the National Assembly is described, it is stated that women shall constitute not less than the thirty percent of all the members. Moreover, out of the ten members that can be appointed by the President, at least five shall be women.[227] For the purpose of the election of women mentioned in Article 66, Article 78 of the Constitution describes the procedure for the election of women members in the Parliament. These provisions are nowadays fully respected: following the last elections in 2015, the members of the Parliament are 263, and 113 of them are women, namely 43% of the total.[228]

Chapter six of the Constitution, in Articles 129 to 131, describes the structure, the functions and the procedures of the Commission for Human Rights and Good Governance (CHRAGG), an independent government department. This national body shall sensitize about the preservation of human rights, receive the complaints on their violations, conduct inquiries and research, institute proceedings to prevent the violation of these rights, inquiry in the conduct of any person or institution concerned, advise the Government and other public institutions on the matters of human rights and good governance and ease conciliation and reconciliation among parties being brought in front of the Commission. The CHRAGG was created in 2000, following the thirteenth Amendment of the Constitution, and became operational the following year.[229]

In 2012 a Constitutional Review Commission was established. A first draft of the proposed Constitution was proposed the following year and a second draft was proposed in 2014. For the first time in the country's history, an article concerning women's rights was introduced, encompassing prohibition against discrimination, harassment, abuse, violence, sexual violence and harmful traditional practices. This proposed Constitution represents a new opportunity to enhance women's rights and

[227] ibid., Art. 66 (1) (b)(e)
[228] http://parliament.go.tz/pages/compositon
[229] http://www.chragg.go.tz

gender equality in Tanzania. Unfortunately, the referendum planned on the Constitution has been postponed indefinitely.[230]

3.1.3 International Human Rights Treaties ratified by Tanzania

The United Republic of Tanzania has ratified numerous international human rights treaties protecting rights of women: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1985); the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1976); the International Covenant on Civil and Political Rights (ICCPR, 1976); the Convention on the Rights of the Child (CRC, 1991); the African Charter on Human and Peoples' Rights (ACHPR, 1984); the African Charter on the Rights and Welfare of the Child (ACRWC, 2003); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2007); the Convention on the Elimination of Discrimination in Employment and Occupation (1958); the Convention on Equal Remuneration for work of Equal Value (1951); the Beijing Platform for Action (1995); the ICPD Plan of Action (1994); the Convention on Workers with Family Responsibilities (1981); the Convention on Maternity Protection (2000); the Declaration on Gender Equality in Africa (1981); the Declaration on the HIV/AIDS Epidemic (1999); the Women's Declaration and Agenda for a Culture of Peace in Africa (1999); and the SADC Declaration on Gender and Development (1997), which binds member countries to have an affirmative action to promote female participation in politics. These treaties contain provisions concerning the equality between men and women's rights. As mentioned in a landmark treaty as CEDAW, the general object is "to eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms".[231]

Nevertheless, Tanzania follows a dualist approach to international law, where international treaties are not part of the law of the land, and don't have force of law unless they are domesticated. The Parliament must adopt enabling legislation to give

[230] Dancer, Helen (2017): An Equal Right to Inherit? Women's Land Rights, Customary Law and Constitutional Reform in Tanzania. In Social & Legal Studies 26 (3), pp. 291-310.
[231] CEDAW, "General recommendation No. 25,", Par. 4

effect to these treaties. For instance, in 2008 Tanzania enacted the HIV and AIDS Prevention and Control Act, and in 2009 the Child Act. [232] As stated by Justice Mwalusanya, one of the most eminent Tanzanian judges in human rights cases, Tanzania's adherence to the common law and dualist system created difficulties in invoking international human rights treaties and foreign case law.[233] Despite this constrain, international law has been also playing a role in Tanzanian cases, and in the protection of women's rights.

As mentioned, the UDHR is incorporated into the Tanzanian Constitution, and this was also confirmed by the High Court in 2005, with a judgment in *Legal and Human Rights and others v the Attorney General*.[234] On the UDHR the Court held:

> *Tanzania is a party to various International Human Rights Instruments. The Universal Declaration of Human Rights (UDHR), which is the core of International Human Rights law, is incorporated in Article 9(f) of our Constitution.*

An exemplary case in which the High Court of Tanzania gave its judgement on a case of gender discrimination, invoking the African Charter in conjunction with CEDAW, is *Ephraim v. Pastory & Another*.[235] The first respondent, Holaria Pastory, is a female member of the Haya clan. Her father left her land in inheritance and she sold the land to a non-member of the clan, which is the second respondent. The appellant is a male member of the clan, Bernardo Ephraim, which asked for the nullification of the sale of the land. He based his declaration upon Haya Customary Law, which states that women may receive clan land in usufruct but may not to sell it. The Court used the equality before the law provision in the Constitution[236] to hold that customary law should conform with the norms of equality and non-discrimination, thus also in

[232] Chacha B. Murungu, "The place of international law in human rights litigation in Tanzania," in *International law and domestic human rights litigation in Africa*, ed. Magnus Killander, 57–69 (Pretoria: Pretoria University Law Press, 2010), 60

[233] Helen K. Bisimba and Chris M. Peter, *Justice and rule of law in Tanzania: Selected judgements and writings of Justice James L. Mwalusanya and commentaries*, with the assistance of James L. Mwalusanya (Dar es Salaam, Tanzania: Legal and Human Rights Centre, 2005), 635

[234] Legal and Human Rights Centre (LHRC) and Others v Attorney General (1) (Miscellaneous Civil Case No 77 of 2005) [2006] TZHC 1 (24 April 2006)

[235] Ephraim v Pastory (2001) AHRLR 236 (TzHC 1990)

[236] *The Constitution of the United Republic of Tanzania*, Art. 13 (1)(2)

customary law, women has to be given the same rights as men. Even if the Constitution do not provide a hierarchy of customary law and the equality provision, the court pointed to Tanzania's international obligations, namely the ratification of ICCPR, CEDAW, the African Charter, and it was also noted that the Bill of Rights reflected the provisions of UDHR. These references were made to show that women's rights had to be respected and that customary law had to evolve to respect these obligations. The law on inheritance has been modified, and any law banning women from alienating land was of no effect.[237] This is a landmark decision for the prevention of gender-based discrimination in Tanzania and in other African countries as well. It was the proof of the importance of international human rights treaties within the dualist Tanzanian system. Also, as noted by the judge of the case, Justice Mwalusanya, it challenged the myth that only urban women with weak cultural moorings seek a different interpretation of "African cultural values" and underlined the importance of women's human rights.

According to the CEDAW Committee's guidelines, State Parties shall present periodic reports on the actions taken to implement CEDAW's provisions. Tanzania has presented the second and third periodic reports in 1996, the combined fourth, fifth and sixth reports in 2007 and the seventh and eighth periodic reports in 2014. The Committee on the Elimination of Discrimination against Women provided in 2008 the Draft concluding observations on the elimination of discrimination against women in Tanzania.[238] This document firstly acknowledged some positive aspects and achievements of the State: the establishment of the CHRAGG, the efforts undertaken in education, including the adoption of the Education Sector Development Programme 2000-2015; the introduction of legal reforms for the elimination of discrimination against women, as the Land Act No. 4 of 1999, amended in 2004. Beside these recognitions, the Committee underlines the many areas of concern in the eradication of discrimination against women in Tanzania. For instance, the State is asked to engage in awareness-raising about the Convention and in training of judges at all levels; the national gender machinery, namely the Ministry of

[237] Banda, *Women, law and human rights*, 37

[238] CEDAW, "Draft concluding observations of the Committee on the Elimination of Discrimination against Women: United Republic of Tanzania"

Community Development, Gender and Children Affairs for Tanzania mainland and the Ministry for Labour, Youth, Employment, Women and Children Development for Zanzibar, needs to be strengthen with the necessary authority and human and financial resources; the State is urged to put in place a comprehensive strategy to eliminate cultural harmful practices as FGM, polygamy and bride price; consequently, violence against women needs to be combated, since it is still a widespread phenomenon, socially legitimized by a culture of silence and impunity, and the State shall ensure the prosecution of perpetrators and legal aid for the victims; FGM is also addressed by the Committee, since the enforcement of its prohibition is still considered weak. The Committee also recommends the adoption of other human rights treaties, the promotion of women's participation in decision-making, equal opportunities in education and work, the protection of health-related rights, as the reduction of maternal and infant mortality, the contrast to HIV/AIDS, and the protection of vulnerable groups of women, as rural women, refugee women, older women and women with disabilities. In the field of family relations, the State is asked to harmonize civil, religious and customary law and eliminate discriminatory practices as polygamy. The State of Tanzania is finally asked to present a combined report in 2014 to respond to the concerns expressed.

The United Republic of Tanzania submitted its seventh and eighth combined report in 2014. In this document, the State addressed all areas of intervention raised by the Committee, presenting the action taken to endorse the Convention's provisions and the implementation of other declarations and plans of action as well. It is worth to note that the State has taken numerous initiatives, for example FGM has been criminalized in the Penal Code and various strategies have been started aiming at curbing harmful practices; a National Study on violence against Children[239] has been conducted in 2009, making of Tanzania the first African country to conduct such a study; a ministerial GBV Committee has been established to expedite GBV cases; police officers were trained on women and children rights and Gender and Children

[239] United Republic of Tanzania, Violence Against Children in Tanzania: From Commitments to Action – Key Achievements from the Multi-Sectoral "Priority Responses" to Address Violence against Children (2011-2012) and Priority Activities for 2012-2013, Dar es Salaam: Government of the United Republic of Tanzania, June 2012

Desks have been established in major Police Stations; the State has undertaken constitutional, legislative, policies and administrative measures to ensure women's participation in political and public life; various plans and programs to reduce maternal and infant mortality have been launched; several health surveys have been conducted, as the 2011 -2012 Tanzania HIV and Malaria Indicator Survey (THMIS).[240]

The United Republic of Tanzania presented this detailed report within the deadline provided by the CEDAW Committee. The many initiatives described demonstrate the willingness of Tanzania to comply with the CEDAW provisions and generally with the international human rights treaties it ratified. Nonetheless, as it will be presented in the continuation of this chapter, many areas in which discrimination against women occurs are still not sufficiently addressed, and Tanzanian women's rights are still struggling for protection. As a matter of fact, according to the Gender Equality Indexes, Tanzania is ranked 129 in the Gender Inequality Index[241] and 53 in the Global Gender Gap Index.[242]

[240] Tanzania Commission for AIDS (TACAIDS), Zanzibar AIDS Commission (ZAC), National Bureau of Statistics (NBS), Office of the Chief Government Statistician (OCGS), and ICF International, Tanzania HIV/AIDS and Malaria Indicator Survey 2011-12. Dar es Salaam: TACAIDS, ZAC, NBS, OCGS, and ICF International, 2013.

[241] The Gender Inequality Index reflects the inequality between men and women in three dimensions: reproductive health, empowerment and labour market participation. Source: United Nations Development Programme, Human Development Report 2016.

[242] The Global Gender Gap Index benchmarks national gender gaps on health, education, political and economic criteria. Source: World Economic Forum, the Global Gender Gap Report 2016.

3.1.4 National Plan of Action to end Violence against Women and Children in Tanzania

One of the key actions of the Government of Tanzania to tackle discrimination and violence is the National Plan of Action to end Violence against Women and Children in Tanzania (NPA-VAWC). It is a five-year national plan, and the most recent one addresses the period 2017-2022.[243] It is worth to note that women and children compose the majority of the population: in 2012 the total population was 44.9 million, of which 51.3% are women and children under the age of 18 constitute 50.1% of the entire population.[244] This Plan incorporates a group of strategies based on the Tanzanian context, to intensify the prevention and response services to end all forms of violence. It is also based on previous experiences, since its predecessor came to an end in 2015.[245]

The previous National Plan resulted in some success developments, but also in some challenges left for the current Plan. Some of the most remarkable achievements of the decade 2001-2015 are: the ratification of many human rights instruments, as the Maputo Protocol; the establishment of Police Gender and Children Desks nationwide, which resulted in an increase of reported VAW cases to the police; the establishment of a Gender Desk within the Director of Public Prosecution (DPP) and within the CHRAGG and the establishment of Tanzania Women Judges' Association (TAWJA); the enactment of many laws addressing women's challenges (for example the HIV and AIDS (Prevention and Control) Act, 2008; the Law of the Child Act, 2009; the Anti-Trafficking in Persons Act, 2008); the formulation of pro-women rights policies (as the National Microfinance Policy of 2000; the National Strategy for Gender Development of 2005; National Strategy for Growth and Reduction of Poverty (MKUKUTA II) of 2010). Certainly, the aim of the elimination of VAW and VAC is still far, and some of the main challenges left by the first National Plan are for instance the strengthening of the criminal justice system, since less than 25% of VAW reported cases were

[243] United Republic of Tanzania, "Tanzania National Plan of Action_Violence Against Women and Children 2017-2022," (December 2016); NPA-VAWC 2017/18 – 2021/22
[244] Tanzania Population and Housing Census, 2012.
[245] United Republic of Tanzania, "Tanzania National Plan of Action_Violence Against Women and Children 2001-2015".

completed through judicial procedures; the amendment of discriminatory laws such as the Law of Marriage Act, 1971, the Customary Law Declaration Order, 1963; and, the laws governing probate and inheritance matters; the need of a specific and comprehensive legal framework on VAW; the lack of public funding for NGOs.[246]

The National Plan of Action to end VAW and VAC in Tanzania in 2017-2022 has a dramatic situation to face: according to the 2015-2016 Demographic Health Survey (DHS), 40% of women aged 15-49 have experienced physical violence, of which 22% in the 12 months prior the survey, and 17% have experienced sexual violence; 8% of women who has been pregnant, experienced violence during the pregnancy. In comparison with the previous 2010 DHS, there has been no change in the occurrence of physical violence, and sexual violence is more common among currently married women and women who are divorced, separated, or widowed, as displayed in Figure 3.

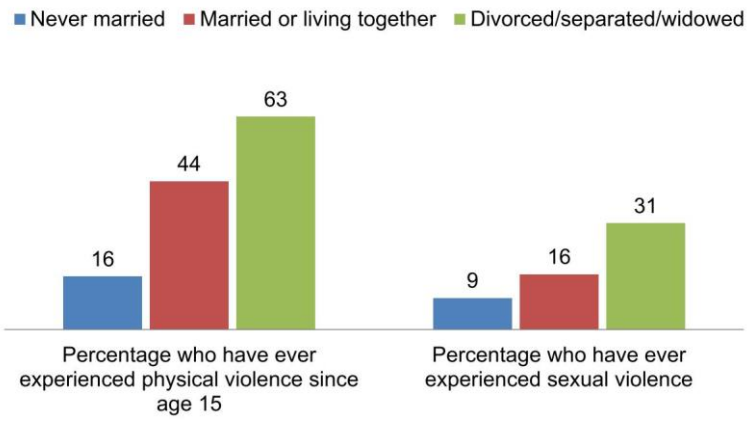

Figure 3: Women's experience of physical or sexual violence by marital status in Tanzania[247]

Moreover, a Violence Against Children survey presented in 2011 found that one out of three girls and one out of seven boys experience some form of sexual violence

[246] WILDAF Tanzania, "Tanzania Women's Rights Situation," (2015), 15–20

[247] Ministry of Health, Community Development, Gender, Elderly and Children Dar es Salaam, Ministry of Health Zanzibar, National Bureau of Statistics Dar es Salaam, Office of Chief Government Statistician Zanzibar, ICF, "Tanzania Demographic and Health Survey and Malaria Indicator Survey 2015-2016 - Final Report," (December 2016)

before turning 18[248] and in addition to physical, sexual and emotional violence, women and children in Tanzania are subjected to traditional harmful practices, such as child marriage and FGM.

To eliminate violence against women and children and to improve their welfare, the National Plan of Action focuses on eight areas of intervention, both on prevention and response. The first thematic area is the household economic strengthening: it aims at empowering women through the access to financial supportive services and at increasing their awareness on rights to property, inheritance and protection from GBV. For instance, some priority actions are the support of micro-economic activities and women economic groups as VICOBA.[249] The second area addresses concerns, norms and values, to tackle harmful traditional practices, institutionalized gender inequality and capacity and resilience of women and children, for instance through advocacy campaigns to religious and influential leaders and policy makers to promote positive norms. The third thematic area is the safe environment, focusing on the prevention of violence in public spaces and work spaces, and in case of emergencies situations as for people displaced because of conflict or natural disaster. The fourth area's purpose is to promote positive parent-child relationships and reduce violent parenting practices, mainly thanks to education, training of community facilitators, social workers, health workers, teachers, police and other community institutions. The fifth area of action is the implementation and enforcement of laws: firstly, it faces existing laws addressing VAWC to analyse the gaps that perpetuate violations of women and children's rights (Low of Marriage Act, Birth and Death Registration Act, Inheritance laws, Employment and Labour Relations Act…) and promote the ratification and domestication of international and regional instruments facing these issues. Secondly, the NPA evidences the inadequacy of the legal system; for this reason, it is considered necessary to assess the capacity needs of the legal institutions to respond to VAWC and build the capacity of legal sector institutions, associations

[248] United Nations Children's Fund, U.S. Centers for Disease and Prevention, Muhimbili University of Health and Allied Sciences, "Violence Against Children in Tanzania: Findings from a National Survey 2009," (August 2011)

[249] Village Community Banks (VICOBA) is a micro-finance program providing loans to low-income people to allow them to start their own business. It is widely used in Tanzania, especially by groups of women.

and paralegal groups to respond to VAWC. Thirdly, the access to legal service shall be facilitated. The sixth area of action presented in the NPA-VAWC is the strengthening of response and support services for VAWC, including resources, tools and infrastructures. The seventh area presents the strategy for a safe, inclusive and accessible learning environment for children, through prevention, the spread of knowledge about child rights, reproductive health and a reporting mechanism of VAC in school settings. The last area of intervention is the development and institutionalization of a comprehensive VAWC coordination, monitoring and evaluation mechanism. The NPA contains also a detailed analysis of the costing for the implementation of each thematic area and the actors and means of verification of the results to achieve.

It is a wide and ambitious plan, which further developed the previous plans existing at a country level to face violence and discrimination. It is also a proof of the Tanzanian Government's engagement in the protection of human rights in the last decades, thanks to the many initiatives and the ratification of several human rights treaties. Nonetheless, the implementation of these provisions is still hindered by deeply entrenched traditions and patriarchal systems, especially in rural areas. Moreover, despite the vast number of GBV cases pending in the Judiciary, the Government has not established a specific court or a specific session on these cases.[250] On the contrary, the current President of Tanzania, John Pombe Magufuli, based his 2015 electoral campaign on the fight of corruption and promised the establishment of a special court on this matter. The prevention of VAW and VAC is not a priority for the current Government, and this endangers the efficacy of programs as the NPA-VAWC and the domestication of international and regional human rights instruments.

[250] WILDAF Tanzania, "Tanzania Women's Rights Situation", 20

3.2 Discriminatory laws and harmful practices against women in Tanzania

3.2.1 Child marriage

On July 2016, the High Court of Tanzania took a landmark decision for women and children's rights:[251] The Law of Marriage Act, which contained discriminatory provisions on the legal age for marriage, has been amended, making 18 years the age at which both boys and girls can marry.

The application was filed by Rebeca Gyumi, member of a Tanzanian NGO (Msichana Initiative) to challenge the constitutionality of the provisions of the Law of Marriage Act (Cap. 29, sections 13 and 17). The provisions of section 13 and 17 provided for different age of marriage: boys could get marry at the age of 18 or above, while girls could be married at 15, or even 14 with the consent of the Court or the parents. The Applicant accused that these provisions infringed the right against discrimination and the right to dignity and equality of a person provided by the 1977 Constitution, as amended. Specifically, the Applicant argued that the provisions of section 13 and 17 were unconstitutional for offending Article 12, 13 and 18 of the Constitution and should be declared null and void and be expunged from law books. The Law of the Child Act of 2009 considers any person below the age of 18 as a child: thus, a girl below the age of 18 does not possess the legal capacity to enter into marriage, and this can also imply a further violation: the denial of children's rights to education. The provision against discrimination contained in international human rights treaties ratified by Tanzania have also been recalled (UDHR, CRC, CEDAW, ICCPR), as well as local and international precedents as a Zimbabwean decision on similar provision: *Loveness Mudzuru & Ruvimbo Tsoddz v. Minister of Justice Legal & Parliamentary Affairs and Others*.[252]

[251] *Rebeca Z. Gyumi v. Attorney General*, Miscellaneous Civil Cause No. 5 of 2016.
[252] Loveness Mudzuru & Ruvimbo Tsoddz v. Minister of Justice Legal & Parliamentary Affairs and Others, Const. Application No. 79/14, CC 12-15) [2015] ZWCC 12 (20 January 2016)

The Principle State Attorney resisted the allegations, asserting that the mentioned provisions conformed to the will of the people at the time of the writing, and were a mean to conform the different cultures and tradition present in Tanzania, allowing each ethnic group to follow its customary norms, traditions and religious beliefs. The fact that the law required the consent of the Court before the marriage with a minor is allowed was presented as a sufficient protection. Nonetheless, it has been acknowledged that the Law of Marriage Act was controversial and source of debate, and the Government was already discussing a possible remedy.

The Court finally found that the challenged provisions were discriminatory and violated the principle of equality by setting different ages to get marry for men and women. It also recalled the health risks a child can be exposed to in case of child marriage and child pregnancies, and it quoted Article 6 of the Maputo Protocol, which calls for states to ensure equality between men and women and to regard them as equal partners in marriage. The Court cited the African Charter on the Welfare of the Child (1990), ratified by Tanzania in 2003, which in Article 21(2) provides that:

> *"Child marriage and the betrothal of girls and boys shall be prohibited and effective action including legislation, shall be taken to specify the minimum age of marriage to be 18 years […]"*[253]

The Court concluded that sections 13 and 17 of the Law of Marriage Act, besides being not useful anymore, are unconstitutional. The Court mandated the Government to amend the Law within one year from the date of judgment. Anyhow, this change has yet to happen.

This is a landmark decision, especially in a country as Tanzania, which has one of the highest rates of child marriage in the world: 37% of girls get married under the age of 18.[254] Furthermore, little before the judgment of the Court, the Parliament approved a tougher punishment for men who marry schoolgirls or get them pregnant: they now

[253] African Commission on Human and Peoples' Rights, African Charter on the Rights and Welfare of the Child, 1990, Art. 21(2).
[254] https://www.girlsnotbrides.org/high-court-tanzania-child-marriage/

face 30 years in prison.[255] To enact this law all school heads will be required to submit a report to the Education Ministry regarding students who get married or pregnant.

This judgment and this policy to persecute the men who impregnate minor girls look promising. Unfortunately, the current situation in Tanzania does not looks the same. In June 2017, the president of Tanzania John Magufuli announced that no pregnant girl would be allowed to study, nor readmitted after giving birth. In a highly criticized comment during a debate in parliament he stated: "as long as I am president, no pregnant student will be allowed to return to school. We cannot allow this immoral behaviour to permeate our primary and secondary school. After getting pregnant, you are done".[256] Such standpoint setbacks the slow progress made in the protection of women and children's rights in the previous years. As reported by the Government, the way to go to ensure these rights is still long: more than 6% of girls 13 to 24 years of age who had ever been pregnant reported that at least one pregnancy was caused by sexual violence, 21% of girls aged 15-19 have given birth and the child marriage rate is still high.[257] Clearly, the number of girls which can be excluded from receiving education is high.

This hard-line stance met a severe reaction coming from NGOs and girls' rights advocates. They argue that denying girls access to education is a human rights' violation and a form of discrimination, and instead of blaming girls, who as minor cannot even consent to sexual relations, the State should fight violence against them to prevent young girls' pregnancies. The response of the president has been even more fierce. NGOs who protect teenage mothers have been threatened to be deregistered; an opposition member who criticized this decision has been charged of insulting the president; headteachers who do not follow this rule will be fired.[258] Even though this attitude contrasts with the Sexual Offences Special Provision Act of 1998,

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255 https://www.reuters.com/article/us-tanzania-childmarriage/tanzania-launches-crackdown-on-child-marriage-with-30-year-jail-terms-idUSKCN0ZK1US

256 https://www.theguardian.com/global-development/2017/jun/30/tanzania-president-ban-pregnant-girls-from-school-john-magufuli

257 United Nations Children's Fund, U.S. Centers for Disease and Prevention, Muhimbili University of Health and Allied Sciences, "Violence Against Children in Tanzania", 3

258 https://www.ft.com/content/c7507730-712c-11e7-93ff-99f383b09ff9

the Education Act amended in 2016, the Maputo Protocol and many other international treaties, there is little room for dialogue with the current presidency.

Furthermore, denying teenage mothers access to education perpetuates discriminatory gender norms, impeding to realize the equal enjoyment of the right to education by every girl, as proscribed by the Human Rights Council,[259] a right that plays a key role in development and against poverty. The NGO Equality Now accuses that the government is punishing pregnant girls on the basis of gender and is curtailing their futures and their chances to exit poverty.

Following this policy, discriminatory actions against children and women's rights came in no time. In December 2017 the President pardons two men convicted of having raped ten primary school children[260] and in January 2018 five pregnant school girls have been arrested in Tanzania. This was the result of a crackdown announced by the police to end teen pregnancies. The District Administrative Secretary said: "we have managed to arrest the girls and their parents but unfortunately those who impregnated the girls have escaped".[261] Human rights groups have criticized the arrest and further criticized the policy adopted by the government to tackle teen pregnancies. They underline how prosecuting the girls and not the perpetrators sends the wrong message, and that the government is violating human rights. The explanation given for these arrests is that it represents a way to deter other students from getting pregnant and encourage the parents to prevent their children from having sexual intercourses.

Activists are particularly concerned about the president's uncompromising attitude. The director of Equality Now in Africa said: "Tanzania's leaders are promoting a culture of human rights violations in which young victims of sexual violence are being punished while perpetrators are going free".[262]

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[259] Human Rights Council (2016): HRC Resolution: Realising the Equal Enjoyment of the Right to Education by Every Girl (A/HRC/RES/32/20)

[260] https://www.theguardian.com/global-development/2017/dec/13/tanzania-pardons-two-child-rapists-arrest-pregnant-schoolgirls-president-magufuli

[261] https://eastafricamonitor.com/tanzania-5-pregnant-school-girls-arrested/

[262] https://www.equalitynow.org/press-clips/tanzania-pardons-two-child-rapists-and-calls-arrest-pregnant-schoolgirls

3.2.2 Female Genital Mutilation

As defined by WHO, female genital mutilation consists of "all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons". Four types of FGM are listed: type I is also called clitoridectomy, since it involves the partial or total removal of the clitoris; type II, also known as excision, is the partial or total removal of the clitoris and the labia minora; type III, the most drastic one, is the infibulation, and involves the excision of part or all of the external genitalia and the narrowing of the vaginal orifice; type IV includes all harmful procedures to the female genitalia for non-medical reasons, including pricking, incising, cauterisation.[263]

Tanzania is within the 28 African countries is which FGM is still practiced as a deeply-entrenched cultural practice among 20 of the 120 ethnic groups living in the country. All types of FGM are found in the country, but 80% of the reported cases was of the Type II (excision). Figure 4 displays the occurrence of this practice at a continental level, divided by areas and not by national boundaries since the percentage can vary widely within the same country. In contrast, Figure 5 shows the percentage of women who undergone this practice at a national level in Tanzania.[264]

[263] WHO, *Eliminating female genital mutilation: An interagency statement UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO* (Geneva: World Health Organization, 2008)

[264] C. a. F. Yusuf, "Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania," *African Human Rights Law Journal* (2013): 357

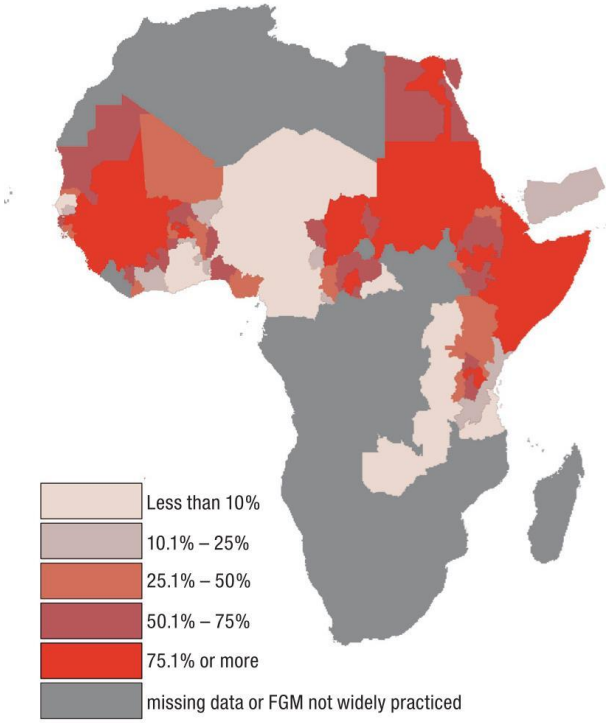

Figure 4: Prevalence of female genital mutilation in Africa (women aged 15-49)[265]

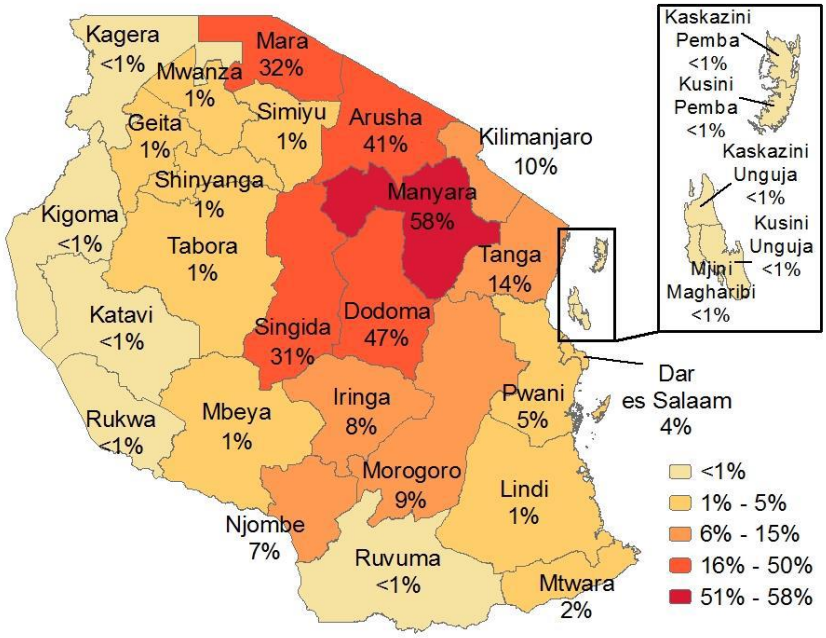

Figure 5: Percentage of women age 15-49 who are circumcised in Tanzania, by region[266]

[265] WHO, *Eliminating female genital mutilation*, Sec2:5

[266] Ministry of Health, Community Development, Gender, Elderly and Children Dar es Salaam, Ministry of Health Zanzibar, National Bureau of Statistics Dar es Salaam, Office of Chief Government Statistician

As shown, in terms of geographic distribution the regions of Tanzania where the practice of FGM is still widely performed are Mara, Arusha, Manyara, Singida and Dodoma. It is commonly practiced by the ethnic groups Chagga, Pare, Maasaai, Iraque, Gogo, Nyaturu, Kurya, Ruri, Ikoma, Sweta and Zanaki.[267]

The 2016 Demographic and Health survey (TDHS) reports that the number of women who have undergone FGM in Tanzania has dropped to 10%, a decline from 18% in the 1996 survey. Anyhow, the percentage in rural areas is double than in urban areas, with peaks of 58% and 47% in the regions of Manyara and Dodoma respectively. 35% of circumcised women were submitted to this practice before the age of 1, and 28% were circumcised at age 13 or older. Between the 2004-05 TDHS and the current one, the proportion of circumcised women age 15-24 who were circumcised at age 13 or older increased from 25% to 36%. This suggest an increase in the age at which girls are being circumcised.[268] A point of concern is also that the drop in the last two decades could not be just the result of an actual decline, but it could be influenced by the underreporting of the practice since it became prohibited in 1998.

As a matter of fact, despite the wide use of FGM in many Tanzanian regions, the practice is prohibited by law. Firstly, Tanzania adopted many international human rights treaties, among which the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the UN Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child and particularly the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) ratified by Tanzania in 2007 and explicitly addressing and prohibiting FGM.[269] Secondly, in 1998 Tanzania criminalized the

Zanzibar, ICF, "Tanzania Demographic and Health Survey and Malaria Indicator Survey 2015-2016 - Final Report"

[267] Yusuf, "Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania": 357

[268] Ministry of Health, Community Development, Gender, Elderly and Children Dar es Salaam, Ministry of Health Zanzibar, National Bureau of Statistics Dar es Salaam, Office of Chief Government Statistician Zanzibar, ICF, "Tanzania Demographic and Health Survey and Malaria Indicator Survey 2015-2016 - Final Report", 357–66

[269] African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Art. 5b (prohibition, through legislative measures backed by sanctions, of all forms

practice of FGM for the first time in its legal history, with the Tanzanian Special Provision Act, a 1998 amendment to the Penal Code. It criminalises FGM as a form of cruelty to children: as a matter of fact, it prohibits FGM only under the age of 18. Section 169 A (1) provides:

> *Any person who, having the custody, charge or care of any person under eighteen years of age, ill-treats, neglects or abandons that person or causes female genital mutilation or carries or causes to be carried out female genital mutilation or procures that person to be assaulted, ill-treated, neglected or abandoned in a manner likely to cause him suffering or injury to health, including injury to, or loss of, sight or hearing, or limb or organ of the body or any mental derangement, commits the offence of cruelty to children.*[270]

Despite this provision, according to Amnesty International the law has rarely been applied and in any case, it provides for the protection of girls only if under the age of 18. Besides this, the numerous NGOs in Tanzania fighting against FGM report that some girls who managed to avoid genital mutilation were forced to submit to it when they were over 18 and the practice is no longer illegal.[271] The cases of prosecution are still scarce. Some examples are the sentence against three women in October 2011, condemned to spend 30 years in prison for performing the genital mutilation on a young girl and causing her death.[272] In October 2016 two residents of the Serengeti district have been sentenced to a three-years imprisonment for performing FGM on a 14 years old girl.[273]

The legal framework seems not to be sufficient to contrast FGM in Tanzania. In these years a few arrests have been made and prosecutions under this provision of the Penal Code have been rare. The enforcement of the legislation is difficult because of

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of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them).

[270] Penal Code ch. 16 of the Laws of Tanzania (n 103 above), sec 169(A)(1).

[271] Deutsche Gesellschaft fuer Internationale Zusammenarbeit (GIZ), "Female Genital Mutilation in Tanzania," (2011)

[272] https://www.state.gov/j/drl/rls/hrrpt/2003/27756.htm

[273] http://www.thecitizen.co.tz/News/Two-jailed-for-mutilating-14-year-old-girl/1840340-3492180-9gqn94/index.html

the insufficient knowledge of the law, the victim's reluctance to accuse family and community members, inadequate police resources. Moreover, rural areas are difficult for police to access, and if cases are reported to the police, they are often dismissed because of lack of evidence or lack of witnesses.[274] More action should be taken to prevent this practice, and not to act only in case of death of the victim. Tackle FGM only with law can present also disadvantages, as driving the practice underground, thus limiting the access to medical services for the victims; lowering the age at which FGM is carried out to avoid controls or, in the case of Tanzania, performing it after the age of 18 when it is not illegal anymore; criminalizing a practice that is rooted in a people's culture is also thorny, and may lead to resistance to preserve the cultural identity.[275] Therefore, it has been often demonstrated that legal prosecution needs to be coupled with other initiatives. A successful example is an initiative conducted by the Tanzanian government to educate people about the risks linked with FGM: a modified form of the practice has been introduced, namely a symbolic incision not implying any removal, but just representing the passage to adulthood for the girls.[276] This initiative recalls another one pursued in the neighbouring country of Kenya, where some communities have been persuaded to adopt alternative practices, to maintain the celebratory elements of the ritual, but eliminating harmful aspects as the cutting. To sustain the program, led by local NGOs, some educators have been trained to support the alternative rites, advise the community and ensuring the respect for local cultural values, by maintaining the traditions around the "coming of age" rituals.[277]

The National Plan of Action to End Violence Against Women and Children in Tanzania 2017-2022 aims also at combating harmful practices and FGM, by training women and men on the effects of FGM in ten regions of Tanzania. Within this framework, NGOs who are fighting to eradicate this practice and are able to have direct access to the local communities, even if remote, ask to receive more support by the

[274] http://www.refworld.org/docid/48d2237c28.html
[275] Banda, *Women, law and human rights*, 237
[276] B. Rwezaura, "Competing "images" of childhood in the social and legal systems of contemporary Sub-Saharan Africa," *International Journal of Law, Policy and the Family* 12, no. 3 (1998)
[277] Banda, *Women, law and human rights*, 242

Government. Beside this, the Government is also asked to review the Penal Code, since it criminalizes FGM only if performed under the age of 18.[278] The law should criminalize the practice at any age and with no exceptions.

3.2.3 Women's land right

Customary norms and practices of local communities are recognized as customary law in Tanzania. In this context, the right of women to inherit land in Tanzania has always been mistreated. Women are commonly excluded due to socio-cultural factors or they are given an inferior status in matters of inheritance. These customs have been codified in 1963, when some interpretations of customary laws have been incorporated in the Local Customary Law Declaration Orders (CLDOs).[279] Many recommendations have been made to reform these written customary laws, both by the Law Reform Commission of Tanzania and by civil society activist. However, by now the CLDO remains in force and applicable. The Law of Marriage Act of 1971 provides the right of married women to acquire property in Tanzania, to hold and dispose it, to contract and to sue or be sued on a contract or in tort. In 1999, the Land Acts expanded these rights to all women, independently from their marital status. However, in none of these two provisions there is reference to women's right to inherit.[280]

In Tanzanian family contexts, where customary norms of marriage and succession have a gendered lineal connection with the land, the issue of women's inheritance is delicate. Women and men have unequal power, especially in marriage, where women normally pass from the father's family to the husband's family and have no rights on any family's land. Consequently, the resistance against women's inheritance is vastly due to social resistance to change marriage uses and family ties. The dynamic

[278] WILDAF Tanzania, "Tanzania Women's Rights Situation", 145
[279] Abdon Rwegasira, *Land as a human right: A history of land law and practice in Tanzania* (Dar el Salaam: Mkuki na Nyota, 2012), 269
[280] ibid.

of power relations in the marriage would be called into question if women have access to land independently of the family or the husband.[281]

Despite this resistance, and despite the lack of reference to women's inheritance rights in the 1977 Constitution and in the 2014 proposed Constitution as well, a new wave of judicial activism is finding place in Tanzanian courts. The high point came with the 1989 case *Ephraim v. Pastory*, already presented in the first part of this Chapter. Justice Mwalusanya declared customary law on women's inheritance of clan land discriminatory and inconsistent with the Constitution. In spite of this case and many others recognizing an equal right to inherit, Tanzanian courts are still insecure in guaranteeing that constitutional rights always outdo discriminatory customary rules of inheritance. This emerged with the 2005 case *Stephen and Charles v. Attorney General*, in which the High Court of Tanzania rejected the request of activist lawyers to declare the customary inheritance law unconstitutional. The claimants were two widows of customary marriages, who have been denied the right to inherit or administer their husbands' land, including their homes, by the husbands' families. The reason for the Court's denial is that although it agreed that the law is discriminatory, it was not possible to effect customary change by judicial pronouncements, because this could be dangerous and create chaos, "opening the Pandora's box, with all seemingly discriminative customs from our 120 tribes plus following the same path."[282] It further declares that decisions on customary law shall start being accepted and implemented by the majority at the grassroots, and not by courts.

In 2006 the applicants filed a notice of appeal against the decision of the High Court, arguing that it should be declared null and void because it contravenes the Constitution, the CEDAW and many other international human rights instruments. Moreover, they underlined the Court abdicated its responsibilities by failing to

[281] Helen Dancer, "An Equal Right to Inherit? Women's Land Rights, Customary Law and Constitutional Reform in Tanzania," *Social & Legal Studies* 26, no. 3 (2017): 298

[282] High Cout of Tanzania's decision on the case *Stephen and Charles v. Attorney General (*Justice Mihayo).

declare the customary provisions unconstitutional, despite recognising the discriminations occurred.

After many attempts and memoranda by the applicants, the appeal was finally considered by the Court of Appeal in December 2010, but the Court annulled the claimants' appeal as incompetent.[283] After three more unsuccessful attempts, in November 2012 the claimants submitted the case to the CEDAW Committee, which in April 2015 issued the case of *ES and SC v. Republic of Tanzania*.

The appellants declared to be victims of human rights violation by the United Republic of Tanzania and reported that customary law inheritance rules, being patrilineal and excluding women from inheritance, contravene the guarantees of equal protection and non-discrimination of the 1977 Constitution and Tanzania's international obligations. The complainants claim they have been deprived of their rights under articles 2(c), 2(f), 5(a), 13(b), 15(1), 15(2), 16(1)(c) and 16(1)(h) of the Convention, together with general recommendations Nos. 21 and 27 of the Committee regarding equality in marriage and family relations and older women and their human rights' protection.[284] They substantiated their claims with detailed descriptions of the discriminations occurred. When asked to submit its observations on admissibility of the merits, the United Republic of Tanzania provided no response to the Committee, despite many reminders. Therefore, the Committee proceeded with its considerations, and in view of the unreasonably prolonged appeal proceedings and the claims presented by the applicants, considered the communication applicable.[285] The Committee recalled that, under articles 2(f) and 5(a) of the Convention, States parties shall amend or abolish both existing laws and also customs and practices that constitute discrimination against women, and under articles 16(1) and 13 all discriminations against women related to marriage and family relations and in areas of economic and social life shall be eliminated.[286] It also reminded that the application of discriminatory customs perpetuates gender

[283] ibid.
[284] CEDAW Committee, "Communication No. 48/2013: Views adopted by the Committee at its sixtieth session (16 February-6 March 2015)," (2 March 2015); CEDAW/C/60/D/48/2013, Par. 3.1
[285] ibid., Par. 6.1 to 6.4
[286] ibid., Par. 7.2 to 7.4

stereotypes and discriminatory attitudes. Concerning this specific case, the Committee asserted that Tanzania has failed to revise or adopt the appropriate legislation to eliminate the cited discriminations, thus maintaining a discriminatory legal framework which violates articles 2(f), 5, 15 and 16 of the Convention. Furthermore, shortcomings as refusing to assist the victims and to respond to the applicants' appeal both by the Attorney General and the Court of Appeal, display a denial of access to justice and a failure to provide effective remedies to the victims.[287] The Committee made seven recommendations to Tanzania, including an expediting of the constitutional review process to "address the status of customary laws to ensure that rights guaranteed under the Convention have precedence over inconsistent and discriminatory customary provisions" and to bring all discriminatory customary laws in compliance with the Convention. Other recommendations concerned capacity building, civil society, women's organizations, consultation, education and dialogue with legal professionals, awareness-raising, local authorities and traditional leaders.[288]

The State was asked to submit a report on the matter within a period of six month. This coincided with a peculiar period for the Republic of Tanzania, since in October 2015 there have been the political elections, and the Committee's request took a backseat. As of today, Tanzania has provided no answer and the victims have not been compensated. This is raising the concern of many human rights advocates and NGOs: Amnesty International accused the country of failing in implement CEDAW's recommendations and addressing gender-based discrimination;[289] Human Rights Watch addressed a letter to the United Republic of Tanzania concerning this case and urging the State to comply with the recommendations of the UN CEDAW Committee and provide compensations and reparations to the victims.[290]

[287] ibid., Par 7.6, 7.7
[288] ibid., Par. 9
[289] Amnesty International, "Amnesty International Report 2016/17: The state of the world's human rights," (2017): 358
[290] https://www.hrw.org/news/2016/04/18/letter-human-rights-watch-united-republic-tanzania-compliance-un-cedaw-committee

The conservative retreat of the High Court of Tanzania is in contrast with the last decade's constitutional cases on women's rights in Africa.[291] It appears to be a contradictory decision, since the Court recognised the discrimination of inheritance customary norms but refused to use the Constitution as supreme source of law to address the problem. Secondly, the legislature also missed the opportunity to include inheritance provisions in the proposed Constitution. With this framework, the status quo is not going to change, and gender-based discriminations will continue. For this reason, legislative interventions to update customary laws codified in the 60s is clearly needed.

This would not represent a threat to customary law itself, as analysed by Dancer:[292] it would continue to be recognized as a source of law in the legal system of Tanzania, and a constitutional equal right to inherit would represent both a national commitment to gender equality and a reference point for the process of compliance of customary law with constitutional rights. Although slow, recent developments as those presented in this chapter and the current drafting of the Constitution represent an opportunity for Tanzania to look holistically to law reforms and pursue the objective of legally recognised and safeguarded gender equality and non-discrimination.

[291] Dancer, "An Equal Right to Inherit?": 304
[292] ibid., 305

4 Conclusion

> *"From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritances of clan land and self-acquired land of their fathers is concerned. It is part of the long road to women's liberation. But there is no cause for euphoria as there is much more to do in the other spheres"*[293]
>
> Justice Mwalusanya

There is a long road ahead for women to see their humanity legally recognized. Despite the great strides made in the development of international and regional instruments, much remains to be done in terms of implementation. This thesis has tried to provide an overview of the legal framework for the protection of women's rights in Africa, to understand the material change it can bring to African women's lives and the challenges it still faces.

What emerges from this research, and from the many documents and facts presented, is that although African women are still suffering many human rights violations, there are the premises for future developments. These are supported primarily by the human rights instruments developed in the last decades. The evolution from Western biased and male biased instruments, which were doubly discriminating against African women, has been fundamental. It finally culminated in the adoption of the Maputo Protocol, the most comprehensive and progressive tool for the protection of African women's rights, which has just started being applied by regional courts and demonstrated its vast potential. The Protocol is a powerful tool in the hands of women's rights advocates: it is African-made and of a wider scope than previous instruments, covering the entire spectrum of civil and political, economic, social, cultural and environmental rights. For the first time, African women have a fully customised instrument to defend themselves.

[293] Judgment of Justice Mwalusanya in the case *Ephraim v. Pastory and Another, 2001*

The young African Court on Human and Peoples' Rights, exactly as the Maputo Protocol, has a big potential, which still needs to be taken advantage of. Its main weakness is that, despite its wide mandate and potential and despite the many regional and international human rights instruments available, the Court still finds itself with its hands tied. This is due to the lack of recognition and acceptance of its competence by the African states. Only 30 states out of 53 have ratified the Protocol establishing the Court, and within these only 8 have made a declaration under Article 34.6 of the Protocol accepting the competence of the Court to receive cases by NGOs and individuals. This explains why in the field of women's rights, its contribution is still in its early stages and as now, only two cases on these issues have been brought before the Court. Both decisions are still pending and could create a valuable legal precedent for the jurisdiction of the Court. Clearly, if women victims of human rights violations and NGOs are not granted direct access to the Court, the potential of this body cannot be exploited. A strategic tool for the protection of women's rights in Africa has been put in place and could actively provide its contribution. Now it is time for the African countries to recognize its importance and authority, in the interest of the citizens.

The case study of Tanzania provides a national perspective on the issue of women's rights and their protection by domestic courts. The domestic implementation of international human rights treaties proves to be fundamental, and it strongly needs to be endorsed by the political will to comply with these obligations. Tanzania committed in these last decades to comply with its international duties and to face discriminatory issues, for instance by adopting most of the human rights instruments, making the declaration allowing NGOs and individuals to seize the African Court and engaging to tackle violence against women and children. Unfortunately, on various fields this engagement is purely formal, while women continue to be discriminated not only in everyday life, but also by the domestic courts and politics. For instance, at the time of writing, a young pregnant girl in Tanzania could be arrested and loose the right of attending school, just for being pregnant. At the same time, the man who could have raped her, could easily escape any kind of punishment. This obviously contravenes any kind of international and national law cited in this thesis.

Nonetheless, this is what we are reading in the newspapers nowadays, as explained in the third chapter. Human rights advocates and NGOs are concerned for the setbacks Tanzania is suffering now, especially when most vulnerable groups are affected, as women, children and LGBTI. The current Government is reversing the slow but steady progress the country has been doing in the field of human rights in the last decades.

This thesis demonstrates how women's rights in Africa have been successfully fostered also thanks to the international human rights instruments presented in the first chapter, especially the Maputo Protocol. Moreover, the challenges posed by the lack of awareness and implementation of the Protocol, or the use of religion and culture to justify harmful practices and discrimination are now faced by a forward momentum to gender equality. Additionally, the legal framework existing in Africa is now robust. It is time for Tanzania and the other countries to engage in its domestication in national laws, hence allowing African women to claim and enjoy their rights, as provided by the law.

Legal change can result in social change. In the past female genital mutilation was a normal ritual that girls needed to pass through, with no exceptions. Renaming this practice, labelling it as a form of violence against women and providing a legal framework to tackle it has been a way to foster the social and cultural debate that is helping to challenge FGM. Providing women with the legal tools to defend their rights is the first and necessary step to bring positive changes. Now African women have these tools. Although young and still not fully accepted, they represent a real hope for the effective protection of women's rights on the African continent.

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Table of figures

Annex: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The States Parties to this Protocol,

CONSIDERING that Article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the Assembly of Heads of State and Government of the Organization of African Unity meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa;

CONSIDERING that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

FURTHER CONSIDERING that Article 18 of the African Charter on Human and Peoples' Rights calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions;

NOTING that Articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter;

RECALLING that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights;

NOTING that women's rights and women's essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995;

RECALLING ALSO United Nations Security Council's Resolution1325 (2000) on the role of Women in promoting peace and security;

REAFFIRMING the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development;

FURTHER NOTING that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the

United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women;

RECOGNISING the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy;

BEARING IN MIND related Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between women and men;

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

FIRMLY CONVINCED that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated;

DETERMINED to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights;

HAVE AGREED AS FOLLOWS:

Article 1
Definitions

For the purpose of the present Protocol:

a) "African Charter" means the African Charter on Human and Peoples' Rights;

b) "African Commission" means the African Commission on Human and Peoples' Rights;

- "Assembly" means the Assembly of Heads of State and Government of the African Union;
- “AU” means the African Union;
- ‘‘Constitutive Act’’ means the Constitutive Act of the African Union;
- "Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;
- "Harmful Practices" means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity;
- ‘‘NEPAD’’ means the New Partnership for Africa’s Development established by the Assembly;
- "States Parties" means the States Parties to this Protocol;
- "Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war;
- “Women” means persons of female gender, including girls;

Article 2

Elimination of Discrimination Against Women

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

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

Article 3

Right to Dignity

- Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights;
- Every woman shall have the right to respect as a person and to the free development of her personality;
- States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women;
- States Parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

Article 4

The Rights to Life, Integrity and Security of the Person

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.

2. States Parties shall take appropriate and effective measures to:

a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;

b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;

c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;

d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;

e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;

f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;

g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;

- prohibit all medical or scientific experiments on women without their informed consent;
- provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
- ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women.
- e nsure that women and men enjoy equal rights in terms of access to refugee status, determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents;

Article 5

Elimination of Harmful Practices

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

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

Article 6

Marriage

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

- no marriage shall take place without the free and full consent of both parties;
- the minimum age of marriage for women shall be 18 years;

- monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;
- every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;
- the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;
- a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;
- a woman shall have the right to retain her nationality or to acquire the nationality of her husband;
- a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;
- a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;
- during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

Article 7

Separation, Divorce and Annulment of Marriage

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:

- separation, divorce or annulment of a marriage shall be effected by judicial order;
- women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
- in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;
- in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

Article 8

Access to Justice and Equal Protection before the Law

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- effective access by women to judicial and legal services, including legal aid;
- support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
- that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- that women are represented equally in the judiciary and law enforcement organs;

- reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

Article 9
Right to Participation in the Political and Decision-Making Process

1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:

a) women participate without any discrimination in all elections;

b) women are represented equally at all levels with men in all electoral processes;

c) women are equal partners with men at all levels of development and implementation of State policies and development programmes.

2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

Article 10
Right to Peace

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.

2. States Parties shall take all appropriate measures to ensure the increased participation of women:

a) in programmes of education for peace and a culture of peace;

b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;

- in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women;
- in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women;
- in all aspects of planning, formulation and implementation of post conflict reconstruction and rehabilitation.

3. States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

Article 11
Protection of Women in Armed Conflicts

- State**s** Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations which affect the population, particularly women.
- State**s** Parties shall, in accordance with the obligations incumbent upon them under the international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
- State**s** Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other

forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

- State**s** Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

Article 12
Right to Education and Training

1. States Parties shall take all appropriate measures to:

a) eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;

b) eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;

- protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;
- provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;
- integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.

2. States Parties shall take specific positive action to:

a) promote literacy among women;

b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology;

c) promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

Article 13
Economic and Social Welfare Rights

States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:

a) promote equality of access to employment;

b) promote the right to equal remuneration for jobs of equal value for women and men;

c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;

d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;

e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;

f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it;

g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;

h) take the necessary measures to recognise the economic value of the work of women in the home;
i) guarantee adequate and paid pre and post-natal maternity leave in both the private and public sectors;
j) ensure the equal application of taxation laws to women and men;
k) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
l) recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;
m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

Article 14

Health and Reproductive Rights

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

Article 15

Right to Food Security

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

Article 16

Right to Adequate Housing

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

Article 17

Right to Positive Cultural Context

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

Article 18

Right to a Healthy and Sustainable Environment

1. Women shall have the right to live in a healthy and sustainable environment.
2. States Parties shall take all appropriate measures to:
a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;
b) promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control;

c) protect and enable the development of women's indigenous knowledge systems**;**
d) regulate the management, processing, storage and disposal of domestic waste;
e) ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.

Article 19

Right to Sustainable Development

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:
a) introduce the gender perspective in the national development planning procedures;
b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
c) promote women's access to and control over productive resources such as land and guarantee their right to property;

d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and

f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

Article 20

Widows' Rights

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:
a) that widows are not subjected to inhuman, humiliating or degrading treatment;
b) a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;

c) a widow shall have the right to remarry, and in that event, to marry the person of her choice.

Article 21
Right to Inheritance

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

Article 22
Special Protection of Elderly Women

The States Parties undertake to:
a) provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;

b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

Article 23
Special Protection of Women with Disabilities

The States Parties undertake to:
a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;

b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

Article 24
Special Protection of Women in Distress

The States Parties undertake to:
a) ensure the protection of poor women and women heads of families including women from marginalized population groups and provide the an environment suitable to their condition and their special physical, economic and social needs;

b) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

Article 25
Remedies

States Parties shall undertake to:
a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;

b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

Article 26

Implementation and Monitoring

1. States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.

2. States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

Article 27

Interpretation

The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

Article 28

Signature, Ratification and Accession

1. This Protocol shall be open for signature, ratification and accession by the States Parties, in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission of the AU.

Article 29

Entry into Force

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.
2. For each State Party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession.
3. The Chairperson of the Commission of the AU shall notify all Member States of the coming into force of this Protocol.

Article 30

Amendment and Revision

1. Any State Party may submit proposals for the amendment or revision of this Protocol.
2. Proposals for amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the AU who shall transmit the same to the States Parties within thirty (30) days of receipt thereof.
3. The Assembly, upon advice of the African Commission, shall examine these proposals within a period of one (1) year following notification of States Parties, in accordance with the provisions of paragraph 2 of this article.
4. Amendments or revision shall be adopted by the Assembly by a simple majority.
5. The amendment shall come into force for each State Party, which has accepted it thirty (30) days after the Chairperson of the Commission of the AU has received notice of the acceptance.

Article 31

Status of the Present Protocol

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.

Article 32

Transitional Provisions

Pending the establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be the seized with matters of interpretation arising from the application and implementation of this Protocol.

Adopted by the 2nd Ordinary Session of the Assembly of the Union
Maputo , 11 July 2003