

# Monitoring compliance of African women's human rights commitments by the African Court on Human and Peoples' Rights

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## SUMMARY

Since the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the African human rights system has undergone significant developments with regards to women's rights. Despite the progress made in gender equality and addressing gender injustice through the ratification and domestication of women's human rights standards in national constitutions, laws, policies and institutions, women and girls in Africa continue to face human rights violations in all spheres of life. This article examines the jurisprudence of the African Court on Human and Peoples' Rights (African Court) and analyses the extent to which the Court ensures state compliance with and accountability for women's rights in Africa. It argues that although the Maputo Protocol specifically clothes the African Court with the mandate to interpret its application and implementation, the inherent and structural design of the African Court, however, greatly limits the cases that can be filed before the Court to the detriment of women's rights. This is because women's rights, though justiciable before the African Court, in theory, are not so in practice as the form of the Court and the reliance of classical formal doctrines such as *locus standi*, objectivity, reasonable standards and the exhaustion of local remedies result in the exclusion of women's rights cases before the Court.

## 1 Introduction

For the past four decades, the African human rights system has undergone significant developments with regard to women's rights. During this time, African countries have adopted and ratified numerous international human rights treaties and conventions on women's rights in several areas. These include the equal and inalienable rights of all women,<sup>1</sup> elimination of prostitution,<sup>2</sup> equal remuneration of men and women,<sup>3</sup> the right to vote and access to political office without

discrimination,<sup>4</sup> the right to education,<sup>5</sup> the right to marry,<sup>6</sup> the right to retain nationality during marriage<sup>7</sup> among others.

Due to years of advocacy and lobbying, the Maputo Protocol was adopted in 2003.<sup>8</sup> The Maputo Protocol, the African women's bill of rights, builds on human rights instruments including the Universal Declaration of Human Rights (UDHR),<sup>9</sup> International Convention on Civil and Political Rights (ICCPR),<sup>10</sup> International Convention on Economic, Social and Cultural Rights (ICESR),<sup>11</sup> the Declaration on the Elimination

- 1 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted by the UN General Assembly on 18 December 1979, United Nations Treaty Series, vol 1249, at 13 <https://www.un.org/en/universal-declaration-human-rights/index.html> (last accessed: 2021-09-08).
- 2 Preamble, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, approved by General Assembly Resolution 317 (IV) of 2 December 1949, entry into force 25 July 1951, in accordance with art 24 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx> (last accessed: 2021-09-08).
- 3 Art 2, Equal Remuneration Convention, 100 of 1951, adopted by the General Conference of the International Labour Organisation on 29 June 1951, entry into force 23 May 1953 [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C100](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100) (last accessed: 2021-09-08).
- 4 Convention on the Political Rights of Women (1953), adopted by the General Assembly Resolution 640 (VII) on 20 December 1952, entry into force 7 July 1954 [https://treaties.un.org/doc/Treaties/1954/07/19540707%2000-40%20AM/Ch\\_XVI\\_1p.pdf](https://treaties.un.org/doc/Treaties/1954/07/19540707%2000-40%20AM/Ch_XVI_1p.pdf) (last accessed: 2021-09-08).
- 5 Preamble, Convention against Discrimination in Education, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation on 14 December 1960, entered into force 22 May 1962, in accordance with art 14 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DiscriminationInEducation.aspx> (last accessed: 2021-09-08).
- 6 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages adopted by the General Assembly Resolution 1763 (XVII) on 7 November 1962, entry into force 9 December 1964 [https://treaties.un.org/doc/Treaties/1964/12/19641223%2002-15%20AM/Ch\\_XVI\\_3p.pdf](https://treaties.un.org/doc/Treaties/1964/12/19641223%2002-15%20AM/Ch_XVI_3p.pdf) (last accessed: 2021-09-08).
- 7 UN Gen Assembly, Convention on the Nationality of Married Women adopted by the General Assembly Resolution 1040 (XI) on 29 January 1957, entry into force 11 August 1958.
- 8 Art 5, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) [https://au.int/sites/default/files/treaties/37077-treaty-0027\\_-\\_protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_on\\_the\\_rights\\_of\\_women\\_in\\_africa\\_p.pdf](https://au.int/sites/default/files/treaties/37077-treaty-0027_-_protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa_p.pdf) (last accessed: 2021-09-12).
- 9 Universal Declaration of Human Rights, adopted by the UN General Assembly Resolution 217 A (III) in Paris on 10 December 1948 <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last accessed: 2021-09-12).
- 10 International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with art 49 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (last accessed: 2021-09-08).
- 11 International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976 at 171.

of Discrimination against Women (DEDAW),<sup>12</sup> CEDAW,<sup>13</sup> the African Charter on Human and Peoples' Rights (ACHPR), the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>14</sup> and strengthens the ACHPR's provisions on gender equality.<sup>15</sup>

It incorporates clear and extensive definitions of discrimination against women, and includes provisions on economic harm, harmful practices such as Female Genital Mutilation and violence against women,<sup>16</sup> domestic violence,<sup>17</sup> polygamy,<sup>18</sup> HIV/AIDS,<sup>19</sup> medical abortion,<sup>20</sup> socio-economic rights,<sup>21</sup> food security,<sup>22</sup> adequate housing,<sup>23</sup> electoral quotas for women,<sup>24</sup> and emphasises corrective and specific positive action, and requires special measures to be put in place to mitigate against discrimination.<sup>25</sup> It requires states parties to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.<sup>26</sup> The Maputo Protocol mandates states to protect women during armed conflict and prohibits any child, specifically girls under the age of 18 years, from directly taking part in hostilities or being recruited as a soldier.<sup>27</sup> It also recognises that women can be victims of multiple discrimination and intersectionality of violations and therefore acknowledges unique categories such as widows, elderly women,

12 The Declaration on the Elimination of Discrimination Against Women is a human rights proclamation adopted by the General Assembly on 7 November 1967. It was an important precursor to the legally binding 1979 CEDAW and was drafted by the Commission on the Status of Women in 1967 [https://www.lawphil.net/international/treaties/dec\\_nov\\_1967.html](https://www.lawphil.net/international/treaties/dec_nov_1967.html) (last accessed: 2021-09-12). See also the Declaration on the Elimination of Violence against Women, proclaimed by General Assembly resolution 48/104 of 20 December 1993 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx> (last accessed: 2021-09-12).

13 CEDAW at 13.

14 Preamble, African Charter on the Rights and Welfare of the Child, adopted by the OAU in 1990, entry into force in 1999 [https://au.int/sites/default/files/treaties/36804-treaty-african\\_charter\\_on\\_rights\\_welfare\\_of\\_the\\_child.pdf](https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf) (last accessed: 2021-09-12).

15 Article 27, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005) [https://au.int/sites/default/files/treaties/37077-treaty-0027\\_-\\_protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_on\\_the\\_rights\\_of\\_women\\_in\\_africa\\_e.pdf](https://au.int/sites/default/files/treaties/37077-treaty-0027_-_protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa_e.pdf) (last accessed: 2021-09-12).

16 Art 5, Maputo Protocol.

17 Art 4(2), Maputo Protocol.

18 Art 6(c), Maputo Protocol.

19 Art 14(1)(e), Maputo Protocol.

20 Art 14(2)(k), Maputo Protocol.

21 Arts 12-16, Maputo Protocol.

22 Art 15, Maputo Protocol.

23 Art 16, Maputo Protocol.

24 Art 9, Maputo Protocol.

25 Art 2, Maputo Protocol.

26 Art 10(3), Maputo Protocol.

27 Art 11, Maputo Protocol.

women with disability and in distress such as nursing or pregnant women in detention and refugees.<sup>28</sup>

To ensure the implementation of these international women's human rights norms, regional bodies such as the African Court on Human and Peoples' Rights (African Court) have been charged with the responsibility of ensuring the compliance of women's human rights law. The African Court was established under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, on 9 June 1998,<sup>29</sup> in order to complement and reinforce the protective function of the African Commission on Human and Peoples' Rights (African Commission).<sup>30</sup> It possesses wide jurisdiction to determine matters on any human rights instrument ratified by the state party concerned.<sup>31</sup> In essence, the Court's mandate, includes amongst others, to interpret the application and interpretation of the Maputo Protocol.<sup>32</sup>

Despite these significant developments, implementation remains a challenge. In fact, in March 2020, the Commission on the Status of Women expressed concern that progress has not been fast or deep enough, that in some areas progress has been uneven, major gaps remain and that obstacles, including structural barriers, discriminatory practices and the feminisation of poverty persist.<sup>33</sup> The Commission recognised that 25 years after the Fourth World Conference on Women, no country had fully achieved gender equality and the empowerment of women and girls; that significant levels of inequality persist globally; that many women and girls experience multiple and intersecting forms of discrimination, vulnerability and marginalisation throughout their life; and that women of African descent, women with HIV and AIDS, rural women, indigenous women, women with disabilities, migrant women and elderly women have made the least progress.<sup>34</sup>

This article aims to examine the jurisprudence of the African Court and the level of protection delivered by the Court to women's rights with a focus on the implementation and interpretation of the Maputo Protocol. The paper focuses on uncovering problematic assumptions and tensions

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28 See arts 20, 22, 23, 24, Maputo Protocol.

29 Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights [https://au.int/sites/default/files/treaties/36393-treaty-0019\\_-\\_protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoplesrights\\_on\\_the\\_establishment\\_of\\_an\\_african\\_court\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf) (last accessed: 2021-09-08).

30 Preamble and Art 2, African Court Protocol.

31 Art 3(1), African Court Protocol.

32 Art 27, Maputo Protocol.

33 Commission on the Status of Women, sixty-fourth session, 09-20 March 2020 UN ESC, UN Doc E/CN.6/2020/L.1 (2 March 2020) <https://au.int/sites/default/files/documents/38226-doc-csw64-politicaldeclaration.pdf> (last accessed: 2021-09-08).

34 UN Doc E/CN.6/2020/L.1 (2 March 2020).

that animate the system and the institutional architecture. These include the tension between local, regional, and international human rights and standards, and the tension between procedure and substance. The paper demonstrates that although women's rights are justiciable before the African Court in theory, they are not so in practice as the form of the Court and the reliance of classical formal doctrines such as *locus standi*, objectivity, reasonable standards and the exhaustion of local remedies result in the exclusion of women's rights cases before the Court.

The article is divided into four main parts. The first part introduces the background and context. The second part discusses women's human rights in "theory" as depicted in the legal framework. The third part uses the example of the jurisprudence of the African Court to describe the challenges of implementing women's human rights in "practice". We then conclude the article with some lessons on the African Court's experience with African women's human rights.

## 2 Background and context

In Africa, women's struggles against oppression predate colonialism.<sup>35</sup> There is a long history of women mobilising in creative ways to resist patriarchal and political domination, asserting their personal and collective rights.<sup>36</sup> African women played significant roles as revolutionaries and several legendary women helped transform their societies even before colonisation.<sup>37</sup> Despite the hurdles women faced in African traditional society,<sup>38</sup> women played a complementary, rather than subordinate, role to men.<sup>39</sup> However, the onset of colonial rule, premised on neo-liberal institutions characterised by the public/private distinction, resulted in the deterioration of the status of African women as women's experiences and knowledge were relegated to the "private" sphere.<sup>40</sup> The education system reflected gender divisions, with girls educated on women's place in society, especially within the family and

35 Kolawole *Womanism and African Consciousness* (1997).

36 Tamale *Decolonization and Afro-Feminism* (2020).

37 Tamale (2020). Examples include Queen Eyleuka (Dalukah) of Ethiopia, Queen Lobamba of Kuba (Congo), Princess Nang'oma of Bululi (Uganda), Queen Rangita of Madagascar, Queen Nzinga of Angola and Queen Nyabingi (northern Tanzania & western Uganda).

38 Nakayi, Twesiime-Kiryia and Kwagala "The Women's Movement in Africa Creative Initiatives and Lessons Learnt" 2005 *East African Journal of Peace and Human Rights* 265.

39 Sudarkasa "'The Status of Women' in Indigenous African Societies" 1986 *Feminist Studies* 91.

40 Tripp "Women and Politics in Africa Today" *Democracy in Africa* (2013-12-09) <http://democracyinafrica.org/women-politics-africa-today> (last accessed: 2021-09-08).

focused on domestic skills and home economics, as opposed to the boys' training in job-related fields, such as artisans or clerks.<sup>41</sup> The colonial state formally relegated women to an inferior position through various laws and policies and formalised the separation of the public and the private spheres of life.<sup>42</sup> Ownership of land was restructured and women lost the little control they had over land due to the system of land registration.<sup>43</sup>

Consequently, African women engaged in collective struggles for freedom from colonial and imperial domination and supremacy.<sup>44</sup> Anticolonial resistance was one of the few ways for women to enter public life during the rise of nationalism. Women played key roles in the independence movements, participating as nationalists, freedom fighters, and as members of political parties, trade unions, and civil society organisations.<sup>45</sup> However, in the same way that colonialism sought to erase Africa's history, Pan-Africanism excluded women from the spotlight and male-dominated narratives omitted their contributions to the nationalist struggle and to the emergence and ideology of the Pan-African Movement.<sup>46</sup> Despite their crucial role in the struggle for independence, there was no marked improvement in the status of women after independence.<sup>47</sup>

## 2 1 The developments in women's human rights globally and in Africa

In 1946, the United Nations (UN), through the Economic and Social Council established the Commission on the Status of Women to promote women's rights in economic, social and cultural fields.<sup>48</sup> From 1947 to 1962, the Commission focused on setting standards and drafting international conventions to change discriminatory legislation and foster global awareness of women's issues.<sup>49</sup> It drafted the early international conventions on women's rights, such as the 1953 Convention on the Political Rights of Women, the 1957 Convention on the Nationality of Married Women, the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and contributed to the International Labour Organisation's 1951 Convention

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41 Oyewumi "Conceptualising Gender: The Eurocentric Foundations of Feminist Concepts and the Challenge of African Epistemologies" (2002). Arnfred and Codesria *African Gender Scholarship: Concepts: Methodologies and Paradigms* (2004).

42 Oyewumi (2002); Arnfred and Codesria (2004).

43 Tripp "Women's Movements, Customary Law and Land Rights in Africa: The Case of Uganda" 2004 *Afr Stud Q* 1.

44 Oyewumi (2002); Arnfred and Codesria (2004).

45 Tripp, Casimiro, Kwesiga and Mungwa *African Women's Movements: Transforming Political Landscapes* (2011).

46 Tamale (2020).

47 Oyewumi (2002); Arnfred and Codesria (2004).

48 UN Women "A Brief History of the CSW" <https://www.unwomen.org/en/csw/brief-history> (last accessed: 2021-09-08).

49 UN Women "A Brief History of the CSW".

concerning Equal Remuneration for Men and Women Workers for Work of Equal Value. In 1963, the Commission drafted the DEDAW.

The international women's movement inspired the African feminist movement in the 1970s-1980s.<sup>50</sup> In the early 1970s, the UN championed the equality between men and women and convened the first World Conference on Women in Mexico City in 1975 where it declared 1976-1985 the UN Decade for Women. In 1979, the international women's bill of rights, CEDAW was adopted. In a bid to achieve the goals of CEDAW, the Third World Conference on Women in Nairobi in 1985 adopted the Forward-looking Strategies for the Advancement of Women.<sup>51</sup> The Fourth World Conference for Women held in Beijing in 1995 resulted in the Beijing Declaration and Platform for Action.<sup>52</sup> These conferences were important in rejuvenating African women's groups.<sup>53</sup>

Regionally, the ACHPR provided that every individual is entitled to the enjoyment of the rights and freedoms recognised and guaranteed in it without distinction of any kind such as sex.<sup>54</sup> However, it had only one provision that spoke about women: Article 18(3) provides that the state shall ensure the elimination of every discrimination against women and ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. The normative content of the ACHPR with respect to the protection of women's rights was inadequate considering the context of the numerous human rights violations and gender inequality faced by women in Africa.<sup>55</sup> The ACHPR reflected and reinforced the subordinate role women held in Africa, while its lumping of women and children together in a provision concerning the family resounded the public/private distinction and the low status women occupied. A change finally came when the African Union adopted the Maputo Protocol in 2003, which came into effect in 2005.<sup>56</sup>

50 Berger *African Women's Movements in the Twentieth Century: A Hidden History* (2014).

51 The Nairobi Forward-looking Strategies for the Advancement of Women as adopted at the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985.

52 [https://www.un.org/en/events/pastevents/pdfs/Beijing\\_Declaration\\_and\\_Platform\\_for\\_Action.pdf](https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf) (last accessed: 2021-09-08).

53 Kabira "Constitutionalizing Travelling Feminisms in Kenya" (Spring 2019) *Cornell International Law Journal* 137.

54 Art 2, African (Banjul) Charter on Human and Peoples' Rights, adopted by the eighteenth Assembly of Heads of State and Government of the OAU on 27 June 1981, entry into force 21 October 1986 [https://www.achpr.org/public/Document/file/English/banjul\\_charter.pdf](https://www.achpr.org/public/Document/file/English/banjul_charter.pdf) (last accessed: 2021-09-08).

55 Omondi, Waweru and Srinivasan *Breathing Life into Maputo Protocol: Jurisprudence on the Rights of Women and Girls in Africa* (2018) [https://d3n8a8pro7vhnmx.cloudfront.net/equalitynow/pages/817/attachments/original/1543482389/Breathing\\_Life\\_into\\_Maputo\\_Protocol\\_Case\\_Digest-Jurisprudence\\_on\\_the\\_Rights\\_of\\_Women\\_and\\_Girls\\_in\\_Africa.pdf?1543482389](https://d3n8a8pro7vhnmx.cloudfront.net/equalitynow/pages/817/attachments/original/1543482389/Breathing_Life_into_Maputo_Protocol_Case_Digest-Jurisprudence_on_the_Rights_of_Women_and_Girls_in_Africa.pdf?1543482389) (last accessed: 2021-09-08).

56 Art 5, Maputo Protocol.

### 3 Women's human rights in theory

#### 3.1 The international framework for the protection of women's rights

The framework on women rights is comprised of various instruments of general application and others specifically for women. The Preamble of the UN Charter reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. One of the purposes of the UN is the promotion and realisation of human rights and fundamental freedoms for all without distinction as to sex.<sup>57</sup> The UDHR<sup>58</sup> recognises the inherent dignity and the equal and inalienable rights of all members of the human family, and sets out the human rights and fundamental freedoms to which all men and women, everywhere in the world, are entitled, without any discrimination.<sup>59</sup>

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others aims at the elimination of prostitution.<sup>60</sup> State parties are required to put in place measures to specially protect women and children immigrants and to prevent those persons seeking employment from being exposed to the danger of prostitution.<sup>61</sup>

The Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value guarantees the principle of equal pay for equal work.<sup>62</sup> The Convention on the Political Rights of Women assures the right of women to vote and access political office without discrimination.<sup>63</sup> The Convention on the Nationality of Married Women guarantees married women the right to retain their nationality during marriage and at its dissolution.<sup>64</sup> The Convention concerning Discrimination in Respect of Employment and Occupation prohibits all

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57 See Arts 1 para 3, 13(b) and 55, Charter of the United Nations and Statute of the International Court of Justice, adopted on 26 June 1945, entered into force on 24 October 1945 <https://www.un.org/en/sections/un-charter/un-charter-full-text/> (last accessed: 2021-09-08).

58 Universal Declaration of Human Rights, adopted by the UN General Assembly resolution 217 A (III) in Paris on 10 December 1948 <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last accessed: 2021-09-12).

59 The International Bill of Human Rights, Fact Sheet 2 (Rev 1) <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1.en.pdf> (last accessed: 2021-09-08).

60 Preamble, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, approved by General Assembly resolution 317 (IV) of 2 December 1949, entry into force 25 July 1951, in accordance with art 24 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx> (last accessed: 2021-09-08).

61 Arts 17(1) and 20.

62 Art 2, Equal Remuneration Convention.

63 Convention on the Political Rights of Women (1953).

64 Convention on the Nationality of Married Women (1958).



discrimination and mandates member states to pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination.<sup>65</sup>

The Convention against Discrimination in Education is founded upon the UDHR's principle of non-discrimination and the right of every person to education and the United Nations Educational, Scientific and Cultural Organisation's (UNESCO's) role of furthering for all universal respect for human rights and equality of educational opportunity.<sup>66</sup> The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages is anchored in Article 16 of the UDHR which entitles men and women of full age to enter into a marriage with the free and full consent of the intending spouses and to found a family.<sup>67</sup>

The ICCPR,<sup>68</sup> ICESCR<sup>69</sup> and the Convention on the Rights of the Child (CRC)<sup>70</sup> mandate state parties to guarantee the equal right of both sexes to enjoy the rights in them without discrimination. Preceded by the DEDAW,<sup>71</sup> the CEDAW is the first global instrument to comprehensively address the human rights of women within all the spheres of life: political, social, economic and cultural. It is the second most ratified human rights instrument after the CRC, with the membership of 189 of 197 UN member states. It is anchored in the UN Charter and the international covenants on human rights, being the UDHR, ICCPR and ICESCR, noting that despite these instruments, extensive discrimination against women continues to exist.<sup>72</sup> The Committee on the CEDAW is tasked with monitoring the progress of the implementation of CEDAW.<sup>73</sup>

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime aims to prevent and combat trafficking in persons, paying particular attention to women and

65 Art 2, Discrimination (Employment and Occupation) Convention, 111 of 1958, adopted by the 42nd ILC session on 25 June 1958, entry into force 15 Jun 1960 [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C111](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111) (last accessed: 2021-09-08).

66 Preamble, Convention against Discrimination in Education.

67 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1964).

68 International Covenant on Civil and Political Rights (1976).

69 International Covenant on Economic, Social and Cultural Rights (1976).

70 Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with art 49 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (accessed 2021-09-08).

71 The Declaration on the Elimination of Discrimination Against Women (1967).

72 Preamble, CEDAW.

73 Established under art 17, CEDAW.

children and also to protect and assist the victims of such trafficking, with full respect for their human rights.<sup>74</sup>

### 3 2 The regional framework on women's rights

Regionally, the ACHPR builds on the foundation of global human rights instruments by entitling every person to the enjoyment of the rights and freedoms recognised and guaranteed therein without distinction of any kind such as sex or any status<sup>75</sup> in line with the principle of equality before the law and equal protection of the law.<sup>76</sup> The ACHPR is further tailored to the communal model that most African societies have, providing not only entitlement to the enjoyment of rights but duties and obligations too, a combination that ensures the cohesion of their societies.<sup>77</sup> However, the ACHPR was silent on women's rights specifically. As indicated earlier in the paper, the ACHPR mandates states to ensure the elimination of every discrimination against women and also ensure the protection of the rights of women as stipulated in international declarations and conventions. In light of the treaties and conventions on women's rights globally and in Africa identified earlier and the gender inequality faced by women in Africa, several scholars have argued that the normative content of the ACHPR with respect to the protection of women's rights was inadequate.<sup>78</sup>

In addition to the ACHPR, the ACRWC seeks to protect children, girls included.<sup>79</sup> The ACRWC emphasises five distinguishable principles of child's rights protection: non-discrimination in the enjoyment of its rights and freedoms,<sup>80</sup> including during apartheid;<sup>81</sup> the best interests of the child;<sup>82</sup> the survival, development and protection of the child;<sup>83</sup> and freedom of expression.<sup>84</sup>

The African Youth Charter enshrines non-discrimination in the enjoyment of the rights and freedoms recognised and guaranteed in it, irrespective of race, ethnic group, colour, sex, language, religion, political

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74 Art 2 and 9, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, adopted by General Assembly Resolution 55/25 of 15 November 2000, entry into force 25 December 2003.

75 Art 2, Banjul Charter.

76 Art 3, Banjul Charter.

77 Wa Mutua "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" 1999 *Virginia Journal of International Law* 339.

78 Omondi, Waweru and Srinivasan (2018).

79 Preamble, ACRWC.

80 Art 3, ACRWC.

81 Art 26, ACRWC.

82 Art 4, ACRWC.

83 Art 5, ACRWC.

84 Art 7, ACRWC.

or other opinion, national and social origin, fortune, birth or other status.<sup>85</sup> Article 23 mandates state parties to eliminate discrimination against girls and young women according to obligations stipulated in various international, regional and national human rights conventions and instruments designed to protect and promote women's rights, while Article 25 requires the elimination of harmful social and cultural practices that affect the welfare and dignity of young women.

The African Charter on Democracy, Elections and Governance echoes the principle of non-discrimination and requires measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalised and vulnerable social groups.<sup>86</sup> The crucial role of women in development and strengthening of democracy is acknowledged thus states should create conditions for the full and active participation of women in politics, decision-making processes and structures and ensure gender parity in representation at all levels, including legislatures.<sup>87</sup> State parties should provide free and compulsory basic education to all, especially girls and ensure the literacy of citizens above compulsory school age, particularly women, rural inhabitants, minorities, people with disabilities, and other marginalised social groups.<sup>88</sup>

## 4 Women's human rights in practice at the African Court

### 4.1 Why the Court matters with regards to women's rights

This section examines the extent to which African women's rights are justiciable before the African Court. By reviewing the technical and procedural requirements, we evaluate the extent to which the Court fulfils its mandate in Article 27 of the Maputo Protocol.<sup>89</sup> The Court possesses wide jurisdiction to determine matters on any human rights instrument ratified by African countries.<sup>90</sup> Unlike the African Commission, the Court's decisions are final and binding on state parties to the Protocol hence the significance of the Court's mandate with regard to women.<sup>91</sup>

85 Art 2, African Youth Charter, adopted by the AU on 2 July 2006, entry into force 8 August 2009 [https://au.int/sites/default/files/treaties/7789-treaty-0033\\_-\\_african\\_youth\\_charter\\_e.pdf](https://au.int/sites/default/files/treaties/7789-treaty-0033_-_african_youth_charter_e.pdf) (last accessed: 2021-09-08).

86 Art 8, African Charter on Democracy, Elections and Governance, adopted on 25 October 2011, entry into force 15 February 2012 <https://www.achpr.org/legalinstruments/detail?id=29> (last accessed: 2021-09-08).

87 Art 29, African Charter on Democracy, Elections and Governance.

88 Art 43, African Charter on Democracy, Elections and Governance.

89 Art 27, Maputo Protocol.

90 Art 3(1), Maputo Protocol.

91 Art 28(2), Maputo Protocol.

## 4 2 Accessibility and admissibility requirements of the Court

Access to the African Court is twofold, either as of right or discretionary.<sup>92</sup> The African Commission, state parties and African Intergovernmental Organisations can access the Court as of right.<sup>93</sup> Non-Governmental Organisations (NGOs) with observer status before the African Commission and individuals may institute cases directly before the Court,<sup>94</sup> only if member states who have ratified the African Court Protocol make a declaration accepting the competence of the Court to receive such cases.<sup>95</sup> Thirty African states have ratified the African Court Protocol but only six have made a declaration under Article 34(6) accepting the jurisdiction of the Court to hear complaints by individuals and NGOs.<sup>96</sup> It is for this reason that it has been argued that the basic genetic structure of the Court and restricted access to it staunchly protects state sovereignty, limiting the institution's power to act so that from the outset, it was destined to fall short in its efforts to protect and promote human rights.<sup>97</sup>

When determining the admissibility of a case instituted by an NGO or individual, the African Court is guided by Article 56 of the African Charter, which lays out seven requirements.<sup>98</sup> First, the case needs to indicate the authors even if the latter request anonymity.<sup>99</sup> Second, it should be compatible with the Charter of the OAU or the African Charter.<sup>100</sup> Third, it should not be written in disparaging or insulting language directed against the state concerned and its institution or to the OAU.<sup>101</sup> Fourth, it must not be based exclusively on news disseminated through the mass media.<sup>102</sup>

92 Ebobrah "Admissibility of complaints before the African Court on Human and Peoples' Rights: Who should do what?" 2009 *Malawi Law Journal* 87.

93 Art 5(1), African Court Protocol.

94 Art 5(3), African Court Protocol.

95 Art 34(6), African Court Protocol.

96 Burkina Faso 1998; Malawi 2008; Mali 2010; Ghana 2011; Tunisia signed in 2017 but is yet to deposit its declaration. Rwanda deposited in 2013 and officially withdrew it on 24 February 2016. Tanzania deposited in 2010 and officially withdrew on 22 November 2020. Benin deposited in 2016 but gave notice of withdrawal on 24 March 2020; Côte d'Ivoire deposited in 2013 but gave notice of withdrawal on 28 April 2020. See [https://au.int/sites/default/files/treaties/36393-sl-protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoplesrights\\_on\\_the\\_estab.pdf](https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf) (last accessed: 2021-09-12).

97 R Wright "Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights" 2006 *Berkely Journal of International Law* 463.

98 <https://www.achpr.org/legalinstruments/detail?id=49> (last accessed: 2021-09-08).

99 Art 56(1), Banjul Charter.

100 Art 56(2), Banjul Charter.

101 Art 56(3), Banjul Charter.

102 Art 56(4), Banjul Charter.

Fifth, it should be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.<sup>103</sup> This requirement is based on the fact that regional and international mechanisms are not substitutes for the domestic implementation of human rights but are tools to assist the domestic protection of rights under the principle of complementarity.<sup>104</sup> The principle of complementarity stipulates that when a national body is capable of providing the necessary remedy, it should do so, without the international body getting involved, thereby preserving the capacity of the body, as well as ensuring that national systems are given the primacy of place.<sup>105</sup>

The local remedies to be exhausted should be available, effective, sufficient, accessible, and the procedure for accessing the local remedies should not be unduly prolonged and complex.<sup>106</sup> Where remedies are lacking in any of these, or where there are systemic violations, the requirement does not apply.<sup>107</sup> The fact that local remedies must be exhausted illustrates the tension between local, regional and international norms. While the laws as provided in the international treaties and conventions might provide for freedom from discrimination, equality among others, nevertheless, the procedure that demands subjection to local remedies might preclude women from accessing justice where local contexts do not provide for similar rights.

The sixth criteria is that the case should be submitted within a reasonable period from the time local remedies are exhausted or from the date the commission is seized with the matter.<sup>108</sup> This does not apply where there is an exception to the rule to exhaust local remedies and each case is considered on its own merits to ascertain the reasonableness of the time.<sup>109</sup>

The seventh condition is that the case must not deal with cases which have been settled by those states involved in accordance with the principles of the Charter of the UN or the Charter of the OAU or the provisions of the Charter.<sup>110</sup> The mechanisms must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations.<sup>111</sup> This is similar to the principle of *res*

103 Art 56(5), Banjul Charter.

104 *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

105 FIDH "Admissibility of Complaints before the African Court: A Practical Guide" (2016) <https://www.refworld.org/pdfid/577cd89d4.pdf> (last accessed: 2021-09-08).

106 FIDH (2016).

107 FIDH (2016).

108 Art 56(6), Banjul Charter.

109 See the African Court case of *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe human and peoples' rights movement v Burkina Faso* (Application 013/2011) ACtHPR (28 March 2014).

110 Art 56(7), Banjul Charter.

111 Art 56(7), Banjul Charter.

*judicata* and aims to prevent conflicting judgments and ensure that the same case is not considered by multiple separate bodies.<sup>112</sup>

This admissibility criterion is similar to those of other human rights bodies, which, as discussed in the preceding section, were developed when the rights found in human rights instruments were not justiciable because women's rights were not considered human rights. Therefore, the reality of women's experiences was not taken into consideration in the expansion of these criteria.<sup>113</sup> Historically, women's rights in African states were not justiciable before domestic courts and this remains true to come extent today. Therefore, although the principle of complementarity demands that what can be adjudicated upon at national level goes first and only then does the supra-national regime kick in, African states jeopardise the adjudication of women's rights issues.

### 4 3 Conflicting understandings of justiciability

According to the CEDAW Committee, the right of access to justice is a fundamental element of the rule of law, and it is essential to the realisation of women's human rights everywhere.<sup>114</sup> The right of access to justice is multidimensional and comprises six interrelated and essential components: justiciability, availability, accessibility, good quality, provision of remedies for victims and, accountability of justice systems.<sup>115</sup> According to the Committee, justiciability requires the unhindered access by women to justice as well as their ability and empowerment to claim their rights under the Convention as legal entitlements.<sup>116</sup> The Committee recommended the need to ensure that rights and correlative legal protections are recognised and incorporated in the law, improving the gender responsiveness of the justice system; to improve women's unhindered access to justice systems, and to cooperate with civil society and community-based organisations to develop sustainable mechanisms to support women's access to justice and encourage NGOs and civil society entities to take part in litigation on women's rights.<sup>117</sup>

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112 The doctrine of *res judicata* <https://legal-dictionary.thefreedictionary.com/Doctrine+of+res+judicata> (last accessed: 2021-09-12).

113 Ramaseshan "The Op-CEDAW as a Mechanism for Implementing Women's Human Rights: An analysis of decisions Nos 6-10 of the CEDAW Committee under the Communications procedure of the OP-CEDAW" International Women's Rights Action Watch, Asia Pacific, Occasional Papers Series 13 (2009) <http://cedawsouthasia.org/wp-content/uploads/2017/07/OP-CEDAW-AS-A-MECHANISM-FOR-IMPLEMENTING-WOMENS-HUMAN-RIGHTS.pdf> (last accessed: 2021-09-08).

114 General Recommendation 33 on Women's Access to Justice, CEDAW (3 August 2015) UN Doc CEDAW/C/GC/33 (2015) 3 <https://undocs.org/pdf?symbol=en/CEDAW/C/GC/33> (last accessed: 2021-09-08).

115 General Recommendation 33 on Women's Access to Justice (2015).

116 Para 14(a), General Recommendation 33.

117 Para 15, General Recommendation 33.

States have a specific obligation to implement international instruments and decisions from international and regional justice systems related to women's rights.<sup>118</sup> In line with this, the CEDAW Committee urges states, individually or through international or regional co-operation, to establish credible monitoring mechanisms for the implementation of international law.<sup>119</sup>

While the CEDAW Committee has an expansive understanding of justiciability, the institutional architecture of the African Court as well as the admissibility requirements assume the classical hallmarks of a public/private distinction that relegate women's issues to the "private" sphere and men's issues to the "public" sphere.<sup>120</sup> The Court presupposes that the legal order (enforceable legally binding norms) is part of a system that has an internal order or coherence. Classical legal thought as reflected in the admissibility and justiciability requirements, exhaustion of local remedies rule is geared towards ensuring neutrality, uniformity, precision, certainty, autonomy and protection of rights through efficiency and order. However, by invoking doctrines such as exhaustion of the local remedies rule, the formal requirements of the court result in rigidity, alienation and the problem of under inclusiveness of matters that can be brought before the Court. Although this provision appears to be gender-blind and gender neutral, its effect is critical with regards to women rights. Many issues that have been at the heart of the regional women's movement are relegated in the "private" sphere to be considered by "the state" at "local" levels resulting in their exclusion from adjudication at regional levels. In addition, the majority of African states have not accepted the jurisdiction of the African Court to handle cases from individuals and NGOs hence non-justiciable women's rights issues at the national stage often cannot be litigated at the Court due to *locus standi*.

#### 4 4 Cases at the African Court on women's rights

As at June 2021, the African Court has received a total of 318 applications including three from the African Commission; 93 of these have been finalised, four transferred to the African Commission, while 221 are pending.<sup>121</sup> The Court has also received thirteen requests for advisory opinions, twelve of which have been finalised while one is pending.<sup>122</sup> The African Court has only received three applications that relate to the

118 Para 56(e), General Recommendation 33.

119 Para 56(e), General Recommendation 33.

120 D Kennedy "Three Globalizations of Law and Legal Thought (1850-2000)" (2003).

121 African Court "Pending Cases" <https://www.african-court.org/cpmt/pending> (last accessed: 2021-09-08).

122 African Court "Advisory Proceedings" <https://www.african-court.org/cpmt/advisory-pending>; <https://www.african-court.org/cpmt/advisory-finalised> (last accessed: 2021-09-08).

Maputo Protocol, two of which were dismissed and one determined on its merits.<sup>123</sup>

With regards to women's rights, the Article 2 of the African Charter espouses the right of every individual to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind including sex or other status. The African Court in *African Commission on Human and Peoples' Rights v Kenya*<sup>124</sup> held that the expression 'any other status' under Article 2 encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter.<sup>125</sup> In determining whether a ground falls under this category, the Court considers the general spirit of the Charter and evaluates whether distinction or differential treatment lacks an "objective" and "reasonable" justification or where it is not necessary and proportional.<sup>126</sup> Although a number of cases have been adjudicated by the Court on the right to non-discrimination, none of them dealt with women's rights or discrimination on the basis of sex or gender.<sup>127</sup> The question remains why? Why has the court not dealt with this issue? Even though Article 18(3) mandates states to ensure the elimination of every discrimination against women and ensure the protection of the rights of the woman no case has been filed at the court alleging the violation of this article and yet these violations continue to be a day-to-day occurrence on the continent.<sup>128</sup>

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123 See African Court Law Report Volume 2 (2017-2018) PULP (2019) [https://www.african-court.org/en/images/Publications/English\\_Law\\_Reports\\_18\\_Feb\\_2020.pdf](https://www.african-court.org/en/images/Publications/English_Law_Reports_18_Feb_2020.pdf) (last accessed: 2021-09-08).

124 (merits) (2017) 2 AfCLR 9.

125 *African Commission on Human and Peoples' Rights v Kenya* para 138.

126 *African Commission on Human and Peoples' Rights v Kenya* para 139.

127 See *Omary v Tanzania* (admissibility) (2014) 1 AfCLR 358; *Jonas v Tanzania* (merits) (2017) 2 AfCLR 101; *Diakité v Mali* (jurisdiction and admissibility) (2017) 2 AfCLR 118; *Woyome v Ghana* (provisional measures) (2017) 2 AfCLR 213; *Nguza v Tanzania* (merits) (2018) 2 AfCLR 287; *Mango v Tanzania* (merits) (2018) 2 AfCLR 314; *Ramadhani v Tanzania* (merits) (2018) 2 AfCLR 344; *Chrysanthe v Rwanda* (jurisdiction and admissibility) (2018) 2 AfCLR 361; *William v Tanzania* (merits) (2018) 2 AfCLR 426; *Paulo v Tanzania* (merits) (2018) 2 AfCLR 446; *Werema v Tanzania* (merits) (2018) 2 AfCLR 520; *Makungu v Tanzania* (merits) (2018) 2 AfCLR 550; *Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599; *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (Advisory Opinion) (2017) 2 AfCLR 572; *Isiaga v Tanzania* (merits) (2018) 2 AfCLR 218; *Kemboje v Tanzania* (merits) (2018) 2 AfCLR 369.

128 The cases of *Mugesera v Rwanda* (provisional measures) (2017) 2 AfCLR 149; *Anudo v Tanzania* (merits) (2018) 2 AfCLR 248; and *Nguza v Tanzania* (merits) (2018) 2 AfCLR 287 involved art 18(1) of the African Charter.



*Request for an Advisory Opinion by the Centre for Human Rights University of Pretoria, Federation of Women Lawyers Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association*<sup>129</sup> sought the Court's interpretation of Article 6(d) of the Maputo Protocol, which provides for the recording and registration of marriages. The Court held that the African Intergovernmental Organisation applicants lacked *locus standi* as they did not have observer status before the Africa Union as mandated under Article 4(1) of the African Court Protocol. The case of *Mariam Kouma and Ousmane Diabetè v Republic of Mali*<sup>130</sup> alleged the violation, inter alia, of the right to dignity and protection from all forms of violence and torture under Articles 3 of the Maputo Protocol, the right to health under Article 14(1) of the Maputo Protocol, and the right of access to justice and the right to reparation as provided under Article 6 of the Maputo Protocol. The Court upheld the objection based on the non-exhaustion of local remedies and declared the application inadmissible.

The first judgment on the Maputo Protocol was *Association Pour le Progres et la Defense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v the Republic of Mali*<sup>131</sup>. It is discussed in detail to analyse the extent to which the Court ensured state compliance and accountability to women's rights in Africa. The National Assembly of Mali on 3 August 2009 adopted the Persons and Family Code, which, despite being popular and supported by human rights organisations, was not promulgated due to widespread protests by Islamic organisations. A revised Code was adopted and promulgated in December 2011, which the Applicants alleged violated several international human rights instruments ratified by Mali. The Applicants thus requested the Court to order the amendment of the Code for violating various standards in international human rights that will be discussed later.

The Respondent filed a preliminary objection on three issues. First, that the application did not relate to the interpretation of the Charter or any other human rights instrument and therefore the Court lacked material jurisdiction. The Court held that it had the jurisdiction to determine the matter, which alleged the violation of rights guaranteed by the Charter and other instruments ratified by Mali based on Article 3(1)

129 (001 of 2016) ACtHPR (28 September 2017) [https://www.pulp.up.ac.za/images/pulp/books/legal\\_compilations/cases/eng/CHR%20and%20Others%20\(Advisory%20Opinion\)%20\(2017\)%202%20AfCHR%20622.pdf](https://www.pulp.up.ac.za/images/pulp/books/legal_compilations/cases/eng/CHR%20and%20Others%20(Advisory%20Opinion)%20(2017)%202%20AfCHR%20622.pdf) (last accessed: 2021-09-08).

130 (admissibility) (2018) 2 AfCLR 237 [https://www.pulp.up.ac.za/images/pulp/books/legal\\_compilations/cases/eng/Kouma%20and%20Diabat%20v%20Mali%20\(admissibility\)%20\(2018\)%202%20AfCLR%20237.pdf](https://www.pulp.up.ac.za/images/pulp/books/legal_compilations/cases/eng/Kouma%20and%20Diabat%20v%20Mali%20(admissibility)%20(2018)%202%20AfCLR%20237.pdf) (last accessed: 2021-09-08)

131 *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Mali* (Application 046 of 2016) ACtHPR (11 May 2018) <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/215/3a6/5f52153a6cd1a562612259.pdf> (last accessed: 2021-09-08).

of the African Court Protocol. It is important to note that this was the first case before the African Court that did not allege any violation of the African Charter.

The second objection was on the admissibility of the application on the ground that the Applicants failed to exhaust local remedies, a fact which the Applicants admitted as no remedies existed. The Court noted that the constitutionality of laws in Mali is challenged through a constitutional petition<sup>132</sup> but this can only be filed by the Prime Minister, President of the Republic, President of the National Assembly, one-tenth of the members of Parliament, the President of the High Council of Collectives or one-tenth of the National Counsellors, or by the President of the Supreme Court.<sup>133</sup> No remedy was available to the Applicants as NGOs were not entitled to approach the Constitutional Court thus the application was admissible.

The third objection was that since the Code was enacted on 30 December 2011 and the application filed on 26 July 2016, the application was not filed within a reasonable time.<sup>134</sup> The Applicants retorted that the violations were continuing and therefore time started to run after the cessation of the violations. However, the Court held that time is counted from the date local remedies are exhausted or from the date set by the Court as being the commencement of time. Since no remedy was available at the domestic level, the date for filing is that on which the Applicants acquired knowledge of the impugned law.<sup>135</sup>

The Court further took into account the circumstances of the cases from the uncontested facts admitted by the two opposing parties. The Applicants needed time to properly study the compatibility of the Code with the many relevant international human rights instruments ratified by the Respondent State and given the climate of fear, intimidation and threats that characterised the period following the adoption of the law on 3 August 2009, the Court held that it was reasonable to expect the Applicants to have been affected by that situation as well. Therefore, the Court held that the application was filed within a reasonable time.

The Court proceeded to determine the merits of the case and the five issues alleged to be in violation of the Maputo Protocol, the ACRWC and the CEDAW. The first issue was that the Persons and Family Code set the minimum age of marriage at 18 for boys and 16 for girls and allowed special exemption for marriage at 15 years with the father's or mother's consent for the boy, and only the father's consent for the girl. The

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132 Art 5, Constitution of Mali.

133 Art 88, Constitution of Mali.

134 Art 56(6) of the Charter, reproduced in Article 6(2) of the Court Protocol and Rule 40.

135 The Court relied on the European Court of Human Rights case in *Dennis v United Kingdom* (76573/01) ECHR (2 July 2002), where it was held that where it is clear from the outset that no effective remedy is available to the applicant, the period runs from the date of the act at issue, or from the date of knowledge of that act or its effect on or prejudice to the applicant.

Respondent argued that the 2009 version of the Code complied with Mali's international commitments but this was not promulgated following a *force majeure* mass process movement that posed a huge threat of social disruption, the disintegration of the nation and upsurge of violence, the consequence of which could have been detrimental to peace, harmonious living and social cohesion that the mobilisation of religious forces attained such a level that no amount of resistance action could contain it.<sup>136</sup> It further argued that the international rules must not eclipse social, cultural and religious realities. The Court held that a situation of *force majeure* is not consistent with international law. Mali violated Article 6(b) of the Maputo Protocol and Articles 2, 4(1) and 21 of the ACRWC for failing to guarantee compliance with the minimum age of marriage of 18 years and the right to non-discrimination.

The second issue the Applicants submitted was that the Code permitted the maintenance of marriage customs and traditions that do not allow for the consent of the parties. It entitled religious ministers and civil registry officials to perform marriages but there was no provision for verification of the parties' consent by the religious ministers,<sup>137</sup> no sanctions were prescribed against defaulting religious ministers who failed to perform the verification,<sup>138</sup> and there was no requirement that parties should give consent orally and in-person before religious ministers.<sup>139</sup> The Respondent State replied that under the Code, there is no marriage when there is no consent,<sup>140</sup> marriage publicly celebrated by a religious minister is subject to compliance with the conditions enshrined in the Code,<sup>141</sup> and that the Code regulated the validity of the marriage celebrated by a religious minister, the transmission of the marriage certificate to the civil registrar and its registration in the Civil Register.<sup>142</sup> The Court held that these provisions allowing for the application of religious and customary laws on the consent to marriage were inconsistent with Articles 2(1)(a) and 6(a) of the Maputo Protocol and Articles 10 and 16 of CEDAW.

The third issue involved the fact that the applicable regime in matters of inheritance was religious and customary law and that the Code applied only where religion or custom has not been established in writing, by testimony, experience or by common knowledge or where the deceased, in his lifetime, has not manifested in writing or before witnesses his wish that his inheritance should be distributed otherwise.<sup>143</sup> This amounted to legalising discrimination in inheritance against women and girls in violation of Article 21 of the Maputo Protocol, and Article 16(h) of CEDAW.

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136 *Dennis v United Kingdom*.

137 Art 300, Persons and Family Code.

138 Art 287, Persons and Family Code.

139 Art 283, Persons and Family Code.

140 Art 283(1), Persons and Family Code.

141 Art 300, Persons and Family Code.

142 Arts 303(3) and 304, Persons and Family Code.

143 Art 751, Persons and Family Code.

The Respondent State indicated that prior to 2009, inheritance was entirely customary and that the 2009 Code provided for an equal share for men and women to inherit property. However, because of the protests, the 2011 Code was made flexible so that anyone who did not wish succession to be arranged according to customary or religious rules simply expresses their desire to have their inheritance devolved according to the Family Code's rules or their will. The Court held that the Islamic law applicable in Mali and the customary practices with regards to inheritance violated Article 21(1) and (2) of the Maputo Protocol.

The fourth issue submitted by the Applicants was that by adopting the Code, the Respondent State demonstrated a lack of willingness to eliminate the traditional cultural practices that undermine the rights of women, girls and children born out of wedlock. The Court agreed that by maintaining discriminatory practices which undermine the rights of women and girls, the Respondent State violated Article 2(2) of the Maputo Protocol, and Articles 1(3) and 5(a) of CEDAW. The Court consequently held the Respondent State to have violated Article 2 of the Maputo Protocol, and 16(1) of CEDAW on the right to non-discrimination for women and girls and ordered the Respondent State to, *inter alia*, amend the impugned law, harmonise its laws with the international instruments, and take appropriate measures to bring an end to the violations established, comply with its obligations under Article 25 of the Charter with respect to information, teaching, education and sensitisation of the population and submit to it a report on the measures taken in respect of the above within a reasonable period which, in any case, should not be more than two (2) years from the date of the judgment.

This judgment was a significant win for the women and girls in Mali and Africa and sets a landmark precedent with regards to the rights of women in marriage and the family. The Court took ownership of its wide jurisdiction and found violations not only of the Maputo Protocol but also the ACRWC and CEDAW. The Court liberally applied the reasonable time requirement, finding that the more than four-year interval between the passing of the Code in Mali and the filing of the case was considered a reasonable time. The Court ensured justice and was eager to adopt a liberal interpretation of procedural matters for the benefit of a more effective and substantive protection of human rights. Indeed, the African Court, with its unique processes in ensuring the protection of human rights generally in Africa, met the need to have an effective enforcement mechanism for the protection of women's rights and human rights in Africa.<sup>144</sup> However, in reality, its accessibility and admissibility criteria make it difficult for human rights activists to use it as a platform for overseeing the implementation of the Maputo Protocol.<sup>145</sup> This further

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144 Hansungule "An African Perspective on the Protection of women's rights in international law" (2012) (unpublished).

145 Budoo "Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union" 2018 *AHRLJ* 58.

confirms the fear that among scholars and human rights practitioners that despite the fact that the African Court has proved itself worthy of making a decision concerning violations of the Maputo Protocol in *IHRDA v Mali*, such a positive stride might not be repeated any time soon.<sup>146</sup>

The Court was silent and simply rejected the Respondent's arguments on *force majeure* and the adaptation of its legislation to social and cultural realities, which both pertain to derogation.<sup>147</sup> In addition, by indirectly addressing Mali's argument about social realities, the Court properly refrained from entering the complex debate over universalism versus cultural relativism.<sup>148</sup> This shows that the Court will not tolerate any infringement on women's rights based on political or cultural factors and that state parties are mandated to zealously ensure that women's rights are protected, promoted and fulfilled without exception or excuse.

#### 4 5 The "man" of the Court

Throughout history, feminists the world over have argued that the law is gendered.<sup>149</sup> Carol Smart has argued for instance, that the law exercises power in its ability to exclude women's experiences and perspectives.<sup>150</sup> She argues that the law is effective in silencing parties. For instance, a lawyer speaks for his or her client and when a party can speak, their words and experiences are turned into something that the law can "digest and process". In the case of the African Court, for a case to be justiciable, the state party must have ratified the African Court Protocol and made a declaration under Article 34(6) allowing citizens and NGOs to so file and it must submit to the standards of *locus standi*, admissibility, relevance, objectivity, as discussed in the section above.

In addition, feminists such as Naffine Ngaire have demonstrated that the law has a historically located man in mind. This man reflects the Weberian "ideal type" and is used as the central justifying character of the *Gesellschaft* concept of justice whose subjects' social relationships are based on impersonal ties such as general duty to society. This discounts the *Gemeinschaft* concept of justice where social relationships between individuals based on close personal and family ties are critical. The Court

146 Budoo 2018 *AHRLJ*.

147 Kombo "Silences that Speak Volumes: The Significance of the African Court Decision in *APDF and IHRDA v Mali* for women's human rights on the continent" 2019 *Africa Human Rights Yearbook* 389 <https://www.acerwc.africa/wp-content/uploads/2020/01/AHRY-2019-whole-book.pdf> (last accessed: 2021-09-08).

148 Kombo 2019 *Africa Human Rights Yearbook*.

149 Kabira, Nkatha and Kameri-Mbote "Woman of Law: Women's Triumph in Kenya's Constitution of Kenya 2010" in Kabira, Kameri-Mbote and Meroka (eds) *Changing the Mainstream: Celebrating Women's Resilience* (2018) 312; Kabira and Kameri-Mbote "The Man of COVID 19: The Place of COVID-19 Measures in International Women's Human Rights Law in Kenya" (2021) (Forthcoming); Kameri-Mbote & Nkatha Kabira *SDG 5 - Achieving Gender Equality* (2021) (Forthcoming).

150 Smart *Feminism and the Power of Law* (1989); Pateman *The Sexual Contract* (1989).

is no exception to this critique. The Court assumes a *Gesellschaft* conception of justice by emphasising ideals such as “locus standi”, “reasonableness” and “objectivity”, among others. It also emphasises the centrality of the individual which in African socio-political contexts would exclude the place of communities in the social construction of gender related concerns. The Court also assumes a sharp distinction between public/private and hence the requirements that local remedies must be exhausted (private) and that state sovereignty (private) must take precedence over the regional system.

Furthermore, this assumption distinguishes between law and politics and thus all matters considered “political” and “contested” are therefore not justiciable before the Court. Interestingly, women’s rights issues have throughout the ages been considered essentially contested issues.<sup>151</sup> These ideals, as feminist scholars argue, have historically located male experiences in mind and thus exclude women’s experiences and perspectives. As Carol Smart argues, this practice is a demonstration of the power of law and by extension, the power of the court, to disqualify alternative accounts.<sup>152</sup> The parties involved never really get to say what they would like to say because their true experiences probably do not fit into the court’s perspective on their problem. For instance, in the case of issues considered “political”, the court cannot decide and the issue is not considered justiciable before the court. The classical distinction between law and politics, law and fact, public and private result in the exclusion of women’s experiences which have historically been relegated to the private sphere. Perhaps this could be the reason why women’s human rights are justiciable before the Court in theory but in practice the Court’s procedures silence the experiences of women which do not fit within the formal requirements of the Court.

## 5 Recommendations

The African Court is a powerful mechanism to hold state parties accountable for women’s rights. However, although 30 states have ratified the Protocol establishing it, only six states have made the Article 34(6) declaration allowing individuals and NGOs to institute human rights cases. Therefore, the African Union (AU) and the African Commission should call on states to ratify the Protocol and make the declaration so as to enable more women’s rights cases to be instituted. In the long term, the AU should consider dropping the Article 34(6) declaration.

The African Commission and African inter-governmental organisations can access the court as of right. Therefore, the African Commission should refer women’s rights cases filed before it to the African Court and under its promotional mandate undertake

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151 Baer *Feminist Theory and The Law: The Oxford Handbook of Political Science* (2011).

152 Smart (1989).

sensitisation on the African Court. On the other hand, African inter-governmental organisations should institute women's rights cases and request for advisory opinions on the provisions of the Maputo Protocol. In the long term, the AU should expand the *locus standi* and allow NGOs with observer status before the African Commission the standing to request advisory opinions.

Individuals and NGOs with observer status before the African Commission should be encouraged to file cases on women's rights before the African Court with regard to member states who have accepted the Court's mandate to receive individual cases. These NGOs should also file to be recognised by the AU to widen their standing to institute cases.

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

## 6 Conclusion

This article has demonstrated that even though African governments have enacted conventions and treaties for the advancement of women's human rights on the continent, nevertheless, compliance with these commitments remains a challenge. The article has revealed that one of the most significant instruments for monitoring compliance with women's human rights, the African Court, is marked with institutional and inherent weaknesses that greatly limit the cases that can be filed before the Court by individuals and NGOs to the detriment of women's rights. This is because women's rights, though justiciable before the African Court, in theory, are not so in practice as the form of the Court and the reliance of classical formal doctrines such as *locus standi*, objectivity, reasonable standards and the exhaustion of local remedies result in the exclusion of women's rights cases before the court. For the Court to play its role of ensuring compliance with women's human rights in Africa, we must unmask the man of the Court and the all the structural hurdles that silence women's experiences and knowledge.