

# WOMEN'S REPRESENTATION AND RIGHTS IN THE AFRICAN COURT

LILIAN CHENWI\*

**Abstract:** The African Union and African states' have committed to upholding gender equality and women's rights. A pivotal mechanism for advancing this commitment and human rights in general is the African Court on Human and Peoples' Rights, with its broad substantive jurisdiction. This article considers the legal basis for gender parity and the extent to which gender representation and women's rights has been advanced through or by the Court. It establishes that though the Court's jurisprudence on women's right is quite scant, the Court has illustrated its potential and willingness to protect women's rights through its advisory and contentious jurisdiction. Significant strides have also been made in attaining gender equality on the Court's bench, but with more to be done in terms of substantive representation in the Court's leadership positions.

**Keywords:** African Court, African Human Rights Court, gender equality, women's representation, women's rights, human rights in Africa, access to justice, legal costs.

**Summary:** 1. INTRODUCTION. 2. WOMEN'S REPRESENTATION ON THE COURT'S BENCH. 3. WOMEN'S RIGHTS IN THE COURT'S JURISPRUDENCE. 3.1. Bringing Legal Matters/Cases on Women's Rights: Some Constraints. 3.2. Protection of the Rights of Poor and Marginalised Women. 3.3. Protection of Women's Marriage and Inheritance Rights. 4. CONCLUSION.

## 1. INTRODUCTION

Gender equality and women's rights are essential to Africa's development. However, the African Charter on Human and Peoples' Rights (African Charter), the main African regional human rights treaty, fails to give adequate attention to gender equality and women's rights in its provisions, merely recognising the need for states to protect women's rights and eliminate all discrimination against women.<sup>1</sup> This has resulted in the adoption of various measures to supplement the African Charter. For example, in May 1999, the African Commission on Human and Peoples' Rights (ACmHPR),<sup>2</sup> based on the need to give specific attention to the problems and rights of women in Africa, appointed a special rapporteur on the rights of women in Africa.<sup>3</sup> The Special Rapporteur is a focal

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\* Professor, School of Law, University of the Witwatersrand, South Africa (lilian.chenwi@wits.ac.za)

<sup>1</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (hereafter 'African Charter'), Article 18(3); see also Articles 2 and 3 on equality.

<sup>2</sup> A quasi-judicial regional body and an organ of the AU, mandated to promote and protect human and peoples' rights in Africa.

<sup>3</sup> African Commission on Human and Peoples' Rights, 'Resolution ACHPR/res.38(XXV)99 on the Appointment of a Special Rapporteur on the Rights of Women in Africa' 25th Ordinary Session, 26 April to 5 May 1999.

point for the promotion and protection of women's rights in Africa.<sup>4</sup> In 2003, the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) was adopted<sup>5</sup> to supplement the African Charter. As its name suggests, the Protocol is dedicated to women's rights and is the main African regional treaty on women's rights. Furthermore, in 2004 and 2009, the African Union (AU) illustrated its commitment to advancing gender equality by adopting the Solemn Declaration on Gender Equality in Africa<sup>6</sup> and a comprehensive policy on gender,<sup>7</sup> respectively. The policies and treaties provide a framework for the realisation of gender equality, non-discrimination and women's rights in Africa.

However, disparities exist between men and women in various spheres, due in part to inadequate mainstreaming of gender issues in various policies and sectors.<sup>8</sup> This has impacted negatively on the enjoyment of rights, particularly for women.

It is therefore important that the relevant frameworks not only translate into enjoyment of women's rights in practice but also in the development of jurisprudence or tradition at the African regional level that advance the rights of women, gender equality and women's representation in all spheres and at various levels. With Covid-19, this has become even more crucial. Globally, Covid-19 has worsened gender inequalities, gender-poverty gaps and exposed women to rights violations. As stated by the United Nations (UN) Secretary General: 'Across every sphere, from health to the economy, security to social protection, the impacts of COVID-19 are exacerbated for women and girls simply by virtue of their sex'.<sup>9</sup> In Africa, an increase in gender-based violence including

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<sup>4</sup> For more information on the Special Rapporteur's mandate, see African Commission on Human and Peoples' Rights, 'Special Rapporteur on Rights of Women: Mandate and Biographical Notes' <https://www.achpr.org/specialmechanisms/detailmech?id=6> (accessed 2 September 2021).

<sup>5</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 13 September 2000, entered into force 25 November 2005, AU Doc. CAB/LEG/66.6 (hereafter 'African Women's Protocol'). The Protocol is also referred to as the Maputo Protocol.

<sup>6</sup> African Union 'Solemn Declaration on Gender Equality in Africa' AU Doc. Assembly/AU/Decl.12 (III) Rev.1 (July 2004) (hereafter 'AU Declaration on Gender Equality').

<sup>7</sup> African Union, 'AU Strategy for Gender Equality and Women's Empowerment 2018-2028' adopted 20 March 2019 <https://au.int/documents/20190320/au-strategy-gender-equality-womens-empowerment-2018-2028> (accessed 2 September 2021) (hereafter 'AU Gender Strategy').

<sup>8</sup> Lohini Moodley, Mayowa Kuyoro, Tania Holt, Acha Leke, Anu Madgavkar, Mekala Krishnan, Folakemi Akintayo, 'The Power of Parity: Advancing Women's Equality in Africa' (November 2019) <https://www.mckinsey.com/featured-insights/gender-equality/the-power-of-parity-advancing-womens-equality-in-africa> (accessed 2 September 2021).

<sup>9</sup> United Nations Secretary General, 'The Impact of COVID-19 on Women' *Policy Brief* (9 April 2020) p. 2 <https://www.unwomen.org/en/digital-library/publications/2020/04/policy-brief-the-impact-of-covid-19-on-women> (accessed 13 October 2021). See also: Talha Burki 'The Indirect Impact of Covid-19 on Women' (2020) 20:8 *Newsdesk* pp. 904-905.

domestic and sexual violence, and child marriages has been reported in many states.<sup>10</sup> Also, some African states have failed to protect women from the socio-economic impacts of Covid-19.<sup>11</sup>

This article considers the role of the African Court on Human and Peoples' Rights (African Court or ACtHPR) – in strengthening women's rights protection in the continent; specifically, the legal basis and extent to which gender representation, and women's rights, have been advanced through or by the Court. The ACtHPR is 'the judicial arm of the African Union'.<sup>12</sup> It is 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<sup>13</sup> (ACtHPR Protocol). Its mandate is to interpret and apply the African Charter and other relevant human rights instruments as well as provide its opinion on legal issues related to these instruments. It is thus also tasked with interpreting and applying the African Women's Protocol that is aimed at advancing women's rights and gender equality. In fact, the African Women's Protocol specifically tasks the ACtHPR with interpretation of the Protocol.<sup>14</sup> Through this mandate, the Court can provide important insights into the Protocol's provisions and drive its implementation (and implementation of gender equality and women's rights in general). The Court is therefore a pivotal mechanism for advancing gender equality and women's rights, including in cases of violations of women's rights. It should be noted that though reference is made to women and girls/girl children in parts of this article where emphasis on the latter is necessary, the term women is used in other parts to include girls as defined in the African Women's Protocol.<sup>15</sup>

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<sup>10</sup> See generally: African Union, 'Policy Paper - GBV in Africa during COVID-19 Pandemic' (22 January 2021) <https://au.int/en/documents/20210122/policy-paper-gbv-africa-during-covid-19-pandemic> (accessed 2 September 2021); Equality Now, 'Women's Rights in Africa: Celebrating the 17th Anniversary of the Maputo Protocol during COVID-19' (11 July 2020) [https://www.equalitynow.org/womens\\_rights\\_africa\\_maputo\\_protocol\\_covid\\_19](https://www.equalitynow.org/womens_rights_africa_maputo_protocol_covid_19) (accessed 2 September 2021).

<sup>11</sup> See Equality Now (n 10).

<sup>12</sup> The ACtHPR is described as such on its website (see African Court on Human and Peoples' Rights 'Basic Information' <https://www.african-court.org/wpafc/basic-information> (accessed 25 April 2022)). It should however be noted that the judicial arm of the AU would be the envisioned African Court of Justice and Human Rights (ACJHR) should it come to practical fruition. Though the ACtHPR is currently operating as a single Court, it is undergoing structural reform, to be merged with the African Court of Justice (which is currently non-operational) and with the introduction of an international criminal law section, to form a three-sectioned ACJHR. Uncertainty remains as to the timeframe of the changes, as states have thus far failed to ratify the relevant treaty. See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted 27 June 2014 (not yet in force with no ratifications and 15 signatories) <https://au.int/en/treaties> (accessed on 15 December 2021). On the ratification challenges, see Maram Mahdi 'Africa's International Crimes Court is Still a Pipe Dream' (15 October 2019) <https://issafrica.org/iss-today/africas-international-crimes-court-is-still-a-pipe-dream> (accessed 15 December 2021).

<sup>13</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 9 June 1998, entered into force 25 January 2004, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (hereafter 'ACtHPR Protocol').

<sup>14</sup> African Women's Protocol (n 5) Article 27. Prior to the Court's operationalisation, the ACmHPR was tasked with matters of interpretation, in addition to monitoring implementation of the Protocol.

<sup>15</sup> African Women's Protocol (n 5) Article 1(k).

This article first considers the relevant legal framework and gender composition of the Court (its bench in particular). The aim is establish the legal basis for, and extent of, gender representation on the bench. The consideration of gender representation and equality on courts' bench is important, as the presence of women judges in this space, that they have historically been excluded from, enhances the legitimacy of courts and is necessary for attaining a more just rule of law.<sup>16</sup> It has been acknowledged that women 'also contribute significantly to the quality of decision-making and thus to the quality of justice itself'.<sup>17</sup> But this aspect is beyond the scope of this article. The article does not delve into the question of whether or not one could draw any correlations between the Court's gender composition and the jurisprudence, as the focus is not on the difference women judges make in relation to the quality of decisions.<sup>18</sup> Therefore, the article does not consider the effectiveness of the elected female judges as viewed through their rulings. The article then considers the Court's jurisprudence (advisory and contentious decisions on women's rights) with the aim of identifying the extent to which it has sought to enforce women's rights. Understanding the Court's strides or contribution to upholding women's representation and rights would be useful in relevant advocacy initiatives on gender equality and women's rights. Also, the Court's decisions has wide-ranging implications for advancing human rights for all and in affording justice to victims of rights violations. It should be noted that the ACtHPR's has also undertaken advocacy initiatives on women's rights through, for instance, organisation of seminars.<sup>19</sup> This has however been to a limited extent. Though the Court's advocacy initiatives are not considered in this article, they are important in raising awareness of women's rights and providing a forum for discussing challenges limiting enjoyment of women's rights. They are therefore a useful means of promoting women's rights in the continent that should be employed consistently.

## 2. WOMEN'S REPRESENTATION ON THE COURT'S BENCH

One of the principles of the AU is promotion of gender equality.<sup>20</sup> The AU recognises the need to build partnerships 'between governments and all segments of civil society, in particular women', among others.<sup>21</sup> Building on the AU Constitutive Act,

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<sup>16</sup> Vanessa Ruiz, 'The Role of Women Judges and Gender Perspective in Ensuring Judicial Independence and Integrity' <https://www.unodc.org/dohadeclaration/en/news/2019/01/the-role-of-women-judges-and-a-gender-perspective-in-ensuring-judicial-independence-and-integrity.html> (accessed 13 September 2021).

<sup>17</sup> Ibid.

<sup>18</sup> On the question of whether women judges make decisions that are different from their male counterparts and on the contributions of women judges (drawing on the experiences of African women judges) to international courts, see generally, Josephine Dawuni, 'African Women Judges on International Courts: Symbolic or Substantive Gains' (2018) 47(2) *University of Baltimore Law Review* 199-245.

<sup>19</sup> For example, in 2016, on International Women's day, it organised a seminar on the rights of women under the African Women's Protocol. The seminar was part of activities to celebrate 2016 as African Year of Human Rights with particular focus on the Rights of Women, as declared by the AU. See African Court on Human and Peoples' Rights, 'Activity Report of the African Court on Human and Peoples' Rights: 1 January – 31 December 2016', AU Executive Council: Thirtieth Ordinary Session, Doc. EX.CL/999(XXX) (22-27 January 2017) paragraph 36.

<sup>20</sup> Constitutive Act of the African Union, adopted 7 November 2000, entered into force 26 May 2001, OAU Doc. CAB/LEG/23.15 (hereafter 'AU Constitutive Act'), Article 4(l).

<sup>21</sup> Ibid, Preamble.

the AU's constitutive instrument, the principle of gender equality and representation of women is enshrined in the African Women's Protocol, requiring states parties to, inter alia, ensure equality between women and men, enforce gender equality rights, promote equal access to rights and opportunities, and 'ensure increased and effective representation and participation of women at all levels of decision-making'.<sup>22</sup> A year later, the AU called for the expansion and promotion of the principle of gender parity 'at all levels' and 'to all the other organs of the African Union' as well as the 'active promotion and protection of all human rights of women and girls'.<sup>23</sup>

The AU subsequently adopted Agenda 2063, committing to an Africa where development is 'people-driven, relying on the potential of African people, especially its women and youth and caring for children'.<sup>24</sup> The AU and African states further committed to achieving by 2063 an inclusive Africa where, inter alia: (a) 'the full potential of women' is realised; (b) gender equality is entrenched – with empowered women – in all spheres of life; (c) there is 'transformative leadership in all fields' including women; (d) there is 'full gender parity' in public and private institutions; (e) all forms of gender-based violence and discrimination in social, economic and political spheres against women and girls will have been removed; (f) 'women ... play an important role as drivers of change'; and (g) young women are the 'path breakers of the African knowledge society'.<sup>25</sup> The AU and African states believe that achieving gender equality will ensure African states' position 'amongst the best performers in global quality of life measures'.<sup>26</sup> Also that women empowerment and their 'full participation in all areas of human endeavours' will enable the African society to reach its full potential in, inter alia, development.<sup>27</sup>

To realise the above principles and aspirations, the AU adopted a Gender Strategy for the period 2018-2028 with its goal being 'full gender equality in all spheres of life'.<sup>28</sup> One of the principles on which the strategy is built is 'giving women and girls an influential voice in all spheres of life'.<sup>29</sup> The strategy calls for, inter alia, equal and fair representation of women in leadership and decision-making positions, 'at all levels', including 'in most elected official positions of the' AU<sup>30</sup> and by extension its organs and institutions.

<sup>22</sup> See, for example, African Women's Protocol (n 5) Preamble and Articles 2, 7(d), 8(d), 9(2), 13(a).

<sup>23</sup> AU Declaration on Gender Equality (n 6) pp. 1 and 3.

<sup>24</sup> African Union 'Agenda 2063: The Africa We Want' (2015) Aspiration 6: paragraphs 8 and 47-58 [https://au.int/Agenda2063/popular\\_version](https://au.int/Agenda2063/popular_version) (accessed 7 September 2021).

<sup>25</sup> Ibid, paragraphs 6, 27-28, 31, 34, 45, 47-58, 66(c)(e) and 72(k).

<sup>26</sup> Ibid, paragraph 11

<sup>27</sup> Ibid, paragraph 66(e); see also paragraph 8.

<sup>28</sup> AU Gender Strategy (n 7) p. 8.

<sup>29</sup> Ibid, p. 12.

<sup>30</sup> Ibid, pp. 10 and 17.

It is therefore fitting that the ACtHPR Protocol, though adopted prior to the AU Gender Strategy, recognises in addition to the requirement of regional representation<sup>31</sup> and personal attributes of candidates,<sup>32</sup> the need for adequate gender representation in the nomination and appointment of judges of the Court. It requires states parties to give 'due consideration ... to adequate gender representation in nomination process' of judges and the AU Assembly to 'ensure that there is adequate gender representation' in the election of judges.<sup>33</sup>

Despite the above commitments, a decade after the Court began operation,<sup>34</sup> it had not achieved gender parity on its bench. The Court was in fact identified as one of two AU organs where women were the least represented.<sup>35</sup> In the elections of judges of the ACtHPR, 'very few female candidates' were nominated by states parties for election and 'where female candidates were submitted, the candidates were not elected' despite states parties' duty to ensure adequate gender representation.<sup>36</sup>

Generally, adherence to the principle of gender representation in AU organs and institutions has always been a challenge.<sup>37</sup> In the context of the ACtHPR, this could be partly attributed to the lack of clarity on what 'adequate' gender representation entails. Put differently, the lack of a prescribed number of gender representation. Also, secondary consideration has been given to the requirement of gender representation compared with the requirement of regional balance.<sup>38</sup>

Accordingly, to ensure adherence to the requirement of adequate gender representation, the AU Executive Council decided in 2016 that, in the nomination process, '[a]t least one (1) member from each region shall be a woman'.<sup>39</sup> In line with

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<sup>31</sup> ACtHPR Protocol (n 13) Article 14(2) requires 'representation of the main regions of Africa and of their principal legal traditions'. The regional representation quota is as follows: 'East (2), Central (2), North (2) South (2), and West (2), except in cases in which a region which has been duly informed has not presented candidates' (see African Union Executive Council, 'Decision on the Modalities on the Implementation of the Criteria of Equitable Geographical and Gender Representation in AU Organs and Institutions' Decision No. EX.CL/Dec.907(XXVIII), Doc. EX.CL/953(XXVIII), Twenty-Eighth Ordinary Session Decisions (23 - 28 January 2016) paragraph 2(i)).

<sup>32</sup> ACtHPR Protocol (n 13) Article 11(1) requires that candidates be (a) nationals of AU member states, (b) jurists, (c) of high moral character and (d) with 'recognized practical, judicial and academic competence and experience in the field of human and peoples' rights'.

<sup>33</sup> ACtHPR Protocol (n 13) Articles 12(2) and 14(3).

<sup>34</sup> The ACtHPR began operation in 2006.

<sup>35</sup> African Union Executive Council 'Modalities on the Implementation of the Criteria of Equitable Geographical and Gender Representation in AU Organs and Institutions' Doc. EX.CL/953(XXVIII) Twenty-Eighth Ordinary Session Decisions (23 - 28 January 2016) paragraph 13. The other AU organ with the least female representation being the AU Commission on International Law.

<sup>36</sup> *Ibid*, paragraph 14.

<sup>37</sup> *Ibid*, paragraph 2.

<sup>38</sup> Dawuni (n 18) p. 205.

<sup>39</sup> African Union Executive Council, 'Decision No. EX.CL/Dec.907(XXVIII)' (n 31) paragraph 2(iii).

this requirement, the election of judges for that year for some regions was postponed as the relevant states had nominated only male candidates. Generally, the reasons for not nominating women are unclear. Arguably, the absence of transparency and wide publicity of the nomination process at the national level and inadequate (or lack of) consultation by governments with relevant civil society professional organisations are limiting factors to the identification of qualified women candidates. Notwithstanding, states clearly did not implement the requirement of gender equality in the nomination process.<sup>40</sup> This resulted in a skewed gender balance bench (with two women judges only), attracting criticism.<sup>41</sup> This was a concern from the Court's inception. While raising concern over the Court constantly having not more than two women judges, Justice Sophia Akuffo (then President of the Court) was however positive that the non-nomination of women judges was not intentional and should be addressed in subsequent nominations.<sup>42</sup> Hence, she consistently called on AU member states to meet their commitment to gender equality through nominating more women to the Court's bench.<sup>43</sup> In 2017, the number of women judges on the bench rose to five.<sup>44</sup> However, men judges continued to remain the majority. In 2018, however, the swearing in of other women judges saw ground-breaking progress, with the Court having a female majority bench.

Hence, the strive for improving women representation on the Court's bench paid off. 2021 marked the 15th anniversary of the Courts operationalisation, three years after achieving a gender balanced bench and little but noteworthy progress on women representation in leadership roles of the Court, with the election of a female President of the Court. Currently, the Court has a female majority bench, with seven of the 11 judges being women, including the President of the Court.<sup>45</sup> The AU's commitment to gender equality and sustained advocacy (led by women's organisations) to achieve women's equal participation in decision-making, among other regional factors and mechanisms,

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<sup>40</sup> Generally, a key challenge that the AU is faced with is implementation of its policies, including gender policies. See Babatunde Joshua Omotosho 'African Union and Gender Equality in the Last Ten Years: Some Issues and Prospects for Consideration' (2015) 5(1) *Journal of Integrated Social Sciences* 92-104, p. 97.

<sup>41</sup> See: Japhet Biegon and Magnus Killander 'Human Rights Development in the African Union during 2008' (2009) 9(1) *African Human Rights Law Journal* 295-311, p. 305; Sonya Sceats 'Africa's New Human Rights Court: Whistling in the Wind' *Chatham House International Law Briefing Paper 09/01* (March 2009) p. 11; Viljoen (n 89 ) p. 424.

<sup>42</sup> Sophia Akuffo 'The Practical relationship between the African Court on Human and Peoples' Rights and the African Union Permanent Representatives Committee' (October 2012) <https://www.african-court.org/wpafc/the-practical-relationship-between-the-african-court-on-human-and-peoples-rights-and-the-african-union-permanent-representatives-committee-justice-sophia-akuffo/> (accessed 12 January 2022).

<sup>43</sup> Kuukuwa Andam and Sena Dei-Tutu 'Sophia Akuffo: Balancing the Equities' in Josephine Jarpa Dawuni and Akua Kuenyehia (eds.) *International Courts and the African Woman Judge: Unveiled Narratives* (2018) 98-108, p. 103.

<sup>44</sup> Magnus Killander and Michael Gyan Nyarko 'Human Rights Developments in the African Union (January 2017-September 2018)' (2018) 18(2) *African Human Rights Law Journal* 732-757, p. 739.

<sup>45</sup> For a list of current and former judges of the ACtHPR, see African Court on Human and Peoples' Rights, 'Judges' <https://www.african-court.org/wpafc> (accessed 13 January 2022).

contributed to the Court's gender-balanced bench success.<sup>46</sup> The activism of Justice Akuffo also played a role.

Importantly too, the Court played a critical role through revising its Rules, incorporating the requirement of gender parity in its 2020 Rules.<sup>47</sup> This was a catalyst for women's representation in the Bureau of the Court. The 2020 Rules are aimed at, inter alia, ensuring gender parity and representation in the Court at various levels. The Court's previous Rules (the 2010 Rules) had a general provision on 'securing a balanced representation of gender' in making appointments and electing to office.<sup>48</sup> But the 2020 Rules go further with a specific provision requiring observance of the principles of gender parity and a rotation system, as far as possible, in the composition of the Bureau.<sup>49</sup> The Rules also require observance of gender parity in the composition of the Registry. Specifically, they require consideration of gender representation, as far as possible, in the appointment of the Registrar and Deputy Registrar.<sup>50</sup> In establishing committees and working groups that facilitate the Court's work, gender is one of the factors to be taken into account, as much as possible.<sup>51</sup> It is hoped that the 2020 Rules would facilitate sustainable women representation in not just the Bureau but other levels of the Court as required in the Rules. For example, gender parity is needed in the leadership positions of the Court's registry. The current Registrar (since 2012, previously deputy registrar from 2010) and Deputy Registrar (since 2014) are both men.<sup>52</sup> It is also hoped that states will foster sustained gender parity through nomination of more women. Generally, when qualified women candidates have been nominated, they have been elected.<sup>53</sup>

The Court's gender-balanced—and particularly its female majority—bench is noteworthy, in light of the glaring persistent underrepresentation of women in international courts.<sup>54</sup>

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<sup>46</sup> See generally, J. Jarpa Dawuni, 'Keeping Gender on the Agenda for International Benches: A Case Study of the African Court on Human and Peoples' Rights' in Freya Baetens (ed.), *Identity and Diversity on the International Bench: Who is the Judge* (OUP, 2020) pp. 516-537 on contributing factors to the Court's recent achievement of gender balance.

<sup>47</sup> African Court on Human and Peoples' Rights, 'Rules of Court', adopted 25 September 2020 (hereafter 'ACtHPR Rules') Rule 32.

<sup>48</sup> Africa Court on Human and Peoples' Rights 'Rules of Court' (2010) Rule 13.

<sup>49</sup> ACtHPR Rules (n 47) Rule 10(2).

<sup>50</sup> Ibid, Rule 16(2).

<sup>51</sup> Ibid, Rule 26(1).

<sup>52</sup> See African Court on Human and Peoples' Rights 'Office of the Registrar' <https://www.african-court.org/wpafc/category/registry/office-of-the-registrar/> (accessed 13 January 1978).

<sup>53</sup> In 2008 and 2010, for example, there were only women nominees, and they were elected (see PeaceWomen 'Africa: In Pursuit of gender Parity at the African Court' (2012) <https://www.peacewomen.org/content/africa-pursuit-gender-parity-african-court> (accessed 11 January 2022).

<sup>54</sup> Andreas Follesdal 'How Many Women Judges are Enough on International Courts?' (2021) *Journal of Social Philosophy* 1-23, p. 1. See also Elizabeth Odio Benito 'Symposium on Gender-Representation: gender Parity in International Courts – The Voice of an International Judge' *OpinioJuris* (14 October 2021) <http://opiniojuris.org/2021/10/04/symposium-on-gender-representation-gender-parity-in-international-courts-the-voice-of-an-international-judge/> (accessed 14 January 2021).



Some writers have however cautioned, and rightly so, that the Court's gender balanced bench success should be celebrated cautiously. This is because symbolic representation does not necessarily imply substantive representation within the Court and there needs to be corresponding presence of women judges in leadership roles of the Court (the Bureau to be specific) in order to achieve substantive representation.<sup>55</sup> Though 'women currently make up 55% of judges on the ACtHPR, they account for 35% of all judges since the Court was established'.<sup>56</sup> Following the 2021 appointments, there was a slight increase in women's representation in terms of leadership roles in the institution. Women now account for 27% as three women – two times in the president role (2012-2014 and 2021-2023) and three times in the vice president role (2008-2010 and 2010- 2012) - have thus far served (including the current president) in the Bureau of the Court compared to eight men. This reflects an increase from 20% comprising two women, compared to the Bureau position prior to 2021.

While numerical gender representation confirms in reality, substantive gender representation remains distant. Also, female judges mainstreaming since the past three years is yet to facilitate gender representation in other leadership positions of the Court. There is thus need to also ensure gender balance in the Court's leadership positions. This would also ensure that women have a leadership role in contributing to human rights protection and development in the continent. However, for the judges to be able to facilitate realisation of women's rights using jurisprudence, they have to be given the opportunity through the bringing of cases on women's rights issues and violations before the Court.

### 3. WOMEN'S RIGHTS IN THE COURT'S JURISPRUDENCE

Though the African Charter failed to give adequate attention to women's rights,<sup>57</sup> the AU and African states subsequently expressed their firm commitment to promoting, protecting and realising women's rights. For example, the AU Gender Strategy seeks to promote and protect women's rights and gender equality.<sup>58</sup> Also, states parties to the African Women's Protocol have affirmed their determination 'to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights'.<sup>59</sup>

The African Women's Protocol addresses the gap in the African Charter, providing a comprehensive normative framework on women's rights. It guarantees women's civil, political, economic, social and cultural rights, and some peoples' (group) rights as they apply

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<sup>55</sup> See for example, J. Jarpa Dawuni and Sègnonna H. Adjolohoun, 'The ACtHPR: From the Politics of Gender to the Gender of Politics? Why Women's Representation on the Bench is not Enough' *AfricaLaw* (2021) <https://africlaw.com/2021/05/26/the-acthpr-from-the-politics-of-gender-to-the-gender-of-politics-why-womens-representation-on-the-bench-is-not-enough/#more-2160> (accessed 7 September 2021).

<sup>56</sup> Ibid.

<sup>57</sup> While singling out women as a group that deserves special protection, the single provision in the African Charter that refers to women, simply require that states parties eliminate discrimination against women and ensure protection of women's rights as provided for in international treaties and declarations. See African Charter (n 1) Article 18(3).

<sup>58</sup> AU Gender Strategy (n 7) p. 12.

<sup>59</sup> African Women's Protocol (n 5) Preamble.

to women. As noted in section 1 above, it further mandates the ACtHPR to protect women's rights. Specifically, the Court is charged with interpreting the African Women's Protocol.<sup>60</sup>

The Court has a broad substantive jurisdiction, as it is not restricted to African human rights treaties. Its jurisdiction extends to providing an opinion on legal matters relating to the African Charter or other relevant human rights instruments (advisory jurisdiction).<sup>61</sup> It also extends to cases and disputes relating to interpretation and application of the African Charter, ACtHPR Protocol and any other relevant human rights instrument that have been ratified by the states concerned (contentious jurisdiction).<sup>62</sup> Hence, the Court can also address matters relating to other African regional treaties with implications for women such as the African Children's Charter that is relevant to protecting the rights of girl children, and UN human rights treaties on women's rights such as the Convention on the Elimination of Discrimination against Women (CEDAW),<sup>63</sup> if ratified by the concerned African state.

Despite its broad substantive mandate, women's rights protection in the ACtHPR's jurisprudence is very scant. The Court has, as of December 2021, dealt substantively with women's rights in one advisory matter<sup>64</sup> and one contentious matter<sup>65</sup>. The decision in these matters is considered in sections 3.2 and 3.3 below. Another case that alleged violation of, inter alia, the African Women's Protocol (Article 3 on the right to dignity and protection from violence, Article 14(1) on the right to health and Article 6 on right of access to justice) was found to be inadmissible as local remedies had not been exhausted.<sup>66</sup> The low number of women's rights cases is disappointing considering that violations of women's rights is rife in the continent.<sup>67</sup> However, the Court has not been presented with many opportunities to uphold women's rights, thus limiting its ability to improve on its women's rights jurisprudence and to adequately demonstrate its potential to uphold women's rights. The low number can be attributed to, inter alia: constraints in bringing cases (elaborated on below); inadequate awareness of the Court;<sup>68</sup> inadequate awareness and use of the African

<sup>60</sup> Ibid, Article 27.

<sup>61</sup> ACtHPR Protocol (n 13) Article 4(1).

<sup>62</sup> Ibid, Article 3(1).

<sup>63</sup> Convention on the Elimination of Discrimination against Women, adopted 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13.

<sup>64</sup> The Court has received 15 advisory opinion requests and has issued an opinion on four of them, including the opinion that addresses women's rights. See ACtHPR 'Cases – Statistics' <https://www.african-court.org/cpmt/statistic> (accessed 25 April 2022).

<sup>65</sup> The Court has received 325 contentious cases and finalised 140, including the contentious matter on girl children's and women's rights. See *ibid*.

<sup>66</sup> *Kouma and Diabaté v Mali*, Application No. 040/2016, Judgment (21 March 2018).

<sup>67</sup> Former judge/president of the ACtHPR, Sylvain Oré, has expressed his disappointment regarding the volume of litigation on women's rights taking into consideration 'the serious violations experienced by African girls and women' despite 'the massive ratification of the Maputo Protocol'. See African Union, 'Final Communiqué of the 59th Ordinary Session of the African Commission on Human and Peoples' Rights' (21 October - 4 November 2016) paragraph 10.

<sup>68</sup> See African Court on Human and Peoples' Rights, 'Activity Report of the African Court on Human and Peoples' Rights: 1 January – 31 December 2020', AU Executive Council: Thirty-Eight Ordinary Session, Doc. EX.CL/1258(XXXVIII) (3–4 February 2021) (hereafter 'ACtHPR Activity Report 2021') paragraph 45, identifying inadequate awareness as a challenge faced by the Court. The Court has thus been involved in several activities aimed at raising awareness among stakeholders (paragraph 25).

Women's Protocol,<sup>69</sup> and regional treaty bodies not making effective use of their standing before the Court to bring cases or legal issues on women's rights. Though the African Women's Protocol has received wide ratification, it is yet to attain universal ratification.<sup>70</sup> The AU views the lack of universal ratification as a 'deficit' that has 'grave consequences on the lives of women and girls in the continent', limiting full protection of women's rights in the continent.<sup>71</sup> It is generally acknowledged that failure to realise the rights in the Protocol can occur through failure to ratify it.<sup>72</sup> The non-ratification by some states is mainly based on issues relating to women and girls' sexual and reproductive health rights, particularly in the context of marriage or access to abortion.<sup>73</sup> The Protocol 'offers women in the continent a critical tool for pursuing comprehensive remedies for human rights violations'.<sup>74</sup> One of the avenues through which this can be pursued in cases of violations is the ACtHPR, subject to the relevant state's ratification of the Protocol. Hence, the AU's goal of universal ratification is an important one in the quest to uphold women's rights, ensure their full enjoyment, and facilitate access to remedies for women's rights violations. To achieve the goal of universal ratification, advocacy efforts from various sectors including regional institutions, governments and civil society organisations have to be intensified. For example, the AU should effectively implement a technical assistance programme aimed at assisting states that have not yet ratified the Protocol to overcome obstacles to its ratification. Also, governments should initiate regular national dialogues with relevant domestic stakeholders on the importance of the Protocol to their domestic constituencies and importance of ratification as part of AU member states' commitment to promote and protect human rights.<sup>75</sup>

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<sup>69</sup> See generally, Victor Oluwasina Ayeni (ed.), *The Impact of the African Charter and the Maputo Protocol in elected African States* (PULP, 2016), confirming lack of awareness and use of the African Women's Protocol and 'remedial systems in place at the supranational level to secure [rights] where domestic remedies become unavailable', and underscoring the need to increase awareness of the treaty's provisions at the domestic level and how the provisions can be used to resolve human rights problems in specific contexts. See also: Romi Sigsworth and Liezelle Kumalo, 'Women, Peace and Security: Implementing the Maputo Protocol in Africa' *Institute for Security Studies Paper 295* (July 2016) p. 20, confirming inadequate awareness of the African Women's Protocol on the ground.

<sup>70</sup> 42 of the 55 African states have ratified the Protocol. See the Protocol's ratification/accession 'Status List' <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed 18 October 2021).

<sup>71</sup> African Union, 'Slow Progress in Meeting Commitment to 2020 as the Year of Universal Ratification of Maputo Protocol' Press Release (18 November 2020) <https://au.int/en/pressreleases/20201118/slow-progress-meeting-commitment-2020-year-universal-ratification-maputo> (accessed 18 October 2021).

<sup>72</sup> Adetokunbo Johnson, 'Barriers to Fulfilling Reporting Obligations in Africa under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2021) 21(1) *African Human Rights Law Journal* 176-203, p. 178.

<sup>73</sup> African Union, 'Maputo Protocol Scorecard and Index Introduced to Monitor Implementation of Women's Rights' Press Release (23 June 2020) <https://au.int/fr/node/38758> (accessed 21 October 2021).

<sup>74</sup> Johanna E. Bond, 'Intersectionality, Women's Rights in Africa, and the Maputo Protocol' in Veronica Fynn Bruey (ed.) *Patriarchy and Gender in Africa* (Lexington Books, 2021) 47-80, p. 48.

<sup>75</sup> On measures to encourage ratification of AU treaties generally, see Tiyanjana Maluwa 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' (2012) 13 *Melbourne Journal of International Law* 1-49, p. 33-40.

### 3.1. Bringing Legal Matters/Cases on Women's Rights: Some Constraints

'[A]ccess to regional and international human rights institutions usually is beyond the reach of millions of African women suffering from discrimination, violence and oppression'.<sup>76</sup> Various factors limit the ability to bring legal matters/cases relating to women's rights before the ACtHPR. There is restrictive access to the Court for certain entities. Also, major hurdles to women's access to justice regionally include access to resources, knowledge, legal aid and proficient legal representation.<sup>77</sup> In addition, it should be re-emphasised that lack of awareness of the African Women's Protocol provisions and regional mechanisms such as the ACtHPR through which remedies for violations of the Protocol can be claimed as well as non-ratification of the Protocol in some context also limit ability to bring cases. Though the focus is on women, it is acknowledged that these factors would affect other groups as well, but women are often disproportionately affected due to, inter alia, their limited access to resources and knowledge.

The subsequent paragraphs elaborate on the questions of restrictiveness in access to the Court and legal costs/limitations on access to legal aid and representation. As evidenced from the discussion below, these constraints are not determinant factors in 'all' situations. But are relevant factors to consider.

Generally, there is restrictive access for certain entities – individuals, non-governmental organisations (NGOs) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)<sup>78</sup> – to bring cases before the Court, which hampers the Court's ability to effectively carry out its mandate. In advisory matters, the ACtHPR Protocol does not recognise standing for individuals to bring advisory opinions, hence women in their individual capacity are not able to bring such requests. While NGOs are able to do so on their behalf, the access requirements are problematic, as NGOs must show that they are (a) an African organisation and (b) recognised by the AU.<sup>79</sup> The second element excludes recognition by an organ of the AU.<sup>80</sup> Yet in practice, obtaining AU

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<sup>76</sup> Annika Rudman 'Women's Access to Regional Justice as a Fundamental Element of the Rule of Law: The Effect of the Absence of a Women's Rights Committee on the Enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 319-345, p. 321.

<sup>77</sup> Ibid. The author notes that these are also hurdles at the domestic level. However, because 'international human rights litigation is built upon the principle of state sovereignty and, thus, around the principle of exhaustion of local remedies, limitations to access on the domestic level generally prevent access at the regional level'.

<sup>78</sup> A quasi-judicial regional body and an organ of the AU, mandated to promote and protect children's rights in Africa

<sup>79</sup> ACtHPR Protocol (n 13) Article 4.

<sup>80</sup> *Socio Economic Rights and Accountability Project (SERAP)*, Request No. 001/2013, Advisory Opinion (26 May 2017) (hereafter '*SERAP Opinion*'). In its Opinion, the Court failed to adopt a broad, flexible and contextual approach allowing for recognition by the 'AU' in the ACtHPR Protocol Article 4 to be interpreted to not only mean 'the AU as a separate legal entity' but to also include 'the AU acting through its organs', resulting in it restricting access for NGOs to its advisory jurisdiction.

recognition is difficult and the criteria are not well-known and not easily accessible.<sup>81</sup> Also, many NGOs have recognition by the ACmHPR<sup>82</sup> (an AU organ), which is required when bringing contentious matters to the Court<sup>83</sup> but not sufficient when bringing advisory opinion requests. Hence, the Court has declined to give an advisory opinion in relation to requests brought by African organisations that, though recognised by the ACmHPR, have not been recognised by the AU.<sup>84</sup> Furthermore, while the ACERWC can bring advisory opinion requests as it is an organ of the AU,<sup>85</sup> it does not have standing to bring contentious cases before the Court due to the ACtHPR Protocol's silence on it. As confirmed by the Court, an amendment to the Protocol granting the Committee access to bring contentious cases is therefore required.<sup>86</sup> The Court's failure to provide specific opinion on how and when to address this gap has been followed by a strict formalistic approach by the AU,<sup>87</sup>

<sup>81</sup> Centre for Human Rights, 'African Court Rejects Centre for Human Rights and CAL Request, Leaving Political Tension within AU Unresolved' Press Statement (6 October 2017) [https://www.up.ac.za/faculty-of-law/news/post\\_2573674--press-statement-african-court-rejects-centre-for-human-rights-and-cal-request-leaving-political-tension-within-au-unresolved](https://www.up.ac.za/faculty-of-law/news/post_2573674--press-statement-african-court-rejects-centre-for-human-rights-and-cal-request-leaving-political-tension-within-au-unresolved) (accessed 7 September 2021).

<sup>82</sup> By December 2021, the ACmHPR had recognised 538 NGOs, through the granting of Observer Status to them. See African Commission on Human and Peoples' Rights, 'Combined 50th and 51st Activity Reports of the African Commission on Human and Peoples' Rights' (2022) <https://www.achpr.org/activityreports/viewall?id=53> (accessed 25 April 2022) paragraph 40.

<sup>83</sup> ACtHPR Protocol (n 13) Article 5(3).

<sup>84</sup> See for example: *Rencontre Africain pour la Défense des Droits de l'Homme (RADDHO)*, Request No. 002/2014, Advisory Opinion (28 September 2017) paragraphs 38–39; *Centre for Human Rights of the University of Pretoria (CHR) and Coalition of African Lesbians (CAL)*, Request No. 002/2015, Advisory Opinion (28 September 2017) paragraphs 46–58; *Association Africaine de Défense des Droits de l'Homme*, Request No. 002/2016, Advisory Opinion (28 September 2017) paragraphs 23–36; *Centre for Human Rights of the University of Pretoria, Federation of Women Lawyers Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association*, Request No. 001/2016, Advisory Opinion (28 September 2017) paragraphs 38–50.

<sup>85</sup> ACtHPR Protocol (n 13) Article 4 lists 'any AU organ' as one of the entities with standing to bring advisory opinion requests.

<sup>86</sup> See *African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights*, Request No. 002/2013, Advisory Opinion (5 December 2014) (hereafter '*ACERWC Opinion*').

<sup>87</sup> The AU Executive Council first called on the AU Assembly to amend Article 5(1) of the ACtHPR Protocol to include the ACERWC (African Union Executive Council, 'Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)' Decision No. EX.CL/Dec.923(XXIX), Doc. EX.CL/977(XXIX), Twenty-Ninth Ordinary Session (13-15 July 2016) paragraph 8). It then required the ACERWC to provide justifications and implications for the amendment (African Union Executive Council, 'Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)' Decision No. EX.CL/Dec.1017(XXXIII), Doc. EX.CL/1091(XXXIII), Thirty-Third Ordinary Session (28-29 June 2018) paragraph 7). It also required the AU Commission on International Law to undertake a study on the legal implications of the amendment (African Union Executive Council, 'Decision on the Reports of the Specialised Technical Committees (STCs)' Decision No. EX.CL/Dec.1032(XXXIV), Thirty-Fourth Ordinary Session (7- 8 February 2019) paragraph 32; African Union Executive Council, 'Decision on the Activity Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)' Decision EX.CL/Dec.1043(XXXIV), Doc. EX.CL/1125(XXXIV), Thirty-Fourth Ordinary Session (7-8 February 2019) paragraph 9). The study has been completed (African Union Executive Council, 'Decision on the Activity Report of the African Union Commission on International Law (AUCIL)', Doc. EX.CL/1208(XXXVI), Decision No. EX.CL/Dec. 1083(XXXVI), Thirty-Sixth Ordinary Session (06 - 07 February 2020) paragraph 6). Yet the gap remains, as at time of writing.

resulting in protracted delays of seven years (and counting) in addressing the gap. As 'women' comprise 'persons of female gender, including girls',<sup>88</sup> this is a limitation on the ACERWC's ability to effectively protect girl children's rights through seeking binding remedies from the ACtHPR in cases of violations of their rights.

Individuals and NGOs also face restrictive access in approaching the Court *directly* in contentious matters. First, NGOs must have observer status with the ACmHPR. This condition is unnecessary, as the ACmHPR that grants this status does not apply such a restriction in terms of cases brought before it by NGOs.<sup>89</sup> Though burdensome, the observer status with ACmHPR requirement has not been an actual inhibitor to direct access.<sup>90</sup> Second, states, in addition to ratifying the ACtHPR Protocol, must explicitly permit individuals and NGOs to bring a case before the Court, through the making of an Article 34(6) declaration by the state.<sup>91</sup> States parties have shown unwillingness to do so, evidenced by the fact that only eight out of 33 states parties have entered such a declaration<sup>92</sup> and four others initially entered the declaration but withdrew it following the Court's decisions against them in cases brought by individuals and NGOs.<sup>93</sup> The restrictive access for NGOs to bring contentious cases is a serious inhibitor to access, considering the already restrictive access for NGOs under the Court's advisory jurisdiction. The restrictiveness, it has been argued, 'is a serious obstacle in advancing women's rights through the Human Rights Court' considering that 'NGOs are most likely to advocate on behalf of African women'.<sup>94</sup> While individuals and NGOs have generally made use of the direct access granted to them through an Article 34(6) declaration (with 301 applications from individuals and 21 applications from NGOs as at time of writing), the number of cases involving women's rights remains miniscule. One could attribute this to the other factors explained above that have contributed to the low number of cases on women's rights. Furthermore, the opportunity exists for women and NGOs acting on their behalf to access the Court *indirectly* through the ACmHPR. However, the

<sup>88</sup> African Women's Protocol (n 5) Article 1(k).

<sup>89</sup> Frans Viljoen, *International Human Rights Law in Africa* 2 ed (OUP, 2012) p. 430.

<sup>90</sup> Frans Viljoen 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 63-98, p. 75.

<sup>91</sup> ACtHPR Protocol (n 13) Article 5(3). The Court has therefore declined to consider a case filed by individuals or NGOs where the relevant state has not entered the Article 34(6) declaration. See for example, *Yogogombaye v Senegal*, Application No. 001/2008, Judgment on Jurisdiction (15 December 2009)

<sup>92</sup> See African Court on Human and Peoples' Rights, 'Basic Information' (n 12). The 33 states parties are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Democratic Republic of Congo, Gabon, Gambia, Ghana, Guinea-Bissau, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Madagascar, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Tanzania, Togo, Tunisia and Uganda. The eight states that have entered the art 34(6) declaration are: Burkina Faso, Ghana, Guinea-Bissau, Malawi, Mali, Niger, Gambia and Tunisia.

<sup>93</sup> The states that have withdrawn their Article 34(6) declaration are: Rwanda, Tanzania, Benin and Cote d'Ivoire. On the questionable grounds they advanced for the withdrawal, see Lilian Chenwi, 'The Advisory Proceedings of the African Court on Human and Peoples' Rights' (2020) 38(1) *Nordic Journal of Human Rights* 61-77, p. 62 (footnote 6).

<sup>94</sup> Karen Stefiszyn, 'The African Union: Challenges and Opportunities for Women' (2005) 5 *African Human Rights Law Journal* 358-386, p. 383.

Commission has failed to make effective use of its complementarity relationship with the Court. It has failed thus far to bring advisory opinion requests (the reason is unclear) and has only brought three contentious cases to the Court, despite often receiving rights violations complaints. The Commission's failure has been identified as one of the main barriers of access to the Court.<sup>95</sup>

It is important that the constraints to access are addressed so as to facilitate the bringing of cases on women's rights before the Court. Otherwise, women's right of access to justice – which is 'essential' to the realisation of women's rights and 'a fundamental element of the rule of law'<sup>96</sup> – is hampered.

As regards legal costs/legal aid and representation, the AU has acknowledged that '[r]ealisation of women's rights is hampered by high cost of legal fees' and '[f]ree legal aid to women is rare, provided mainly by civil society organisations'.<sup>97</sup> As noted above, major hurdles to women's access to justice nationally and regionally, include access to legal aid and proficient legal representation.<sup>98</sup>

The ACtHPR does not charge any fees for filing applications but unless the Court decides otherwise, each party bears its own legal costs if any.<sup>99</sup> But litigation before the Court goes beyond the filing of an application. It is 'an expensive exercise', including costs of legal representation and travel expenses.<sup>100</sup> Hence, though registration of a case is free, there are other legal costs involved. It is thus commendable that, in the interest of justice, the Court may provide free legal representation to any party.<sup>101</sup> The Court is required to maintain its own Legal Aid Scheme and to collaborate with the AU Commission in managing the AU Legal Aid Fund for African Human Rights Organs.<sup>102</sup> The Court has set up its Legal Aid Scheme but provision of free legal assistance through the scheme is subject to resource availability.<sup>103</sup> Unfortunately, the Court suffers from resources (including financial) constraints and the AU Legal Aid Fund that would also fund legal assistance has not been operational. The Court thus called on the AU Assembly to ensure the fund's establishment in 2021.<sup>104</sup> In response, the AU Executive Council adopted

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<sup>95</sup> Sidney Tambasi Netya and Cynthia Gathoni Miano 'Reflections on Direct Access to the African Court on Human and Peoples' Rights: A Cul De Sac?' (2021) 6(1) *Strathmore Law Review* 103-136 p.136. The other main barrier identified being reluctance by states to the Article 34(6) declaration and withdrawal of such declaration by some states.

<sup>96</sup> Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 33 on Women's Access to Justice' UN Doc. CEDAW/C/GC/33 (3 August 2015) paragraph 1.

<sup>97</sup> AU Gender Strategy (n 7) p. 42.

<sup>98</sup> Rudman (n 76) p. 321.

<sup>99</sup> ACtHPR Rules (n 47) Rule 32.

<sup>100</sup> Viljoen (n 88) 444.

<sup>101</sup> ACtHPR Protocol (n 13) Article 10(2).

<sup>102</sup> ACtHPR Rules (n 47) Rule 31(3)(4).

<sup>103</sup> African Court on Human and Peoples' Rights 'Fees and Legal Aid' <https://www.african-court.org/wpafc/fees-and-legal-aid/> (accessed 28 December 2021).

<sup>104</sup> ACtHPR Activity Report 2021 (n 68) paragraphs 44 and 48.

a decision in which it, again, urged 'the Chairperson of the AUC, in accordance with previous Executive Council Decisions, to take all necessary measures to operationalize the Legal Aid Fund, and to this end,' invited and encouraged 'all Member States of the Union, to make generous voluntary contributions to the Fund to ensure its sustainability and success'.<sup>105</sup> Considering the aforesaid, the Court's awarding of legal aid in all cases where the interest of justice requires is not guaranteed or could result in delays, due to limited resources. Hence, the high cost of legal fees/access to legal aid and representation is a relevant factor, as it could limit or delay access to justice in some instances. However, it is not a determinant factor considering the possibility of being awarded legal aid. It could be argued that the dearth of women's rights cases at the Court's level is not so much about legal costs but individuals and NGOs (that have direct access) or regional treaty bodies not bringing cases or legal issues (as applicable) before the Court. This is a plausible reality considering that cases on women's rights before other African regional or sub-regional human rights bodies/courts are also limited, compared to other cases. A contributing factor could be limitations to access legal aid and representation at the domestic level generally, which then prevents potential indigent litigants from exhausting domestic remedies and thus prevents them from access at the regional level.<sup>106</sup> Notwithstanding, the ACtHPR considers access to legal aid, among other factors, in assessing whether an applicant is required to exhaust local remedies or be exempted from the rule.

With the opportunities it has been presented with to address women's rights, the Court has made petite but noteworthy strides in relation to the protection of women's rights. Specifically, it has sought to protect the rights of poor women and marginalised women, and the marriage and inheritance rights of women (including girl children and those born out of wedlock).

### **3.2. Protection of the Rights of Poor and Marginalised Women**

Globally, women including girls, 'represent the majority of the poor in most regions and among some age groups'.<sup>107</sup> They are economically, socially and culturally disadvantaged, are systematically denied opportunities and rights, and face structural and other forms of marginalisation.<sup>108</sup> The situation of women has been exacerbated by Covid-19, with measures in response to the pandemic disproportionately affecting the poor, especially poor women and girls.<sup>109</sup> The AU has confirmed that, in Africa, women

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<sup>105</sup> African Union Executive Council, 'Decision on the Activity Report of the African Court on Human and Peoples' Rights' Decision No. EX.CL/Dec.1112(XXXVIII) Thirty-Eight Ordinary Session (3-4 February 2021) Doc. EX.CL/1258(XXXVIII) paragraph 10.

<sup>106</sup> See Viljoen (n 89) 444 and Rudman (n 76) 321 confirming, in the African context, the challenge of access to legal aid and representation at domestic level; with Rudman stating its ripple effect at the regional level.

<sup>107</sup> World Bank Group, *Poverty and Shared Prosperity 2020: Reversals of Fortune* (World Bank, 2020) pp. 9-10, 25, 121, 125, 145 and 149.

<sup>108</sup> Amaka Theresa Oriaku Emordi, Papiya Sengupta and Hope A. Ikednma, 'Women, Marginalisation and Politics in Africa and Asia' (2021) 2(2) *Integrity Journal of Arts and Humanities* 27-35, pp. 27-28.

<sup>109</sup> World Bank Group (n 108) pp. 7-8, 100 and 172; Gabrielle Leite and Samrat Maskey, 'Covid-19 is Driving Women and Girls Deeper into Poverty' (UN Women, 17 October 2020) <https://data.unwomen.org/features/covid-19-driving-women-and-girls-deeper-poverty> (accessed 8 September 2021).



‘remain the majority of the poor, the dispossessed, the landless, the unemployed, those working in the informal sector, and those shouldering the burden of care’.<sup>110</sup> It is therefore important that poor and marginalised women are accorded adequate protection as required under African regional human rights law.

Article 24 of the African Women’s Protocol, for example, obliges states parties to ‘ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs’. The provision thus establishes a ‘composite obligation’, requiring states parties ‘to create an environment where poor and marginalised women can fully enjoy all their human rights’.<sup>111</sup>

Yet, poor and marginalised women in Africa are unable to fully enjoy their rights due to, inter alia, vagrancy laws that many African states retain. Based on their nature and application, vagrancy laws violate Article 24 of the African Women’s Protocol, as established by the ACtHPR in *PALU Vagrancy Opinion*.<sup>112</sup> This was in response to an advisory opinion request on the compatibility of vagrancy laws with African human rights standards, including Article 24 of the African Women’s Protocol. This section of the article considers the Court’s holdings in relation to not just the Protocol but other regional standards, as they are also of relevance to women, who are disproportionately affected by vagrancy. The request was submitted by Pan African Lawyers Union (PALU), followed by five amici submissions and one state (Burkina Faso) submission, all pointing to the incompatibility of vagrancy laws with African human rights standards.<sup>113</sup> As PALU had a memorandum of understanding (MoU) with the AU – ‘to co-operate in undertaking activities concerning the rule of law, promoting peace and integration, and protecting human rights in the continent’ – this was sufficient in meeting the recognition by the AU requirement for it to have access to the Court’s advisory jurisdiction.<sup>114</sup> In the words of the Court, ‘an MoU is an acceptable way by which the AU recognises non-governmental organisations’.<sup>115</sup>

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<sup>110</sup> AU Gender Strategy (n 7) p. 25.

<sup>111</sup> *Pan African Lawyers Union (PALU)*, Request No. 001/2018, Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples’ Rights and Other Human Rights Instruments Applicable in Africa (ACtHPR, 4 December 2020) (hereafter ‘*PALU Vagrancy Opinion*’) paragraph 137.

<sup>112</sup> See *ibid*, generally.

<sup>113</sup> *Ibid* paragraphs 1 and 11-12. The ACmHPR submitted its Principles on the Decriminalisation of Petty Offences in Africa for consideration when addressing the request (see paragraphs 10 and 53). The Principles on the Decriminalisation of Petty Offences in Africa, adopted 25 October 2018 <https://www.achpr.org/legalinstruments/detail?id=2> (accessed 8 September 2021) seeks to ‘guide States on the decriminalisation of petty offences in Africa in terms of Articles 2, 3, 5 and 6 of the African Charter’ through establishing ‘standards against which petty offences created by law or by-law should be assessed’ and promoting ‘measures that can be taken by State Parties to ensure that such laws do not target persons based on their social origin, social status or fortune by criminalising life-sustaining activities’. Examples of petty offences stated in the Principles include ‘being a vagrant’.

<sup>114</sup> *Ibid*, paragraph 24.

<sup>115</sup> *Ibid*.

It is generally recognised that vagrancy laws undermine human rights.<sup>116</sup> In Africa, despite decisions by some sub-regional and domestic courts finding vagrancy laws to be unconstitutional, they are still retained in several states.<sup>117</sup> The penal codes of 'at least' 18 African states contain vagrant offences.<sup>118</sup> A *vagrant* is defined in vagrancy laws in Africa as "any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession," a "suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself" or "someone who loiters or is idle and who does not have a visible means of subsistence and cannot give a good account of him or herself".<sup>119</sup> *Vagrancy*, therefore, as defined by the Court, refers 'to various offences ... including but not limited to: being idle and disorderly, begging, being without a fixed abode, being a rogue and vagabond, being a reputed thief and being homeless or a wanderer'.<sup>120</sup> Put differently, it refers to 'the state or condition of wandering from place to place without a home, job or means of support'.<sup>121</sup> It is therefore a 'misconduct brought about by a perceived socially harmful condition or mode of life'.<sup>122</sup>

Hence, *vagrancy laws* refers to laws that 'criminalise the status of individuals as being poor, homeless or unemployed as opposed to specific reprehensible acts'.<sup>123</sup> They are justified, from a sociological perspective, on three main reasons: (i) 'to curtail the mobility of persons and criminalise begging, thereby ensuring the availability of cheap labour to land owners and industrialists whilst limiting the presence of undesirable persons in the cities;' (ii) 'to reduce the costs incurred by local municipalities and parishes to look after the poor'; and (iii) 'to prevent property crimes by creating broad crimes providing wide discretion to law enforcement officials'.<sup>124</sup> However, the problematic nature of the laws does not only lie in them criminalising the status of certain individuals, but also allowing for the 'deportation to another area' of persons that are declared 'vagrant or rogue and vagabond'.<sup>125</sup> Furthermore, the laws permit the arrests of persons without warrants on the basis that they lack 'means of subsistence and cannot give satisfactory account' of themselves.<sup>126</sup> The laws are therefore seen as 'overly broad' for giving 'too

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<sup>116</sup> See for example Office of the United Nations High Commissioner for Human Rights and UN Habitat, 'The Right to Adequate Housing' Fact Sheet No. 21(Rev.1) p. 22 [https://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf) (accessed 12 October 2021), stating that vagrancy laws 'have a direct impact on' the rights, including 'physical and psychological integrity', of homeless people.

<sup>117</sup> *PALU Vagrancy Opinion* (n 111) paragraphs 60-62.

<sup>118</sup> *Ibid*, paragraph 60.

<sup>119</sup> *Ibid*, paragraph 69. In defining 'vagrant', the Court also drew from Black's Law Dictionary, which defines it as 'anyone belonging to the several classes of idle or disorderly persons, rogues and vagabonds', including anyone who does not have 'a settled habitation', 'strolls from place to place', is 'homeless, idle wanderer' (paragraph 57).

<sup>120</sup> *Ibid*, paragraphs 57 and 58.

<sup>121</sup> *Ibid*, paragraph 57.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid*, paragraph 3.

<sup>124</sup> *Ibid*, paragraph 59.

<sup>125</sup> *Ibid*, paragraphs 3 and 5.

<sup>126</sup> *Ibid*, paragraph 5. This is the case in at least six African states (paragraph 135).

wide a discretion' to law enforcement in deciding who to arrest, and in the absence of a criminal act.<sup>127</sup> This wide discretion results in arbitrary and discrimination invocation of vagrancy laws based on officials' social stigma and prejudice, targeting the poor.<sup>128</sup> Yet, African regional human rights law prohibits arbitrary arrests and detention.<sup>129</sup>

As regards the impact of vagrancy laws on women and their rights, vagrancy laws target those that are poor and marginalised, particularly women, sex workers and victims of domestic violence.<sup>130</sup> Women are particularly at risk of arrest and prosecution under vagrancy laws because they are 'disproportionately affected by poverty'. In their attempt to earn a living, 'often engage in activities such as street trading'. Upon arrest, they often spend longer time in pre-trial detention due to their inability to pay fines, bail or legal representation'.<sup>131</sup> Accordingly, as the ACtHPR held, vagrancy laws' authorisation of the arrest of poor women without a warrant on the basis of them lacking a means of subsistence or not giving a satisfactory account of themselves undermine Article 24 of the African Women's Protocol, which affords protection to poor women.<sup>132</sup> It also held that the application of vagrancy laws results in violation of women's rights to equality, non-discrimination and dignity.<sup>133</sup>

The Court however elaborated on vagrancy laws' violation of the right to equality and non-discrimination with reference to Articles 2 and 3 of the African Charter and Article 3 of the African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>134</sup> and its violation of the right to dignity with reference to Article 5 of the African Charter. Though the Court's ruling on them was from a general perspective (that is, not specifically in relation to women and girls), the provisions and the Court's holdings are of relevance to protection of the rights of women and girl children to non-discrimination and dignity. As accentuated by the Court, the right to non-discrimination requires equal treatment in law and practice.<sup>135</sup> Since not all forms of differentiation are unlawful, any differentiation must be based on 'objective and reasonable' grounds, be 'necessary' and be 'proportional'.<sup>136</sup> However, the ACtHPR did not find any reasonable justification for the distinction in law between vagrants and other members of the population, a distinction that is based on economic status of those classified as vagrants and deprives them of their right to equality before the law.<sup>137</sup> The arrest, without a warrant, and detention of

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<sup>127</sup> Ibid, paragraph 4

<sup>128</sup> Ibid, paragraphs 47, 42 and 83-87.

<sup>129</sup> See for example African Charter (n 1) Article 6.

<sup>130</sup> Ibid, paragraph 52.

<sup>131</sup> Ibid, paragraphs 130 and 133.

<sup>132</sup> Ibid, paragraphs 139-140 and 155(v).

<sup>133</sup> Ibid, paragraph 138.

<sup>134</sup> African Charter on the Rights and Welfare of the Child, adopted 1 July 1990, entered into force 29 November 1999, OAU Doc. CAB/LEG/24.9/49.

<sup>135</sup> *PALU Vagrancy Opinion* (n 111) paragraph 66.

<sup>136</sup> Ibid, paragraph 67.

<sup>137</sup> Ibid, paragraphs 70 and 72-73

vagrants was found to be 'largely unnecessary in achieving the purpose of preventing crimes or keeping people off the streets' since there is often no connection between them and the commission of the criminal offence, and is 'a disproportionate response to socio-economic challenges'.<sup>138</sup> The Court thus held that the formulation and application of vagrancy laws violates the rights to equality and non-discrimination in the African Charter. This is because they, inter alia, criminalise the status of an individual, facilitate discriminatory and disproportionate treatment of the marginalised and underprivileged in society and deprives them of their right to equality before the law.<sup>139</sup> The Court's ruling in this regard has been welcomed, for broadening the prohibited grounds of discrimination to include poverty, and for recognising intersectional vulnerability, bringing to light how laws historically inflict and exacerbate forms of vulnerability.<sup>140</sup>

In the context of children generally (thus including the girl child), the Court further found that the enforcement of vagrancy-related laws that result in the arrest, detention and forcible relocation of children is in breach of children's right to non-discrimination in Article 3 of the African Children's Charter.<sup>141</sup> This is based on the disproportionate effect that arbitrary arrests have on marginalised and poor children. For example, street children lose livelihood means upon their forcible removal, children in conflict with vagrancy laws receive less favourable treatment compared to other children in society, and the arrest, detention and forcible removal of their parents or care givers destabilises the family and causes financial problems, with negative effect on children's rights.<sup>142</sup> Based on the incompatibility of vagrancy laws with children's right to non-discrimination, the arrest, detention and relocation of children on the basis of the laws/vagrancy offences also breaches the best interests of the child principle in article 4(1) of the African Children's Charter.<sup>143</sup> This is 'a cross-cutting principle which applies to children, irrespective of status, in diverse circumstances'.<sup>144</sup>

On the right to dignity, the Court also considered that the right is inherent in all without distinction and includes the right to enjoy a decent life.<sup>145</sup> It found vagrancy laws to be incompatible with the right to human dignity under Article 5 of the African Charter, based on their use of terms like 'vagabonds', 'rogue', 'disorderly' and 'idle' to label people. The Court viewed this as reflective of 'an outdated and largely colonial perception of individuals without any rights and dehumanizes and degrades individuals with a perceived lower status'.<sup>146</sup> The then forceful relocation of the labelled individuals

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<sup>138</sup> Ibid, paragraphs 72 and 75.

<sup>139</sup> Ibid, paragraphs 75 and 155(iii).

<sup>140</sup> For further reading on this, see Anneke Meerkotter 'Vagrancy Laws and International Labor Standards: African Reform of Criminal Laws' (2021) 7 *International Labor Rights Case Law* 196-202, pp. 199-201.

<sup>141</sup> Ibid, paragraph 120 and 155(iv).

<sup>142</sup> Ibid, paragraphs 117- 119.

<sup>143</sup> Ibid, paragraphs 123 and 155(iv).

<sup>144</sup> Ibid, paragraph 122.

<sup>145</sup> Ibid, paragraphs 78 and 80.

<sup>146</sup> Ibid, paragraph 79.

also contradicts Article 5, as it vilifies their dignity and, if there is use of force in the relocation process, amounts to physical abuse.<sup>147</sup> The laws are also incompatible with the right to dignity on the basis of their unlawful interference with individuals' efforts to build, maintain and enjoy a decent life and for permitting arbitrary arrest (arrests without warrants).<sup>148</sup>

The Court also found arrests, detention and forcible relocation of vagrants to be in violation of the right to protection of the family guaranteed in Article 18 of the African Charter.<sup>149</sup> This right is of particular importance to women, as one of the duties placed on states in realising the right is to eliminate discrimination against women and protect women's rights. The Court's ruling on the right was however from the perspective of the family in general and not women in particular. The ruling is however of relevance to women who are breadwinners and their rights. It found a violation on the basis of, inter alia, separation of families and deprivation of emotional and financial support for other family members that depend on the arrested person.<sup>150</sup> The Court took into consideration the incompatibility of vagrancy laws with other rights in arriving at this conclusion, since not all arrests and detention based on law are per se impermissible.<sup>151</sup>

In addition and of relevance to advocacy efforts on women's and girl children's rights, as women are among the groups disproportionately affected by vagrancy laws, is the ACtHPR holdings on vagrancy laws' incompatible with other rights in the African Charter and African Children's Charter. This was however also from a general as opposed to a women perspective, as the issues were raised generally and not specifically in relation to women. But again of relevance to women as vagrancy laws disproportionately affects their rights as confirmed by the Court. Due to the 'overly broad and ambiguous nature' of vagrancy laws, resulting in unclear conditions and reasons for arrest and detention, the Court found arrests based on such laws to be arbitrary, especially if without a warrant. Thus in breach of the right to liberty guaranteed in Article 6 of the African Charter.<sup>152</sup> The application of vagrancy laws also breach the right to fair trial guaranteed in Article 7 of the African Charter. Specifically, the Court found law enforcement officers' arrest of individuals under laws and soliciting information from them regarding possible criminal culpability to be at odds with the right to presumption of innocence. Hence a violation of Article 7 of the African Charter which guarantees this right.<sup>153</sup> Forcing or exerting undue influence on those arrested (sometimes arbitrarily) under vagrancy laws to explain themselves in relation to their perceived status (as well as regarding crimes not related to vagrancy) also amounts to coercing them to make self-incriminating statements, in breach

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<sup>147</sup> Ibid, paragraph 81.

<sup>148</sup> Ibid, paragraphs 80 and 82.

<sup>149</sup> Ibid, paragraphs 107 and 155(iii).

<sup>150</sup> Ibid, paragraph 105.

<sup>151</sup> Ibid, paragraph 106.

<sup>152</sup> Ibid, paragraphs 86-87 and 155(iii).

<sup>153</sup> Ibid, paragraph 94

of Article 7, as the African Charter implicitly proscribes self-incrimination.<sup>154</sup> Vagrancy laws are also incompatible with children's fair trial rights guaranteed in Article 17 of the African Children's Charter, as the lack of clarity and ambiguity in vagrancy laws result in basic fair trial guarantees, such as an arrest being based on reasonable ground and arrests with a warrant, not being complied with.<sup>155</sup> The enforcement of vagrancy laws further breach the right to freedom of movement in Article 12(1) of the African Charter.<sup>156</sup> Though limitation of this right is prescribed by vagrancy laws, the laws however fail to meet the requirements of necessity and consistency with other rights, as they are often used for crime-prevention purposes, yet other less-restrictive means exist for the prevention of crime that do not infringe on freedom of movement, including provision of 'shelter for the homeless' and 'vocational training for the unemployed'.<sup>157</sup>

Following its finding that vagrancy laws violate various rights, including the rights of women and children, the ACtHPR then elucidated on states' obligation to amend such laws, and the nature of the obligation.<sup>158</sup> The Court opined that states' positive obligation under the African Women's Protocol, African Charter, and African Children's Charter is to adopt 'all necessary measures including the adoption of legislative and other measures in order to give full effect' to the rights guaranteed in the instruments.<sup>159</sup> This obligation requires states to, within reasonable time, review and amend or repeal all their vagrancy and related laws in order to ensure their conformity with these treaties.<sup>160</sup> However, necessary measures to this effect must be taken 'in the shortest time possible'.<sup>161</sup>

The ACtHPR has demonstrated its role in protecting women's rights through not only finding laws that violate their rights to be incompatible with African regional human rights standards but also requiring states to do away with such laws. The influence or reach of an advisory opinion is much wider compared to decisions in contentious cases that are binding on the specific parties to the disputes. Hence, if complied with, the rights of poor and marginalised women and girls in Africa, among other vulnerable groups/ persons affected by vagrancy laws as well as their mental and physical integrity would be safeguarded. The Court's role in ensuring this opinion results in real change on the ground includes monitoring and noting, in its regular report to the AU Assembly, the extent of compliance and recommending necessary actions by the Assembly and African states. Concerted regional and domestic advocacy initiatives on decriminalisation of poverty and protection of women's rights are also necessary.

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<sup>154</sup> Ibid, paragraphs 92-93 and 155(iii).

<sup>155</sup> Ibid, paragraph 128 and 155(iv).

<sup>156</sup> Ibid, paragraphs 102 and 155(iii).

<sup>157</sup> Ibid, paragraphs 99-101.

<sup>158</sup> Ibid, paragraph 152.

<sup>159</sup> Ibid, paragraphs 149-151 and 153.

<sup>160</sup> Ibid, paragraphs 154 and 155(vi).

<sup>161</sup> Ibid, paragraph 155(vi).

### 3.3. Protection of women's marriage and inheritance rights

Prevalent denial of women's right to inherit property and land has been identified as a significant impediment to the realisation of women's rights in Africa.<sup>162</sup> At least '125 million girls and women' in the African continent have undergone child marriage.<sup>163</sup> The Covid-19 pandemic has exacerbated the situation. It has had a disproportionate impact on the socio-economic welfare of African women and girls, 'deepening pre-existing inequalities and structural injustices' and causing a considerable increase in child marriages, among other abuses experienced by women and girls.<sup>164</sup> Strengthening protection of women's marriage and inheritance rights is thus crucial.

The ACtHPR sought to enforce women's marriage and inheritance rights and state duty to eliminate harmful practices that negatively affect women's rights in *APDH and IHRDA* – a contentious case against Mali, submitted by two NGOs (Association pour le progrès et la défense des droits des femmes maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHRDA)).<sup>165</sup> The case concerned a challenge to Mali's Family Code of 2011 on the basis of its incompatibility with relevant international human rights standards.

It should be noted that it took just over four and a half years following the adoption of the challenged law for the case to be brought before the ACtHPR, but the Court adopted a flexible approach to interpreting the admissibility requirement of submission 'within a reasonable period',<sup>166</sup> taking the particular circumstances of the case into consideration in finding this long period to be reasonable.<sup>167</sup> Specifically, the Court considered 'that the Applicants needed time to properly study the compatibility of the law with the many relevant international human rights instruments to which the Respondent State is a Party' and 'given the climate of fear, intimidation and threats that characterised the period following the adoption of the law on 3 August 2009, it is reasonable to expect the Applicants to have been affected by that situation as well'.<sup>168</sup>

<sup>162</sup> Abby Morrow Richardson, 'Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform' (2004) 11(2) *Human Rights Brief* 19-22.

<sup>163</sup> UN Women, 'Realizing the African Union Campaign to End Child Marriage: Emerging Lessons from Child Marriage Programming in Malawi and Zambia' Policy Paper (2020) p. 8 <https://www2.unwomen.org/-/media/field%20office%20africa/attachments/publications/2020/10/policy-paper-emerging-lessons-from-child-marriage-programming-in-malawi-and-zambia-en.pdf?la=en&vs=1022> (accessed 17 September 2021)..

<sup>164</sup> African Union, UN Commission Economic Commission for Africa (UNECA) and UN Women 'Gender Equality and Women Empowerment (GEWE)' *Quarterly Newsletter*, Issue No. 02 (February 2021) p. 2.

<sup>165</sup> *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v Mali*, Application No. 046/2016, Judgment (11 May 11 2018) (hereafter '*APDH and IHRDA*').

<sup>166</sup> Provided for in African Charter (n 1) Article 56(6).

<sup>167</sup> *APDH and IHRDA* (n 165) paragraphs 52-54.

<sup>168</sup> *Ibid*, paragraph 54.

On marriage rights, Mali's Family Code not only set the minimum age of marriage for girls at 16, with possibility for girls to be married at 15 years of age where compelling reasons exist, but also differentiated between girls and boys by setting the minimum age of marriage for boys at 18.<sup>169</sup> Article 6(b) of the African Women's Protocol and Article 21(2) of the African Children's Charter recognise 18 years as the minimum age of marriage for both boys and girls, and the latter defines a child in Article 2 as someone below 18 years of age. Despite being a state party to these treaties, Mali failed to comply with its obligations 'to take all appropriate measures to ... guarantee the minimum age for marriage at 18 years', to ensure that the best interests of the child is the 'primary consideration' in all matters affecting the child and to prohibit child marriage.<sup>170</sup> The Court therefore found a violation of Article 6(b) of the African Women's Protocol and Articles 2, 4(1) and 21 of the African Children's Charter.<sup>171</sup> Furthermore, the Court found that the manner in which religious marriages took place posed a 'serious risks that may lead to forced marriages and perpetuate traditional practices that violate international standards' on age of marriage and the parties' consent.<sup>172</sup> This was because Mali's Family Code did not require that religious ministers who celebrate marriages verify the parties' consent<sup>173</sup> and allowed for religious and customary laws on consent to be applied in the marriage celebration procedure.<sup>174</sup> The right of 'free consent to marriage' was thus not upheld, in violation of Article 6(a) of the African Women's Protocol and Article 16(1)(b) of the CEDAW.<sup>175</sup>

On inheritance rights, Mali's Family Code allowed for the application of religious and customary law in inheritance matters as the default law, which was of concern because under Islamic law, a woman gets 'half of the inheritance a man receives' and 'children born out of wedlock', unlike children born in wedlock, only get inheritance 'if their parents so desire'.<sup>176</sup> The Court thus found that the Islamic law and customary practices on inheritance contravened the right to equitable share in inheritance of property in Article 21(2) of the African Women's Protocol, and the right to non-discrimination and the duty to give primary consideration to the best interest of the child in inheritance matters guaranteed in Articles 3 and 4 of the African Children's Charter.<sup>177</sup> As the practices are discriminatory and undermine women and children's rights, the Court also found a violation of the right to non-discrimination in Article 2 of the African Women's Protocol and Article 16(1) of the CEDAW, and a violation of Mali's obligation to eliminate harmful practices or traditions towards women in Article 2(2) of the African Women's Protocol, Articles 1(3) and 21 of the African Children's Charter and Article 5(a) of the CEDAW.<sup>178</sup>

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<sup>169</sup> Ibid, paragraphs 76-77.

<sup>170</sup> Ibid, paragraphs 7-9 and 75.

<sup>171</sup> Ibid, paragraphs 78 and 135(v).

<sup>172</sup> Ibid, paragraphs 94-95.

<sup>173</sup> In contrast, a civil status officer was required to verify consent or face sanctions for non-verification.

<sup>174</sup> *APDH and IHRD* (note 165) paragraphs 89-93 and 95.

<sup>175</sup> Ibid, paragraph 135(vi).

<sup>176</sup> Ibid, paragraphs 111-112.

<sup>177</sup> Ibid, paragraphs 113-115.

<sup>178</sup> Ibid, paragraphs 120-125 and 135(vii).



The significance of this decision lies in the fact that it is the first decision on the African Women's Protocol, a treaty that has been underused in rights claims. The decision therefore gives visibility to the Protocol and its practical usefulness in challenging social and traditional realities (including laws and practices) that lead to discrimination against women and that manifest in violations of their rights.

The decision is also reflective of the Court's competence to ask states to amend impugned legislation that violate rights. The Court ordered Mali 'to amend the impugned law, harmonise its laws with the [applicable] international instruments, and take appropriate measures to bring an end to the violations established'.<sup>179</sup> It also required Mali to comply with its obligation under Article 25 of the African Charter 'to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as the corresponding obligations and duties are understood'.<sup>180</sup> The Court considered the finding of a violation itself to be 'a form of reparation for the Applicants'.<sup>181</sup>

The real impact of the decision is dependent on Mali's compliance with it. Mali was ordered to report on implementation of the above orders 'within a reasonable period which, in any case, should not be more than two (2) years from the date of' the judgment.<sup>182</sup> However, in its latest activity report to the AU considered in February 2022, the ACtHPR reported non-compliance, adding that Mali is yet to report on measures taken to comply with the Court's judgment (with the extended deadline to report on compliance lapsing).<sup>183</sup> Whether the decision will be implemented (in whole or part) remains to be seen, as there are concerns that implementation of the decision could result in civil unrest due to current social and religious values that are upheld in the country.<sup>184</sup> Hence the potential of the decision in bringing about real change on the ground has been limited by delayed/non-compliance.

#### 4. CONCLUSION

Gender inequality and violation of women's rights exist on a continuum in the African continent (as well as globally), in both the public and private spheres and in different forms. The ACtHPR has a role to play in addressing this challenge.

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<sup>179</sup> *APDH and IHRD* (note 165) paragraph 135(x) (see also: paragraph 130).

<sup>180</sup> *Ibid*, paragraphs 131 and 135(xii).

<sup>181</sup> *Ibid*, paragraph 135(xi).

<sup>182</sup> *Ibid*, paragraph 135(xiii).

<sup>183</sup> African Court on Human and Peoples' Rights, 'Activity Report of the African Court on Human and Peoples' Rights: 1 January – 31 December 2021', AU Executive Council: Fortieth Ordinary Session, Doc. EX.CL/1323(XL) (20 January – 3 February 2022) paragraph 37. See also, ACtHPR Activity Report 2021 (n 68) pp. 22-23 (Annex II).

<sup>184</sup> Tetevi Davi, 'African Court on Human and Peoples' Rights Delivers Landmark Ruling on Women's Rights and the Rights of the Child in Mali' *EJIL:Talk* (27 July 2018) <https://www.ejiltalk.org/african-court-on-human-and-peoples-rights-delivers-landmark-ruling-on-womens-rights-and-the-rights-of-the-child-in-mali/> (accessed 18 October 2021).

Women's representation on the ACtHPR's bench and the Court's enforcement of women's rights is important to illustrating its role in addressing and advancing women's rights and gender equality in Africa. The Court has facilitated gender representation through, *inter alia*, adopting new Rules explicitly requiring adherence to gender equality in the appointment of judges and other key staff. The Court has achieved gender balance on its bench but is yet to achieve substantive equality in leadership positions of the Court. More women judges need to be given the opportunity to lead the Court through their election to the Bureau of the Court. Also, the female judges mainstreaming since the past three years is yet to facilitate gender representation in other key arms of the Court such as leadership positions in its registry.

Further, the Court has helped advance women's rights through its jurisprudence (advisory and contentious). The jurisprudence of the Court shows very scant but significant rulings on women's rights (as well as rights in general in relation to issues such as vagrancy laws that disproportionately affect women). The Court has underscored the practical value of the African Women's Protocol, among other treaties, in protecting women's rights. The real impact of the Court's decisions in advancing women's rights is dependent on their effective implementation, which at present looks bleak. There has been non-compliance thus far with the women's rights decisions and the Court is faced with a general compliance crisis as confirmed in its latest activity report.

The Court has shown a glimpse of its potential to uphold women's rights; a record that requires expansion so as to further reinforce and strengthen women's rights in the continent. The Court would be able to expand on its women's rights jurisprudence and, hopefully, continue to protect the rights of women in Africa, if more cases on women's rights/issues are brought before it. To facilitate this, factors that limit access to the Court or the ability of victims to bring cases to the Court need to be addressed. For instance, states parties to the ACtHPR Protocol need to enter the relevant Article 34(6) declaration in order to facilitate access to the Court, and states parties and relevant treaty bodies need to bring cases or legal questions on women's rights to the Court. In the absence of direct access for NGOs and individuals, the ACmHPR has a role to play in facilitating access through bringing cases of women's rights violations to the Court. The ACmHPR and the ACERWC should also make use of their standing to bring legal questions relating to women's rights to the Court through its advisory jurisdiction. Effective use of these opportunities by the ACmHPR and ACERWC will not only fill the gap in access but also provide the Court with an opportunity to advance women's rights through its jurisprudence. Also, the AU, states and civil society organisations have a role to play in raising awareness of the rights in the African Women's Protocol and mechanisms available to victims in cases of violations or non-implementation of decisions affecting them. States that have not ratified the African Women's Protocol need to demonstrate their commitment to the AU's goal of achieving universal ratification of the treaty by acceding to or ratifying the Protocol. This would facilitate access to remedies where actions contrary to the treaty are undertaken by the states or non-state actors under their control. Failing which, opportunities to hold the states accountable are limited.

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