

A feminist perspective on reform of the African human rights system

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1 Introduction

There have been concerns expressed about the manner in which the rights of women are dealt with in international human rights law. It is argued that women's rights are human rights and that they should be mainstreamed in the general human rights instruments. On this basis, some argue that to consider them in separate instruments and therefore to segregate them, is not appropriate.¹ They argue that documents such as the Draft Protocol on Women's Rights² detract from the principle that human rights treaties, such as the African Charter on Human and Peoples' Rights (African Charter or Charter), should be for all.³ On the other hand, it is claimed, a certain amount of attention focused specifically on women's rights is necessary as 'women were excluded from all

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¹ K Mahoney 'Theoretical perspectives on women's human rights and strategies for their implementation' (1996) 21 *Brooklyn Journal of International Law* 799-841; S Wright 'Human rights and women's rights: An analysis of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women' in K Mahoney & P Mahoney (eds) *Human rights in the 21st century: A global challenge* (1993) 75.

² This is due to go before an experts meeting of the OAU in 2001 before being adopted by Council of Ministers and Assembly of Heads of State and Government in 2002.

³ See GA Resolution A/RES/53/120, 10 February 1999, Follow-up to the Fourth World Conference on Women and full implementation of the Beijing Declaration and Platform for Action, 53rd session; Vienna Declaration and Programme of Action, World Conference on Human Rights, UN Doc.A/CONF.157/23 (1993), Part I, para 28 confirms that women's rights are 'an inalienable, integration and indivisible part of universal human rights'; T Meron 'Editorial comments: Enhancing the effectiveness of the prohibition of discrimination against women' (1990) 84 *American Journal of International Law* 213; A Gallagher 'Ending the marginalisation: Strategies for incorporating women into the United Nations human rights system' (1997) 19 *Human Rights Quarterly* 283.

aspects and levels of international structures and policy making' and 'it would be inconceivable to challenge a concern about the rights of people belonging to a racial, religious or indigenous group on the grounds that they are simply people too'.⁴

So how has the African Charter and the African Commission on Human and Peoples' Rights (African Commission or Commission) dealt with women's rights? This article will first consider whether the Commission has mainstreamed women's rights into its work before examining more theoretical perspectives on whether the way in which the Charter is actually formulated restricts its ability to protect women.

On the face of it, the Charter does not seem to accord any particular mention of women, any more than other international human rights instruments have done.⁵ The only provisions are the non-discrimination clause in article 2 prohibiting discrimination on the basis of sex, among other things, and the requirement in article 18(3) that states eliminate 'every discrimination against women and also ensure the protection of the rights of women', in conjunction with the rights of the family and the child. However, a consideration of the Charter's inclusion of what are perceived to be its more unusual provisions and the way in which the Charter as a whole has been interpreted offers some hope for women's rights.

2 Promotion and protection of the rights of women

The African Commission's approach to women's rights indicates both an attempt to highlight the concerns but also to mainstream debate into its existing procedures. In regard to the former, the African Commission has taken several initiatives to specifically focus on the position of women. In 1998 it appointed Commissioner Ondziel-Gnelenga to the position of Special Rapporteur on Women's Rights. This is a positive development which brought attention to the situation of women in Africa and has the potential to ensure that such concerns are integral to

⁴ BE Hernández-Truyol 'Women's rights as human rights rules, realities and the role of culture: A formula for reform' (1996) 21 *Brooklyn Journal of International Law* 605 617.

⁵ For example, the European Convention on Human Rights, art 12 provides for a right of 'men and women of marriageable age' to marry and found a family; art 14 prohibits discrimination on the basis of sex, among other grounds. The American Convention on Human Rights, art 1 prohibits discrimination on the basis of sex and other grounds; art 4(5) prohibits capital punishment being imposed on pregnant women; art 17(2) recognises the right of men and women of marriageable age to marry and raise a family. The International Covenant on Civil and Political Rights, art 2 includes a non-discrimination clause; art 3 is specifically directed towards 'equal right of men and women to the enjoyment of all civil and political rights'; art 6(5) prohibits the death penalty being imposed on pregnant women; art 23(2) provides the right of men and women to marry and found a family; and art 26 provides for equality before the law and prohibition of discrimination on the basis of sex and other grounds.

all of the Commission's work. It is a shame, however, that little concrete action has been taken by the Rapporteur since her appointment.⁶ In the same vein, the Commission also has just adopted a Draft Protocol on the Rights of Women, although this is yet to be fully operational, requiring additional approval, adoption by the Organisation of African Unity (OAU) and ratification by states.⁷ The Draft Protocol draws upon the UN instruments and others and develops them further with some progressive provisions.

Thus, attempts by the Commission to focus on the rights of women specifically have been made, although arguably their results have been limited. What is also important is the extent to which the Commission considers such actions to have dealt adequately with women's rights or whether it believes it must mainstream such rights into its procedures as a whole.

The picture of the extent to which the African Commission has dealt with women's rights as human rights in the Charter is mixed. Certainly, the African Commission is the most representative of all regional human rights bodies, with four out of its eleven commissioners being women. There is also a provision for equal gender representation to be taken into account not only in the nomination but also in the appointment of women to the African Court.⁸ This is in contrast to there being no women on the seven member Inter-American Commission or Court of Human Rights and only eight of the 40 judges of the European Court of Human Rights are women. Furthermore, women are only around a sixth of the total membership of the UN Human Rights Committee and a ninth of the Committee on Economic, Social and Cultural Rights. While placing women on the Commission may be argued to be a token gesture and will not necessarily guarantee better protection of women's rights in general, it does, however, indicate at least a willingness by the OAU to take concrete action in this respect.

Similarly, in its state reporting procedure the Commission has raised the issue of women as something upon which states should be focusing.⁹ The original Guidelines for state reporting had a specific section on

⁶ This is partly due to limited funding, although there have been concerns that what funding was provided was not used appropriately. The Commissioner, for example, spent several months in Europe researching literature on women's rights, when some argued it would have been more appropriate for her to be visiting African countries.

⁷ Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [Final Version], 13 September 2000, CAB/LEG/66.6; reprinted in (2001) 1 *African Human Rights Law Journal* 53.

⁸ Art 12(2) of the Protocol reads: 'Due consideration shall be given to adequate gender representation in the nomination process.' Art 14(3) notes that 'In the election of the judges, the Assembly shall ensure that there is adequate gender representation'.

⁹ Art 62 of the Charter requires states to submit reports on the legislative and other measures they have taken to implement provisions of the Charter. States are to submit reports every two years to the Commission.

women's rights¹⁰ and the amended guidelines require states also to report specifically on 'what is the state doing to improve the conditions of . . . women'.¹¹ Now, the commissioners seem to ask questions consistently about the rights of women during the examination of state reports.¹² Other special rapporteurs have also considered the rights of women in their mandate.¹³

This approach has not been reflected, however, in the Commission's communication procedure.¹⁴ There have been very few cases that either touch upon or relate directly to the rights of women. One explanation is that non-governmental organisations (NGOs) may have failed to submit such cases for the attention of the Commission. There are, for example, only 16 of the NGOs that have observer status before the Commission that focus specifically on women's rights.¹⁵ Another reason

¹⁰ Guidelines for national periodic reports, Second Annual Activity Report of the African Commission on Human and Peoples' Rights 1988–1989, Annex XII, para VII. These noted the reporting requirements of the UN Convention on the Elimination of All Forms of Discrimination Against Women and also that reports on women's rights should be submitted to the African Commission given that 'discrimination against women in Africa is of such widespread occurrence', para VII.2. It called on states to report on the 'actual, general, social, economic, political and legal framework within which a state party approaches the elimination of discrimination against women in all its forms . . . ; any legal and other measures adopted to implement the Convention or their absence . . . ; whether there are any institutions or authorities which have as their task to ensure that the principle of equality between men and women is complied with in practice and what remedies are available to women who have suffered this discrimination; the means to promote and ensure the full development and advancement of women . . .'. It also requires that reports 'reveal obstacles to the participation of women on an equal basis with men in the political, social, economic and cultural life of their countries, and give information on types and frequencies of cases of non-compliance with the principle of equal rights. The reports should also pay due attention to the role of women and their full participation in the solution of problems and issues which are referred to in the preamble and which are not covered by the articles of the Convention', paras VII.8–VII.9.

¹¹ It also includes children and the disabled in this list, Amendment of the general guidelines for the preparation of periodic reports by states parties, DOC/OS/27 (XXIII), para 5.

¹² R Murray 'Report on the 1998 sessions of the African Commission on Human and Peoples' Rights' *Human Rights Law Journal* (forthcoming); R Murray 'Report on the 1997 sessions of the African Commission on Human and Peoples' Rights' (1998) 19 *Human Rights Law Journal* 169.

¹³ For example, the Special Rapporteur on Prisons and other Conditions of Detention, Commissioner Dankwa, has noted in his reports issues such as whether there are female sections at prisons, *Report on Visit to Prisons in Zimbabwe*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex VI.

¹⁴ Arts 55–59.

¹⁵ Out of a total of 236. Status of Submission of NGO Activity Reports as at 30 September 2000, DOC/OS (XXVIII)/182b. This is not because the Commission has rejected more applications from women's organisations but is due to the lack of women's organisations in Africa as a whole. The Commission has also not necessarily encouraged women's organisations specifically to apply for observer status.

may be the limited extent to which the Charter is known to African women generally, at all levels of society, but particularly the majority of women who live in rural areas, who are not educated or who do not work outside of the home.

The only situation in the Commission's protective mandate where women's rights have specifically been raised has been in relation to Mauritania.¹⁶ On its visit to the country in 1997 the Commission met with the Secretary for Women from the government as well as an NGO, the Mauritanian League for the Defence of Women's Rights (LMDDF), and dealt with the specific concerns of groups representing widows who argued that no prosecutions had been undertaken in relation to soldiers of a particular ethnic group who had been killed. The Commission also paid particular attention in its report to violations of rights of women in general and noted that:¹⁷

[A]lthough they appear to be in decline, the traditional forms of treatment of women remain serious causes of concern, in most cases in isolated, rural communities. Such treatment comprises the feeding by force of adolescent girls and female genital mutilation. These practices are widely condemned by international health experts because their effects are harmful to the physical and psychological health of their subjects.

The Commission noted that female genital mutilation 'continues to be widespread among all the ethnic groups of the country with the exception of the Wolofs'. Furthermore, 'the problems linked to early marriage, polygamy and divorce constitute a source of concern for the protection of women's rights in Mauritania where the traditions of the family prevail'. It noted women's participation in the economic sector of the country but that 'they are notable for their absence in political and legal life'. It thus concluded, without making any specific reference to particular rights, that 'the promotion of women's rights is deficient in the country and merits a particular attention'. At the end of the report the Commission found, among other things, that the issue of widows was still unresolved, but disappointingly does not mention women's rights any further.

Similarly, in subsequent communications against the country,¹⁸ listing actions such as prisoners being beaten and burnt and women being raped, it held that:¹⁹

¹⁶ *Report of the Mission to Mauritania of the African Commission on Human and Peoples' Rights*, Nouakchott 19–27 June 1996, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IX.

¹⁷ n 16 above para 5.

¹⁸ Communications 54/91, 61/91, 98/93, 164/97 to 196/97 & 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Inter africaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, Thirteenth Annual Activity Report.

¹⁹ n 18 above para 118.

[T]he government did not produce any argument to counter these facts. Taken together or in isolation, these acts are proof of widespread utilisation of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of article 5. The fact that prisoners were left to die slow deaths . . . equally constitutes cruel, inhuman and degrading forms of treatment prohibited by article 5 of the Charter.

The above discussion is a rather superficial look at what the Commission appears to have done for women. The aim of this paper is, however, to concentrate on more theoretical concerns, to ask whether the way in which the Charter has been drafted itself limits the promotion and protection of women's rights. In this respect, it is worth considering, from a feminist perspective, the very basis on which the Charter, and more generally international human rights law, is formed.

3 Feminist perspectives on international law

Feminist writers and others have argued that international law is male biased.²⁰ The dominant discourse thus fails to take account of those outside its parameters and hence there are viewpoints which are neglected from the mainstream debate. The argument is that such marginalised viewpoints are those of women and that international human rights law as it is presently formulated does not take account of their situation, 'feminine views name what is absent in the thinking and social activities of [men], what is relegated to "others" to think, feel and do'.²¹

This dominant group thus commands the discourse on human rights and international law, as has been argued:²²

The dominant position [of men] is not just their control of international legal institutions but follows from the fact that they created modes of thought, figures of speech by which these institutions understood and by which international law is operated and developed.

This ensures that the views of the marginalised group do not succeed and their position as subordinate is maintained. In this way control can be maintained over women and this prevents them from questioning the role that men play in human rights themselves or arguing that it should be changed.

International law (and international human rights law), it is argued by feminist theories, is based on opposing dichotomies. It is argued that such an approach fails to take account of a much wider experience beyond traditional male perspectives. Thus, it is argued, human rights

²⁰ See the seminal article by H Charlesworth *et al* 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 613.

²¹ S Harding *The science question in feminism* (1986) 186.

²² K Ginther 'Re-defining international law from the point of view of decolonisation and development of African regionalism' (1982) 26 *Journal of African Law* 49 59.

has been posited in contrasting terms such as state/individual, war/peace, public/private as though these were clear divides into which issues could clearly be separated. The argument is that such an approach neglects the position and experience of women. These dichotomies suggest that international human rights law can be approached in terms of either/or and this neglects the benefits of the two extremes.²³ The result is that one of the extremes is deemed secondary and irrelevant.²⁴

I have argued,²⁵ and want to develop this further here, that this is not the approach of the African system, and the African Commission is a useful indication of a way to view the human rights system from a more holistic perspective. It indicates a willingness to move beyond such strict dichotomies, which is also central to the protection of the rights of women. A number of examples can be taken as explanations:²⁶

3.1 Public/private

There are strong arguments from feminist writers that international human rights law with its traditional focus on the state as against the individual, only concentrates on the public relationship and fails to account for the private domain, namely the relationship between individuals.²⁷ Human rights law traditionally imposes duties on the state towards the individual; individuals themselves are not under human rights law accountable towards other individuals.

Feminist writers argue that this approach reflects the male domain and male perspective in which human rights law as we know it was developed and that many violations of the rights of women occur in the domestic setting.²⁸ So, for example, has torture in international human rights law been considered to apply to situations where state agents are the perpetrators of the violence. It has not been traditionally related to private individuals inflicting harm against others in the domestic

²³ N Lacey 'Theory into practice? Pornography and the public/private dichotomy' in A Bottomley & J Conaghan (eds) *Feminist theory and legal strategy* (1993) 93-99 states that the law is 'structured around pairs of ideas which are opposed in the sense that the attribution of one excludes the other'.

²⁴ Harding (n 21 above) 165 argues that that some matters are usually associated with women and thus deemed irrelevant, namely, emotion as opposed to reason; others as opposed to self; subjectivity as opposed to objectivity.

²⁵ See R Murray *The African Commission on Human and Peoples' Rights and international law* (2000).

²⁶ These are all illustrated in the book, referred to above.

²⁷ C MacKinnon *Towards a feminist theory of the state* (1989); K Goodall 'Public and private in legal debate' (1990) 18 *International Journal of Social Law* 445; E Schneider 'The violence of privacy' (1992) 23 *Connecticut Law Review* 973; K Engle 'After the collapse of the public/private distinction: Strategising women's rights' in D Dallymeyer (ed) *Reconceiving reality: Women and international law* (1993).

²⁸ See Engle, as above. See also A Clapham *Human rights in the private sphere* (1993) 352.

setting.²⁹ Women are often abused in their own homes/domestic setting, at work, by their relatives or persons known to them. Yet one is classified as torture in international law whereas the latter, being carried out by non-state agents, is not.³⁰ There is no difference between these positions which would justify the different treatment. As Clapham notes:³¹

There should be protection from all violations of human rights and not only when the violator can be directly identified as an agent of the state. . . . This could be legally justified by a dynamic interpretation which considered the general evolution of international law. . . . This is not the same as advocating the abolition of the notions of public and private.

The African Commission has in fact been willing to go beyond this divide, and a few examples are worth noting in relation to the position of women. Its Draft Protocol on the Rights of Women, following the precedent of the UN's Convention for the Elimination of All Forms of Discrimination Against Women, applies to both the 'public and private sphere' or 'all spheres'. It recognises that violence against women can occur in private settings as well as the public domain and treats both as equal of the protection of human rights. Similarly, the Commission has required the state to consider the private aspects of work³² and recognise the value of work in the home.³³

3.2 Civil and political rights/economic, social and cultural rights

Another example of a dichotomy which neglects the position of women is the separation of rights between civil and political rights and economic, social and cultural rights. In the same way, one can argue that this divide has relegated the latter to being of less importance³⁴ and

²⁹ Engle argues that 'concentrating too much on the public/private distinction excludes important parts of women's experiences. Not only does such a focus often omit those parts of women's lives that figure into the 'public', however that gets defined, it also assumes that 'private' is bad for women. It fails to recognise that the 'private' is a place where many have tried to be and that it might ultimately afford protection to (at least some) women', Engle (n 27 above) 143.

³⁰ MacKinnon (n 27 above).

³¹ Clapham (n 28 above) 134.

³² Paras B.54(b) & II.8 Guidelines for national periodic reports.

³³ See below.

³⁴ See FP Hosken 'Toward a definition of women's human rights' (1981) 3 *Human Rights Quarterly* 2; C Bunch 'Women's rights as human rights: Toward a revision of human rights' (1990) 12 *Human Rights Quarterly* 488; B Stark 'Nurturing rights: An essay on women, peace and international human rights' (1991) 13 *Michigan Journal of International Law* 144; J Kerr 'The context and the goal' in J Kerr (ed) *Ours by right: Women's rights as human rights* (1993); AO Ilumoka 'African women's economic, social and cultural rights: Toward a relevant theory and practice' in R Cook (ed) *Human rights of women: National and international perspectives* (1994) 307.

this impacts on the extent to which they are protected.³⁵ As Craven notes:³⁶

The reason for making the distinction between first and second generation rights could be more accurately put down to the ideological conflict between East and West pursued in the arena of human rights during the drafting of the Covenants . . . The fact of separation has been used as evidence of the inherent opposition of the two categories of rights. In particular, it has led to the perpetuation of excessively monolithic views as to the nature, history and philosophical conception of each group of rights . . . Of greater concern, however, is that despite the clear intention not to imply any notion of relative value by the act of separating the Covenants, it has nevertheless reinforced claims as to the hierarchical ascendance of civil and political rights.

In addition, using the public/private divide, one can challenge the traditional distinction that is drawn between civil and political rights and economic, social and cultural rights. It is suggested that a reason why some nations have been so wary of accepting economic, social and cultural rights may not just have been to do with the expense that their implementation would impose. It is argued that violations of the rights such as the right to work and health (although not necessarily education) required state intervention in matters where the violator was not the state but a private employer or individual. Recognising that states should intervene in such areas advocates an interventionist approach that does not sit comfortably with the protection of the private sphere or with the free market values held by a liberal state. There is no indication in the Charter that economic, social and cultural rights are treated differently from civil and political rights and the African Commission has, however, been willing to require state intervention in numerous areas.

Furthermore, whereas it has been argued that the International Covenant on Economic, Social and Cultural Rights defines rights in terms

³⁵ 'The shocking reality is that states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights', statement by the Committee on Economic, Social and Cultural Rights to the 1993 Vienna World Conference, UN Doc E/C 12/1992/2 83.

³⁶ M Craven *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development* (1995) 8.

of a male perspective,³⁷ the African Commission seems to have gone beyond this in its development of these rights. For example, article 13 of the Draft Protocol on the Rights of Women states that women are to have 'equal opportunities to work'. The Draft Protocol also contains provisions covering remuneration, working conditions, dismissal³⁸ and equal pay for equal work for women.³⁹ The Commission has required states to report on 'equal opportunity for promotion' including 'measures adopted in the public and private sectors including those relating to working conditions, salaries, social security, career possibilities and continuing education for teaching staff'.⁴⁰ It has required states to indicate their social security schemes including maternity benefits⁴¹ and equal access to educational opportunities.⁴²

The Commission appears to have gone further by not just applying economic, social and cultural rights to women, but by recognising the specific impact they can have on women. Thus, under the Draft Protocol on the Rights of Women states should also 'create conditions to promote and support the occupations and economic activities dominated by women, in particular, within the informal sector' and 'encourage the establishment of a system of protection and social insurance for women working in the informal sector'.⁴³ It goes beyond the circle of salaried women, to require that states 'recognise the economic value of the work of women in the home' and to 'recognise motherhood and the upbringing

³⁷ Charlesworth argues that although economic, social and cultural rights 'might be thought by their very nature to transcend the public/private dichotomy', the way in which they are defined in the International Covenant on Economic, Social and Cultural Rights 'indicates the tenacity of a gendered public/private distinction in human rights law. The Covenant creates a public sphere by assuming that all effective power rests with the state . . . The Covenant, then, does not touch on the economic, social and cultural context in which most women live', namely under the domination of men. She argues that the right to work is defined in the public sphere and the right to food 'has been elaborated in a way that offers little to women'; H Charlesworth 'What are "women's international human rights"?' in Cook (n 34 above) 58 74-76.

³⁸ In addition, the Commission has required states to report in relation to arts 16 and 18 of the Charter on maternity protection, including pre-natal and post-natal protection; assistance to working mothers; paid leave; leave with social security benefits; guarantees against dismissal and measures in favour of working mothers who are self-employed or participating in family enterprise (para II.A.29 Guidelines for national periodic reports).

³⁹ Para II.6 Guidelines for national periodic reports.

⁴⁰ Paras B.54(b) & II.8 Guidelines for national periodic reports.

⁴¹ Paras II.17 & 18 Guidelines for national periodic reports.

⁴² For example, art 12 of the Draft Protocol on the Rights of Women provides that states should eliminate discrimination against women and references to stereotypes and take positive action to increase literacy rates, promote education and training for women and girls and promote the retention of girls in schools and training institutions.

⁴³ Arts 13(e) & (f) Draft Protocol on the Rights of Women.

of children as a social function for which the state, the private sector and both parents must take responsibility'.⁴⁴ The Commission has thus recognised a wider definition of work which takes account of the experiences of women and goes beyond the public sphere aspects of work which may be still male dominated.

It is disappointing, however, that despite these interpretations, comparatively little attention has been paid by the African Commission to such economic, social and cultural rights when compared with civil and political rights. One of the reasons for this may be lack of cases being submitted by NGOs. This does not always account for the lack of jurisprudence, however. The Commission should take such opportunities dynamically, as should NGOs who should start to consider these rights in their submission of cases and require the Commission to make some pronouncements. Although the Commission does not appear to have been willing to follow the old divide between economic, social and cultural rights and civil and political rights and does not permit states to argue their lack of resources as a reason for failing to comply with civil and political rights nor economic, social and cultural rights, it has not fully exploited the opportunity to interpret these rights.

3.3 Duties/rights

Connected to the notion of public/private has been the often perceived dichotomy between rights and duties. It has been argued that the traditional view of human rights law, where only states are responsible, is no longer valid for the reason that 'in practice it is impossible to differentiate the private from the public sphere. Even if we can distinguish between the two, such difficult distinctions leave a lacuna in the protection of human rights and can in themselves be particularly dangerous.'⁴⁵

The assumed dichotomy that underlies much of the literature on international human rights law and the African system in particular implies the opposition between traditional and Western approaches and between male and female. This leads to assumptions that duties are only owed to the state and thus may infringe rights. A lack of understanding of the African notion of community confuses the ideology on which the Charter is based, which sees duties as being directed towards the community or the family rather than the state, in contrast to the collectivist approach of a socialist ideology. Thus, duties complement, rather than detract from, human rights. It is common knowledge that one of the unique features of the Charter is its inclusion in detail of the duties of individuals.⁴⁶ The African Commission itself has made it clear that it has not permitted states to use duties in this way. The Commission

⁴⁴ Arts 13(h) & (l) Draft Protocol on the Rights of Women.

⁴⁵ Clapham (n 28 above) 94.

⁴⁶ Arts 27–29.

has recognised that there is no derogation clause in the Charter and that the only legitimate reasons for limiting rights and freedoms are found in article 27(2) of the Charter, namely 'the rights of others, collective security, morality and common interest'. The limitations must be 'strictly proportionate' and 'absolutely necessary' and may 'not erode the right'. Nigeria has attempted to use this provision on several occasions and its arguments have been rejected by the Commission. The Commission found, for example, that restrictions imposed on newspaper houses for no other reason than to punish criticisms of the government were not legitimate limitations for the purposes of article 27(2).⁴⁷

Similarly, the African Commission has been willing to consider duties of non-state actors and violations of the rights by other individuals. From the point of view of women, the Commission has indicated in its Draft Protocol that human rights protection should be accorded to them in the private sphere, as noted above. In the Draft Protocol it also indicated that the perpetrators of violence against women should be brought to account.⁴⁸ Thus, although it has not gone as far as using the individual duties provisions in its Charter to say that actions can be brought against private persons through its own procedures, it is imposing an obligation on the state to take action under the name of human rights.⁴⁹ In its amended guidelines on state reporting, the Commission requests from states 'what is being done to ensure that individual duties are observed'.⁵⁰ Thus, in general, the Commission has held that there is a duty on all not to use violence,⁵¹ and has required states to protect their citizens against domestic violence.⁵² It has also addressed recommendations to non-state entities such as 'manufacturers of anti-personnel mines' to be 'conscious of the dangers and destructions caused by the use of their products'.⁵³

⁴⁷ Communications 140/94, 141/94 & 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, Thirteenth Annual Activity Report.

⁴⁸ Art 5(c) Draft Protocol on the Rights of Women.

⁴⁹ The original Guidelines for national periodic reports required that 'every individual shall observe the duties enunciated' in art 29 and that states should provide 'a full report on each of the duties', para VI.6.

⁵⁰ Para 7 Amendment of the General Guidelines.

⁵¹ 'The Commission . . . condemns the use of violence in South Africa to settle disputes by any body in South Africa and in particular the recent massacre of 18 peoples', Final Communiqué of the 10th ordinary session, Banjul, The Gambia, 8–15 October 1991, para (a).

⁵² Commissioners have asked such questions during state reporting procedures, see Danish Centre for Human Rights *African Commission on Human and Peoples' Rights Examination of state reports: Gambia, Zimbabwe, Senegal, 12th session, October 1992* (1995) 25.

⁵³ Resolution on Anti-Personnel Mines, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex VIII, para 4.

It is hoped that the Commission will use these unusual provisions to be dynamic and progressive, knowing that it has a flexible enough instrument and the mandate to do so.

3.4 Individual/community

Another dichotomy traditionally viewed in international human rights law has been that between the community and the male individual. Western and male approaches would argue that human rights are vested in the individual and not in groups, and would see the community as a threat to the rights of the individual.⁵⁴ In contrast, the African/feminist approach has argued that they are not in conflict with each other but that 'a dialogue and permanent equilibrium should exist between the individual and the social group to which he belongs'.⁵⁵ As Kiwanuka argues, 'the individual is not totally aloof, irresponsible and opposed to the society. This is to say that the people of Africa are "community bound" rather than individualistic.'⁵⁶

Thus peoples' rights in international human rights law, with their community focus, have been perceived as having less status than 'first' or 'second generation' rights and where they have been accepted, it is argued that they have been interpreted from a perspective which fails to take account of the experience of women. For example, some have argued that the way in which self-determination has been interpreted⁵⁷

⁵⁴ For a discussion on the issue of community see R Kiwanuka 'The meaning of peoples' rights in the African Charter on Human and Peoples' Rights' (1988) 80 *American Journal of International Law* 80 82.

⁵⁵ EG Bello 'The African Charter on Human and Peoples' Rights. A legal analysis' (1985-86) 194 *Hague Recueil* 9 25.

⁵⁶ ML Balanda 'The African Charter on Human and Peoples' Rights' in K Ginther & W Benedek (eds) *New perspectives and conceptions in international law: An Afro-European dialogue* (1994) 139. See also G Triggs 'The rights of peoples and individual rights: Conflict or harmony' in J Crawford *Rights of peoples* (1988) ch 9.

⁵⁷ C Chinkin 'A gendered perspective to the international use of force' (1992) 12 *Australian Yearbook of International Law* 279 280 notes that 'there is a fundamental contradiction between the notion of self-determination as meaning the right of "all people" to "freely determine their political status and freely pursue their economic, social and cultural status" and the continued domination and marginalisation by one sector of the population in the nation state of another sector. Colonisation has been universally condemned by the international community as being about domination, oppression, exploitation, aggression and power and therefore per se constituting a threat to the maintenance of international peace and security.' She continues on 281: '[T]he role of women under colonialism is in many ways symbolic of the domination of the colonised within a colonial society.'

perpetuates the notion of a patriarchal state.⁵⁸ As Gardham has argued:⁵⁹

On this analysis the right of self-determination is just part of the existing power structure and has nothing to offer women. Liberation movements, moreover, are no less patriarchal in their structure and operations than established states.⁶⁰

To take an example, it has been argued that the right to development 'is an example of how the international legal order privileges a male perspective and fails to accommodate the realities of women's lives'.⁶¹ Thus Charlesworth has argued that the UN Declaration on the Right to Development⁶² fails to account for women, as its approach to involving women in the development process is argued to be only a 'token consideration'. Thus, 'an assumption of the international law of development is that underdevelopment is caused by a failure to meet the model of a capitalist economy. Development means industrialisation and westernisation.'⁶³ Thus, it is believed that the right to development despite being formulated in 'neutral language' does not challenge the

⁵⁸ J Gardham 'A feminist analysis of certain aspects of international humanitarian law' (1992) 12 *Australian Yearbook of International Law* 265 notes at 268 that 'the concept of self-determination of peoples has as its aim the achievement of the Western patriarchal state. The patriarchal state is regarded by feminists as both creating and perpetuating the oppression of women.' According to C MacKinnon 'Feminism, Marxism, method and the state: Towards feminist jurisprudence' (1983) 8 *Signs: Journal of Women in Society* 625 644: '[T]he liberal state coercively and authoritatively constitutes the legal order in the interests of men as a gender, through its legitimising norms, forms, relation to society and substantive policies.'

⁵⁹ Gardham (n 58 above) 269.

⁶⁰ Chinkin (n 57 above) 284 notes 'Third world feminists coming from this tradition of struggle against colonialism and foreign domination are drawing the political connections between what occurs at home and the international structures; the same forces that operate to maintain marginalisation and oppression of women at home operate internationally in actions by stronger states against weaker states. The methods used are also identical — rape, battering, aggression, economic exploitation, rendering invisible'. Moreover, 'the pursuit of self-determination as an abstract political goal has not terminated oppression and domination of one part of society by another. States are patriarchal structures not solely in the sense of exclusion of women from elite positions and decision-making roles, but also in the assumptions as to the concentration of power and control in an elite and the domestic legitimisation of the use of force to maintain that control' (285). The African Commission in some respects has taken a traditional approach to self-determination stressing that the principle of *uti possidetis* is to be respected and that secession should, as a general rule, not be permitted; Communication 75/92, *Katangese Peoples' Congress v Zaire*, Eighth Annual Activity Report; *Report on Mission of Good Offices to Senegal*, Tenth Annual Activity Report.

⁶¹ H Charlesworth 'The public/private distinction and the right to development in international law' (1992) 12 *Australian Yearbook of International Law* 190 194.

⁶² General Assembly Resolution 41/128 (1986).

⁶³ Charlesworth (n 61 above) 60 196–7. The Declaration merely notes in art 8 that '[e]ffective measures should be undertaken to ensure that women have an active role in the development process'.

pervasive, and detrimental, assumption that women's work is of a lesser order than men's. The right thus rests on and reinforces a public/private distinction based on gender. The effect is not only to deny the fruits of development to Third World women but also to exacerbate their already unequal position.⁶⁴

Again, the African Charter is unique in its inclusion among its provisions, of a number of peoples' rights. The African Commission has paid some attention to these rights and, in relation to the right to development, has reaffirmed that it 'is an inalienable human right by virtue of which every human person is entitled to participate in, contribute to and enjoy the economic, social, cultural and political development of the society'.⁶⁵ It has interpreted this in relation to women specifically in its Draft Protocol on the Rights of Women in Africa stating that 'women shall have the right to fully enjoy their right to sustainable development', requiring states to⁶⁶

take all appropriate measures to (a) ensure that women participate fully at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes; (b) facilitate women's access to land and guarantee their right to property, whatever their marital status; (c) facilitate women's access to credit and natural resources through flexible mechanisms; (d) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and (e) ensure that in the implementation of trade and economic policies and programmes such as globalisation, the negative effects on women are minimised.

It also includes other provisions on the right of women to participate in the determination of cultural policies,⁶⁷ be involved in management of the environment,⁶⁸ and calls on states to 'reduce military expenditure significantly in favour of spending on social development, while guaranteeing the effective participation of women in the distribution of these resources'.⁶⁹ It is also apparent that the education of women is essential to this process.⁷⁰

The Commission has also recently been willing to use the provisions on peoples' rights to suggest that protection should be increased for minority groups within a particular state. Thus, the Commission declared in its recent decision against Mauritania that domination of one section of society by another was a violation of peoples' rights. The Commission considered the possibility that article 19, and the right of all peoples to

⁶⁴ Charlesworth (n 61 above) 203.

⁶⁵ Resolution on the African Commission on Human and Peoples' Rights, Seventh Annual Activity Report, Annex XV.

⁶⁶ Art 19 Draft Protocol on the Rights of Women.

⁶⁷ Art 17(1).

⁶⁸ Art 18(2)(a).

⁶⁹ Art 11(3).

⁷⁰ Charlesworth (n 61 above) 202.

be equal with the same respect and same rights, may apply to black Mauritians:⁷¹

At the heart of the abuses alleged in the different communications is the question of the domination of one section of the population by another. The resultant discrimination against Black Mauritians is, according to the complainants the result of a negation of the fundamental principle of equality of peoples situated in the African Charter and constitutes a violation of its article 19.

It also held that there could be a violation of article 23(1) and the right of all peoples to national and international peace and security with the attacks against Mauritanian villages.⁷²

The Commission thus appears to be willing to go beyond traditional notions of what might constitute a people, to apply the concept to oppressed groups. It is argued that the concept of a people might apply to women⁷³ and this is something the African Commission has been willing, at least, to imply. In its Draft Protocol on Women's Rights it has applied the rights of peoples to women, namely that women should have a right to international and national peace and security, under article 23, a right to live in a healthy environment in accordance with article 24 and, as seen above, the right to development as provided by articles 21, 22 and 24 of the Charter.⁷⁴

3.5 Cultural relativism/universality

Throughout much of the international debate of international human rights law is the dichotomy between universality and cultural relativism.

⁷¹ Communications 54/91 *et al* (n 18 above) para 142. Unfortunately the Commission was not able to find a violation in this particular case, although it is not clear why. 'The Commission must admit however that the information made available to it does not allow it to establish with certainty that there has been a violation of article 19 of the Charter along the lines alleged here. It has nevertheless identified and condemned the existence of discriminatory practices against certain sectors of the Mauritanian population.'

⁷² 'As advanced by the Mauritanian government, the conflict through which the country passed is the result of the actions of certain groups for which it is not responsible. But in the case in question, it was indeed the Mauritanian public forces that attacked Mauritanian villages. And even if they were rebel forces, the responsibility for protection is incumbent on the Mauritanian state, which is a party to the Charter . . . The unprovoked attacks on villages constitute a denial of the right to live in peace and security', para 140.

⁷³ As Chinkin argues: '[W]omen have never been viewed as "peoples" for the purposes of the right to self-determination and, given the assumptions about the content and implications of that right, they never will or should be. Unfortunately the international community recognises only the right of "peoples" to self-determination and self-determination is in practice most frequently linked to the notion of independence and statehood', Chinkin (n 56 above) 289. See also A Scales 'Militarism, male dominance and law: Feminist jurisprudence as oxymoron?' (1989) 12 *Harvard Women's Law Journal* 25.

⁷⁴ Arts 11, 18 & 19 Draft Protocol on the Rights of Women.

In this respect it is often perceived as difficult to reconcile issues of gender and culture.⁷⁵ Thus, the Charter has been criticised for placing women's rights within the provision relating to the family, article 18, and for the potential that these rights will be rendered subject to article 61 and the duty placed on the Commission, in interpreting the Charter, to take into consideration 'African practices consistent with international norms of human and peoples' rights, customs generally accepted as law . . .'. This could be seen as a rather simplistic argument. As has been argued in relation to Muslim values as being contrary to the rights of women, the arguments are not straightforward. It might not be religion that is to blame for the inequality of women but instead 'patriarchal attitudes, cultural norms, and male-dominated juristic traditions [which] have played a role in denying women their basic human rights'.⁷⁶ Although little has been said by the African Commission on such issues, it has made it clear that the provisions in the Charter prevail over inconsistent customs,⁷⁷ in relation to women's rights for example stating in the Draft Protocol on the Rights of Women that states should 'prohibit all harmful practices which affect the fundamental rights of women and girls and which are contrary to recognised international standards . . .'.⁷⁸

It would be useful if the Commission developed such issues further. It can use gender as a window through which common grounds can be stressed:⁷⁹

Gender is a particularly well-suited point of reference for the reconstruction of the flawed, monocular scheme precisely because it encompasses vital and often ignored issues of race, ethnicity, nationality, culture, language, color, religion, ability (physical and mental), socio-economic class and sexuality . . . it affords a sharp focus within the macrocosm of international law. Virtually every society . . . evidences some form of gender discrimination or subjugation. Sex inequality is a global reality.

⁷⁵ E Brems 'Enemies or allies? Feminism and cultural relativism as dissident voices in human rights discourse' (1997) 19 *Human Rights Quarterly* 136.

⁷⁶ M Monshipouri 'The Muslim world half a century after the Universal Declaration of Human Rights: Progress and obstacles' (1998) 16 *Netherlands Quarterly of Human Rights* 287 309.

⁷⁷ In Communications 48/90, 50/91, 52/91 & 89/93, *Amnesty International; Comité Loosli Bachelard; Lawyers' Committee for Human Rights; Association of Members of the Episcopal Conference of East Africa v Sudan*, Thirteenth Annual Activity Report, the Commission held that 'when Sudanese tribunals apply Shari'a, they must do so in accordance with the other obligations undertaken by the State of Sudan. Trials must always accord with international fair-trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish', para 73.

⁷⁸ Art 6 Draft Protocol on the Rights of Women. 'Harmful practices' are defined in the Draft Protocol, art 1(e) as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health and bodily integrity'.

⁷⁹ Hernández-Truyol (n 4 above) 613.

4 Reform of the Charter?

So, would it be appropriate to suggest any reforms of the Charter from a feminist perspective? On a general basis, it is submitted that whilst the Draft Protocol is a welcome development and a strong indication of the Commission's willingness to pay attention to women's rights, the Draft Protocol should be used more generally as the Commission's authoritative interpretation of the Charter. In this respect, the Commission should ensure that it is not used by states that have not ratified the Draft Protocol to argue that they are not bound by its provisions. Further, in this vein, the Commission must ensure that the existing provisions of the Charter and existing mechanisms are strengthened for women, such as use of the communications procedure, in the same manner in which the state reporting procedure has been used recently. Women's rights must be mainstreamed within the African Charter as a whole.

As indicated, however, the debate about the rights of women must go beyond a mere discussion of the application of provisions of the Charter, and examine whether the Charter itself must be reformed. In this respect, this article hopes to have presented the argument that, unlike many international human rights instruments, from a feminist perspective, the African Charter indicates a more holistic approach which is not grounded in opposing dichotomies which are, it is argued, the result of a system dominated by the male perspective. It thus has gone beyond the public/private divide and other divides which open the possibility of women's rights being taken seriously.

In this respect, some points about the future direction of the Commission are worth making. Firstly, it has shown itself to be innovative in certain aspects and it is essential if the Commission could continue this and use these provisions to develop the notion of duties to enhance the protection of rights, rather than, as the traditional argument would presume, detract from them. It could use these provisions to emphasise the responsibilities of non-state entities not only to continue more extensively and forcefully its practice of applying the Charter to the private sphere in relation to the rights of women, but also to apply such duties to other non-state entities wielding power. In the same way, the Commission should strengthen notions of community, by continuing to develop its jurisprudence on peoples' rights to groups subject to discrimination. Its recent case law against Mauritania indicates a willingness to move beyond the traditional Western/male perspective towards a focus more on power than state and thus that such rights could be useful for other vulnerable groups.

The conclusion is that I would not, therefore, advocate, on a feminist basis, a change to the provisions of Charter itself but instead urge the Commission to build upon its wide-ranging provisions and powers. NGOs also have a responsibility to submit cases using the Charter to its full potential.

One should then, however, take this further and advocate that other international, non-African bodies should look and learn from the approach of the African Commission. The African Commission has moved beyond a strict dichotomous approach that underlies much of international human rights law and in this way has offered hope for the protection of the rights of women. The reason why it has done this, however, may have less to do with its conscious desire to advance the protection of women's rights, than with its own willingness to offer an alternative to Western ideology. It has been argued throughout this paper that a feminist perspective argues that international human rights law is formulated by men and so, as indicated by opposing dichotomies approaches, fails to take account of the position of women. It is thus fundamentally flawed. The same argument can be applied from non-Western and thus African perspectives: 'The role of women under colonialism is in many respects symbolic of the domination of the colonised within a colonial society.'⁸⁰ Thus, international human rights law is not only male biased, but also Western biased, created by European states. As a result, their dominant position has ensured that the voice of women, and of Africa, is not considered relevant or valid to the debate or development of human rights law. The views and perspectives of the African bodies are marginalised to the extent that international literature on human rights and UN bodies does not often cite the jurisprudence and statements of African institutions. From the point of view of the international community it would seem that Africa has a lot of catching up to do, and that there is little if anything that it could contribute to the development of human rights law as a whole.

Because of the history of the continent of colonisation and imposition of European values and structures onto Africa, it is a mixture of these different influences. The African Commission reflects this mixture and is therefore useful in terms of developing human rights law to take account of this 'other', non-Western/non-male view. It offers a method by which non-Western countries' challenges to international law could enlighten and refocus the principles of international law as they now stand. It can thus challenge whether international human rights law as it is presently formulated is indeed universal.⁸¹ The approach of the African Commission has been to move away from these unhelpful dichotomies inherent in human rights law towards a more holistic approach that takes account of a variety of perspectives. In this respect it not only offers the possibility

⁸⁰ Chinkin (n 57 above) 281. For more detailed discussion on this issue see Murray (n 25 above).

⁸¹ 'Unless the experiences of women contribute directly to the mainstream international legal order . . . international human rights law loses its claim to universal applicability: it should be more accurately characterised as international men's rights law'; H Charlesworth 'Human rights as women's rights' in J Peters & A Wolper *Women's rights. Human rights: International feminist perspectives* (1995) 103 105.

of better protection and recognition of women's rights, but also offers something to the international community as a progressive way in which rights could be interpreted.

The most common criticism in the West of the African human rights system is not that it is too radical, but that it is not doing anything. No one is aware of the Commission's activities. While the lack of respect accorded to the Commission so far could be partly explained by the unwillingness of international bodies to consider the Commission as having anything to offer, it is also, arguably, partly due to the fault of the Commission itself which has not disseminated its work as widely and as freely as it could have done. Clearly, therefore, the Commission must be more public at all levels in its activities, disseminate its opinions and decisions and do this while such opinions are relevant, not many years later. Commissioners themselves must be committed to their decisions and the respect that should be accorded to the Commission, must take their task seriously.

In turn, the international community, the UN, regional bodies and writers must also be more willing to draw upon African material in their discussion and development of human rights law. They must accord it more respect rather than dismissing it as irrelevant, primitive or behind. It is these unusual aspects of the Charter that are essential to a developing international human rights law that is truly universal and truly reflective of all persons in the world. This is where the African Commission, as its Charter is not constrained by some of the wording of other international documents, can take a dynamic role and push this forward, challenging notions of human rights, the international human rights system and rather than make this a weakness, make it a strength. Respect in itself will help to ensure respect from others. What does seem to be essential is that the Commission is taken seriously and takes itself seriously. It needs to move beyond this perception that it is still catching up, and move towards recognising that it occupies a valid place on the international scene, and that others can learn something from it.