

The African Union: Challenges and opportunities for women

*Karen Stefiszyn**

Researcher, Centre for Human Rights, Faculty of Law, University of Pretoria;
Assistant, Africa Programme, United Nations-affiliated University for Peace

Summary

This paper provides an overview of the various structures of the African Union in terms of the challenges and opportunities they present for women's rights advocacy. The following structures are discussed in relation to the African Union's declared commitment to gender equality as one of its governing principles: the Assembly of the Union; the Executive Council; the Commission; the Pan-African Parliament; the African Court of Justice; the Economic, Social and Cultural Council; the Peace and Security Council; the African Commission on Human and Peoples' Rights; and the African Court on Human and Peoples' Rights. The discussion reveals that women are unrepresented or under-represented in the main decision-making bodies of the African Union. Recommendations are offered for advocacy to remedy the present imbalance and to advance women's rights generally.

1 Introduction

Gender inequality in Africa is entrenched in all societal structures, from the Assembly of the African Union (AU) to the family and everything in between. Attitudes that women are unequal and inferior to men permeate society. Manifestations of these attitudes are apparent in the following realities: Customary laws relating to marriage, family and land ownership discriminate against women and deny them fundamental human rights. The consequences of gender inequality are evident in the greater prevalence of HIV/AIDS amongst women than men, a fact highly associated with sexual violence. Women suffer disproportio-

* BA (Western Ontario), MSt (Oxford); karen.stefiszyn@up.ac.za; cuba@lantic.net. This article is an edited version of the author's dissertation submitted for the Master of Studies degree in international human rights law at the University of Oxford.

nately in wars created by men. Women sacrifice their lives in childbirth. In many cases their reproductive organs were traditionally mutilated at a young age or they were forced into marriage as a child, raped and impregnated, and their bodies were physically unable to meet the demands of labour. Women maintain a low economic status, largely attributable to the undervaluation of their work. Women and girls in Africa are becoming a growing commodity for sex trafficking bought and sold as slaves. Girl children are often denied education or at best not encouraged in school, perpetuating a cycle of poverty and inequality. Finally, but not exhaustively, women are still generally excluded from decision-making bodies at local, regional and international levels, inhibiting their ability to affect policies that perpetuate the above-mentioned manifestations of inequality.

According to Charlesworth¹

[w]e must work to ensure that women's voices find a public audience, to reorient the boundaries of mainstream human rights law so that it incorporates an understanding of the world from the perspective of the socially subjugated.

Could the AU be an audience for African women's voices? The AU has enshrined its commitment to gender equality in article 4(I) of the Constitutive Act of the AU (Constitutive Act or Act).² It has initiated the process of gender mainstreaming³ in its various organs and has included important provisions regarding women in protocols subsequent to the Act. As Kofi Annan has noted: 'Increasingly, Africans understand that their continent cannot develop unless its women exercise real power.'⁴ In July 2004, the AU adopted the Solemn Declaration on Gender Equality in Africa (Gender Declaration),⁵ and in so doing, reaffirmed their commitment to continue, expand and accelerate

¹ H Charlesworth 'What are "women's international human rights?"' in R Cook (ed) *Human rights of women: National and international perspectives* (1994) 58-76.

² Constitutive Act of the African Union CAB/LEG/23.15 (26 May 2001) reprinted in C Heyns (ed) *Human rights law in Africa* (2004) 181-187.

³ In accordance with the United Nations Committee on Economic, Social and Cultural Rights' agreed conclusions 1997/2, gender mainstreaming refers to the 'process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is gender equality' in 'Gender mainstreaming: An overview' Office of the Special Advisor on Gender Issues and Advancement of Women UN New York (2002) <http://www.un.org/womenwatch/osagi/pdf/GMS-Overview.pdf> (accessed 1 November 2004). See also R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 152-156.

⁴ Press Release SG/SM/9408AFR/991 <http://www.un.org/News/Press/docs/2004/sgsm9408.doc.htm> (accessed 15 December 2004).

⁵ Solemn Declaration on Gender Equality in Africa Assembly/AU/Decl 12 (III) Rev 1 (2004).

efforts to promote gender equality at all levels.⁶ Most significantly, it adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)⁷ in July 2003. Furthermore, the promotion of women in all activities is a stated priority of the New Partnership for Africa's Development (NEPAD).⁸

This paper explores the AU's commitment to gender equality and argues that, through strategic capitalisation of the current regional framework, significant opportunities for the advancement of African women's rights exist. An overview of the African regional framework will be provided. Following a brief background section, each structure of the AU is discussed from a gender perspective. These are the Assembly, the Executive Council, the AU Commission, the Pan-African Parliament, the African Court of Justice, the Economic, Social and Cultural Council, the Peace and Security Council, the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights. NEPAD and the sub-regional organisations are not examined in this paper, although they are further important entry points for gender advocacy.⁹ Challenges and opportunities for women's rights advocacy are presented with corresponding recommendations for capitalisation of the AU's commitment to gender equality. The conclusion will focus, generally, on challenges for gender advocates in advancing women's rights in Africa.

⁶ n 5 above, para 5.

⁷ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66 6/Rev 1 (2003).

⁸ New Partnership for Africa's Development (2001) (NEPAD) para 67 reprinted in Heyns (n 2 above) 187-212.

⁹ One of the two long-term objectives of NEPAD, Africa's major economic development initiative, is to promote the role of women in all activities. One entry point for gender advocacy within NEPAD is the African Peer Review Mechanism (APRM), created by the NEPAD Declaration on Democracy, Political, Economic, and Corporate Governance (NEPAD Declaration), where states agree to periodic peer reviews, an assessment of their performance in areas of political and economic governance. Gender advocates can ensure states' fulfilment of their obligations and commitments with respect to women's rights are a component of the peer review process through, eg, the provision of information to the African Peer Review Team, including statistics and concrete examples of action and inaction on behalf of the government. Sub-regional organisations have made commitments to gender equality, which increase the leverage for lobbying when added to national, regional and international obligations concerning women's rights. Where women's rights activists are unable to attend important regional level meetings, such as the Assembly Summits, due to financial resources, they may be able to complement the regional advocacy efforts within their sub-region. The greatest challenge is to co-ordinate policies regarding gender and work towards consistency between the AU and the sub-regions.

2 Background

The AU replaced the Organization of African Unity (OAU) in 2001 and, despite accompanying cynicism,¹⁰ the transition has also created hope by means of new opportunities for improving the culture, or lack thereof, of human rights on the continent. Established in 1963, the OAU prioritised the struggles against colonialism and apartheid. Despite the important human rights implications inherent in each of those goals, human rights as defined by international treaties, such as those comprising the International Bill of Rights, were not on its agenda for close to 18 years of its existence. The rights of women were also not prioritised. Under the OAU, Africa witnessed countless failures in the areas of peace, good governance, the rule of law and, consequently, respect for human rights. The AU offers hope for a new African human rights legacy.

One objective of the AU is the promotion and protection of 'human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter) and other relevant human rights instruments'.¹¹ This includes the Women's Protocol, as an extension of the African Charter, and the United Nations (UN) Convention on the Elimination of Discrimination Against Women (CEDAW) as a human rights instrument, ratified by almost all African states.¹² Human rights are a thread running through the list of objectives that are outlined in the Constitutive Act of the AU. For example, regional unity and solidarity, socio-economic integration, peace and security, democratic principles, globalisation, sustainable development, living standards and health are all issues of central importance to the AU.¹³ The Charter of the UN and the Universal Declaration of Human Rights (Universal Declaration) are also given prominence.¹⁴

The same thread continues through the list of principles by which the AU shall function. 'Respect for democratic principles, human rights, the rule of law and good governance' are amongst the list of principles, as is the promotion of gender equality.¹⁵ Equally significant is the principle of 'participation of the African peoples' in the activities of the AU. Read with the gender equality principle and the Preamble to the Act, whereby the 'need to build a partnership between governments and all segments of civil society, in particular women . . .' is expressed, the

¹⁰ See eg N Udombana 'Can the leopard change its spots? The African Union Treaty and human rights' (2002) 17 *American University International Law Review* 256.

¹¹ Art 3(h) Constitutive Act (n 2 above).

¹² Somalia and Sudan are the only two African states that have not ratified CEDAW.

¹³ Arts 3(a), (c), (f), (g), (i), (j), (k) & (n) Constitutive Act.

¹⁴ Art 3(e) Constitutive Act.

¹⁵ Arts 4(m) & (l) Constitutive Act.

AU is welcoming women's rights advocates to advance their agenda in co-operation.

The Constitutive Act lists nine organs of the AU in article 5. They are the Assembly of the Union, the Executive Council, the Pan-African Parliament (PAP), the Court of Justice, the Commission (the Secretariat), the Permanent Representatives Committee, the Specialised Technical Committees, the Economic, Social and Cultural Council (ECOSOCC) and the Financial Institutions. Provisions were made for the establishment of others¹⁶ and accordingly, the Peace and Security Council (PSC) has since been added.¹⁷ Each organ has been conceived to implement the objectives of the Constitutive Act mindful of its underlying principles. In other words, each organ has a promotional and protective human rights mandate to be carried out in accordance with gender equality. However, even if African leaders intend to ultimately surprise cynics with effective implementation of the AU's objectives, African women would be unwise to leave such entirely in their hands, especially in light of the fact that outside the Commission of the AU, there are currently few women representing the interests of half of the African population.

An understanding of the functions of each mechanism, particularly with regard to potential entry points for human rights advocacy, is necessary to empower gender activists to capitalise on the enshrined commitments of the AU and hold African leaders accountable to their stated objectives and principles. Where doors are closed to women in one organ, windows are often open in another.

3 Organs of the African Union

3.1 The Assembly of the African Union

The Assembly is the 'supreme organ of the Union',¹⁸ composed of Heads of States and Government.¹⁹ It meets once a year in ordinary session and it can meet in extraordinary session.²⁰ Its main functions, all of which have potential to impact women's rights, include to determine the common policies of the AU; to receive, consider and take decisions on reports and recommendations from the other organs of the AU; and to monitor the implementation of policies and decisions of the AU, as well as to ensure compliance by all member states.²¹

¹⁶ Art 5(2) Constitutive Act.

¹⁷ Decision on the Establishment of the Peace and Security Council of the African Union ASS/AU/Dec 3(1) (2002).

¹⁸ Art 6(2) Constitutive Act.

¹⁹ Art 6(1) Constitutive Act.

²⁰ Art 6(3) Constitutive Act.

²¹ Art 9 Constitutive Act.

As there are no female Heads of States in Africa, representation on the Assembly is entirely male. Inevitably, the Assembly will not be an entry point for women's participation as decision makers until women become Heads of States and Government. Therefore, advocacy efforts for increased women's political participation nationally, guided by the Beijing Platform of Action,²² must continue with vigour. In the meantime, incorporation of the gender perspective into the most pressing issues of continental concern via the Assembly of the AU is challenging and reliant on strategic lobbying, such as the identification and lobbying of gender-sensitive Heads of States, recognisable through constitutionally enshrined commitments to gender equality and women's participation in national politics, for example.²³ The challenge of sensitising men to women's concerns is exacerbated by the lack of resources generally available to women's networks.²⁴ Greater financial resources would assist them in order to meet and strategise in advance of the annual Assembly Summit and, subsequently, to facilitate lobbying efforts at the summits.

However, despite these discouraging obstacles and to the credit of successful lobbying by gender advocates, two extraordinary breakthroughs have already been achieved. In Maputo in 2003, the Assembly adopted the Women's Protocol and, in Addis Ababa in 2004, they adopted the Gender Declaration whereby they agreed to several concrete, time-limited actions to address specific issues, including gender-based violence, HIV/AIDS, women in peace processes and education. In doing so, the Assembly has proven a willingness to respond to pressure from African women to heed their concerns. Future advocacy towards ratification of the Protocol and its subsequent implementation and adherence to the commitments in the Declaration must build on these successes.

3.2 The Executive Council

The Executive Council (Council), responsible to the Assembly,²⁵ is composed of Ministers of Foreign Affairs who meet twice a year in ordinary

²² Beijing Declaration and Platform for Action Fourth World Conference on Women A/CONF177/20 and A/CONF177/20/Add1 (1995) (Beijing Platform for Action) paras 181-195.

²³ 'From OAU to AU and NEPAD: Strategies for African women' Report of the Regional Strategy Meeting on Women's Political Participation and Gender Mainstreaming in the African Union and its Specialised Mechanisms Nairobi, 2003 (From OAU to NEPAD) 36 <http://www.femnet.or.ke/documents/au.pdf> (accessed 10 September 2004).

²⁴ M Wandia 'African Union and NEPAD: Briefing paper on the challenges and opportunities for African women' 6 <http://awdf.org/lib/pdf/femnetpaper.pdf> (accessed 10 September 2004).

²⁵ Art 13(2) Constitutive Act.

session.²⁶ It was established with a broad mandate. It is to co-ordinate and take decisions on policies in areas of common interest to the member states,²⁷ and to consider issues referred to it by the Assembly. It is also empowered to monitor the implementation of policies, decisions and agreements adopted by the Assembly,²⁸ several of which are relevant to African women, such as the Gender Declaration and the Women's Protocol. Significantly, the Executive Council is required to ensure the promotion of gender equality in all programmes of the AU.²⁹

Few African women hold the ministerial position within the Foreign Affairs Office and are, therefore, generally restricted from this forum other than through external lobbying efforts. Article 10 of the Constitutive Act does provide for governments to designate Ministers or authorities other than the Minister of Foreign Affairs to the Executive Council.³⁰ As it is no longer uncommon in several African states for women to hold ministerial positions, this is one way, albeit not the most accessible one, for more women to find themselves on the Executive Council. As with the Assembly, advocacy efforts must focus on women's participation nationally in politics. In the meantime, the Executive Council remains one of the organs less receptive to women as decision makers.

3.3 The Commission

The Commission is the Secretariat of the AU³¹ and, as such, has numerous functions. These include representing the AU and defending its interests,³² implementing decisions taken by other organs,³³ promoting integration and socio-economic development,³⁴ ensuring the promotion of peace, democracy, security and stability,³⁵ and ensuring the mainstreaming of gender in all programmes and activities of the AU.³⁶

The Commission is composed of a Chairperson, a Deputy Chairperson, and eight commissioners, all of whom act as 'international officials

²⁶ According to art 10(2) of the Constitutive Act, any member state may request an extraordinary session which must be approved by two-thirds of all member states.

²⁷ Art 13(1) Constitutive Act.

²⁸ Art 13(2) Constitutive Act.

²⁹ Rules and Procedures of the Executive Council (2002) Rule 5(1) & (u).

³⁰ According to art 10(1) of the Constitutive Act, other Ministers or authorities designated by the governments of member states may participate on the Executive Council in lieu of the Minister of Foreign Affairs.

³¹ Art 20(1) Constitutive Act.

³² Art 3(2)(a) Statutes of the Commission of the African Union ASS/AU/2(l)-d (2002).

³³ Art 3(2)(c) Statutes of the Commission of the African Union.

³⁴ Art 3(2)(p) Statutes of the Commission of the African Union.

³⁵ Art 3(2)(r) Statutes of the Commission of the African Union.

³⁶ Art 3(2)(cc) Statutes of the Commission of the African Union.

responsible only to the Union'.³⁷ Each commissioner is elected to be responsible for a particular portfolio.³⁸ The commissioners are appointed regionally,³⁹ and at least one commissioner from each region shall be a woman.⁴⁰ There are five female commissioners at present, rendering the Commission the first organ of the AU to achieve gender parity.

In recognition of gender issues as cross-cutting through all the portfolios of the Commission, the Commission has established the Women, Gender and Development Directorate (Gender Directorate),⁴¹ whose functions include monitoring, gender mainstreaming, advocacy, performance tracking, gender training, capacity building, research, communication and networking.⁴² Winnie Byanyima, a Ugandan parliamentarian and experienced gender activist internationally, is the Director of the Gender Directorate and is assisted by two professional staff. In order to fulfill its mandate, the Gender Directorate will have to depend heavily on co-operation with civil society and respective gender advocates must embrace the opportunity for partnership. In order to facilitate such partnerships, there is a need to create a database, accessible to all AU organs, of gender-focused civil society organisations (CSOs), which highlights their areas of specialisation and corresponding experts.⁴³ This would be an invaluable asset throughout all the structures of the AU and for gender advocates. The establishment of the Gender Directorate can significantly contribute to the capacity of the AU to mainstream gender, provided it focuses on strategic issues and acts as a catalyst rather than holding the overall responsibility for gender mainstreaming.⁴⁴ Furthermore, the member states of the AU must ensure adequate financial and human resources are directed to the Gender Directorate in order for it to fulfill its mandate.

Another important platform for women's voices provided for within the Commission is the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA). The purpose of the CSSDCA, among other functions, is 'to serve as a policy development forum that would enable productive interface among policy organs of the AU and the elaboration and advancement of common values and

³⁷ Art 4(1) Statutes of the Commission of the African Union.

³⁸ The portfolios are peace and security, political affairs, infrastructure and energy, social affairs, human resources, science and technology, trade and industry, rural economy and agriculture, and economic affairs.

³⁹ Art 6(2) Statutes of the Commission of the African Union.

⁴⁰ Art 6(3) Statutes of the Commission of the African Union.

⁴¹ Art 12(3) Statutes of the Commission of the African Union.

⁴² Description of the Gender and Development Directorate http://www.africa-union.org/Structure_of_the_Commission/depWOMEN,%20GENDER%20AND%20DEVELOPMENT.htm (accessed 11 December 2004).

⁴³ Wandia (n 24 above) 7.

⁴⁴ Gender mainstreaming (n 3 above) 25.

goals',⁴⁵ and 'to serve as a bridge to link and bring civil society into the mainstream of activities and decision making within the African Union'.⁴⁶ A Civil Society Officer has been appointed within the CSSDCA to, *inter alia*, strengthen civil society partnerships with the AU Commission, and to facilitate civil society participation in the AU. Gender advocates can capitalise especially on the CSSDCA's roll as a monitoring and evaluation mechanism for the AU⁴⁷ to pressure member states from within the AU, rather than as an external lobby group only.

The Commission has taken steps to fulfill its mandate in ensuring gender mainstreaming in all programmes and activities of the AU. However, experience in the UN has proven that gender mainstreaming is a long-term process that requires explicit ongoing attention, resources and political capital.⁴⁸ Civil society must assume an important monitoring role in this respect.

3.4 The Pan-African Parliament

The Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament⁴⁹ entered into force on 14 December 2003 and has been ratified by almost all member states of the AU. The Pan-African Parliament held its inaugural session in Addis Ababa in March 2004 before moving to its permanent home in South Africa, where it has already held its second session.⁵⁰ According to the Preamble, its establishment was 'informed by a vision to provide a common platform for African peoples and their grass-roots organisations to be more involved in discussions and decision making on the problems and challenges facing the continent'.⁵¹ The Preamble further states the determination of the member states to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.⁵² Gender advocates need no further invitation to advance their agenda within the Pan-African Parliament.

⁴⁵ Description of CSSCDA http://www.africa-union.org/Structure_of_the_Commission/depCsscda.htm (accessed 11 December 2004).

⁴⁶ As above.

⁴⁷ As above.

⁴⁸ Gender mainstreaming (n 3 above) 25.

⁴⁹ Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament EAHG/3(V) (2001) (Pan-African Parliament Protocol) reprinted in Heyns (n 2 above) 212-217.

⁵⁰ The second session of the PAP was held on 16 September 2004.

⁵¹ Preamble Pan-African Parliament Protocol.

⁵² As above.

The current female president of the PAP, Gertrude Mongella, stated at her inauguration:⁵³

To my sisters in Africa, the struggle we started years ago, which resulted in the abolition of slavery, colonialism, and the dismantling of apartheid, is now bearing fruit; we now see the practical implementation of equality.

Unlike the Assembly of the AU, where women must lobby male decision makers for the promotion and protection of their rights, women are decision makers within the PAP. The Parliament is composed of five representatives from each member state, at least one of whom must be a woman.⁵⁴

The functions and powers of the PAP are broad and, as such, are open to the permeation of a women's rights agenda, particularly in light of the expressed objective to promote the principles of human rights. For example, one function of the PAP is to examine, discuss or express an opinion and make recommendations on any matter pertaining to human rights, democracy, good governance and the rule of law.⁵⁵

With an understanding of this mandate, women's rights advocates can ensure that their concerns reach scrutiny in a prominent forum where women carry political weight. The PAP is further entrusted to 'work towards the harmonisation or co-ordination of the laws of member states.'⁵⁶ Accordingly, gender advocates can advise members of the PAP with respect to the co-ordination of legislation to advance implementation of CEDAW and the Women's Protocol upon its entry into force. Recommendations concerning the attainment of the objectives of the AU can also be made by the Parliament.⁵⁷ For example, the Parliament can recommend that member states ratify the Women's Protocol without delay. The President of the PAP has been lobbied by a coalition of civil society members in this respect.⁵⁸

The potential for resonance of women's voices within the PAP is weakened by article 2, whereby 'the Pan-African Parliament shall have consultative and advisory powers only'.⁵⁹ The Protocol does envisage full legislative powers ultimately, by amendment.⁶⁰ Advocacy strategies

⁵³ B Lop 'Pan-African Parliament: Windows of opportunity for gender equality in Africa?' *REDI News* 25 March 2004 <http://www.sardc.net/Editorial/Newsfeature/04250304.htm> (accessed 10 October 2004).

⁵⁴ Art 4(2) Pan-African Parliament Protocol.

⁵⁵ Art 11(1) Pan-African Parliament Protocol.

⁵⁶ Art 11(3) Pan-African Parliament Protocol.

⁵⁷ Art 11(4) Pan-African Parliament Protocol.

⁵⁸ 'Africa: PAP President petitioned to urge African governments to ratify Protocol on the Rights of Women in Africa' *Pambazuka News* 21 October 2004 <http://www.pambazuka.org/index.php?issue=179> (accessed 15 December 2004).

⁵⁹ Art 2(3)(i) Pan-African Parliament Protocol.

⁶⁰ Art 2(3) Pan-African Parliament Protocol.

must include lobbying for this amendment and also for amendment to the Parliament's inadequate gender quota of 20%.

3.5 The Court of Justice⁶¹

The Protocol of the Court of Justice of the AU,⁶² not yet in force,⁶³ 'shall be the principal judicial organ of the Union'.⁶⁴ Its judgments will be binding and the Assembly may take measures, such as sanctions, to ensure compliance with a judgment of the Court.⁶⁵ It shall have jurisdiction over a wide range of matters, including the interpretation, application or validity of AU treaties and all subsidiary legal instruments adopted within the framework of the AU.⁶⁶ Access to the Court by third parties, such as non-governmental organisations (NGOs), who are most likely to advocate on behalf of African women, is conditional on state consent,⁶⁷ a notable obstacle. The Protocol of the Court of Justice of the AU provides for equal gender representation in the election of judges.⁶⁸

The African Court of Justice is an important entry point for women, not least due to its requirement for gender equality in the election of judges. African women must seize every platform available to impact regional decision making and, where the platforms are not yet available, the situation must be remedied. While women's rights activists are currently waging a passionate campaign, discussed below, for the ratification of the Women's Protocol, they must not overlook the imperative to lobby states to also ratify the Protocol to the African Court of Justice.

3.6 The Economic, Social and Cultural Council

The Statutes of the Economic, Social and Cultural Council (ECOSOCC) of the AU⁶⁹ entered into force upon adoption by the Assembly in July

⁶¹ A decision has been made to integrate the African Court on Human and Peoples' Rights and the Court of Justice into one court. As the practical implementation of the decision is still under consideration by the Chairperson of the Commission and a Protocol for the united court does not yet exist, this paper approaches the African Court of Justice and the African Court on Human and Peoples' Rights according to their present Protocols.

⁶² The Protocol of the Court of Justice of the African Union (2003) (Protocol of the Court of Justice).

⁶³ Eight countries have ratified the Protocol as of 1 September 2005.

⁶⁴ Art 2(2) Protocol of the Court of Justice.

⁶⁵ Arts 51 & 52(2) Protocol of the Court of Justice, read with art 23(2) Constitutive Act.

⁶⁶ Art 19(1)(b) Protocol of the Court of Justice.

⁶⁷ Art 18(1)(d) Protocol of the Court of Justice.

⁶⁸ Art 7(3) Protocol of the Court of Justice.

⁶⁹ Statutes of the Economic, Social and Cultural Council of the African Union, Experts/PRC/ECOSOCC Statutes/Rev5 (2004) (ECOSOCC Statutes).

2004, and ECOSOCC has been operational since March 2005. It is a result of 'the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples'.⁷⁰ Accordingly, it provides numerous entry points for gender advocacy. Although it is an advisory body only, 'the power of ECOSOCC lies in the fact that, as a structure of the Union, it has the "right to be heard" and its submissions taken into account'.⁷¹

In conformity with the objectives of the AU, the objectives of ECOSOCC include to forge partnerships with all segments of civil society;⁷² promote the participation of civil society in the implementation of the policies and programmes of the AU;⁷³ promote a culture of good governance and human rights;⁷⁴ and promote a culture of gender equality.⁷⁵ The functions of ECOSOCC are broadly stated and, as such, can be influenced by gender advocates assuming their representation on the Council. For example, it is entrusted to undertake studies and submit recommendations in accordance with a recommendation from any other organ of the AU or 'as it deems necessary'.⁷⁶ The equal representation of women on ECOSOCC will greatly increase the likelihood of gender mainstreaming into the studies to be undertaken.

ECOSOCC is composed of 150 CSOs,⁷⁷ drawn from national, regional, continental, and diaspora levels plus others nominated by the Commission.⁷⁸ Election of the members, other than those nominated by the Commission, shall ensure 50% gender equality.⁷⁹ Aside from a General Assembly, a Standing Committee and a Credentials Committee, Sectoral Cluster Committees will form part of the structure of

⁷⁰ n 69 above, Preamble.

⁷¹ K Sturman & J Cilliers 'ECOSOCC bringing peoples' power to the African Union?' (2003) 12 *African Security Review* <http://www.iss.org.za/pubs/ASR/12No1/Esturman.html> (accessed 19 September 2004).

⁷² Art 2(2) ECOSOCC Statutes.

⁷³ Art 2(3) ECOSOCC Statutes.

⁷⁴ Art 2(5) ECOSOCC Statutes.

⁷⁵ Art 2(6) ECOSOCC Statutes.

⁷⁶ Art 7(2)(3) ECOSOCC Statutes.

⁷⁷ Art 4(1) ECOSOCC Statutes. Art 3(2) defines CSOs as the following: social groups such as those representing women, children, the youth, the elderly and people with disability and special needs; professional groups such as associations of artists, engineers, health practitioners, social workers, media, teachers, sport associations, legal professionals, social scientists, academia, business organisations, national chambers of commerce, workers, employers, industry and agriculture as well as other private sector interest groups; non-governmental organisations; community-based organisations; voluntary organisations; and cultural organisations.

⁷⁸ Arts 4(1)(a)-(d) ECOSOCC Statutes.

⁷⁹ Art 4(2) ECOSOCC Statutes.

ECOSOCC.⁸⁰ Entrusted to formulate opinions and provide inputs into the policies and programmes of the AU,⁸¹ along with the preparation and submission of advisory opinions and reports of ECOSOCC,⁸² the Sectoral Committees create space for ample input from gender advocates. All the Sectoral Cluster Committees have the potential to influence women's rights directly or indirectly including, in particular, those concerned with peace and security, political affairs, social affairs and health, rural economy and agriculture, economic affairs, and women and gender. The Women and Gender Committee, for example, can advise the AU regarding gender mainstreaming in all its activities in accordance with its principle of gender equality.

Considering the advisory mandate of ECOSOCC, the necessity of understanding the intricate structure of the AU in its entirety becomes increasingly apparent. For example, the Women and Gender Committee of ECOSOCC should collaborate with the Women, Gender and Development Directorate of the Commission as well as with the Executive Council. The latter are both entrusted to ensure gender mainstreaming in all activities of the AU and both hold powers greater than those of an advisory nature. Given that the PAP is also mandated to make recommendations to the Assembly, efforts towards gender mainstreaming could be further consolidated.

ECOSOCC is a welcome development in the AU as a forum for African women to advance their rights and influence the activities of the AU accordingly. Most importantly, ECOSOCC provides an opportunity for women's voices outside of the more political structures, such as the Commission and the PAP, and opens doors to a greater diversity of participants. An illiterate, rural woman involved in a community-based organisation (CBO), for example, could theoretically be nominated to ECOSOCC and such should be encouraged in order to truly build partnerships between governments and the peoples of Africa as intended. In order for women to influence the activities of the AU and advance their agenda, organisations focused on women's rights must lobby vigorously for membership. It would be a missed opportunity to find a Council representative of 150 CSOs where none have a mandate focused exclusively on women's rights. Lobbying efforts must then turn to those CSOs with other interests. Noble as their concerns may be, gender advocates must sensitise them to their own agenda and the interdependency of women's rights with all other continental struggles for which civil society may be advocating. As such, the chances of mainstreaming gender into all issues undertaken by ECOSOCC will be increased.

⁸⁰ Art 8(1) ECOSOCC Statutes.

⁸¹ Art 11(1) ECOSOCC Statutes.

⁸² Art 11(2) ECOSOCC Statutes.

3.7 The Peace and Security Council

Given that 24 African states are engaged in conflict to varying degrees,⁸³ the Peace and Security Council of the AU is of vital importance. It entered into force on 26 December 2003, having been established 'as a standing decision-making organ for the prevention, management and resolution of conflicts'.⁸⁴ In order to 'facilitate timely and efficient response to conflict and crisis situations in Africa',⁸⁵ it 'shall be supported by the Commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force and a Special Fund'.⁸⁶ These are established within the Protocol. The Peace and Security Council shall be composed of 15 member states,⁸⁷ elected according to the principle of equitable regional representation and according to specified criteria that must be met.⁸⁸ As representation on the Peace and Security Council shall be at the level of Permanent Representatives, Ministers or Heads of State and Government, there is no assurance of gender equality, or even gender representation, within the decision-making body of the Council. The sub-heading 'Chairmanship' under article 8 suggests that a woman holding a position on the Council was not even considered at the time of drafting. Furthermore, in article 11, whereby the composition of the Panel of the Wise is described, there is no requirement that any of the five 'highly respected African personalities' be women.⁸⁹

Women are recognised in the Protocol as vulnerable victims of conflict. The Preamble recognises that 'conflicts have forced millions of our people, including women and children, into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope'. Article 14 stipulates that the 'Peace and Security Council shall assist vulnerable persons, including children, the elderly, women and other traumatised groups in the society'. The Beijing Platform for Action notes that 'the equal participation of women in power structures and their full involvement in all efforts for the prevention and resolution of conflicts are essential for the maintenance and promotion of peace and security'.⁹⁰ The Preamble of the African Women's Protocol recalls 'United Nations Security Council Resolution 1325 (2000) on the Role of Women in Promoting Peace and Security'

⁸³ As of 1 September 2005, CrisisWatch No 21 International Crisis Group <http://www.icg.org/home/index.cfm?id=3056&1=1> (accessed 1 September 2005).

⁸⁴ Art 2(1) Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002) (Peace and Security Protocol).

⁸⁵ As above.

⁸⁶ Art 2(2) Peace and Security Protocol.

⁸⁷ Art 5(1) Peace and Security Protocol.

⁸⁸ Art 5(2) Peace and Security Protocol.

⁸⁹ Art 11(2) Peace and Security Protocol.

⁹⁰ Beijing Platform for Action (n 22 above) para 135.

and article 10 of the same Protocol articulates women's right to peace. It says: 'Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.' While no one would argue that women are not vulnerable during conflict, women must also be recognised as potential leaders in peace processes.

There are a few open windows. Article 8 of the Protocol, concerning procedures, provides for the invitation to participate in open meetings by any CSO involved in, or interested in, a conflict or situation under consideration by the Peace and Security Council. It further provides for informal consultations between the Council and civil society.⁹¹

Article 12 outlines the establishment of a continental early warning system 'in order to facilitate the anticipation and prevention of conflicts'.⁹² It states that the Commission of the AU shall collaborate with, among others,⁹³ relevant NGOs.⁹⁴ There are women's NGOs in Africa whose sole mandate concerns peace,⁹⁵ and as such would be valuable collaborators, particularly in the provision of information regarding gender-sensitive indicators, such as rape and other gender-specific human rights violations, which are often prevalent in societies prone to conflict.⁹⁶

Article 13, with respect to an African Standby Force, indicates that the civilian and military personnel of national standby contingents will be trained on international humanitarian law and international human rights law, with particular emphasis on the rights of women and children.⁹⁷ The Commission shall co-ordinate the training courses and, in this respect, the Women and Gender Directorate within the Commission must assert a pertinent role and appeal to women's organisations for experts to form an integral part of training facilitation.

Article 20 is the most important. African women must take full advantage of the invitation for⁹⁸

[n]on-governmental organizations, community-based and other civil society organizations, particularly women's organizations, to participate actively in

⁹¹ Art 8(10)(c) Peace and Security Protocol.

⁹² Art 12(1) Peace and Security Protocol.

⁹³ The UN, its agencies, other relevant international organisations, research centres and academic institutions.

⁹⁴ Art 12(3) Peace and Security Protocol.

⁹⁵ Eg, Mano River Peace Movement, a network of NGOs in West Africa, and Femmes Africa Solidarité based in Geneva and Dakar.

⁹⁶ E Piza-Lopez & S Schmeidl 'Gender and conflict early warning: A preliminary framework' (July 2002) Geneva: Swiss Peace Foundation with International Alert 13 http://www.peacewomen.org/resources/Early_Warning/implementingB25.html (accessed 24 October 2004).

⁹⁷ Art 13(13) Peace and Security Protocol.

⁹⁸ Art 20 Peace and Security Protocol.

the efforts aimed at promoting peace, security and stability in Africa. When required such organizations may be invited to address the Peace and Security Council.

Rather than waiting for their invitation to address the PSC, women's organisations and civil society, generally, would be wise to model the NGO Working Group on the UN Security Council (NGO Working Group), which has created its own means for participation in the UN Security Council. The NGO Working Group, founded in 1995, is a group of about 30 NGOs working in fields related to Security Council matters.⁹⁹ It organises weekly private and off-the-record briefings with Security Council delegates in order to influence their thinking on policy matters through the provision of information, experience and expertise.¹⁰⁰ Women's organisations in the NGO Working Group were integral in the inception and adoption of UN Security Council Resolution 1325.¹⁰¹ In this respect, international co-operation by means of capacity building and technical assistance could be solicited to organise a similar working group. Experience could be shared for the benefit of co-operation between the Peace and Security Council and African civil society, particularly women's organizations, in order to influence gender mainstreaming.

Unfortunately, however, a NGO working group in Africa would be more difficult to facilitate due to accessibility to the PSC meetings, held in Addis Ababa. Scarce financial resources will be required in order for women's groups to attend in order to meet with its delegates. As with the Assembly, when African men meet to set and implement the African agenda with respect to issues of concern to all Africans, they do so with all expenses paid, often in extravagance. African women, however, in these cases, must fundraise through all available means, and subsequently, send only a small delegation to attempt to influence the final decisions.

Article 20 can be broadly interpreted. CSOs are invited to participate in the efforts aimed at promoting peace, security and stability in Africa. The efforts are not specified as those relating to the PSC. Arguably, article 20 is an invitation for women's groups to participate in the efforts of the AU, the African Commission, NEPAD, and the sub-regional organisations, all of which are involved in the promotion of peace, security and stability. In this respect, with an amount of creative strategising, the opportunities to advance women's rights as they relate to peace and security are more significant than is structurally evident. Studies must be

⁹⁹ NGO Working Group on the Security Council Information Statement, 2004 <http://www.globalpolicy.org/security/ngowkgrp/statements/current.htm> (accessed 12 December 2004).

¹⁰⁰ As above.

¹⁰¹ F Hill 'NGO perspectives: NGOs and the Security Council' (2002) 1 *Disarmament Forum* <http://www.unidir.ch/pdf/articles/pdf-art9.pdf> (accessed 12 December 2004).

undertaken, documentation compiled based upon which, reports must be drafted and disseminated widely in the above-mentioned structures. This will assist to facilitate consideration by decision makers of the often overlooked gender implications of conflict in all stages, from early warning to post-conflict.

While opportunities do exist to include women's voices into the decision-making processes, the PSC is lacking a policy and plan for gender mainstreaming. Other organs of the AU, such as the Executive Council and the Commission entrusted with co-ordinating gender mainstreaming and ensuring gender equality, must seek co-operation from civil society and address this with urgency. An important advocacy tool in this respect is UN Security Council Resolution 1325,¹⁰² which addresses the impact of war on women, and women's contributions to conflict resolution and sustainable peace. It should be promoted and disseminated by women's organisations, particularly those concerned with peace and conflict, in order to guide facilitation of gender mainstreaming into all the activities of the AU related to peace and security.

4 The African regional human rights system

4.1 The African Commission on Human and Peoples' Rights

The African Commission was inherited by the AU from the OAU and is the implementing mechanism for the African Charter¹⁰³ and the Women's Protocol.¹⁰⁴ Eleven elected commissioners, currently of which the Chairperson and four others are female, serving in their personal capacity,¹⁰⁵ are entrusted with the African Commission's promotional and protective mandates. Primarily, although not exclusively, the adoption of resolutions on human rights issues and the appointment of Special Rapporteurs on thematic issues, of which one is the rights of women in Africa, are intended to promote the African Charter, while an individual communications procedure is provided for to protect the rights within.¹⁰⁶ Furthermore, state parties are obligated to submit bi-annual reports to the African Commission,¹⁰⁷ a measure that cuts across its promotional and protective mandates.¹⁰⁸ There

¹⁰² United Nations Security Council Resolution 1325 on Women, Peace and Security S/RES/1325 (2000).

¹⁰³ Art 30 African Charter on Human and Peoples' Rights OAU/CAB/LEG/67/3/Rev5 (1996), reprinted in Heyns (n 2 above) 134.

¹⁰⁴ Art 26 Women's Protocol.

¹⁰⁵ Art 31 African Charter.

¹⁰⁶ Arts 47-59 African Charter.

¹⁰⁷ Art 62 African Charter.

¹⁰⁸ F Viljoen 'Introduction to the African Commission and the regional human rights system' in Heyns (n 2 above) 385 421.

are several opportunities to capitalise on available entry points for women's rights advocacy within the African Commission. These include promoting the adoption of gender-related resolutions, co-operation with the Special Rapporteur on the Rights of Women in Africa, bringing communications to the African Commission, and participating in the reporting procedure.

The core of the African regional human rights system is the African Charter, adopted by the OAU in 1981.¹⁰⁹ All member states of the AU are party to the African Charter and, thus, subject to the African Commission. The African Charter has two Protocols, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights¹¹⁰ and the Women's Protocol. The former has entered into force,¹¹¹ while the latter is awaiting the required 15 ratifications.¹¹² As extensive academic commentary exists¹¹³ on the African Charter, the following overview will be brief and focused on the relevance of the African Charter to women. Within the multi-generational norms included in the Charter and its distinctive inclusion of individual duties, women are inadequately addressed. Article 2 of the African Charter prohibits distinction on the basis of sex to be entitled to the enjoyment of the rights in the Charter and article 3 guarantees equality before the law and equal protection of the law. Article 18, concerning the family, ensures 'the elimination of every discrimination against women' and also ensures the 'protection of the rights of the women and the child as stipulated in international declarations and conventions'. The grouping of women with children is generally perceived by women's rights advocates as patronizing, while the consideration of women within the context of the family 'which is the

¹⁰⁹ Other components of the African human rights system are the African Committee on the Rights and Welfare of the Child, which implements the African Charter on the Rights and Welfare of the Child, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Convention on the Conservation of Nature and Natural Resources and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (the Bamako Convention).

¹¹⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU/LEG/MIN/AFCHPR/PROT (III) (1998) (African Human Rights Court Protocol).

¹¹¹ The African Human Rights Court Protocol entered into force on 15 January 2004.

¹¹² Thirteen countries have ratified the Women's Protocol as of 1 September 2005.

¹¹³ See eg M Hansungule 'The African Charter on Human and Peoples' Rights: A critical review' (2000) 8 *African Yearbook of International Law* 265; C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Penn State Law Review* 679; M Mutua 'The African human rights system: A critical evaluation' Background Paper to the UNDP 2000 Human Development Report 5 http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF (accessed 29 September 2004), M Mutua 'The Banjul Charter: The case for an African cultural fingerprint' in A An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002).

custodian of morals and traditional values recognised by the community'¹¹⁴ is problematic, considering that certain traditional African values conflict with women's rights. The overall unsatisfactory consideration of women's rights in the African Charter, in part, motivated the drafting of the Women's Protocol.

The Women's Protocol has been welcomed as the 'missing link in the African Charter's protection of women'.¹¹⁵ Despite the struggle ahead for its ratification and implementation, the adoption of the Women's Protocol is a monumental achievement for women's rights activists. The Protocol addresses rights of concern to African women. It prohibits harmful traditional practices, for example, such as female genital mutilation and outlines measures to accompany legislation towards its eradication.¹¹⁶ It addresses marriage, including polygamy and the choice of matrimonial regime.¹¹⁷ Economic and social welfare rights¹¹⁸ and group rights, such as the right to a healthy and sustainable environment,¹¹⁹ the right to peace¹²⁰ and the right to development,¹²¹ are also addressed. The inclusion of reproductive rights, including the right to abortion in specified cases,¹²² is particularly innovative as is the inclusion of widow's rights,¹²³ the right to inheritance,¹²⁴ and special protection for the elderly and disabled.¹²⁵

The Protocol is commendable, not least for its recognition of the limitations of legislative prescriptions alone and its provision, therefore, of a holistic approach to women's rights. Article 2, for example, requires state parties to

[c]ommit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of

¹¹⁴ Art 18(2) African Charter.

¹¹⁵ G Ndirangu & S Karmal (eds) *The African Union Protocol on the Rights of Women in Africa: Not yet a force for freedom* (August 2004) campaign pamphlet published jointly by Equality Now, African Women's Development and Communications Network (FEMNET), Oxfam GB, CREDO for Freedom of Expression and Associated Rights, and Fahamu.

¹¹⁶ Art 5 Women's Protocol.

¹¹⁷ Art 6 Women's Protocol.

¹¹⁸ Art 13 Women's Protocol.

¹¹⁹ Art 18 Women's Protocol.

¹²⁰ Art 10 Women's Protocol.

¹²¹ Art 19 Women's Protocol.

¹²² Art 14(2)(c) Women's Protocol. The specified cases are sexual assault, rape, incest, and 'where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus'.

¹²³ Art 20 Women's Protocol.

¹²⁴ Art 21 Women's Protocol.

¹²⁵ Arts 22 & 23 Women's Protocol.

harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

Similar provisions with regard to public education and other social-based actions appear throughout the Protocol, thus enhancing its utility as a tool for gender advocates.

Largely attributable to a relentless campaign by women's organisations and networks, 13 out of a required 15 states have ratified the Women's Protocol since its adoption.¹²⁶ The ratification campaign is a remarkable example of the resolve of African women and a model for advocacy, which can be carried over towards the Protocol's future implementation. Model components include, for example, the formation of a coalition of organisations from Africa and abroad to implement the ratification campaign, thus accruing the benefits that accompany strength in numbers. The coalition has prepared a petition and is gathering signatures on-line and, innovatively, via text messages through cellular phones, in recognition of the fact that more Africans can access a cellular phone than a computer. Another model component of the campaign has been the strategic lobbying of key regional actors, such as Heads of States at the latest AU Heads of States Summit in Addis Ababa, ambassadors, and the President of the Pan-African Parliament. The campaign is also being waged at national levels with effective use of the media, awareness and sensitisation workshops, and co-operation with the Special Rapporteur on the Rights of Women of the African Commission.¹²⁷

In 2004, at the 35th ordinary session of the African Commission, the Commission adopted its first resolution concerning women's rights, entitled the 'Situation of Women and Children in Africa'.¹²⁸ Mention was given to the persistence of harmful traditional practices, widespread poverty, the stigmatisation of women with HIV/AIDS, and the need for states to ratify the Women's Protocol. Stronger resolutions are required whereby these issues and others are addressed in detail individually, rather than as part of a general situation alongside children, another vulnerable group with often related, but unique, needs and concerns. Unfortunately, these types of resolutions are difficult to secure due to the highly political nature of the African Commission, despite the independence of the commissioners. While the presence of five female commissioners, including the Chairperson, inspires hope for an increased prevalence of women's rights-related resolutions, unanimity

¹²⁶ As of 1 September 2005.

¹²⁷ Ndirangu & Karmel (n 115 above).

¹²⁸ African Commission on Human and Peoples' Rights, Resolution on the Situation of Women and Children in Africa (2004) 35th ordinary session of the African Commission on Human and Peoples' Rights <http://www.fidh.org/IMG/pdf/Resolutions35CADHPa.pdf> (accessed 29 October 2004).

is required for the adoption of resolutions. Thus, the aversion of even one commissioner from, or allied with, a less progressive state concerning women's rights can prevent the adoption of a resolution. Mindful of the inevitable politics surrounding the consideration and adoption of resolutions, gender advocates must strategise accordingly. For example, drafting must include diplomacy. Likely opponents and allies within the African Commission must be identified and lobbied. Ultimately, as NGOs may often be perceived as a nuisance, the respective allies should lobby the opponents. Finally, publicity, via the media in particular, must be used to its full potential. Civil society and the AU must monitor any resulting changes in the situation and continue to exert pressure. The PAP and ECOSOCC, in particular, are well placed in this respect as platforms for women's voices and due to their advisory mandate.

Out of over 300 communications received by the African Commission, none have touched upon women's rights directly.¹²⁹ There is a need to develop the jurisprudence of the African Commission in this respect. Several reasons for the underutilisation of this entry point can be deduced. First, NGOs have simply not brought communications concerning issues of concern specifically to women to the African Commission.¹³⁰ As the majority of African women, particularly in the rural areas, remain unaware of the existence of the African Charter and thus unaware of how it can assist their plight, it is up to NGOs to solicit relevant cases to advance before the Commission.

The admissibility requirements for communications¹³¹ are cumbersome, particularly concerning the exhaustion of remedies, as women often have difficulty accessing local courts for a variety of reasons. Another reason for the gap in jurisprudence, with respect to women's rights, is the respective inadequacy of the African Charter. Many violations affecting women are perceived as irrelevant to the communications procedure, as they do not correspond directly with a provision in the African Charter. While, arguably, all violations of women's rights as articulated in the Women's Protocol can be alleged under the African Charter, a significant amount of legal manoeuvring would be required by the litigants, which likely acts as a deterrent. Domestic violence is one example of a violation, which *prima facie* does not correspond to a Charter provision. Arguably, however, domestic violence can constitute torture.¹³² Accordingly, a violation of article 5 of the African Charter can

¹²⁹ R Murray 'A feminist perspective on reform of the African human rights system' (2001) 1 *African Human Rights Law Journal* 208.

¹³⁰ As above.

¹³¹ Art 56 African Charter.

¹³² For an elaboration of the argument that domestic violence can constitute torture, see eg R Copelon 'Intimate terror: Understanding domestic violence as torture' in Cook (n 1 above) 116-152 and H Charlesworth *et al* 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 628-630.

be alleged by a groundbreaking NGO prepared to put forward the argument, although none have seized the opportunity to advance the African Commission's jurisprudence in this respect. Once the Women's Protocol enters into force, advocates will undoubtedly feel more empowered, and indeed will be, to capitalise on the communications procedure. Finally, the majority of decisions¹³³ which have been seized by the African Commission to date, reflect one of the main criticisms of international law from a feminist perspective in that it is designed to protect members of society from public violations, whereas the majority of violations against women occur in the private sphere.¹³⁴

In pursuance of this particular avenue for advocacy, a clear strategy must be devised beforehand whereby prospective cases are carefully considered before the actual submission is made. As the broad goal is the advancement of women's rights, cases must be selected with regard to their potential value as regional and international precedents. A successful decision accompanied by effective publicity could have far-reaching positive repercussions for African women. A potential strategy to employ, in this respect, would be to select an issue first and then recruit the respective complaints. For example, the responsibility of the state arising out of human rights violations perpetrated by individuals and women's enjoyment of economic, social and cultural rights are two general areas in which the substantive law of human rights, as it particularly affects women, needs development.¹³⁵

A revolutionary challenge for African women's NGOs to undertake would be to bring gender-related communications to the African Commission that would reveal the existence of a series of serious or massive violations, as provided for under article 58 of the African Charter. If the African Commission opines that a series of serious and massive violations does exist, it shall draw these cases to the attention of the Assembly of Heads of State and Government, whereby they may request the African Commission to undertake an in-depth study.¹³⁶ The well-

¹³³ The African Commission has recognised the responsibility of the state for the actions of non-state actors in the following communications: *Commission Nationale Des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) paras 20-22; *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 50; *Malawi African Association & Others v Mauritania* (2000) AHRLR 147 (ACHPR 1999) paras 134, 140; *The Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 57 & 58.

¹³⁴ See eg Charlesworth *et al* (n 132 above) 625.

¹³⁵ A Byrnes 'Enforcement through international law and procedures' in Cook (n 1 above) 189-217.

¹³⁶ Arts 58(1) & (2) African Charter.

documented¹³⁷ systemic rape of women in the Darfur region of Sudan, for example, is rife for implementation of article 58.

However, gender advocates must not be hasty and use the communications procedure for political statements or publicity alone while risking the loss of the case, which could have detrimental effects in the long run. As Byrnes observes:¹³⁸

Losing a case at the international level may impede prospects for political and legal change at the national level, since a government may claim that the changes advocated are not required by international law.

Given the favourable ratio of the commissioners and the increased sensitisation to women's rights, provided by the adoption of the Women's Protocol, the chances of favourable decisions, if based on strong, strategic communications, are greater than ever. It is time for gender advocates to tread this unexplored path and capitalise on the communications procedure as an opportunity for advancing women's rights.

The African Commission has three Special Rapporteurs, one of which is on the Rights of Women in Africa.¹³⁹ As women's rights gain prominence on the regional agenda, so does the importance of the Special Rapporteur increase. However, her mandate is difficult to carry out with limited financial and human resources. It includes encouraging and working with NGOs in the field of promotion and protection of women's rights and serving as a link between the Commission and inter-governmental and non-governmental organisations at regional and international levels, in order to harmonise the initiatives on the rights of women.¹⁴⁰ She receives no funding from the African Commission and holds other responsibilities as a commissioner on the African Commission and as a full-time public servant in Mozambique.

¹³⁷ See eg United Nations Commission on Human Rights 'Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights' (7 May 2004) UN Doc E/CN4/2005/3 and Amnesty International 'Darfur: Rape as a weapon of war: Sexual violence and its consequences' (19 July 2004) AI Index AFR 54/076/2004.

¹³⁸ Byrnes (n 135 above) 200.

¹³⁹ The other two are the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions and the Special Rapporteur on Prisons and Conditions of Detention in Africa.

¹⁴⁰ The other components of his or her mandate are to: carry out a study on the situation of the human rights of women in Africa; to draw up guidelines on the drafting and examination of state parties' reports on the rights women in Africa; to ensure or make a follow-up on the implementation of the Charter by state parties. In this vein, the Special Rapporteur will prepare a report on the situation of violations of women's rights and propose recommendations to the Commission; to assist African governments in the development and implementation of their policies of promotion and protection of women's rights in Africa; to collaborate with Special Rapporteurs from the UN and other regional systems; 'Draft Terms of Reference for the Special Rapporteur on the Rights of Women in Africa' reprinted in Heyns (n 2 above) 601-602.

Co-operation by civil society with the Special Rapporteur is an under-utilised means to advance women's rights despite its prevalence in her mandate. This is due to a lack of awareness by civil society of her mandate or lack of means mutually to initiate co-operative initiatives.

In recognition of the dire need to provide the Special Rapporteur with technical assistance to enable her to carry out her mandate, the Centre for Human Rights at the University of Pretoria in South Africa has an agreement to collaborate with the African Commission to support the Special Rapporteur.¹⁴¹ The Centre for Human Rights will collect information and documentation, facilitate networking, conduct research and produce material. Penal Reform International provides similar co-operation as is being offered by the Centre to the Special Rapporteur on Prisons and Conditions of Detention in Africa with notable success,¹⁴² thus setting an inspiring precedent.

The Special Rapporteur has the political access to amplify women's voices, especially in forums where they otherwise remain whispers. For example, the Special Rapporteur reports to the African Commission, the contents of which then becomes part of the African Commission's report to the Assembly.¹⁴³ Gender advocates, subsequently, have access to the Assembly via the Special Rapporteur if first the entry point is recognised, and then capitalised upon. Most importantly, information must be provided to the Special Rapporteur in order to ensure women's issues of greatest concern are included in her report. This will be even more important once the Women's Protocol enters into force in order to work towards its implementation.

The reporting procedure under article 62 of the African Charter, whereby state parties are required to submit bi-annual reports to the African Commission, must also be maximised for gender advocacy. While states are required to include women's rights in their reports under the African Charter,¹⁴⁴ the Women's Protocol explicitly reinforces this obligation.¹⁴⁵ Women's NGOs must ensure they are aware, in advance, of which states are to report at the African Commission session. They can then mobilise to place pressure on the respective governments to prepare a report for delivery. Use of the media in this respect could be constructive where overdue reports, in particular, should be highlighted. They can also lobby the relevant officials in

¹⁴¹ Centre for Human Rights 'Providing technical support to the Special Rapporteur on the Rights of Women in Africa', on file with author.

¹⁴² J Harrington 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 260.

¹⁴³ Draft Terms of Reference (n 140 above).

¹⁴⁴ Guidelines for National Periodic Reports Under the African Charter Second Annual Activity Report of the African Commission on Human and Peoples' Rights 1988 para 5 in Heyns (n 2 above) 507.

¹⁴⁵ Art 26 Women's Protocol.

person and, if necessary, offer technical assistance in the drafting of the report. The preparation of shadow reports is most enlightening for the commissioners as, not surprisingly, issues are raised that are often absent in the government reports. While the reporting procedure has always been an important entry point for advocacy, the Women's Protocol, through its comprehensive list of rights and prescriptions for state actions, now requires much more detailed reporting from states whereby they must indicate the legislative and other measures undertaken for the full realisation of the rights in the Protocol.¹⁴⁶

While opportunities for advancing women's rights through the African Commission have always existed, they have not been effectively translated into advocacy. The inadequacy of the African Charter to address women's concerns is likely to account for this. The current climate, however, with the ratio of female commissioners and the adoption of the Women's Protocol, should inspire gender advocates to lobby for the adoption of pertinent resolutions, to submit individual communications regarding violations of women's rights, to strengthen partnerships with the Special Rapporteur, and to participate in the reporting procedure.

4.2 The African Court on Human and Peoples' Rights

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights entered into force on 15 January 2004. The Court is to 'complement the protective mandate of the African Commission on Human and Peoples' Rights'.¹⁴⁷ Cases and disputes submitted to it concerning the interpretation and application of the African Charter, its own Protocol and any other relevant human rights instrument will fall under the Court's jurisdiction.¹⁴⁸ This includes the Women's Protocol, also to be interpreted by the Court.¹⁴⁹

Although article 12(2) refers to adequate gender representation in nominating and electing judges, the Protocol does not ensure gender equality in the composition of judges. While this does demonstrate progress from the African Charter, where there is no reference to gender representation concerning the nomination of commissioners, the reference to 'adequate gender representation' is vague and relative to those submitting the ballot. The Assembly, who elects the judges, must be entrusted to elect 50% female judges according to the AU's principle of gender equality. State parties to the Protocol propose candidates for

¹⁴⁶ As above.

¹⁴⁷ Art 2 African Human Rights Court Protocol.

¹⁴⁸ Art 3(1) African Human Rights Court Protocol.

¹⁴⁹ Art 27 Women's Protocol.

the office of judge of the Court.¹⁵⁰ They must do so in accordance with the Guidelines for Nomination and Election of Judges to the African Court on Human and Peoples' Rights whereby 'States Parties should encourage the participation of civil society, including professional, academic and women's groups, in the processes of selection of nominees'.¹⁵¹ Accordingly, gender advocates must ensure eligible female judges are brought to the attention of the relevant parties during the selection process. Subsequent to elections, efforts must then focus on sensitising all the judges to the provisions of the Women's Protocol.

Another weakness in the Protocol, from a gender perspective, is article 5(3), read with article 34(6), regarding access to the Court. Relevant NGOs can only institute cases directly before the Court if the concerned state has made a separate declaration accepting the Court to receive cases by NGOs. As NGOs are most likely to advocate on behalf of African women, this is a serious obstacle in advancing women's rights through the Human Rights Court. Gender advocates must lobby states directly to accept the competence of the Court to receive individual communications and lobby the other organs of the AU, such as the Commission, the Executive Council and the PAP, to encourage states to make the necessary declaration.

Given the African Commission's weakness in enforcement, the significant manifestation of the complementary nature of the Court to the African Commission is the binding nature of the Court's judgments on states.¹⁵² States that do not comply with the Court's judgments may arguably be subject to sanctions by the Assembly.¹⁵³ The Human Rights Court could finally provide the necessary 'teeth' to the African human rights system in time for the entry into force of the Women's Protocol, ultimately leading to strengthened prospects for implementation. In theory, in a truly gender mainstreamed AU, the Human Rights Commission, informed by civil society in co-operation with the Special Rapporteur on Women, may bring a case before the Human Rights Court against a state who, despite having ratified the Women's Protocol, has failed to protect women in armed conflicts, for example. If that state is found to be in violation of the Protocol and does not comply, the AU may subject that state to sanctions.

¹⁵⁰ Art 12 African Human Rights Court Protocol.

¹⁵¹ *Note Verbale* Commission of the African Union 'Guidelines for Nomination and Election of Judges to the African Court on Human and Peoples' Rights' BC/OLC/66 5/8/Vol V (2004).

¹⁵² Art 30 African Human Rights Court Protocol.

¹⁵³ Art 23(2) of the Constitutive Act (n 2 above) states: '[A]ny member state that fails to comply with the decisions and policies of the Union may be subjected to other [than as listed in art 23(1)] sanctions . . .' Arguably, a decision of the African Court on Human and Peoples' and Rights is a decision of the Union.

7 Conclusion

The overview of women's participation in the AU structures reveals that women are absent or inadequately represented within the main policy-making mechanisms, namely the Assembly of the AU, the Executive Council and the Peace and Security Council. 'Without the active participation of women and the incorporation of women's perspective at all levels of decision making, the goals of equality, development and peace cannot be achieved.'¹⁵⁴ The Commission, with equal gender representation, is administrative. ECOSOCC provides for equal representation of women in its composition, but its powers are advisory only. A woman leads the PAP, but it only has a 20% quota for women and is also an advisory body. The AU's commitment to gender parity in all its organs remains unfulfilled.

Although gender equality is a principle of the AU, the reality is that patriarchy remains highly institutionalised in all African systems, and rarely are those who benefit from the *status quo* eager to witness its evolution. It is now in the hands of African women and men to wage a multifaceted struggle formulated around the various available entry points for gender advocacy and, in so doing, maximise the opportunities presented by the AU's commitment to gender equality. Components of the struggle may include claiming the existing political space for women as decision makers within the AU and creating space where it does not currently exist, advocating for ratification of the Women's Protocol and the African Court of Justice, and increased and more effective engagement with the African Commission.

Despite the favourability of the regional political structures to endeavours towards gender equality, significant general challenges exist aside from those already highlighted. First, gender mainstreaming is a complex process and many political leaders and even gender activists are confused as to what gender mainstreaming actually means.¹⁵⁵

It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.

In other words, contrary to common perceptions, gender mainstreaming is not complete once women are simply welcomed participants in traditionally male-dominated structures. The lack of understanding of how gender perspectives can be identified and addressed remains one

¹⁵⁴ Beijing Platform for Action (n 22 above) para 181.

¹⁵⁵ UN Committee on Economic, Social and Cultural Rights agreed conclusions 1997/2 (n 3 above).

of the most serious constraints.¹⁵⁶ While advocating for a critical mass of female participants in the AU, the greater challenge is to maximise the opportunities created once women within the various mechanisms hold power. Policies and programmes, along with corresponding activities, must ultimately reflect the experiences and needs of women and men. This has yet to materialise beyond lip service in the AU.

Another challenge in the midst of advancing women's rights is the proliferation of mechanisms within the AU. As Heyns pertinently observes:¹⁵⁷

The current proliferation of mechanisms means that there is a lack of focus of resources and effort, with the result that none of them might be in a position to make any difference.

The structural proliferation within the AU does not necessarily assist advocacy efforts. While the various organs each represent a forum for gender advocacy in varying degrees, efforts to capitalise on the opportunities presented by each will inevitably stretch human and financial resources that are already limited within civil society. For example, several organisations have formed a coalition for the campaign to ratify the Women's Protocol and the campaign is being vigorously waged. Due to capacity restraints, it would be difficult, if not impossible, to wage an equally enthusiastic campaign for the other remaining Protocol not yet in force, the Protocol for the African Court of Justice. The Gender Directorate within the Commission, the Peace and Security Council, the African Commission and other structures of the AU welcome co-operation from civil society and in some cases depend upon it. Researching issues, compiling information and preparing reports much needed for the infiltration of the gender perspective in all activities of the AU would alone require several full-time civil society-based advocates. Lobbying efforts are unsustainable on all fronts, given the overwhelming nature of issues to be addressed, and the forums within which to address them, nationally, sub-regionally, regionally and even internationally. Moreover, there is a lack of critical mass in gender-based organisations knowledgeable of the structures and their corresponding entry points.¹⁵⁸ However, the challenges created by the proliferation of mechanisms in Africa are not insurmountable if, combined with other strategies, issue-based priorities are identified and advocated for within structures most likely to correspond to their advancement.

Finally, the greatest challenge to gender equality in Africa is articulated by Chinkin:¹⁵⁹

¹⁵⁶ Gender mainstreaming (n 44 above).

¹⁵⁷ Heyns (n 113 above).

¹⁵⁸ African Union and NEPAD (n 24 above).

¹⁵⁹ C Chinkin 'Women's human rights in the 21st century: Challenges and opportunities' lecture, University of Oxford (July 2004), on file with author.

As is all too evident from the continuing and widespread gross violations of women's human rights, legal norms and new legal institutions do not of themselves denote change. They must be accompanied by the internalisation of a human rights culture within the particular contexts of diverse societies and the development of a mindset that rejects the different forms of adverse treatment meted out to women worldwide.

The Women's Protocol recognises the need to modify the social and cultural patterns of conduct of women and men, as does CEDAW. The advocacy priorities identified so far must be accompanied by the Protocol's recommended activities of education, information and communication locally, in co-operation with government stakeholders, towards this end.

Are we, activists for women's rights, concerned Africans, and citizens of an increasing globalised world, to see the glass half empty or half full? The reality is discouraging. However, the introductory argument stands. The regional climate for the advancement of women's rights is more favourable than ever. The AU's commitment to gender equality, the historical achievement of gender parity in the African Commission and the goal to extend that precedent to all organs of the AU, the various institutional commitments to gender mainstreaming, and those to co-operate and build partnerships with civil society, and the adoption of the Gender Declaration and the Women's Protocol, are all revolutionary indications that Africa can transform the oppression under which women live. Arguably, only a decade ago, such initiatives would have been inconceivable. Women such as Gertrude Mongella, the President of the Pan-African Parliament, are models of empowered women, and are beginning to dispel perceptions that women belong in servitude in the private sphere. Africa will one day see its first female head of state. The Women's Protocol will enter into force and fierce advocacy efforts leading to such indicate that state parties will not escape pressure to implement its provisions. The period of time required for the attainment of gender equality in Africa is impossible to predict, but there is no question that it is less than it was before the inception of the AU.