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Lornah Afoyomungu Olum

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Lornah Afoyomungu Olum*

“How long shall the fair daughters of Africa be compelled to bury their minds and talents beneath a load of iron pots and kettles?”¹ ~ 1831 Maria W. Stewart

Abstract

This article interrogates the problematic nature of classical international law, showing the ways in which it historically privileged, and advanced, European values and interests over those of subaltern groups. While acknowledging the contributions of the Third World Approaches to International Law (TWAIL) and Feminist approaches, as important challenges to traditional international law, the article argues that these critical movements themselves contain a blind spot - insofar as they do not adequately surface the needs and concerns of the African woman as a subject of international law. To this end, the article suggests a need for further reflection upon, and responses to, the multiple ways in which the African woman is excluded - normatively and institutionally - in the contemporary international legal framework.

1.0 Introduction

This article seeks to contribute to scholarship underlining the glaring gap that exists in regards to the African woman in international law. While wide research has been carried out in the context of feminism and African

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¹ Collins H.P (2000) *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (2nd edition) New York: Routledge. Available at: <https://uniteyouthdublin.files.wordpress.com/2015/01/black-feminist-thought-by-patricia-hill-collins.pdf>. (Last accessed 22 September, 2019).

approaches to international law and Third World Approaches to International Law (TWAIL), negligible jurisprudence can be found that satisfactorily places the 'African Woman' squarely at the centre of international law. The article addresses how the Eurocentric history and nature of international law reinforces the continued exclusion of the African woman.

It also explores the way in which the TWAIL and feminist critiques of international law, which address the exclusion of the Third World and half the world's population from international law, respectively, have failed to make significant strides in promoting the recognition and inclusion of the African woman in institutional and normative structures of regional and international law. Specific examples of regional and international instruments are given illustrating the way in which these international institutions were developed for a homogenised African woman who does not exist.

2.0 History and Development of International Law

International law is the set of rules generally regarded and accepted as binding in relations between states and between nations. It serves as a framework for the practice of stable and organised international relations. The term was first used by Bentham (1789) in his 'Introduction to the Principles of Morals and Legislation' in 1780.²

For a long time, international law was regarded as the law existing between "civilized" states.³ Though today it is the main currency regulating international relations, international law or the law of nations is a

² Bentham, J. (1789) *An Introduction to the Principles of Morals and Legislation*, p.6, T. Payne, London; Practice of stable and organised international relations.

³ Mutua W.M, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry', Vol 16(4) *Michigan Journal of International Law*, pg. 1120. Available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1522&context=mjil>. (Last accessed 28 October, 2019).

See, also, Crawford J, *The Criteria for Statehood in International Law*, 48*BRIT. Y.B. INT'L L.* 93, 98 (1976-77).

See, also, Umozurike U.O, (1993) *Introduction to International Law* 9-10.

development out of exclusively European historical circumstances.⁴ Similarly, this exclusive body of law has identified the sources from which it may be derived as custom, treaty, general principles of law common to all major legal systems, and the judicial decisions and the teachings of highly regarded publicists from different countries.⁵

Mr. Justice Gray, while delivering a judgement in *Hilton v Guyot* in the Supreme Court of the United States in 1895, attempted to define international law as:

*International law, in its widest and most comprehensive sense, - including not only questions of right between nations, governed by what has been appropriately called the "law of nations" [or "public international law"], but also questions arising under what is usually called "private international law," or the "conflict of laws," and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation, - is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.*⁶

Another definition of international law is offered by Whiteman, that:

⁴ Makua (n3 above), 1120.

See, also, Oppenheim, I.L, *International Law: A Treatise* 4 (Arnold D. McNair ed., 4th ed. 1928).

⁵ Article 38 of the Statute of the International Court of Justice, the premier authority on the sources of international law, provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

⁶ (1895), 159 U.S. 113, cited in HJ. Steiner & D.F. Vagts, *Transnational Legal Problems*, 3rd Edn (Mineola: The Foundation Press, 1986) at 11-12.

International law is the law of an organised world community, constituted on the basis of States but discharging its community functions increasingly through a complex of international and regional institutions, guaranteeing rights to, and placing obligations upon the individual citizen, and confronted with a wide range of economic, social and technological problems calling for uniform regulations on an international basis which represent a growing proportion of the subject matters of the law.

The definition stated here above encompasses international law as that which governs the mutual relations of the States. In short, international law is the standard of conduct, at a given a time, for States and other entities thereto.⁷

States have long been the main actors on the international scene, firmly embedded in the Westphalia peace treaty in 1648. It was then the notion of the 'nation state' as the main player emerged.⁸ However, global history no longer takes the nation state as the traditional object of historical analysis. Instead, to global historians, the major actors or subjects of a global history are movements such as the peace movement, or women's suffrage movement and business-like chartered companies. Interestingly, current international legal scholarship also focuses on non-state actors as emerging subjects of international law. Another objective of global history is to overcome the primarily European heritage of national history. Therefore, attention is directed to non-European societies and regions. Their modern history is understood as an autonomous development, and not as a mere reaction to European conquest.⁹

Overtime, international law has been criticised as fundamentally Western. Certainly, most international law is based on Western notions.

⁷ Whiteman W.M, *Digest of International Law*, Vol 1, pg.1.

⁸ Shaw, M. (2008) *International Law*, p.1, Cambridge University Press, Cambridge. The Age of Rights, Columbia University Press, New York.

⁹ Fassbender B, Peters A (eds.) (2012), *Oxford Handbook of International Law*, Oxford University Press.

‘Eurocentrism is the practice, conscious or otherwise, of placing emphasis on European and, generally, Western concerns, culture and values at the expense of those of other cultures.’¹⁰ Eurocentrism often involved claiming cultures that were not white or European as being such, or denying their existence at all.¹¹

International law primarily governed European inter-state relations and was founded on European values and beliefs, a phenomenon that is collectively summed up as Eurocentrism.¹² The law did not equally extend to non-European countries, which were labelled ‘uncivilised’ and were objects, rather than subjects, of international law. After 1945, a number of African states emerged as independent nations and became subjects of international law. Africa since then tried to adopt and promote international law in many fields, but some of the rules and principles of international law are seen as obstacles toward the promotion of the interests of African states.¹³

Several African states adopted international law, in their municipal laws, and accepted the principles of the UN. Through their participation, African states expanded the norms of international law to strengthen and develop their states, and their acceptance of the norms of international law, but not the traditional norms; they also encouraged a just system of international law.¹⁴

¹⁰ Ashcroft B., Gareth G. and Tiffin H. (2002) *The Empire writes back*, Routledge, London.

¹¹ <https://afroetic.com/2012/10/11/education-europe-centered-eurocentrism-vs-african-centered>. (Last accessed 25 November, 2019).

¹² See, Orakhelashvili A, ‘The Idea of European International Law’, Vol. 17(2) (2006), *The European Journal of International Law*; Available at; <http://ejil.org/pdfs/17/2/77.pdf>.

¹³ See, Mitharika P.A, ‘The Role of International Law in the Twenty-First Century: An African Perspective’, Vol. 18(5) (1994), *Fordham International Law Journal*. Available at; <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2566&context=ilj>. (Last accessed 30 October, 2019).

¹⁴ See, Fox H.G, ‘The Right to Political Participation in International Law’, Vol. 17(2), 1992, *Yale Journal of International Law*. Available at; <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1600&context=yjil>. (Last accessed 30 October, 2019).

Even though the contribution to international law by the African states is noticeable,¹⁵ the Eurocentric nature of international law is a limitation in its application on the continent. This limitation caused attempts at the confrontation of traditional international law principles and values through critiques like the Third World Approaches to International Law.

The problematic history of international law demonstrates the notion that its institutions and structures were gendered and therefore closed off to women, most especially the African woman, since their inception. The lack of access to decision making organisations and judicial institutions perpetrated by institutional selection mechanisms that view the qualifications of women as inferior to those of men, means that the African woman has to work twice as hard to overcome multiple intersections of race, gender and class within the domestic and international sphere.

3.0 Critiques of International Law

3.1 Third World Approaches to International Law

Third world approaches to international law, also known as TWAIL¹⁶ has been defined by various international law scholars.¹⁷

¹⁵ Unfortunately, despite these contributions, Adrien Katherine Wing, et al., observes that: 'In the Western hemisphere, Africa is frequently viewed as a basket case and 'welfare continent' rather than a market place and exporter of values and norms. This is particularly the case in scholarly and policy-making circles in the U.S. Nowhere is there more ignorance and misunderstanding about Africa than among American legal academics and the U.S. foreign policy establishment'.

Wing A.K, Levitt J and Jackson C, 'An Introduction to the Symposium: The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift?' (2003) *Transnat'l L. & Contemp. Probs.* 1.

¹⁶ The TWAIL acronym in this article is used in its earlier form referring to "Third World Approaches to International Law". It differs from the TWAIL of the present conference which translates TWAIL as "Third World and International Law".

¹⁷ See, Ramina L, 'TWAIL-"Third World Approaches to International law" and human rights: some considerations. Rev. Investing. Const. Vol.5 no.1 Curitiba Jan./Apr. 2018.

Available at; http://www.scielo.br/scielo.php?script=sci_arttext&pid=S2359-56392018000100261 (Last accessed 4 October, 2019).

See, also, Gathii T.J, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' *Trade L. & Dev.* 26 (2011). Available at

Makau M Mutua in his critique of traditional international law, asserts that:

'The regime of international law is illegitimate! It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable and legitimate code of global governance for the Third World. The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination. Historically, the Third World has generally viewed international law as a regime and discourse of domination and subordination, not resistance and liberation. This broad dialectic of opposition to international law is defined and referred to here as Third World Approaches to International Law (TWAIL).'¹⁸

TWAIL is characterised by three primary objectives according to Makau Mutua.

'Firstly, to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Secondly, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.'¹⁹

<https://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1203&context=facpubs>. (Last accessed 4 October, 2019).

¹⁸ Mutua W.M, 'What is TWAIL?' *American Society of International Law Proceedings*, 94, 31, 2000, pg.31. Available at;

<https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1559&context=articles> (Last accessed 03 October, 2019).

¹⁹ Mutua (n19 above), 31.

He further states that “TWAAIL is not a recent phenomenon.” That it is part of a long tradition of critical internationalism.²⁰ Its intellectual and inspirational roots stretch all the way back to the Afro-Asian anti-colonial struggles of the 1940s–1960s, and even before that to the Latin American de-colonization movements.²¹ It is also deeply connected to the New International Economic Order/G-77 movements that were launched in the 1960s, carried on into the 1970s, and stymied by powerful global forces in the 1980s and 1990s.²² Thus, an earlier generation of TWAAIL scholars like Upendra Baxi, Mohammed Bedjaoui, KebaM’baye, and Weeramantry J. did foreground most of the very same concerns that contemporary TWAAIL scholarship now expresses.²³

For TWAAIL scholars such as Anghie and Chimni, in whose view international law gained its defining characteristic of universality through the colonial encounter, this means a perpetuation of that same system. A system in which doctrines were built on subordination by trying to impose the universal international legal system on the non-European other - a continuation of the colonial encounter. It is this orthodox and Eurocentric teleology of international law that TWAAIL scholars oppose.²⁴

Even though the TWAAIL analysis of international law seeks to expose the fact that the West’s use of international law vis-à-vis the Third World embodies various forms of intolerance, including racism to denigration of

²⁰ Ibid.

²¹ Gathii J.T, ‘Rejoinder: TWAAILing International Law’ (2000) 98 *Mich. L. Rev.* 2066.

²² Mickelson K, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’ (1998) 16 *Wis. Int’l L.J.* 362-368.

²³ Okafor O.O ‘Newness, Imperialism, and International Legal Reform in our Time: A TWAAIL Perspective’ *Osgoode Hall Law Journal* Vol. 43 No. 1&2 (2005), pg. 177-178.

Available at;

<http://biblioteca.cejamerica.org/bitstream/handle/2015/2890/Newness-Imperialism-and-International-Legal-Reform-in-Our-Time-A-TWAAIL-Perspective.pdf?sequence=1&isAllowed=y>. (Last accessed 4 October, 2019).

²⁴ Lundberg H, ‘Permanent Colonialism over Natural Resources? Tracing Colonialism in the Post-Colonial State’ (2018), pg. 14. Available at [http://www.juriskandidatprogrammet.se/WEB.nsf/\(MenuItemByDocId\)/ID27D17AE5595F2E5AC1257D6300302F4A/\\$FILE/JUCN21%20VT18%20Essay%20Hugo_Lundberg.pdf](http://www.juriskandidatprogrammet.se/WEB.nsf/(MenuItemByDocId)/ID27D17AE5595F2E5AC1257D6300302F4A/$FILE/JUCN21%20VT18%20Essay%20Hugo_Lundberg.pdf) (Last accessed 14 October, 2019).

non-Western cultural beliefs and practices to blind faith in liberalism's panacea,²⁵ it does not sufficiently address status of the African woman in the deconstruction of traditional international law norms and principles. In fact, according to feminist scholars like Diane Otto,²⁶ some TWAIL scholars enforce the oppression of the African woman in their attempt to reject the imports left behind by the imperialists by holding onto cultures²⁷ that promote the subjugation of women further. She gives an example of sexual autonomy and freedom of expression as one issue that is often considered incommensurable with a Third World perspective.

3.2 Feminist Critique of International Law

In addition to postcolonial scholarship that is widely viewed as the primary method of critique in addressing international law's relationship with the world, feminist critiques of international law have also adopted a radical and complex perspective.²⁸ Feminist approaches have adopted an intersectional

²⁵ According to Anghie, 'The colonial confrontation was not a confrontation between two sovereign states, but between a sovereign European state and a non-European state that, according to the positivist jurisprudence of the time, was lacking in sovereignty. Such a confrontation poses no conceptual difficulties for the positivist jurist who basically resolves the issue by arguing that the sovereign state can do as it wishes with regard to the non-sovereign entity, which lacks the legal personality to assert any legal position.' Anghie A, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999), 1.

²⁶ Otto D 'The Gastronomics of TWAIL's Feminist Flavourings: Some Lunch Time Offerings' *International Community Law Review* 9(4):345-352 (2007), pg.349. Available at; https://www.researchgate.net/publication/249567746_The_Gastronomics_of_TWAIL's_Feminist_Flavourings_Some_LunchTime_Offerings. (Last accessed 5 October, 2019).

²⁷ Culture is broadly interpreted to mean the various ways that social business is conducted and mediated through language, symbols, rituals and traditions and influenced by issues like race, ethnicity, religion, material base, etc. in Tamale S, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' *Sex Matters* (2007) pg. 150-151. Available at; <http://www.fahamu.org/mbbc/wp-content/uploads/2011/09/Tamale-2007-Right-to-Culture.pdf>. (Last accessed 5 October, 2019).

²⁸ Charlesworth, Chinkin & Wright argue that generally, the feminist analysis of international law involves searching for the silences of the discipline. That by examining the structures and the substance of the international legal system to see how women are incorporated into it. She further asserts that the feminist approach offers a challenge to the implicit liberalism of the dominant theories

perspective where race, class, and gender are seen as historically co-constitutive. Hilary Charlesworth, Christine Chinkin, and Shelley Wright argued that the structures of international law “privilege men.”²⁹

Charlesworth³⁰ states that feminist analysis of international law has two major roles, the first is the deconstruction of the explicit and implicit values of the international legal systems by challenging their claim to objectivity and rationality because of the limited base on which they are built. That all tools and categories of international legal analysis become problematic when we understand the exclusion of women from their construction.³¹ Secondly, that the feminist approach to international law is to reconstruct a truly human system of international law.³²

There are a number of international institutions including, the Commission on Human Rights (CHR), the Human Rights Committee (the Committee), the Commission on the Status of Women (CSOW), and the Committee on the Elimination of Discrimination against Women (CEDAW).³³ Some feminists

about international law- the idea that international law simply sets a structure by which the actors within it can pursue their vision of the good life- by asserting that international law has a gender, a fundamental, if sometimes subtly manifested, bias in favour of men. See generally Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 (1991) *AJIL* 613.

²⁹ Charlesworth, H, Chinkin, C & Wright, S, ‘Feminist Approaches to International Law’, 85 (1991) *AJIL* 613.

³⁰ Charlesworth H, ‘Feminist Critiques of International Law and Their Critics’, Vol 1 Article 1 (1994) *Third World Studies*, pg.3. Available at <https://scholar.valpo.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1033&context=twls> (Last accessed 12 October, 2019)

³¹ According to Catherine Mackinnon, in a national context, the state and its major institution, the legal system, are a direct expression of men’s interests. Mackinnon C, (1989) *Feminism unmodified*.

See, also, Franzway S, Court D & Connell R, (1989) *Staking a claim*.

³² Charlesworth (n37 above), 5.

See, also, Tesón Fernando R. “Feminism and International Law: A Reply.” *Virginia Journal of International Law* 33 (1992–1993): 647–684.

³³ The Commission on Human Rights and the Commission on the Status of Women are functional commissions under the United Nations Economic and Social Council. See generally UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS 14-20, U.N. Doc. ST/HR/2/Rev. 3 (1988). Structurally, the Commissions are on an equal plane in the United Nations, although the Commission on the Status of Women was initially created as a sub-commission of the Commission on Human Rights, but received commission status, in

critique mainstream institutions, CHR and the Committee, for not taking women's rights sufficiently seriously, while others critique the entire institutional structure for granting specialized women's institutions, CSOW and CEDAW, less power and less effective enforcement mechanisms than are granted mainstream institutions. The institutionalist position, then, alternates between suggesting that all institutions more fully assimilate women's rights and focusing on specialized institutions.³⁴

In response to the essentialism critique of the feminist approach, Charlesworth admits that the search for universal women's predicaments can obscure differences among women and homogenize women's experiences.³⁵ She suggests one of the ways of overcoming essentialism is to focus on common problems women face whatever their cultural background, for instance violence against women. However, whether such an approach allows feminists critiques to accommodate the widely different perspectives of women worldwide remains to be seen.

Charlesworth acknowledges that the tactic of identifying universal issues for women is not without complexity.³⁶ She is then tempted to address the issue

response to the sense that women's issues should have their own forum. See *infra* text accompanying notes 173-75. The Human Rights Committee (the Committee) is the institution established to enforce the Covenant on Civil and Political Rights, while the Committee on the Elimination of Discrimination against Women is the institution created by the Women's Convention to enforce that Convention. See UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS.

See, also, Engle K, 'International Human Rights and Feminism: When Discourses Meet', Vol 13(3) *Michigan Journal of International Law* (1992). Available at;

<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1622&context=mjil> (Last accessed 13 October, 2019).

³⁴ See, also, Engle K, 'International Human Rights and Feminism: When Discourses Meet', Vol 13(3) *Michigan Journal of International Law* (1992). Available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1622&context=mjil> (Last accessed 13 October, 2019).

³⁵ Charlesworth H, 'Martha Nussbaum's Feminist Internationalism', 111 (2000) *Ethics*, pp 64-78 at pg.73.

³⁶ Charlesworth (n37 above), 10.

of culture as a rigid and a historical practice in the favour of men.³⁷ She seems to suggest that expecting feminist analysis to avoid all universal, global analysis of the position of women is unfair and that women should be identified as an underclass in the international arena, as long as such identification rests on a “loving perception” of other women.³⁸

The question raised in this article is whether this recognition of anti-essentialist scholarship by non-western feminists is sufficient to reintroduce the African woman in international law.

African legal feminist scholars like Dawuni have suggested that the homogenisation of the experiences of women of African descent can be eliminated by a renewed commitment to documenting the lives, experiences, and contributions of individual women, and the collective of African women in leadership in the domestic, regional, and international spheres. Such theorising must proceed from a positionality that considers the identity, location, and experiences of women across the continent as quite independent and variegated along multiple and intersecting identities.³⁹

³⁷ She quotes Arati Rao asserting that: ‘the notion of culture favoured by international actors must be unmasked for what it is: a falsely rigid, a historical, selectively chosen set of self-justificatory texts and practices whose patent partiality raises the question of exactly whose interests are being served and who comes out on top’.

See, Rao A, *The Politics of Gender and Culture in International Human Rights Discourse in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 167, 174 (Julie Peters & Andrea Wolper eds. 1995).

See, also, Charlesworth (n37 above), 11.

³⁸ Bunting A, ‘Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies’ in Bottomley A and Conaghan J (eds.) (1993) *Feminist Theory and Legal Strategy* 6, 11.

³⁹ The term matri-legal feminism was coined by Dawuni to highlight the lived experiences of the African woman in international law. Matri-legal feminism argues the need for emphasizing cultural differences inherent in the experiences of women in international law. It cautions against linking the experiences of “non-Western” women to a lack of agency. While it undergirds the importance of gender diversity, matri-legal feminism further problematizes the importance of acknowledging regional diversity among and within women in the international system. It emphasizes the importance of recognising the varied experiences of all women under international law.

Dawuni J.J, ‘Matri-legal feminism: an African feminist response to international law’ in Ogg K and Harris S (eds.) (2019) *Research Handbook on Feminist Engagement with International Law*, Edward Elgar Publishing, pg. 446.

4.0 Locating the African Woman in International Law

4.1 Status of the African Woman

As espoused by various scholars, the African woman suffers compound discrimination as a result of gender, race, class, ethnicity, and religion, among other components of her identities. Other than the image of the wife and mother, the most common portrayal of the African woman is that of victim. The identification of the African woman as a subordinate victim, devoid of any form of agency to resist or challenge oppression, has roots in historical, economic, social, cultural and political structures. It is therefore impossible to envision a homogenous African woman due to their diversity of histories, cultures and social circumstances, shared experiences among the women of African descent, whether urban or rural, educated or illiterate, young or old.⁴⁰

As discussed earlier in this article, scholarship has highlighted the fact that an enduring discourse in African human rights literature relates to the tension between culture and women's rights, that is, an extension of the universality and cultural relativism debate. This debate centres on discriminatory practices against women, commonly termed "cultural" and/or "traditional" practices, particularly female genital cutting. Others include inheritance rights, widowhood practices and early marriage or child marriage, which undermine the right of the girl child to good health, education, freedom of speech and association, among other rights. Third World feminist scholars criticise the inherently problematic nature of defining these practices as "cultural" and "traditional," arguing that this conceals the power relations.⁴¹

⁴⁰ Fagbongbe M.D, 'Reconstructing Women's Rights in Africa using the African Regional Human Rights Regime: Problems and Possibilities' (2010), pg.52. *A thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the Faculty of Graduate Studies (Law), University of British Columbia (Vancouver)*. Available at; file:///C:/Users/user/Downloads/ubc_2010_fall_fagbongbe_mosope.pdf. (Last accessed 29 October, 2019).

⁴¹ Fagbongbe (n52 above), 90.

The overall consequences of the above challenges encourage violence and aggression towards women; discourage women's participation in the public domain and decision-making; condition women into being less ambitious, motivated and involved in their own advancement; as well as enable the ineffective and inconsequential integration of women in the development process.⁴² The focus on cultural practices as the primary and most important challenge confronting women of African descent denies class, ethnic and national cleavages in African societies, as well as the agency and complexities of women's realities.⁴³

Locating women in a subordinate victim position in popular culture and especially human rights literature provokes extensive scholarly analyses on the effects, consequences and actions to eliminate such cultural practices often at the expense of other prevailing forms of violence against women. Despite the absence of a unitary or homogenous African culture, the African woman is characterised as a powerless, perpetual victim: a victim of culture reinforced by stereotypical and racist representation of culture.⁴⁴

This point is that the use of "culture" promotes an essentialist and a racialized understanding of things African. It posits a "good" culture against a "bad" culture to sustain a racialized discourse. She categorically states that while she makes no attempt to justify harmful practices, she argues that the focus on African "culture" or "traditional" practices is not only

See, Nyarayan U, (1997) *Dislocating Cultures: Identities, Traditions and Third-World Feminism*, New York: Routledge, pg. 57, 87.

See, also, Mohanty C.T, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' in *Feminism without borders: Decolonizing theory, practicing solidarity*, Durham& London: Duke University Press, 2003.

⁴² Fagbongbe (n52 above), 91.

See, also, Udegbe B, 'Portrayal of Women in Nigeria Media and the Psychological Implication' in Odejide A (ed.), *Women and the media in Nigeria* (Ibadan: Women's Research and Documentation Centre) at 131-136.

⁴³ Fagbongbe (n52 above), 91.

See, also, Ogun-dipe-Leslie M, *Recreating Ourselves: African Women and Critical Transformations*, Trenton: Africa World Press, 1994.

⁴⁴ Fagbongbe argues that African culture is as diverse as there are ethnic groups. This perception also holds true for Muslim women especially with regards to discussions relating to the Sharia.

Fagbongbe (n52 above), 92.

problematic because it conceals power relations and how they operate in the garb of “culture,” but also because it ignores practices that may further human rights goals. In most African societies the practice of the extended family system serves as a safety net for economically marginalised women. Also, commentators regard the focus on African culture as a form of ideological domination that misrepresents the realities of African women.⁴⁵

The flexible nature of culture is indicative of the imperative to decolonise the subordinate assumptions that dominate the ideological construction of the woman of African descent, whether as mothers, wives, politically and economically disempowered, or as minors or victims, whether in the public or the private sphere. The construction of women as victims of culture is consistent with the problematic ideological and racialized discourses of culture. In sum, the uncritical application of terms, such as culture and motherhood to represent practices that violate the rights of women is problematic neglecting other applications that may be more beneficial in promoting rights.⁴⁶

In feminist legal studies, culture is often viewed as a deviation from the path of human rights. Chandra Mohanty demonstrated effectively how ‘first world’ feminists have represented ‘third world’ women as helpless victims of culture, as objects devoid of any agency. She explores the simplified construction of the “third-world woman” in hegemonic feminist discourses. Mohanty extends this critique to urban middle class ‘third world’ scholars who write about their own cultures and rural sisters in the same colonizing fashion.⁴⁷

Most of what is understood as “Culture” in contemporary Africa is largely a product of constructions and (re)interpretations by former colonial

⁴⁵ Ibid

See, also, Taiwo O, ‘Feminism and Africa: Reflections on the Poverty of Theory’ in Oyewumi O, *African women and Feminism: Reflecting on the Politics of Sisterhood*, Trenton, NJ: Africa World Press, 2003 at 61.

⁴⁶ Fagbongbe (n52 above), 52.

⁴⁷ Tamale (n28 above), 150-151.

authorities in collaboration with African male patriarchs.⁴⁸ As Frantz Fanon bluntly put it: “After a century of colonial domination we find a culture which is rigid in the extreme, or rather what we find are the dregs of culture, its mineral strata.”⁴⁹

Some African feminist scholars have warned that such approaches are myopic and dangerous as they create an extremely restrictive framework within which African women can challenge domination.⁵⁰

Legal scholars like Abdullahi An-Na’im approach culture in a nuanced and refreshing fashion, seeking to integrate its local understanding within the human rights discourse and advocating for internal cultural transformation.⁵¹

An-Na'im, for example, raises questions about whether international law really can be of any use to women. As with other advocates, a concern for cultural differences guides his questions. At one point he concentrates on enlisting the cooperation of Muslim women and men in enforcing the law, which he believes would require them to see that the law is normal, not alien, to Muslim culture:

*International standards are meaningless to Muslim women unless they are reflected in the concrete realities of the Muslim environment.... To obtain their cooperation in implementing international standards on the rights of women, we need to show the Muslims in general that these standards are not alien at all. They are, in fact, quite compatible with the fundamental values of Islam. In other words, we need to provide Islamic legitimacy for the international standards on the rights of women.*⁵²

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Tamale (n28 above), 150-151.

⁵¹ An-Na'im A, 'The Rights of Women and International Law in the Muslim Context', 9 *WHITTIER L. REV.* (1987).

⁵² An-Na'im (n63 above), 515.

He suggests a more strategic approach towards the implementation of women's rights:

*Our commitment should not be to the rights of women in the abstract, or as contained in high-sounding international instruments signed by official delegations. It should be a commitment to the rights of women in practice.... It is irresponsible and inhumane to encourage these women to move too fast, too soon and to repudiate many of the established norms of their culture or religious law, without due regard to the full implications of such action.*⁵³

4.2 African Legal Feminism

In the process of developing “home-grown” jurisprudence, African legal feminists have drawn inspiration from the contributions of Western ideological movements such as, feminist legal theory, critical legal theory, critical race theory, Post structural theory and Marxist theory.⁵⁴ Increasingly, when African legal feminists make use of theories originating in the West, attempts are made to interrogate their contexts, find differences and similarities with the local contexts and engage with the extent they can be usefully applied. As espoused earlier in this article, caution must be taken to avoid uncritical superimposition of Western paradigms onto the condition of African women as this may end in disastrous results.⁵⁵

See, also, Engle K, 'International Human Rights and Feminism: When Discourses Meet', Vol 13(3) *Michigan Journal of International Law* (1992). Available at;

<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1622&context=mjil> (Last accessed 13 October, 2019).

⁵³ An-Na'im (n63 above), 515.

See, also, Engle K, 'International Human Rights and Feminism: When Discourses Meet', Vol 13(3) *Michigan Journal of International Law* (1992). Available at;

<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1622&context=mjil> (Last accessed 13 October, 2019).

⁵⁴ The Status of Legal Feminism in Africa: Gains & Limits. Available at; http://www.agi.ac.za/sites/default/files/image_tool/images/429/gender_studies/gws_teaching_africa/gender_law/the_status_of_legal_feminism_in_africa.pdf. (Last accessed 20 September, 2019).

⁵⁵ The Status of Legal Feminism in Africa: Gains & Limits. Available at http://www.agi.ac.za/sites/default/files/image_tool/images/429/gender_studies/gws_teaching_africa/gender_law/the_status_of_legal_feminism_in_africa.pdf

African feminism “encompasses freedom from the complex configurations created by multiple oppressions.”⁵⁶ African feminism combines racial, sexual, class, and cultural dimensions of oppression to produce a more inclusive brand of feminism through which women are viewed first and foremost as human, rather than sexual, beings. It can be defined as that ideology which encompasses freedom from oppression based on the political, economic, social, and cultural manifestations of racial, cultural, sexual, and class biases. It is more inclusive than other forms of feminist ideologies and is largely a product of polarizations and conflicts that represent some of the worst and chronic forms of human suffering.⁵⁷

African feminist scholars have therefore begun to rewrite the history of African society to reflect the role women have played and can play in African societies.⁵⁸ In light of this, feminism provides an invaluable foundation for challenging male mainstream and the status quo, whether within or outside feminist discourses, and it offers a valuable tool for analysing women’s rights in Africa.⁵⁹

[s/gws-teaching-africa/gender-law/the-status-of-legal-feminism-in-africa.pdf](https://www.gws-teaching-africa.com/gender-law/the-status-of-legal-feminism-in-africa.pdf).

(Last accessed 20 September, 2019).

⁵⁶ Steady C.F, ‘African Feminism: A Worldwide Perspective’ in Terborg-Penn R, Harley S, Rushing B.A (eds.), *Women in Africa and the Diaspora*, Washington, DC: Howard University Press, 1987 at 4.

See, also, Fagbongbe (n52 above), 15.

⁵⁷ Steady C.F, ‘African Feminism: A Worldwide Perspective’ in Terborg-Penn R, Harley S, Rushing B.A (eds.), *Women in Africa and the Diaspora*, Washington, DC: Howard University Press, 1987 at 4.

See, George E, *Feminism and the Future of African International Legal Scholarship*, Cambridge University Press.

See, also, Fagbongbe (n52 above), 15.

See, Ofodile E.U, *The past and future of African International law scholarship: International trade and investment law*.

⁵⁸ Zeleza P.T, (1997) *Manufacturing African Studies and Crises*, Dakar: CODESRIA Book Series, at Chapters 9 and 10.

See, also, Steady C.F, (2006) *Women and Collective Action in Africa: Development, Democratization, and Empowerment, with Special Focus on Sierra Leone*, New York: Palgrave Macmillan.

See, Fagbongbe (n52 above), 15.

⁵⁹ Fagbongbe (n52 above), 15.

Legal feminist activism on the continent came of age during the late 1980s when female lawyers who doubled as gender activists organized to pursue gender equality. Prominent among such organizations and networks were the various country chapters of FIDA (the International Federation of Women Lawyers), Associations of Women Jurists (Francophone Africa), Women and the Law in Southern Africa (WLSA), Women and the Law in Eastern African (WLEA), Women and the Law in West Africa (WLWA), Women Living Under Muslim Laws (WLUML) and Women in Law, Development for Africa (WiLDAF).⁶⁰

In 1998 the African Women Lawyers Association (AWLA), the umbrella body of African women lawyers, was launched to strengthen networking between women lawyers in the region in their common goal to promote gender equality. It must be noted, however, that legal activism is not limited to lawyers as they are numerous non-lawyer human rights activists on the continent engaged in this field.⁶¹

One of the obstacles to the development of African feminist literature is that there is no such thing as 'African women'. African feminist scholars have argued⁶² that while at the aggregate level, there is nothing wrong with a broad categorisation of any group of people from a particular region of world, the problem arises when these categorisations are stretched to the point where the lines are blurred, thereby eroding the nuances that are necessary for establishing specificity in casual linkages.

There is a tendency by various feminist scholars to categorise the lives of people from Africa as simply 'African' with little attention paid to the

⁶⁰ Available at; http://www.agi.ac.za/sites/default/files/image_tool/images/429/gender_studies/gws_teaching_africa/gender_law/the_status_of_legal_feminism_in_africa.pdf. (Last accessed 13 October, 2019).

⁶¹ Available at; http://www.agi.ac.za/sites/default/files/image_tool/images/429/gender_studies/gws_teaching_africa/gender_law/the_status_of_legal_feminism_in_africa.pdf. (Last accessed 13 October, 2019).

⁶² Dawuni (n51 above), 445.

multiplicity of historical, cultural⁶³, religious, geographic, and socio-political differences and diversity across the continent.⁶⁴ That by representing the experiences, discourse, and engagement of women of African descent as simply those of 'African women', feminist scholars are reproducing the hierarchy power structures inherent in scholarship.

Such reproduction therefore renders the lives and stories of the women they describe as faceless and lacking in personal agency. Scholarship emerging from different disciplines has contributed to the iconoclastic attempts at what Dawuni refers to as 'lazy theorising' with a mission to be masters and

⁶³ Culture is often invoked as a justification for violations of women's human rights, reflecting deep-seated patriarchal structures and harmful gender stereotypes. In several countries, culture is invoked to negatively impact the rights of women, in particular in the areas of marriage and property. However, culture is not a static or unchanging concept, although some States tend to present it as such in order to justify discrimination and violent practices against women and girls. 'Human Rights of Women in Africa: Conceptualizing rights,' pg.18. Available at; https://www.ohchr.org/Documents/Issues/Women/WRGS/WomensRightsinAfrica_singlepages.pdf. (Last accessed 24 September, 2019).

⁶⁴ Historically, for instance, Tamale states that the colonialists constructed the hyper sexed, polygynous female body, and made a case for the strict regulation and control of African women's sexuality. This was the final stage in politicising African women's sex and sexuality. Laws were imported from the imperial metropolis to repress and police women's sexuality. Traditional customs, which themselves were not very egalitarian in the first place, were reconfigured to introduce new sexual mores, taboos and stigmas, and the total medicalisation of women's reproduction. The result was a more repressed sexuality akin to the Victorian type. Colonialists worked hand in hand with African patriarchs to develop inflexible customary laws that evolved into new structures and forms of domination.

Tamale S. 'Women's sexuality as a site of control & resistance: Views on the African continent,' Keynote Address delivered at the International Conference on Bride price on 14 February 2004 at Makerere University, Kampala. Available at; <https://mifumi.org/wp-content/uploads/2017/02/MIFUMI-Bride-Price-Conference-2004-Women%E2%80%99s-Sexuality-as-a-Site-of-Control-Resistance-Views-on-the-African-Context-Sylvia-Tamale.pdf>. (Last accessed 22 September, 2019).

See, also, Schmidt, Elizabeth. 1991. 'Patriarchy, Capitalism, and the Colonial State in Zimbabwe.' *Signs: Journal of Women in Culture and Society* 16(4): 732-56, Mama, Amina. 1996. 'Women's Studies and Studies of Women in Africa during the 1990s.' *CODESRIA Working Paper Series S/96*, Dakar: CODESRIA.

experts on a whole continent without so much as gaining a deeper knowledge of one country⁶⁵.

In 2006, a group of over two hundred African feminists sitting in Accra during The African Feminist Forum developed a Charter of Feminist Principles for African feminists,⁶⁶ seeking to re-energise and reaffirm African feminism in its multiple dimensions.

Feminism coming out of Africa has given more impetus to questions of development and underdevelopment, being informed by the particular challenges and predicaments that face the African continent.⁶⁷ African feminism has been able to bring the key role of gender in African underdevelopment to many international arenas. Gender discourses in international development have only become acceptable as a result of years of painstaking research and activism, challenging male bias in development.

Feminist thinkers from Africa have played key roles in the international networks that have driven this change. Notable among these are the South-south network Development Alternatives with Women for a New Era (DAWN), and the continental Association of African Women in Research and Development (AAWORD), both established in the early 1980s. Despite the failure of many institutions to implement policy commitments to gender equality, the fact is that feminists have succeeded in shifting the discourse in important ways.

⁶⁵ Dawuni (n51 above), 445.

⁶⁶ Available at;
http://awdf.org/wp-content/uploads/Charter_of_Feminist_Principles_for_African_Feminists.pdf.
(Last accessed 5 October, 2019).

⁶⁷ Ahikire J, 'African Feminism in context: Reflections on the legitimization battles, victories and reversals' pg.12. Available at;
http://www.agi.ac.za/sites/default/files/image_tool/images/429/feminist_african_journals/archive/02/features_-_african_feminism_in_the_21st_century_-_a_reflection_on_ugandagos_victories_battles_and_reversals.pdf. (Last accessed 5 October, 2019).

According to the 2018 World Economic Forum's Global Gender Gap Report⁶⁸, in eleven African countries, women hold close to one-third of the seats in parliaments. With 61 percent, Rwanda has the highest proportion of women parliamentarians in the world. Africa has the highest regional female entrepreneurial activity rate in the world. One in four women starts or manages a business. With Rwanda and Namibia, two Sub-Saharan African countries belong to the top ten of the most gender-equal countries.

The lacuna in feminist international law scholarship is the failure to address the active participation of the African woman in international law. An African feminist critique of the international system drawing, simultaneously, from postcolonial and TWAIL posits that the African woman has always been at the forefront in resisting domination, at local and global levels.⁶⁹ For instance, the well-documented involvement of women in liberation and independence movements across Africa, from Algeria to Zimbabwe, provide women with new spaces in fighting oppression, Western patriarchy, and imperial domination. The involvement of women in militant combat provides one window of explanation on the personal agency of African women in fighting against injustice of any kind. Women's roles continue to date. In many African societies, women are still taking the reins of leadership.⁷⁰

Within the political sphere, the continent has had two democratically elected women presidents and several vice presidents.⁷¹ Women are making modest

⁶⁸ Available at <https://www.un.org/en/sections/issues-depth/africa/index.html>. (Last accessed 12 October, 2019).

⁶⁹ Dawuni (n51 above), 455.

⁷⁰ Levitt J (2015), Preface, in Levitt J (ed.), *Black women and international law: Deliberate interactions, movements and actions*, Cambridge: Cambridge University Press, xvi-xvii.
See, also, Dawuni (n51 above), 455.

⁷¹ President Ellen Johnson Sirleaf of Liberia is the first woman to have held the position as a democratically elected president of an African nation. Others include President Joyce Banda of Malawi (Catherine Samba-Panza of the Central African Republic held the position as interim president during the transition in 2014), Rose Francine Rogombe served as interim president in Gabon in 2015. See, Skaine R (2008), *Women Political Leaders in Africa*, North Carolina: McFarland and Company Publishers.
See, also, Dawuni (n51 above), 455.

strides in some national parliaments, with Rwanda leading globally in the number of women in Parliament. Within the legal arena, women are continuing to spearhead significant positions of leadership as chief justices and presidents of constitutional courts.⁷²

4.3 Normative gaps in International Law

4.3.1 The African Woman in International Instruments

Many African governments have signed up to international instruments on women's rights and put national gender policies that pledge commitment to gender equality. While it is clear that these governments do very little when it comes to concrete operationalisation and commitment of resources,⁷³ international instruments are also riddled with normative gaps that permanently limit them from being beneficial to the African woman because the experiences of all women are essentialized in one fits all laws.

*The Convention on the Elimination of All Forms of Discrimination against Women.*⁷⁴

The United Nations through the General Assembly adopted the Convention in 1979 and it entered into force in 1981. The Convention prohibits private and public discrimination against women, outlaws discrimination against women in all spheres of society. A Protocol to the Convention was adopted in 1999 which provides for individual complaints procedure, through which individuals can make complaints of violations against states parties to the CEDAW Committee.

It is, however, important to identify the weaknesses in the Convention in the representing of the African woman. Although CEDAW has been cited in domestic courts within Africa⁷⁵ to challenge discriminatory laws, through

⁷² Dawuni (n51 above), 455.

⁷³ Ahikire (n81 above), 12.

⁷⁴ Available at <https://www.ohchr.org/documents/professionalinterest/cedaw.pdf>. (Last accessed 12 November 2019).

⁷⁵ *Unity Dow v Attorney General of Botswana* [1991] L.R.C 574 (Bots.), *Longwe v. Intercontinental Hotels* (1992) 4 L.R.C 221 [HC] (Zam), *Ephraim v Pastory& Anor* (1990) L.R.C. 757 [HC] (Tanz).

highlighting the ways in which it has failed to provide adequate and specific protection towards women in Africa, the normative gaps in international law are exposed.

Women experience intersectional discrimination on the basis of multiple identities such as race, ethnicity, religion, which is inextricably linked to other factors and experiences like poverty, level of education, among others.

CEDAW fails to protect against some forms of discrimination that had not yet gained international attention at the time of its drafting. For example, CEDAW fails to explicitly provide protection for members of the lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) community.⁷⁶ The intersectionality theory means that the African woman in the LGBTQI community and a gender minority is at a further layered disadvantage that is not experienced by a heterosexual woman in Africa. This is because most African states have laws criminalising same-sex marriages and communities that are violent and homophobic towards members of the LGBTQI community.⁷⁷

The language of CEDAW references to culture as regressive and women as victims of custom and culture. It has been countered that while it is certainly the case that much of the discussion around matters of culture and tradition in the CEDAW context focuses on the negative impact on women's enjoyment of human rights, that is hardly surprising, given that the purpose of the Convention is to respond to violations of women's human rights, and a goal of the reporting procedure is to identify shortfalls and difficulties with a view to addressing them.⁷⁸ There should, however, be a

⁷⁶ Bond E.J, 'CEDAW in sub-Saharan Africa: Lessons in Implementation' Vol.241 *Michigan State Law Review* (2014), pg. 246. Available at <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1077&context=lr>. (Last accessed 12 November 2019).

⁷⁷ Ibrahim M.A, 'LGBT rights in Africa and the discursive role of international human rights law', Vo. 15 Issue 2 (2015) *African Human Rights Law Journal*. Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962015000200003. (Last accessed 13 November, 2019)

⁷⁸ Byrnes A, 'The Committee on the Elimination of Discrimination against Women', in Hellum A & Aasen S.H (eds.) (2013) *Women's Human Rights: CEDAW in International, Regional and National Law*, at 27, 58-59.

nuanced analysis of custom, including its possible benefits to the African woman.⁷⁹

CEDAW, which specifically aimed to protect women from discrimination, similarly failed to meet the needs of women in the African context. CEDAW was diluted by reservations. In total, twenty-five States Parties made a total of sixty-eight substantive reservations. To date, it is one of the most heavily reserved of all international human rights instruments. Although these reservations technically do not undermine the object and purpose of the treaty, the numerous reservations based on Islamic law and contravening domestic law make it impossible for the women's rights movement to catalyse a coherent realization of women's rights in all countries.

Most reservations are related to Articles 2 and 16, which are considered core provisions of the Convention thus defeating the object and purpose of the Convention. This translates directly to sustaining discrimination against the African woman and therefore denying her the protection that the Convention intended.⁸⁰

The United Nations Security Council Resolution (UNSCR) 1325 on Women, Peace and Security

It was adopted by the UN Security Council at its 4213th meeting on 31 October 2000. Contained within the Resolution are provisions on participation of women in conflict resolution and peace processes; gender mainstreaming in conflict-prevention initiatives; protection of women's rights and bodies in peace and war; and relief and recovery, especially for survivors of sexual violence. The issue of conflict and war is an important

See, also, Bond E.J, 'CEDAW in sub-Saharan Africa: Lessons in Implementation' Vol.241 *Michigan State Law Review* (2014). Available at; <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1077&context=lr>. (Last accessed 12 November 2019)

⁷⁹ Merry E.S, (2009) 2nd ed., *Human Rights and Gender Violence: Translating International Law into Local Justice*, 130.

⁸⁰ Amnesty International: 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women Weakening the protection of women from violence in the Middle East and North Africa region.' Available at <https://www.refworld.org/pdfid/42ae98b80.pdf>. (Last accessed 26 November 2019)

subject especially for the African woman since women face a disproportionate amount of discrimination during war situations, which are, unfortunately, rampant on the continent.

It has been argued that the resolution fails to address the structural causes of inequality that render women the most victimised in war zones. In attempts to mainstream gender within the UN, the focus is always superficial, a trait reflected by UNSCR-1325.⁸¹ It does not consider the institutional inequality and power relations that structure approaches to gender in international organisations. Instead, gender mainstreaming is simply attached to the existing power structures.⁸² Structural causes that inhibit women acting as agents⁸³, such as poverty, lack of access to education, and cultural conceptions (young age of marriage, etc.) are not included within the framework of UNSCR-1325.⁸⁴ Women are brought into the dominant structures of hegemonic militarism and war.⁸⁵

This 'add women and stir' approach renders UNSCR-1325 ineffectual, as it does not allow women to determine the terms of the dialogue, which keeps them as the 'other' and prevents them from contributing meaningfully to women's peace and security. This also prevents women from contributing to strategies aiming to protect women in war zones, leaving such things to the masculine majority, maintaining the status quo. It heavily focuses on the role of women as victims. That is, insight from women may be beneficial to global decision makers, as it provides insight from the perspective of the

⁸¹ Otto, D (2006) 'A Sign of "Weakness? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325,' Vol. 13 *Michigan Journal of Gender and Law*.

⁸² Vayrynen, T (2004) 'Gender and UN Peace Operations: The Confines of Modernity,' Vol.11 No.1, *International Peacekeeping*.

⁸³ According to UN Women, a UN body that promotes women's empowerment and gender equality, women constitute fewer than 10% of peace negotiators globally and only 3% of signatories to peace agreements. Available at; <https://www.un.org/africarenewal/magazine/december-2015/women-peace-security>. (Last accessed 25 November, 2019)

⁸⁴ Pratt, N & Richter-Devroe, S (2011) 'Critically Examining UNSCR 1325 on Women, Peace, and Security,' vol.13, no.4 *International Feminist Journal of Politics*.

⁸⁵ Willett, S (2010) 'Introduction: Security Council Resolution 1325: Assessing the Impact on Women, Peace and Security,' vol.17, no.2, *International Peacekeeping*.

victim.⁸⁶ UNSCR-1325 focuses on women as peace-builders, which reaffirms gender stereotypes that situate women as natural peacemakers, and as being conflict-averse.⁸⁷

These highlighted weaknesses of the Resolution are particularly damning for the African woman because during conflicts and crises in African states, women and girls are singled out by terrorist and extremist groups who abduct them for use as suicide bombers or sex slaves. Therefore, leaving women out of peace and security processes hinders communities from finding long lasting peace.⁸⁸

4.3.2 The African Woman in Regional Instruments

African countries and their governments have recognised that the vision for 'The Africa We Want' cannot be achieved until and unless women enjoy their full rights as equal partners in development. Accordingly, several normative and legislative protocols have been adopted, including the Maputo Protocol⁸⁹, the Solemn Declaration on Gender Equality in Africa⁹⁰ and

⁸⁶ Gibbings, S (2004), *Governing Women, Governing Security: Governmentality, Gender-Mainstreaming and Women's Activism at the UN*, MA Thesis, Toronto, York University.

⁸⁷ Pratt, N & Richter-Devroe, S (2011) 'Critically Examining UNSCR 1325 on Women, Peace, and Security,' vol.13, no.4 *International Feminist Journal of Politics*.

O'Connor T, 'The UNSC & Women: On the Effectiveness of Resolution 1325' (2014), *Australian Institute of International Affairs*. Available at; <http://www.internationalaffairs.org.au/news-item/the-unsc-women-on-the-effectiveness-of-resolution-1325/>. (Last accessed 13 November, 2019).

⁸⁸ Available at; <https://www.un.org/africarenewal/magazine/december-2015/women-peace-security>. (Last accessed 25 November, 2019)

⁸⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Available at; https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf. (Last accessed 12 October, 2019)

⁹⁰ The Solemn Declaration on Gender Equality in Africa 2004 (SDGEA) was adopted at the Third Ordinary Session meeting of the Heads of State and Government of Member States of the African Union in Addis Ababa, Ethiopia. This was against the backdrop of a decision on gender parity taken at the inaugural Session of the African Union Assembly of Heads of State and Government in July 2002 in Durban, South Africa implemented during the Second Ordinary Session of the Assembly in Maputo, Mozambique 2003 through the election of five female and five male Commissioners.

Agenda 2063.⁹¹ While this is commendable progress with regards to adoption of legal and policy frameworks that promote women's rights on the continent⁹², much more needs to be done to ensure that the African woman is adequately represented in regional instruments.

The solemn declaration on Gender Equality in Africa focuses on Combating HIV/AIDS, Malaria, Tuberculosis and other related infectious diseases; promotion of Peace and Security; Campaign for Systematic prohibition of the recruitment of Child Soldiers; Fight against Trafficking in Women and Girls; Promote the Gender Parity Principle; Promotion of the implementation of all Human Rights for Women and Girls; Implementation of the Legislation to guarantee Women's Land, Property and Inheritance Rights; Education of Girls and Literacy of Women; Domestication and Implementation of Regional and International instruments on Gender Equality. Available at https://www.un.org/en/africa/osaa/pdf/au/declaration_gender_equality_2004.pdf. (Last accessed 24 September, 2019)

See, also, Martin O, 'The African Union's Mechanisms to Foster Gender Mainstreaming and Ensure Women's Political Participation and Representation,' (2013), pg.16. *International Institute for Democracy and Electoral Assistance*. Available at; <https://www.idea.int/sites/default/files/publications/african-union-mechanisms-to-foster-gender-mainstreaming-and-ensure-womens-political-participation.pdf>. (Last accessed 24 September, 2019)

See, also, Report of the Chairperson on the Implementation of the Solemn Declaration on Gender Equality in Africa (SDGEA). Available at; <http://www.peaceau.org/uploads/ex-cl-729-xxi-e.pdf>. (Last accessed 25 September, 2019).

⁹¹ In January 2015 the Heads of State and Governments of the African Union adopted [Agenda 2063](#). The vision and ideals in the Agenda serve as pillars for the continent in the foreseeable future, which will be translated into concrete objectives, milestones, goals, targets and actions/measures.

Agenda 2063 strives to enable Africa to remain focused and committed to the ideals it envisages in the context of a rapidly changing world. Available at <https://www.un.org/en/sections/issues-depth/africa/index.html>. (Last accessed 12 October, 2019)

⁹² At a sub-regional level, the African Union has provided guidance to the RECs in complementing and harmonizing global and regional frameworks by integrating and translating various resolutions and commitments into their policies and plans of action. The RECs have already started implementing some coordination and harmonization mechanisms, which will certainly help eliminate discrepancies; and the establishment of priority areas of focus will assist in producing results. But bolder action is still needed. The RECs are expected to monitor the implementation of integration-related policies and programmes, to mobilize the necessary resources to support such policies and programmes, and to report on progress. For example, the RECs all possess dedicated gender units, which include declarations and tools for gender audits and mainstreaming, The Southern African Development Community (SADC) established a Gender Unit in 1996, adopted a Gender Policy Framework in 1997 and established gender focal points at the sectorial level. An SADC Plan of Action for gender and

*The African Charter on Human and Peoples' Rights*⁹³

development was created to audit the programmes and to mainstream gender; while the Economic Community of West African States (ECOWAS) has instituted a gender policy to guide its member states in gender mainstreaming.

The establishment of NEPAD, adopted in Zambia in 2001, is another important initiative with considerable focus on gender issues. Its objective is to enhance Africa's growth and development and its participation in the global economy. Under the NEPAD/Spanish Fund for African Women's Empowerment, 38 projects were finalized from the first phase of the Fund. Under the second phase, 31 projects were approved for a total of EUR 8.2 million. The project proposals covered three priority sectors: economic empowerment, civil society strengthening and institutional strengthening.

The APRM, a self-monitoring instrument voluntarily accepted by member states of the AU, aimed at fostering the adoption of policies, standards and practices and strengthening accountability with respect to commitments to good governance as well as gender equality and women's empowerment.

See, Martin O, 'The African Union's Mechanisms to Foster Gender Mainstreaming and Ensure Women's Political Participation and Representation,' (2013), pg.10. *International Institute for Democracy and Electoral Assistance*. Available at <https://www.idea.int/sites/default/files/publications/african-union-mechanisms-to-foster-gender-mainstreaming-and-ensure-womens-political-participation.pdf>. (Last accessed 24 September, 2019).

Also, The Fund for African Women was created as a single mechanism to ensure policy implementation as well as the effective mainstreaming of gender in policies, institutions and programmes at regional, national and local levels. It became operational in 2011. The AU organs, RECs and member states in this regard are committed to allocate a budget for the implementation of policy (member states are requested to devote 1 per cent of assessed contribution to the Fund; some members states have contributed more) and, since the funds mobilized through this means are insufficient, to strengthen partnerships with international financial agencies and institutions to increase technical expertise, and facilitate the exchange of best practices and financial support for the implementation of AU gender policy. During its first year of operation in 2011, the Fund supported 53 grassroots projects across 27 AU member states. (Australia has also supported the fund.) Martin O, 'The African Union's Mechanisms to Foster Gender Mainstreaming and Ensure Women's Political Participation and Representation,' (2013), pg.16. *International Institute for Democracy and Electoral Assistance*. Available at;

<https://www.idea.int/sites/default/files/publications/african-union-mechanisms-to-foster-gender-mainstreaming-and-ensure-womens-political-participation.pdf>. (Last accessed 24 September, 2019).

See, also, Report of the Chairperson on the Implementation of the Solemn Declaration on Gender Equality in Africa (SDGEA). Available at <http://www.peaceau.org/uploads/ex-cl-729-xxi-e.pdf>. (Last accessed 25 September, 2019).

⁹³ Available at;

<http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>. (Last accessed 13 November, 2019).

The African Charter on Human and Peoples' Rights, also known as the Banjul Charter is a regional human rights instrument developed for the purposes of promoting and protecting human rights in Africa. Though the Banjul Charter was, created with human rights in mind, it only mentions women twice, that is in Article 2⁹⁴ and Article 18(3)⁹⁵ requiring states to eliminate "every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

This created the need to introduce a women-specific protocol. In particular, NGOs and States Parties alike realized that the Charter did not explicitly address commonplace practices like female genital mutilation (FGM), forced marriages, or bride price and, as a result, failed to protect the African woman from harm adequately.⁹⁶

*The Protocol to the African Charter on Human and Peoples' Rights (The Maputo Protocol)*⁹⁷

The Maputo Protocol was adopted by the African Union in 2003 and came into force in November 2005 after achieving the required 15 ratifications.⁹⁸ The AU, in adopting a treaty specifically concerning women, intended to reinforce the "message that women's rights require priority attention in the protection of universal and inalienable rights." The Protocol, among others, affords specific legal protection against gender-based violence, in both the

⁹⁴ Article 2: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'

⁹⁵ Article 18(3): 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.'

⁹⁶ Ayeni O.V 'The impact of the African Charter and the Maputo Protocol in selected African states' (2016) *Pretoria University Law Press*. Available at; <http://www.kelinkenyahome.com/wp-content/uploads/2016/07/DOC-20160718-WA0005.pdf>. (Last accessed 13 November, 2019).

⁹⁷ Available at; https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf. (Last accessed 13 November, 2019).

⁹⁸ Ayeni (n110 above) 8.

public and private sphere and affirms the primacy of women's rights to non-discrimination.⁹⁹

Laudable though the aim might be, the Protocol is useless if it does not contribute to substantial changes in the situation of the African woman. Although it offers a tool for the transformation of the unequal power relations between men and women, there is need to demand for action by African leaders to the existing commitments. African states have been criticised for the slow implementation or lack thereof by states that have ratified the Protocol.¹⁰⁰

While the adoption of legal and policy frameworks that promote women's rights on the continent is commendable progress, more needs to be done in terms of implementation, accountability and most importantly, dismantling institutional international law structures which limit women, particularly where economic, social and cultural rights are concerned.

4.4 Institutional gaps in International Law

International institutions are important players in creating legal norms. Article 38(1) (d) of the Statute of the ICJ, implies international courts do not only settle the dispute before them, but also create binding norms.

The minimal representation of the African woman in international institutions like the International Court of Justice (ICJ), International Criminal Court (ICC), International Centre for Settlement of Investment Disputes (ICSID), World Trade Organization's Dispute Settlement Body (WTO DSB), the International Criminal Tribunal for Rwanda (ICTR's), the African Court on Human and Peoples' Rights (ACtHPR), the Economic Community of West African States (ECOWAS) Court of Justice and the East African Court

⁹⁹ 'Under the African Charter, the lack of specificity on discrimination against women left them vulnerable to arguments that "cultural values" and community norms should prevail, even when it results in physical harm.' Journey to equality: 10 Years of the Protocol on the Rights of Women in Africa. Available at; <http://www.soawr.org/images/JourneytoEquality.pdf>. (Last accessed 25 November, 2019).

¹⁰⁰ Journey to equality: 10 Years of the Protocol on the Rights of Women in Africa. Available at <http://www.soawr.org/images/JourneytoEquality.pdf>. (Last accessed 25 November, 2019).

of Justice, among others reinforces the exclusion of the African woman in shaping and forming international law in a way that promotes her rights and interests.¹⁰¹

4.4.1 The African Woman in Regional Courts and Tribunals

The African Court on Human and Peoples' Rights (ACtHPR)¹⁰² was established by the Protocol to the African Charter on Human and Peoples'

¹⁰¹ It is important to note however, that countries across Africa have made substantial gains in the numbers and leadership roles of women judges, as documented in *Gender and the Judiciary in Africa: From obscurity to parity?* Across, the continent, women occupy important leadership positions such as that of Chief Justices and Heads of Constitutional Courts and these developments at the domestic levels have been replicated at the international level with a growing number of African women judges serving on international courts. However, a lot still needs to be done to increase the numbers on all courts and especially international tribunals.

¹⁰² The ACtHPR is made up of thirty member-states, out of the fifty-four nations on the continent. Judges on this court are to hear and dispose of cases guided by principles of international law and rules of procedure. Taking into account the poor record of international courts in attaining an equitable distribution of the sexes, the framers of the treaties establishing the ACtHPR took into account the need for gender representation in the nomination and selection processes. Protocol to the African Charter on Human and Peoples' Rights on the Establishment, Article 12: 'NOMINATIONS 1. States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State. 2. Due consideration shall be given to adequate gender representation in the nomination process.' Available at; <https://www.refworld.org/docid/3f4b19c14.html>. (Last accessed 22 September, 2019)

Article 14(3) of the Protocol addresses the election process, which is undertaken by the Assembly of Heads of State and Government, and states that "[i]n the election of the judges, the Assembly shall ensure that there is adequate gender representation." Thus, through the nomination and voting procedures, there appears to be emphasis placed on ensuring an adequate gender representation on the court. The meaning of "adequate" is unclear, and thus leaves room for political manoeuvring by States. This provision tends to receive secondary consideration relative to the provisions aimed at achieving regional and geographic balance.

Since the first judicial election was held in 2006, the ACtHPR has had only eight women, out of a total of twenty-three judges, but these numbers have since changed with the last election in 2018. On August 27, 2018, the newly elected judges on the Africa Court on Human and Peoples' Rights were sworn in at the seat of the Court in Arusha, Tanzania.

See, also, Dawuni J.J 'Vive La Diversité! A Roadmap to Gender Parity on African Regional Courts?' *VÖLKERRECHTSBLOG* (2017). Available at; <https://voelkerrechtsblog.org/vive-la-diversite/>. (Last accessed 22 September, 2019).

Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), signed in 1998, and came into force in 2004 with twenty-four ratifications.¹⁰³The first judgment of the Court to deal with the rights of women and the rights of the child in Africa, in [*Association Pour le Progrès et la Défense des Droits des Femmes Maliennes \(APDF\) and the Institute for Human Rights and Development in Africa \(IHRDA\) v Mali*](#). With this decision, the Court has placed strict obligations on states to uphold international human rights standards within the sphere of family law, even when to do so may require them to disapply religious and customary law. This decision was significant because the African Court took a firm stance on the authority of the Maputo Protocol as a human rights instrument binding upon African States. This is vital in the advancement of the rights of women on the continent.

The positive effect of the force of African feminism is visible on the continent in various ways for instance increased participation of African women in regional and international courts.¹⁰⁴ As of January 2017, women on the

See, also, Dawuni J.J and Kang A, "Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa", (2015) *Indiana University Press*. Available at;

<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1072&context=polisci>. (Last accessed 22 September, 2019)

See, also, Dawuni J.J, 'Beyond the Numbers: Gender Parity on the African Court on Human and Peoples' Rights— A Lesson for African Regional Courts?' (2018) *Voices on International Law, Policy, Practice*. Available at <https://ilg2.org/2018/08/28/beyond-the-numbers-gender-parity-on-the-african-court-on-human-and-peoples-rights-a-lesson-for-african-regional-courts/>. (Last accessed 22 September, 2019)

¹⁰³ Available at; <https://www.refworld.org/docid/3f4b19c14.html>. (Last accessed 22 September, 2019)

¹⁰⁴ The relationship between the women's movement and women's representation in the justice sector is understudied. Nonetheless, there is some anecdotal evidence that countries with higher levels of women judges is an indication of the strength and visibility of women in national law associations, and their lobbying efforts often prove pivotal in encouraging governments to appoint women to judicial posts.

International Development Law Organization: 'Women Delivering Justice: Contributions, Barriers, Pathways' (2018), pg. 30. Available at; <https://www.idlo.int/sites/default/files/pdfs/publications/IDLO%20-%20Women%20Delivering%20Justice%20-%202018.pdf>. (Last accessed 22 September, 2019).

African Court on Human and Peoples' Rights (ACtHPR) made up five of the eleven seats on the bench and thus achieving gender parity for the first time in the 11-year history of the Court.¹⁰⁵ The following year, during the 31st Ordinary Session of the Assembly of Heads of State and Government of the African Union election, the gender composition of the court was increased to six women and five men.

The ECOWAS Court of Justice is an organ of the Economic Community of West African States (ECOWAS) a regional integration community of 15 member states in West Africa. Although ECOWAS was founded in 1975 by the Treaty of Lagos, the Court of Justice was not created until the adoption of the Protocol on the Community Court of Justice in 1991. Additionally, the ECOWAS Revised Treaty of 1993 established the Court of Justice as an institution of ECOWAS. The Protocol was amended twice; once in 2005, and again in 2006. The 2005 Supplementary Protocol expanded the Court's jurisdiction to include human rights claims by individuals.^{106,107} The ECOWAS Court has had five women out of 17 judgeships representing 29%.

Within the international arena, the turn of the twenty-first century ushered in a growing number of women appointed to serve on international courts such as the International Criminal Court (ICC),⁸ the African Court on Human and People's Rights (ACtHPR), the European Court of Human Rights (ECtHR), the European Court of Justice (ECJ) and ad hoc tribunals such as the International Criminal Tribunals for Yugoslavia and Rwanda and, at a much slower pace, the International Court of Justice (ICJ). Among the elite group of women judges serving on these courts are prominent African women judges, drawn from across the continent, with a wide variety of judicial and professional experience. Notwithstanding these developments, much remains unknown about the roles and contributions that the pace-setting women who sit on these courts bring to international law.

International Development Law Organization: 'Women Delivering Justice: Contributions, Barriers, Pathways' (2018), pg. 30. Available at; <https://www.idlo.int/sites/default/files/pdfs/publications/IDLO%20-%20Women%20Delivering%20Justice%20-%202018.pdf>. (Last accessed 22 September, 2019).

¹⁰⁵ Dawuni (n51 above).445.

¹⁰⁶ Available at; <http://www.african-court.org/en/index.php/news/press-releases/item/223-judges-of-ecowas-court-of-justice-to-visit-the-african-court>. (Last accessed 13 November, 2019).

¹⁰⁷ Available at <http://prod.courtecowas.org/current-judges-2/>. (Last accessed 13 November, 2019)

The East African Court of Justice (the EACJ), is one of the organs of the East African Community established under Article 9 of the Treaty for the Establishment of the East African Community. Following the amendment of the Treaty establishing the East African Community that was carried out on 14th December, 2006 and 20th August, 2007, the Court was reconstituted to have two divisions, a First Instance Division and an Appellate Division.¹⁰⁸ To date, women have only accounted for four out of the 25 judgeships on the court, representing 16%.

It is noteworthy that the EACJ and the ECOWAS Court of Justice do not contain gender parity provisions in their founding documents and additional protocols. This demonstrates the fact that while women have had some success being elected to the bench without gender quotas, setting aspirational targets may be a good strategy to sustain the desired gender parity outcomes.

It is important that the ACtHPR gender parity success should provide lessons for other regional courts in Africa especially the benches of the ECOWAS Court of Justice and the East African Court of Justice where women judges are underrepresented.¹⁰⁹ The gender parity gains at the ACtHPR can be linked to a combination of regional factors and mechanisms, such as activist agenda to achieve gender equality embodied in the Maputo Protocol and the sustained advocacy for women's equal participation in decision making, led by women's organisations such as Solidarity for African Women's Rights (SOAWR).

Commendable also, is the commitment of the Legal Affairs unit of the African Union in reviewing and rejecting nominations that do not contain the names of women, has proved instrumental in meeting the nomination

¹⁰⁸ Available at; <https://www3.nd.edu/~ggoertz/rei/reidevon.dtBase2/Files.noindex/pdf/e/eacj.pdf>. (Last accessed 13 November, 2019).

¹⁰⁹ Dawuni J.J, 'Beyond the Numbers: Gender Parity on the African Court on Human and Peoples' Rights- A Lesson for African Regional Courts?' (2018). Available at; <https://ilg2.org/2018/08/28/beyond-the-numbers-gender-parity-on-the-african-court-on-human-and-peoples-rights-a-lesson-for-african-regional-courts/>. (Last accessed 29 October, 2019).

requirements. Credit must also be given for the political will of the Assembly of Heads of State and Government to abide by the gender representation provisions in Article 12 (nominations) and Article 14 (elections) of the [Protocol to the African Court on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights](#) (Court Protocol).¹¹⁰

4.4.2 The African Woman in International Judicial and Quasi-judicial Institutions

In March 2012, Justice Julia Sebutinde of Uganda made history as the first woman from the continent of Africa to be elected as one of the 15 permanent judges of the International Court of Justice (ICJ).¹¹¹ As of February 2017, Justice Sebutinde is one of the only four women to have ever sat on the bench of the ICJ and the first African woman compared to fourteen African male judges. Justice Sebutinde's election to the ICJ follows the historic election in 1995 of Judge Rosalyn Higgins of the United Kingdom as the first woman to be elected to the court's bench. She then subsequently became the president of the court from 2006 to 2009. The ICJ's dismal record of electing women generally to the court has been attributed to factors such as the patriarchal nature of the international system, the gendered hierarchy in international law.¹¹² The vote trading during the appointment of international judges and the pool arguments advanced by appointing bodies.¹¹³ Since the African woman faces multiple intersections of race,

¹¹⁰ Dawuni (n123 above).

See, also, Dawuni J.J 'Vive La Diversité! A Roadmap to Gender Parity on African Regional Courts?' *VÖLKERRECHTSBLOG* (2017). Available at <https://voelkerrechtsblog.org/vive-la-diversite/>. (Last accessed 22 September, 2019).

¹¹¹ See, International Court of Justice, *All Members*, available at; <http://www.icj-cij.org/en/all-members>.

¹¹² See, Grossman N, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' *Chicago Journal of International Law*, Vol 12(2) Article 9 (2012). Available at; <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1367&context=cjil>.

See, also, Grossman N, 'Sex representation on the bench: Legitimacy and international criminal courts', 11 *International Criminal Law Review* 453.

¹¹³ Dawuni (n51 above), 447-448.

gender and class relations, these factors are then compounded to reinvent the wheel on her exclusion on international courts.

The coming into force of the International Criminal Court (ICC) in 2002 appears to have charted a new direction in attempts to address the underrepresentation of women in international courts. In 2003, the ICC elected the first cohort of 18 judges to the court, and out of this number seven were women, representing the highest number of women to have served on an international court since its inception. The number of women on the ICC bench increased from 38 percent in 2003 to 57 percent in 2013, and this increase caused the minimum voting requirements to be adjusted to ensure that a man would be elected in the 2014 elections. As of 2016, of the total number of forty-one judges who have served since the inception of the court in 2003, 15 have been women, making up 36% of the total number of judges. African women make up five of the 15, representing the highest number from a single geographic region of the world.¹¹⁴ The success of the ICC in achieving a near gender parity has been attributed to the Rome Statute's provision in Article 36(8) (iii) for a "fair representation of female and male judges."

Nonetheless, the gender composition of international courts remains a contested issue, with varying levels of success across existing international courts and tribunals.¹¹⁵

See, also, Terris D, Roman C, and Swigart L (2007), *The international judge: A n introduction to the men and women who decide the world's cases*, Waltham, MA: University Press of New England/Brandeis University Press.

See, also, Vauchez H, 'More women- but which women? The rule and the politics of gender balance at the European Court of Human Rights, *The European Journal of International Law*, 26(1), (2015), 195-221.

¹¹⁴ Dawuni J.J 'Race to the top? African women judges and international courts (2016). Available at; <https://ilg2.org/2016/07/01/race-to-the-top-african-women-judges-and-international-courts/>. (Last accessed 25 November, 2019).

¹¹⁵ Dawuni (n51 above), 447-448.

See, also, Mackenzie R, Malleson K, Martin P, and Sands P (2010), *Selecting international judges: Principle, process, and politics*, Oxford: Oxford University Press.

See, also, Chappell L (2015), *The politics of gender at the International Criminal Court: Legacies and legitimacy*, Oxford University Press.

The International Centre for Settlement of Investment Disputes (ICSID) is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID of the Washington Convention) with over one hundred and forty member States.¹¹⁶ Since its establishment, women made up a mere 6 percent of individuals appointed to arbitrate disputes in ICSID.¹¹⁷

The World Trade Organization's Dispute Settlement Body (WTO DSB) has authority to establish dispute settlement panels, refer matters to arbitration, Appellate Body and arbitration reports, among others.¹¹⁸ However, since its establishment, only 19 percent of Appellate Body members were women. Three of the four women who served on the Appellate Body since it was created sat on the bench in mid-2010. Women were appointed only 17 percent of the time to WTO arbitral panels in 2009. Women were appointed only 9 percent of the time to ICSID panels in 2009.

The International Criminal Tribunal for Rwanda (ICTR) was formed to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. It was established by Security Council resolution 955 of 8 November 1994 in recognition of the grave violations of humanitarian law committed in Rwanda, which claimed the lives of 800,000 Rwandan Tutsis and moderate Hutus between the months of April and July 1994.¹¹⁹ Since the ICTR's establishment, women constituted thirty six

¹¹⁶ Available at; <http://www.yourarticlelibrary.com/organization/international-centre-for-settlement-of-investment-disputes-icsid/23535>. (Last accessed 13 November, 2019)

¹¹⁷ Grossman N, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' Vol.12 Issue 2, (2012) *Chicago Journal of International Law*.

¹¹⁸ Available at; https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm. (Last accessed 25 November, 2019).

¹¹⁹ Available at; <http://ictrcaselaw.org/ContentPage.aspx?cid=2>. (Last accessed 13 November, 2019)

percent of *ad litem* judges and eighteen percent of all permanent judges.¹²⁰ Twenty percent of ICTR permanent judges were women, while 27 percent of *ad litem* judges were women in mid-2010. Historically, women made up fifteen percent and twenty percent of permanent and *ad litem* judges on the International Criminal Tribunal for the former Yugoslavia (ICTY).¹²¹

In general, men are over-represented when compared to their proportion of the population. However, Courts whose subject matter jurisdiction is limited to human rights and international criminal law are seen to possess the highest percentage of women judges, when both permanent judges and *ad hoc* or *ad litem* judges are included.¹²² The representation of the African woman on the ACtHPR, ICJ and the ICC strongly suggests that there is a pool of qualified women judges from the continent of Africa to fill the positions on the benches of sub-regional, regional, and international courts.¹²³

¹²⁰ Judge Solomy Balungi Bossa from Uganda, one of the eighteen *ad litem* Judges elected by the General Assembly, was sworn in on 1 September 2003 to sit in on the Ndindabahizi trial. Available at; <https://unictr.irmct.org/sites/unictr.org/files/news/newsletters/oct03.pdf>. (Last accessed 13 November, 2019).

¹²¹ Grossman N, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' Vol.12 Issue 2, (2012) *Chicago Journal of International Law*.

¹²² Grossman N, Achieving Sex-Representative International Court Benches, 110 *AJIL* 82-85, (2016). Available at; https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1961&context=all_fac. (Last accessed 20 September, 2019).

¹²³ That there is a shallow pool of qualified female candidates is a poor explanation for the overrepresentation of men on international courts. The pool argument provides that women are found in lower numbers on courts without quotas because not enough qualified women are available to occupy these prestigious positions. Grossman argues that if the pool were the reason for the paucity of women judges, one might anticipate that the number of women on the bench would grow as women enter law schools, the diplomatic corps, and the legal profession in greater numbers. This is not the case for many international courts.

A court is legitimate when it is possessed with justified authority. People (or states) are led to accept [its] authority because of a general sense that the authority is justified. The low numbers of women judges on international courts make empirical studies of the impact of women judges on international adjudication quite rare. The question evoked in this instance is whether a Court that lacks female African judges can be considered illegitimate?

Diversity in international institutions is imperative because the background of the decision-maker influences the way she/he votes and jurisprudence, which in turn shapes the nature of international norms. In this case, diversity would most likely enrich African feminist discourse. It also establishes the legitimacy of an international judicial institution since international institutions exercise governmental power over people from all over the world thus ensuring effective enforcement and given the importance of political will of international law, legitimacy of procedure.

An example of the importance of the diversity on legitimacy of an international law institution can be given of African leaders recently adopting a strategy calling for the collective withdrawal from the ICC at the end of an African Union Summit in October, 2016. Countries like Uganda, Burundi and South Africa expressed their dissatisfaction. The then Information Minister of the Gambia described the ICC as an “International Caucasian Court for the persecution and humiliation of people of colour, especially Africans”.¹²⁴

5.0 Recommendations and Conclusion

Clearly, the African woman faces a disproportionate amount of discrimination in comparison to people of the same gender on the one hand and people of the same race on the other. It is vital to deconstruct these institutions and norms that often advertently or inadvertently discriminate against the African woman.

For example, the selection mechanism for judges/arbitrators to the highest courts/tribunals inhibit the African woman from ascending to the bench because, usually, judges are either selected by the legislature, by the executive, by the executive with the approval of the legislature, or by

Grossman N, Achieving Sex-Representative International Court Benches, 110 AJIL 82-85, (2016). Available at;

https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1961&context=all_fac. (Last accessed 20 September, 2019). See, also, Grossman N, Shattering the Glass Ceiling in International Adjudication, 56 VA. J. INT'L L. 213 (2016).

¹²⁴ Available at; <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court>. (Last accessed 24 November, 2019).

dividing the appointment of judges across multiple institutions which may be biased in favour of male arbitrators because the African woman was not represented at the making of such Rules.

This creates the need to revise the Rules governing such appointments and nominations. These institutions may also adopt affirmative action measures that encourage the African woman (and other minority groups) to apply to such Courts or tribunals. For example, international and regional institutions should adopt a quota system that sets a target to be met for the Court or tribunal to be considered legitimate.

Research has highlighted the phenomenon of “adverse incorporation” whereby women are included in the judiciary on unequal terms. For example, gender stereotypes influence women judges’ assignments to positions in family or juvenile courts, while women are excluded from certain experiences and responsibilities, and thereby prevented from being groomed for leadership positions.¹²⁵ In such circumstances, women often do not “even realize this exclusion is taking place until it is too late; then without proper training, women find advancement in their careers very difficult.”¹²⁶ Moreover, the referenced study identifies a “glass cliff syndrome” whereby women are given precarious projects within the court/tribunal.¹²⁷

Since it has been established that international law privileges men, values and principles of international and regional legal systems should be deconstructed and subsequently reconstructed with the inclusion of the African woman. This guarantees that peculiar experiences of the African woman are recognised in international and regional instruments thus locating the African woman as more than just a victim in international law.

¹²⁵ ICJ, ‘Women and the Judiciary’, pg. 17.

¹²⁶ Virtue Foundation, ‘Senior Roundtable on Women and the Judiciary’, pg. 25.

¹²⁷ International Development Law Organization: ‘Women Delivering Justice: Contributions, Barriers, Pathways’ (2018), pg.25. Available at; <https://www.idlo.int/sites/default/files/pdfs/publications/IDLO%20-%20Women%20Delivering%20Justice%20-%202018.pdf>. (Last accessed on 22nd September, 2019)

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