

The Significance of the African Commission on
Human and Peoples' Rights and the African Court
on Human and Peoples' Rights for Ensuring Peace
and Security for Women in Africa

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1. Introduction

1.1 Choice of subject

Women and girls have often been viewed as to have a lower status than men in African societies. They are victims of forced marriages, virginity tests and genital mutilation, among other human rights violations.¹ Traditions and customs are in cases used to legitimize the oppression of women, which can be a difficult obstacle to overcome.²

Several international instruments, such as the African Charter on Human and Peoples Rights (the African Charter) and the Protocol to the African Charter on Human and People's Rights on the Rights of Women (the Women's Rights Protocol) have been introduced with the aim of improving the situation for women in Africa. But for this type of legislation to be meaningful, there needs to be monitoring institutions which contributes to transforming the law into action. A major way of doing this is through the interpretation and application by judicial bodies. Studies suggest that rulings by these types of institutions can result in "significant, domestic, human rights policy change, consequently supporting the rule of law."³ In Africa, this responsibility lies mainly on the African Commission on Human and Peoples Rights (the ACHPR) and the African Court on Human and Peoples' Rights (the African Court.) This paper aims to investigate what significance these two institutions have in safeguarding the peace and security of women in Africa.

1.2 Limitations

The inter-relations and set-up of the African Human Rights system is rather complicated and not entirely relevant to the issue at hand. Due to this, there won't be any discussion of the relationship between the ACHPR and the African Court in any closer detail.⁴ In addition to that, only the African Charter and the Women's Rights protocol will be mentioned as the legal basis of women's rights in Africa, despite there being other international legislation that is also relevant.⁵ The reason for this is largely due to space limitation. The mentioned legal instruments also cover all the major human rights of women in Africa, meaning that the exclusion of other documents should not affect the findings of this essay in any serious way. Focusing on the African Charter, the Women's Rights protocol and the findings of the two monitoring institutions, allows for a more in-depth evaluation and discussion.

¹ UNHR, UN Women and African Union, p. 19, 33, 37.

² Ssenyonjo, p. 179.

³ Rudman, p. 322.

⁴ For more information on this issue, see Rudman p. 328-329.

⁵ For example, the Convention on the Elimination of All Forms of Discrimination against Women.

1.3 Disposition

The paper begins with a brief review of the legal basis of women's rights in Africa. This is done to give the reader an understanding of which rights the ACHPR and the African Court are supposed to safeguard. After this, the mandate and activities of the ACHPR and the African Court are discussed separately to evaluate each of their contributions in the area of women's rights. Finally, some concluding remarks are given regarding the situation of peace and security of women in Africa.

2. The legal basis of women's rights in Africa

2.1 The African Charter

The African Charter was adopted in 1981 and came into force in 1986. Its provisions are legally binding and it has been ratified by 54 states.⁶ The African Charter contains a general non-discrimination provision in article 2, a provision regarding equality before and in protection of the law in article 3, and a provision prescribing the elimination of every discrimination of women in article 18(3).

2.2 The Women's Rights Protocol

The Women's Rights Protocol was adopted in 2003 and came into force in 2005, established under article 66 of the African Charter. The addition of the Women's Rights Protocol was motivated by desire to strengthen women's rights in Africa and to introduce more comprehensive provisions to protect these rights.⁷ To date, the protocol has been signed by 52 states and ratified by 40 states.⁸

The Women's Rights Protocol covers a wide range of areas, reaching from the abolition of forced marriage in article 6 to the rights to inheritance in article 21. Perhaps the most progressive right covered by the protocol is the right to abortion in certain cases, as is outlined in article 14. States that are parties to the protocol are required, in accordance with article 26 of the Women's Rights protocol and article 62 of the African Charter, to submit periodic reports every two years, detailing what measures they have been taken to implement the provisions of the protocol.

⁶ ACHPR, Ratification table for the African Charter.

⁷ Van Eerdewijk et al, p. 79.

⁸ Van Eerdewijk et al. p. 72.

4. The ACHPR

4.1 Mandate of the ACHPR

The ACHPR was established in 1987 – only a year after the African Charter came in force - in accordance with article 30 of the African Charter. It receives its mandate from article 45 in the African Charter and is charged with the responsibility to protect and interpret the Charter’s provisions, to promote human rights and “any other task entrusted to it by the Assembly of Heads of State and Government.” In alignment with article 45.1.a, the ACHPR can give its recommendations to African governments if the case arises. This means that it’s free to do so when it sees fit and does not have to wait for any complaint to be made.⁹ This interpretation of the Charter has also been clarified by the Commission itself in *Legal Resources Foundation v. Zambia*, where the Commission argued its right to give its view on legal problems concerning human rights.¹⁰

In accordance with articles 47-59 of the ACHPR, the ACHPR is given the mandate to both receive and consider communications between states and, to some degree, individuals and organizations.¹¹ It is unclear whether the decisions by the Commission in these communications are to be considered legally binding or not.¹²

4.2 Significant and illustrative communications

The ACHPR has been criticized for trivializing the issue of rape and sexual violence towards women, by not paying it enough attention or contextualizing the violations.¹³ Often in its communications, the Commission has deferred from elaborating on the topic and only discussed it in a summarized manner. A few examples of this will be presented.

In *Malawi African Association v Mauritania*, the ACHPR referred to women in one passage as being “simply raped.”¹⁴ While the Commission stated that rape did constitute a violation of the rights guaranteed under the African Charter, it didn’t mention or discuss the issue any further than that.

Another case, *DRC v. Burundi, Rwanda and Uganda*, concerned, inter alia, the issue of soldiers with HIV being given the mission to rape Congolese women and girls, to inflict them with the virus. There was multiple evidence of the rapes having taken place, including a report by Human Rights Watch.¹⁵ Once again, the ACHPR said that the actions amounted to serious

⁹ Österdahl, p. 17.

¹⁰ Legal Resources Foundation v Zambia, para. 57.

¹¹ Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010, rule 93.

¹² Murray, p. 52-54.

¹³ Rudman, p. 332–333.

¹⁴ Legal Resources Foundation v Zambia, para. 20.

¹⁵ Human Rights Watch, p. 56 among others.

human rights violations but did not investigate it any further.

The Commission yet again referred to the suffering of women in a rather undetailed manner in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, where the Commission simply stated that “women and children were tortured and there were cases of rape.”¹⁶ This vague statement left out the fact that some of the women in question were prominent political activists and that the torture and rape might have been used as a punishment for this.¹⁷

Another case, *Doebbler v Sudan* concerned the arrest of eight women in Sudan for having violated the state’s Criminal Code by acting immorally. The accused had done things such as wear trousers and dance with men.¹⁸ The punishment for this amounted to 25-40 public lashes each by a plastic whip and wire.¹⁹ The ACHPR received criticism for not classifying the punishment as discriminatory, since the men involved had not received similar punishment. It was also criticized for not discussing whether the actions themselves should even constitute a crime, or what effects the influence of Sharia law on the legal system of Sudan might have for the rights of women living in the state.²⁰

After studying the above cases, it's hard to dismiss the critique that has been directed towards the ACHPR. It's clear that serious human rights violations directed at women - mainly rape - could have been taken more seriously. The ACHPR rarely seems to elaborate on the violations or spend effort investigating the underlying causes of these. In the Commission's defense, this might partly be due to a lack of resources, as the ACHPR has been known to be underfunded.²¹

It is, however, difficult to understand why the Commission has chosen to not mention neither the Women's Rights Protocol or other relevant instruments, such as the CEDAW, in some of its communications.²² The ACHPR would have been able to make use of article 60 of the African Charter, which allows it to draw inspiration from other international human rights instruments.

In contrast to the previous cases, *COHRE v Sudan* can be mentioned. The case concerned a long conflict in the Darfur region, during which the state of Sudan committed several human rights violations, including rape, towards suspected agitators.²³ The Commission sent a

¹⁶ *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para. 5.

¹⁷ Rudman, p. 337.

¹⁸ *Doebbler v Sudan*, para. 5.

¹⁹ *Doebbler v Sudan*, para. 30.

²⁰ Rudman, p. 339–340.

²¹ Okafor, p. 72.

²² Rudman, p. 332.

²³ *COHRE v Sudan*, para. 178.

Special Mission to the region, which gathered personal stories from some of the affected women. The sharing of experiences added a deeper layer to the violations, as the women spoke about consequences of the rapes, such as unwanted pregnancies and not being able to report the offense to the police.²⁴ By investigating the violations more thoroughly, it was possible to gather more information which in turn could've be used to act upon. This gives the opportunity for a more constructive outcome than what the mere mention that violations has taken place offers.

Even though the Women's Rights Protocol has now existed for some time, there has to date only been one case where the ACHPR has directly engaged with women's rights: *EIPR v Egypt*.²⁵ The case concerns four female journalists being beaten, sexually assaulted and intimidated during a demonstration regarding the referendum to amend Egypt's constitution.²⁶ In the case, the Commission does make mention of several legal instruments, including the Women's Rights Protocol, though it had not yet been ratified by Egypt.²⁷ It concluded that the women had been discriminated against under article 2, since the acts had been perpetrated towards them on the basis of their gender.²⁸ The ACHPR further stated that the violence perpetrated towards men and women tend to differ. In this case the violations had, inter alia, consisted of verbal abuse such as referring to the women as "sluts" and "whores", which was considered gender-specific language. There was also the fact that the assailants had targeted the victim's private parts and breasts and intimidated them with allegations of prostitution.²⁹ The ACHPR concluded that this type of differential treatment of the genders amounted to discrimination under 18(3), since there wasn't any valid reason which could excuse it.

The case affirms that sexual violence towards women can constitute discrimination under the African Charter. This might give incentive to women and NGO's championing their cause to approach the ACHPR with complaints. However, though the communication was finalized in 2011, there's yet to be any new case decided on by the ACHPR with similar characteristics. Regardless, the case is significant in its establishment of under which circumstances sexual violence can be considered discriminatory towards women.

²⁴ COHRE v Sudan, para. 151.

²⁵ Rudman, p. 340.

²⁶ EIPR v Egypt, para. 3 and 4.

²⁷ EIPR v Egypt, para. 120–123.

²⁸ EIPR v Egypt, para. 139.

²⁹ EIPR v Egypt, para. 143–144.

4.3 The Special Rapporteur on the Rights of Women in Africa

In 1999, 12 years after its establishment, the ACHPR adopted a resolution on the appointment of a Special Rapporteur on the Rights of Women in Africa (the Rapporteur.)³⁰ The mandate of the Rapporteur includes following up the implementation of the African Charter and the Women's Rights Protocol. The establishment of such a Rapporteur constitutes a way of keeping the issue of women's rights alive and visible.³¹ The Rapporteur regularly releases intersession activity reports, which showcases that the Rapporteur is actively working towards the realization of women's rights through the participation in various forums.³² It's therefore safe to say that the implementation of the Rapporteur has been a significant contribution to highlighting women's human rights in Africa.

A returning theme of the reports is the encouragement to states which hasn't yet ratified the Women's Rights Protocol to do so. In a report from 2009, the Rapporteur criticized how slowly some of the rights following from the protocol were implemented, as well as the lack of periodic reports submitted by the member states.³³ In an intersession report from 2010, the rapporteur comments that despite increased efforts by member states, women are still struggling with poverty, illiteracy, abuse and discrimination.³⁴

On the International Women's Day in 2019, the Rapporteur released a statement where she discussed the status of women in Africa. Despite efforts having been made to improve women's situation in the region, she pointed out that the progress of women's rights has been slow and that their human rights are consistently being violated.³⁵

3. The African Court

3.1 Mandate of the Court

According to article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (the African Court Protocol), the role of the court is to complement the ACHPR's protective mandate. Article 3 lays out the jurisdiction of the court, which covers all submitted cases and disputes regarding how the Charter, its protocols or "any other relevant Human Right's instrument", which has been ratified by the concerned State, should be interpreted and applied. The court can also give advisory opinions upon request, in line with article 4.

³⁰ Resolution ACHPR/res.38 (XXV) 99 on the appointment of a Special Rapporteur on the Rights of Women in Africa.

³¹ Murray, p. 73.

³² See, for example, Asugabor, Intersession Report for the 60th Ordinary Session of the ACHPR, 2017.

³³ Soyata, Intersession Report for the 45th Ordinary Session of the ACHPR, para. 60 and 62. 2009.

³⁴ Soyata, Intersession Report for the 48th Ordinary Session of the ACHPR, para. 34. 2010.

³⁵ Asuagbor, Statement on the Occasion of the International Women's Day.

The rulings by the Courts are binding, according to article 30. Every member State needs to submit a report each year, explaining its work for the previous year, following article 31. More specifically, the report needs to detail cases where the state hasn't complied with the Court's judgement. This type of follow-up mechanism might put pressure on states to implement decisions by the Court. It might also encourage understanding on the Court's side, since it allows it to hear reasons as to why their rulings are not honored.

According to article 27 of the Women's Rights Protocol, the African Court is also trusted with the authority to interpret the application and implementation of the protocol.

3.2 The first case regarding women's rights decided by the Court

Looking through the cases which have been finalized by the court, it's apparent that a vast majority of the applicants are male.³⁶ The judgement in *ADPF and IHRDA v Mali* was issued in 2018 and constitutes the first – and currently only – case where the African Court has ruled on a violation of women's rights under international law.

The case concerns the introduction of the Persons and Family Code in Mali, as a codification of family and individual rights. The law received a lot of backlash from Islamic organizations and was amended to cater to these complaints, which resulted in the legislation being in violation of women's human rights.³⁷ The African Court concluded that it was the responsibility of the state to guarantee compliance with the provisions laid out in, inter alia, the African Charter and the Women's Rights Protocol.³⁸ Furthermore, the court ruled that the state had to amend the legislation in question that was in violations of international human rights.³⁹

The case constitutes a landmark decision, but it remains to be seen whether the ruling will have any practical effects. In accordance with the reporting procedure, Mali will need to submit a report regarding the measures it has taken to uphold the court's decision before May 2020.⁴⁰ Concerns have been raised that the implementation of the ruling might be resisted by the same Islamic forces that opposed the original codification.⁴¹ As with most international treaties, the lack of an enforcement mechanism might prove problematic. On the other hand, the ruling can be used as a form of justification by the Mali government towards its own people as to why it must revise the law. If the decision of the court in *ADPF and IHRDA v*

³⁶ ACHPR, Finalized cases by the African Court

³⁷ *ADPF and IHRDA v Mali*, para. 5-7.

³⁸ *ADPF and IHRDA v Mali*, para. 78, 155 and 125 among others.

³⁹ *ADPF and IHRDA v Mali*, para. 135.

⁴⁰ African Court, Activity Report, p. 37.

⁴¹ Banens, African Court Issues its First Judgement on Women's Rights.

Mali is honored, this has serious implications for the rights of women living under discriminatory legislation.

5. Concluding remarks

Women in Africa have a lot of rights on paper, and the amount of states which have ratified the African Charter and the Women's Rights Protocol indicates a will to work towards women's liberation. But if these rights are not realized in the real world, the instruments become little more than virtue signaling. A state can point at its ratification of the Charter and the protocol as a sign of their concern for women's rights, while conveniently leave out the lack of any actual implementation. As can be seen from the statements by the Rapporteur, progress is slow and women continue to suffer various human rights violations, despite the ratification of several international legal instruments to their benefit. Due to this, it is clear that the ACHPR and the African Court, as the protectors and promoters of the human rights of women, play a significant role in the realization of African women's rights.

Unfortunately, neither of these institutions have involved themselves too much in the rights of women. While the ACHPR has been more active, it has often addressed human rights violations directed at women in a rather dismissive manner in its communications. Voices have been raised against the lack of progress of the realization of women's rights on the continent, and the Women's Rights protocol has been criticized for having a weak monitoring and evaluation system.⁴² It has been argued that ACHPR is too occupied with trying to solve other types of human rights violations to have time to properly focus on women's rights.⁴³ It can further be noted that the Commission has discussed issues specific to women in only ten communications since 1996, out of over 400 finalized communications in total.⁴⁴ This suggests that there is some merit to the claim that the ACHPR does not - for whatever reason - involved itself in women's rights issues to the degree that might be desirable.

It is, however, worth noting that the appointment of and the work performed by the Special Rapporteur has constituted commendable efforts to improve the situation of women in Africa. The Rapporteur does an important job by bringing attention to violations directed towards women and participating in activities to prevent the continuation of these.

All in all, it's undeniable that the ACHPR and the African Court have contributed to the peace and security of women in Africa, albeit not to the degree that they might have been able

⁴² Budoo, Next Steps to Getting Africa's Protocol on Women's Rights Implemented.

⁴³ Banda, p. 74.

⁴⁴ Rudman, p. 331.

to. Hopefully the newer cases we've seen, both from the Commission and the court, is the beginning of a more positive development. In the following years, it will be interesting to see whether more cases regarding violations of women's human's rights will surface and how these will be handled by the ACHPR and the Court.

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