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International Human Rights : the Protection of the Rights of Women and Female Children in Africa : Theory and Practice

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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

**INTERNATIONAL HUMAN RIGHTS: THE PROTECTION OF THE RIGHTS OF
WOMEN AND FEMALE CHILDREN IN AFRICA: THEORY AND PRACTICE**

BY

REV. ELEAZAR ECHEZONACHI OTIOCHA

**SUBMITTED TO THE Golden Gate UNIVERSITY SCHOOL OF LAW,
DEPARTMENT OF INTERNATIONAL LEGAL STUDIES, IN FULFILMENT OF
THE REQUIREMENT FOR THE CONFERMENT OF THE DEGREE OF
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**INTERNATIONAL HUMAN RIGHTS: THE PROTECTION OF THE RIGHTS OF
WOMEN AND FEMALE CHILDREN IN AFRICA: THEORY AND PRACTICE**

BY

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DEDICATION

I wish to dedicate this work to my mother, Naomi Otiocha.(Madam General)
Mama, you have shown true love and dedication to all of your children.

ACKNOWLEDGEMENT

I wish to express my sincere gratitude and thanks to my God and Lord Jesus Christ, whose unfailing mercies and goodness have sustained me to this day. I am highly grateful and thankful to Professor Chris Okeke, chairman of my dissertation committee; your advice and direction has made it possible for the completion of this work.

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To all, both mentioned in this page and not mentioned, I say may God richly bless and reward all of you for your support and prayers.

Rev. Eleazar E. Otiocha

Abstract:

The recognition of women and female rights as a different concept in international law has fully been accepted in modern nation states. The fight for the protection and advancement of women and female rights as an international human right has been an on going work. Women and female children all over the world have always enjoyed a lesser rights when compared with men and boys in every society whether primitive, developing or developed societies.

The 1948 United Nations Universal Declaration “affirming the equality of man and women has been considered a landmark in the quest for the universal equality of all human beings. This declaration notwithstanding, women and female children all over the world have continued to suffer discrimination and inequality with their men and boys counterpart in most societies.

The enactment of the convention on elimination of all forms of discrimination against women in 1979 was one of the first universal answers to this problem. In 1979, the United Nations general assembly adopted the convention on elimination of all forms of discrimination against women (CEDAW), thus recognizing some special rights for women. The treaty came into effect on 3rd of Sept 1981. This convention otherwise known as “women’s bill of rights” established a bench marks for judging and protecting women’s rights worldwide.

Africa followed the train of promoting women’s right by adopting the Maputo Protocol on July 2003. The protocol came into force on 25th November 2005 after it had been ratified by 15 African countries. This protocol elevated the rights of African women to an unprecedented level. The coming into force of the African protocol on the rights of women in Africa was highly celebrated.

Many governments all over the world have enacted laws and regulations to promote and protect the rights of women and female children. A lot of laws have been put in theory to give women equality with men. In reality or practice, many women all over the world still find it difficult to realize their rights.

This study attempts to look at how far the laws on women rights, that is the law in books has become the law in practice/reality in many African states with Nigeria as a case study.

This study acknowledges that in theory many African states have tried to change the statue books to accord women some level of equality with men but at the same time a look at the practice of the law in many African states shows a different pattern of law. There is a big disconnect between women’s theoretical rights and the reality or practice of the theory.

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TOPIC: INTERNATIONAL HUMAN RIGHTS: THE PROTECTION
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THEORY AND PRACTICE.

The main objective of my dissertation is to look at the protection of the rights of women and female children in Africa and further examine to what extent “the Laws on the books have become the Laws in action.” Put differently, since most African countries have signed international instruments on the human rights of women and female children, to what extent have African states protected the human rights of women and female children.

CHAPTER 1

INTRODUCTION:

1 (A) Origin and History of Human Rights:

The origin of human rights is controversial¹ just like the concept of human rights. According to Ishay, the question of the origin of human rights is a

1 Micheline R Ishay. The History of Human Rights. From Ancients Time to Globization Era, University of California Press, P. 18 (2004).

politically charged question.² Currently, there are still some controversies on the precise origin³ and meaning⁴ of the concept of human rights.

Historically it is believed that human right is as old as the human race.⁵ As Shapiee argues “it is not an exaggeration to say that human rights can be traced to the origin of the human race itself.”⁶

To some people, the concept of human rights has always existed with the human race since the origin of man.⁷ Some human rights writers believe in the idea that people enjoy rights simply by virtue of their humanity and this idea is as old as man and history.⁸ This idea may be traced back through the political and legal theories of natural law philosophers, the Roman law and even beyond.⁹

The concept of human rights can be found among the writings of early philosophers like Plato, Aristotle, Cicero, and among early cultures and

² Id.

³ Id. at 19. where Ishay where refers to Rene Cassin as claiming that the concept of human rights originated from the Bible, especially from from the ten commandments and old testament old books of the bible; while other disputes this claim by asserting that concept of human rights could be traced to Hammurabi Code, the oldest surviving collection of law.

⁴ James Avery Joyce. *The New Politics of Human Rights*. St Martins Press, 1-2 (1978). Where he argues that no body knows for sure what human rights are or where they begin, but every body knows what they are not and where they stop.

⁵ Micheal Palumbon, *Human rights: Meaning and History*, Robert E. Krieger Pub Co. P. 13 (1982), Also see generally, J. Donney & R. E. Howard (eds), *International Handbook of Human Rights*, Greenwood Press (1987)

⁶ Rohimi Hj.Shapiee: *Third Generation Human rights- Rights of the Third world: Concepts and Policy Considerations*. Percetakan Negara, P. 40 (1994).

⁷ Yougindra Khushalani, *Human Rights in Asia and Africa*. 4 *Human Rights Law Journal*, at 404-405 (1983), See also generally Joh E. Lewis, *A Documentary History of Human Rights: A Record of Events Documents and Speeches that Shaped our World*, Carroll & Graff (2003).

⁸ George William Mugwanya, *Human Rights in Africa:Enhancing Human Rights through the African Regional Human Rights System*. Transnational Publishers, P. 16 (2003).

⁹ Id.

societies i.e. Jews, Christians, Chinese, the Hummurabi Code, Quran.¹⁰

The idea of human rights can be found in the works of sages, philosophers, prophets and poets from different countries and faiths in all countries including India, China, Japan, Persia, Russia, Turkey, Egypt, Israel, several countries of Africa, and pre-Columbian civilization of South America.¹¹

The culture and history of the earliest civilization shows that the concept of human rights has been cherished through the centuries in many lands.

The concept of human rights and the struggle for human rights is as old as history itself, because it concerns the need to protect the individual against the abuse of power by the monarch, the tyrant or the state.¹²

In every history of creation and every traditional account, whether from lettered or unlettered world, however they may vary in their opinion or belief of certain particulars, all agree that all men are born equal, and with equal natural rights. Even the Mosaic account of creation, whether taken as divine authority or mere history, talks about human rights and equality of man.¹³

In the biblical account of human history and creation, God in many places demanded that man be treated with dignity and respect for human rights was stressed. The demands of the bible correspond with the wordings of the

¹⁰ Ishay, *supra* note 1, at 19-27.

¹¹ A.H. Robertson & J.G. Merrills, *Human Rights in the World: An introduction to study of the protection of human Rights* (4th edition), Manchester University Press, 8 (1996).

¹² *Id.*

¹³ Leviticus 19:33 (NIV), Micah 3 (NIV) & Romans 12: 9-12, Also see Lewis, *supra* note 7, at 357.

drafters of UN Declaration on Universal Human Rights.¹⁴ Supporting this view, Ishay argues that the first article of the Universal Declaration of Human Rights by declaring that all human beings “should act toward one another in a spirit of brotherhood,” corresponds with the biblical injunction “love thy neighbor as thyself and love the stranger as you love yourself.”¹⁵ History alludes to the fact that in every primitive and ancient society, the respect for the rights of man was of utmost importance.¹⁶

Thus, long before the adoption of the United Nations Charter, the concept of human rights had consistently developed with form and content determined by different social and political considerations.¹⁷

It has been argued that the modern day concept of human rights is one of the legacies of western liberal democracy, which came as a result of western rejection of the conservative Judo-Christian religious teachings and clamor

¹⁴Shapiee, supra note 6, at 14. Where he argues that more direct historical antecedents of the concept of human rights can be traced to its foundation in Christianity and Roman law.

¹⁵ Ishay, supra note 1, at 19. Also see Mathew 22:34-40 (NIV).

¹⁶ Ishay, See also Rohimi Hj. Shapiee supra note 6, at 40-43., Robertson et al., supra note 12, at 7-8. where it is argued that in many ancient cultures of Egypt, China,, Persian, Russian, Turkey, Israel, Japan, Cyprus, African nations, they all claim to practice human rights. For example, it is reported that one of the Pharaohs’ of ancient Egypt was giving instructions to his vizirs to the effect that “ when a petitioner arrives from upper or lower Egypt,they should make sure that all is done according it the law, that custom is observed and the rights of each man respected” and the code of Hammurabi, the king of Babylon 2000 years before Christ in which the monarch records his mission “to make justice reign in the kingdom, to destroy the wicked and the violent, to prevent the strong from oppressing the weak and to enlighten the country and promote the good of the people.

¹⁷Mugwanya, supra note 8, at 16.

for individual liberty as way of achieving the utmost happiness of mankind.¹⁸

The reasoning of the school of thought which argues that human rights has been with man in antiquity is predicated on the fact that wherever there is a group of people or community of human beings, there must be issues of the rights of human beings or respect for the rights of human being.¹⁹

There are those who disagree with this idea that human rights has always existed with every primitive society since the origin of man. This disagreement is rooted in the belief that primitive society was more concerned with morals and not legal and individual rights as conceptualized by modern day human rights.²⁰

This controversy notwithstanding, there is some consensus among international law and international relations scholars on the origin²¹ of the modern day concept of human rights.²²

According to Forsythe, the modern day concept of human rights dates back to the 18th century.²³ However, some scholars believe the concept of human

¹⁸ A.J.M. Milne, *Human Rights and Human Diversity*, Macmillan Press Ltd, 1 (1986).

¹⁹ *Id.* at 405.

²⁰ Shapiee, *supra* note 6, at 14.

²¹ Ishay, *supra* note 1, at 65. It is widely agreed that our modern conception of human rights originated in Europe and America, the story of their inception which is embedded in the political and economic and technological changes associated with the rise of the west and relative decline of rival civilizations;

²² This paper will concentrate on the modern day concept of Human Rights as an international obligation which came into being after the formation of United Nations in 1945 and the 1948 Universal Declaration of Human Rights. Many international law scholars agree to the fact that 1948 marks the legal beginning of modern day international Human Right.

right as an international legal obligation of the state is a recent development.²⁴

The first major treaty or “standardization” of human rights came out of multilateral treaties on war and how to protect medical personnel and human rights under armed conflicts. The first major treaty on human rights in armed conflict was the 1864 Geneva Convention for victims of armed conflict. This development came out of concern among the western states and major states of that era on how medical personnel and non combatants should be treated in times of war.²⁵

The treaty on treatment of medical personnel and non combatant people during war times and the earliest formalized concept of human rights was developed on humanitarian ground. Before the formation of League of Nations and United Nations the concept of human rights was primarily concerned with human rights protection in armed conflict.

1(B) Rise of Human Rights as an international Right.

²³ David P. Forsythe, *Human Rights and World politics* University of Nebraska, 4 (1983).

²⁴ Mugwanya, *supra* note 8 at 16, where it is argued that International Human Rights became an issue and a concern in traditional international law after the first world world in 1919, but later became legalized in 1948.

²⁵ *Id.*

If we agree²⁶ with the argument that the issue of human rights has always existed in every society, the question still remains as to the exact time human rights became recognized as a concept in international law.

In the earliest beginning, human beings had no rights under international law, which was defined as the law which governed relations between states.²⁷

This traditional definition was expanded after the Second World War, when it came to be recognized that some newly created intergovernmental organizations could, in some limited sense, also enjoy rights under international law and be subjects of international law. Prior to this, individual human beings were not deemed to have rights under traditional international law; they were said to be objects rather than subject of international law.²⁸

The first international text relating to what we would now call a human right problem was formulated at the beginning of the 19th century.²⁹ It is generally agreed that United State Declaration of independence in 1776 and the French Declaration on the Right of Man in 1789 gave rise to the modern day International Human Rights which was formally established in the 1948

²⁶ This paper will work on the premise that that Human Right has always existed from anitiquity and in many primitive socities.

²⁷ Janusz Symonides, *Human Rights: Concepts and Standards*, Ashgate Publishing Ltd 4 (2000). This is the earliest and traditional definition of Human Right.

²⁸ Id.

²⁹ Robertson et al., *supra* note 12, at 15.

Universal Declaration of Human Rights.³⁰ Modern day international human rights development began with the adoption of the Charter of United Nations.³¹ While it is certainly true that international law recognized some form of international human rights protection prior to the Charter, the process which ushered in “the internationalization of human rights and humanization of international law” as one author calls it³² began with the establishment of United Nations.³³

Sohn a commentator in international law has observed that there seem to be an agreement that the Declaration (Universal declaration on human rights) is a statement of general principles spelling out in considerable detail the meaning of the phrase ‘human rights and fundamental freedoms’ in the Charter of United Nations. The declaration which was adopted unanimously, without a dissenting vote, can be considered as an authoritative interpretation of the Charter of the highest order.³⁴

³⁰ Asante S.K.B. Nation Building and Human Rights in Emergent African Nations 2 Cornell Int. LJ 75-85(1969). See also. A. H. Robertson & J. G. Merrills.Human Rights in the World: An introduction to the study of the international protection of human rights, Manchester University Press 6(1996), See 1948 Charter on Universal Declaration of Human Rights (UDHR)

³¹ Symonides, supra note 27, at 4. See also L.B Sohn, The New International Law: Protection of the Rights of Individuals rather than States, Am. Un. L. Rev. 32 1 (1982).

³² Symonides, supra note 27, at 4.

³³ Id.

³⁴ Id. at 29, quoting L. B. Sohu, A short history of United Nations documents on human rights in The United Nations and Human Rights, 18th report of the commission to study the organization of Peace New York 51-52 (1968).

The modern day concept of human rights was developed during the early 19th century, when the Versailles Peace Treaty of 1919 was drafted.³⁵

However, most of the embodiment of Versailles Treaty was concerned with humanitarian issues.

Modern human rights came into being in the wake of World War II when the quality and dignity of the life of individuals became increasingly significant as a result of the crimes and atrocities of the world war.³⁶ The victors of the world war and the independent nations of the post world war II era were determined to stop a recurrence of events of the world war II by working for the establishment of United Nations and the Universal Declaration of Human Rights.³⁷

The atrocities of World War II made it unfashionable and unsafe to leave the issue of the personal liberty and rights in the hands of the state. This development made issues concerning human rights to become part of international law in the form of treaties and customary law. From this development, the issues of human rights were no longer the exclusive concerns of national jurisdictions.³⁸

³⁵Forsythe, *supra* note 23, at 6.

³⁶ Shapiee, *supra* note 6, at 10. See also Louis Henkin, in *International Rights as Rights in Human Rights: John Rolland Pennock and J.W. Chapman* (eds), New York University Press, 269 (1981).

³⁷ Shapiee, *supra* note 6, at 10.

³⁸ *Id.* at 1.

According to Henkin, human rights were generally not the business of international law until after World War II but individual welfare was not wholly beyond the interest of the international system even before then.³⁹

In summation, the international law of Human Rights arose primarily from contemporary international agreement as states agree to recognize, respect and promote specific rights of the citizens of their own countries. These developments became very popular and effective because new emergent states want to be accepted into the international community as democratic and civilized nations.

1(C) International Human Rights before the Creation of United Nations

By the end of the 19th century and continuing beyond World War II, the world community, inspired by Red Cross, concluded a series of multilateral declarations and agreements that were mainly concerned with humanitarian law of war and victims of war. At the same time, two multilateral labor conventions concluded in 1906 and 1919, did a lot to promote human rights.⁴⁰

Before the creation of United Nations, the League of Nations was the world governing body, which regulated the affairs of nations and the rule of law among the civilized nations of the world. The covenant establishing the

³⁹ Henkin Louis, *The Rights of Man Today*, Westview Press Inc, 90 (1978).

⁴⁰ Richard Pierre Claude & Burns H. Weston, *Human Rights in North-South Relations*. McGill-Queens University Press Montreal, 21 (1989).

League of Nations in 1919 did not formally recognize the rights of man; nevertheless the League committed the League's members to several human rights goals by virtue of Articles 22 & 23.⁴¹ Under Article 22 of the League, the mandate system was established, which placed former colonies of the states which had lost the 1st world war under the mandate and control of the league.

Under Article 23(a) member states of the League of Nations agreed to fair and humane treatment of men, women and children both in their own countries and all countries to which their commercial and industrial relations extended. This development led to the establishment of International Labor Organization and the international system for the protection of minorities.⁴²

Prior to the United Nations, international human rights had no universally accepted definition. This was because as at that time, international law was presumed to be exclusive of state matters and not individual matters.

Robertson et al., asserts that "It was the accepted doctrine that relations between individuals and the states of which they were nationals were governed by the national law of those states, as a matter exclusively within their domestic jurisdiction."⁴³

⁴¹ Id.

⁴² Symonides, *supra* note 27, at 7.

⁴³ Robertson et al., *supra* note 12, at 1-2. See also A.H. Robertson, *Human Rights in Europe*, University Press 149 (2nd edition 1997), quoting Oppenheim, a leading authority in international law from United

The forerunners of modern day international human rights are slavery and warfare. Many bilateral treaties were concluded between 1815 and 1880. The Berlin conference of 1885 on the scramble for Africa stated in its general act that “trading in slaves is forbidden in conformity with the principles of international law as recognized by signatory powers.”⁴⁴ Article 22 of the League of Nations covenant declared that the well being and development of the peoples in the mandated territories should form a sacred trust of civilization and that mandatory powers should administer the territories under conditions which will guarantee freedom of conscience and religion. It also prohibited the abuse of such class of people like the slaves.⁴⁵ Between, 1919 and 1939, the League of Nations attempted to regulate and coordinate international human rights which were at this time concerned with individual rights, labor rights and minority rights.⁴⁶ In the light of the First World War and the anxiety about another war, the League of Nations was primarily concerned with protecting the rights of people and making sure that there was not another war.⁴⁷

Kingdom, where he said “ the so called rights of man, not only do not but cannot enjoy any protection under internal law because that is concerned solely with relations between states and cannot confer rights on individuals” a paragraph from the first edition of Oppenheim ‘s Treatise on international law 1905

⁴⁴ Id. at 19.

⁴⁵ Id. at 16.

⁴⁶ Forsythe, *supra* note 23, at 6.

⁴⁷ Id. at 6-7.

Thus, before the formation of the United Nations, the League of Nations and the international law community did little to develop and promote international human rights.

1(D) United Nations and the Birth of modern International Human Rights.

The preamble to the United Nations reaffirms UN faith in “fundamental human rights, in dignity and worth of the human person, in the equal right of men and women and of nations large and small”⁴⁸ and further declares that one of the purposes of the UN is to encourage the respect for human rights.⁴⁹

There is some consensus that the formation of United Nations in 1945 laid the foundation for the development of modern day human rights but the 1948 Universal Declaration on Human rights officially gave birth to our modern day international human rights. According to Avery, the Universal Declaration of Human Rights, proclaimed by the UN General Assembly on 10 Dec 1948, has been adjoined as the starting point of a new legal order.⁵⁰

By the UN Charter of 1945, the world governments and their people

⁴⁸ Preamble to The Charter of United Nations 1945. See also Richard Pierre Claude & Burns Weston, *Human Rights in the World Community: Issues and Action*, University of Pennsylvania Press 21(1989).

⁴⁹ United Nations Chapter 1 Article 1(3), See also Claude et al., at 21.

⁵⁰ Avery, *supra* note 4 at 45.

reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person.

The 1945 establishment of United Nations was humanity's unanimous response to the Nazi death camps, the fleeing refugees and tortured prisoners of war.⁵¹

In summation, the coming into being of the United Nations in 1945 and the subsequent 1948 Universal Declaration on Human rights brought into being the birth of modern day human rights. The 1948 declarations on human rights and other UN covenants gradually defined and guided the development of our modern day concept of human rights.

Since the coming into being of international human rights, it has been dogged with controversy and two opposing groups. International human rights have been plagued with the controversy of its universality and this has given rise to two opposing groups; the Universalists and Relativists school of international human rights.

1(E) Universalism and Cultural Relativism of International Human rights:

The Universalists and Cultural relativists.

⁵¹ Id. at 43.

Since the adoption of the 1948 universal declaration of Human rights and its general acceptance as the defining barometer of international human rights, there have been strong challenges⁵² to the universality concept of international human rights. In the words of Bennet, “Although it is often claimed that human rights represents a universal and therefore a culturally neutral value system, they betray, at every turn, their origin in western law and philosophy.”⁵³

The controversy surrounding international human rights is how it can exist in a culturally diverse world. As the international community becomes increasingly integrated, the question arises as to how cultural diversity can be respected. Is it possible to have a global culture on human rights? Can a global culture emerge based on and guided by human dignity and tolerance? These are the issues, concerns, and questions underlying the debate over universal human rights and cultural relativism.⁵⁴

According to Ghai, the controversy surrounding the universalism or relativism of human rights has intensified in recent years and has been

⁵² There has been a growing challenge by third and developing world countries, most of whom are signatory to 1945 UN Charter and 1948 Declaration on Human Rights on the view that International Human Rights are universal. See also Jonathan S. Petrikin (ed), *The Third World: Opposing Viewpoints*. Greenhaven Press Inc. 173-174 (1995). Lone Lindholt, *Questioning the Universality of Human Rights: The African Charter on Human and Peoples’ Rights in Botswana, Malawi and Mozambique*, Ashgate Dartmouth (1997).

⁵³ T.W. Bennett, *Human Rights and African Customary Law*, Juta & Co Ltd, 1 (1995).

⁵⁴ Diana Ayton-Shenker, *The challenge of Human Rights and Cultural Diversity*: available at <http://www.un.org/rights/dpi1627e.htm> (last visited 11/18/06). See also Abby Morrow Richardson, *Women Inheritance in Africa: The Need to Intergrate Cultural Understanding and Legal Reforms*, 11 Hum. Rts. Br. 19 (2004).

brought to bear on the credential of the Universal Declaration of Human rights.⁵⁵

In the view of Brzezinski, culture is now to be the dividing line in the debate over the question of freedom and the question of human rights. It rejects the notion of inalienable human right on the grounds that this notion merely reflects western idea and perspective.⁵⁶

International human rights scholars generally fall into two ideological categorie: universalists and cultural relativists. The universalists believe on a set of legal norms which should be applied universally to all persons. Human rights are seen as universal because they adhere to humans by virtue of being human, and for no other reason. Human Rights cannot vary from state to state or individual to individual. They are to be applied equally and similarly to all persons, regardless of cultural differences.⁵⁷

Those who support the universal concept of international human rights argue that human rights need not change from state to state or culture to culture.

Defending this position, Henkin a noted scholar in international human

⁵⁵ Yash Ghai, *Universal Rights and Cultural Pluralism: Universalism and Relativism: Human Rights as a Framework for Negotiating interethnic Claims*, 21 Cardozo L. Rev. 1090 (2000). See also Leigh A. Trueblood, *Female Genital Mutilation: A Discussion on International Instruments, Cultural Sovereignty and Domiance Theory*, 28 Denv. J. Int'l L. & Pol'y 437 (2000).

⁵⁶ Janusz Symonides (ed), *Human Rights: New Dimensions and Challenges*, Ashgate Publishing Ltd, 24 (1998) quoting Z. Brzezinski in *The New Challenges to Human Rights*, Journal of Democracy, 8, 2 (1995).

⁵⁷ Melissa Robbins, *Powerful states, Customary Law and Erosion of Human Rights through Regional Enforcement*, 35 Cal. W. Int'l L. J. 275 (2005), See also Patrick D. Curran, *Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 Chl. J. Int'l L. 331 (2004).

rights argues that to call them human suggest they are universal. They do not depend on gender or race, class or status. To call them rights implies that they are claims as of rights not merely appeals to grace, or charity, or brotherhood, or love; they need not be earned or deserved. They are more than aspiration, or assertions of the good but claims of entitlement and corresponding obligation in some political order under some applicable law.⁵⁸

The theory of Universalism is that rights are inherent in every individual and all individuals are entitled to the protection of those rights. In their view, rights are attached to people because they are humans and not because they belong to a particular culture, hence there can't be cultural variations in human rights. For example a man from Africa should be entitled to the same rights as a man from Europe. Invariably human rights should not be defined by the society in which one lives nor the culture they possess.⁵⁹

The concept of the universality of human rights is based on the notion that there is a universal human nature which is knowable and essentially different from other realities.⁶⁰ The summary of Universalism is that human rights'

⁵⁸ Robin, *supra* note 59, quoting Louis Henkin, *Rights: Here and There*, 81 Colum. L. Rev. 1 1582 (1981).

⁵⁹ *Id.*

⁶⁰ Ghai, *supra* note 57.

norms transcend cultural boundaries and as such states are not permitted to pick and choose the rights applicable to their citizens.⁶¹

On the other hand, cultural relativism is the assertion that human values, far from being universal, vary a great deal according to different cultural perspectives.⁶² Cultural relativism argues that rights are defined by the particular culture, political and social context in which one lives.⁶³

Relativists assert that because there are no universally shared cultural values and norms, there can be no universal rights. According to proponents of cultural relativism, any system of human rights protection must take into full account the individual as a member of the social group, whose sanctioned modes of life shapes his behavior and with whose fate his own is thus inextricably bound.⁶⁴

In the views of cultural relativists, Human Rights derive their meaning as values entirely from the concrete historical contexts and specific cultures in which they operate and because there are no specific trans-cultural rights or values, no state is justified in imposing its cultural ideas of rights on any other states.⁶⁵

⁶¹ Robbin, *supra* note 59. See also Patrick D. Currana, *Relativism, and Private Enforcement of Customary International Law*, 5 *Chl. J. Int'l L.* 311 (2004).

⁶² Ayton-Shenker, *supra* note 56.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Ayton-Shenker, *supra* 56.

The relativist challenge to universalism is based on the assumptions and philosophies of universalism. Relativist concede that rights are drawn from human nature, but assert that human nature is not an abstraction, because humans are defined by their relation to others as part of a society of like-minded people. A human person is not separate from or above society and since societies vary from culture to culture, evaluations are relative to the cultural background out of which they arise.⁶⁶

Cultural Relativist contend that the universal views of human rights, the wordings and views expressed in the UN Charter and the 1948 Universal Declaration are based on western values. They view this as a form of moral or cultural imperialism and they contend that the values of one culture should not be imposed on another culture.⁶⁷ This view can be seen from the position of Chinese delegation in a world conference on Human Rights in Vienna, when the Chinese delegates declared that “One should not think that the human rights standards of certain countries are the only proper ones and demand all other countries comply with them. Any attempt to define rights in terms of universality infringes on a state’s right to autonomy.”⁶⁸

⁶⁶ Ghai, *supra* note 57.

⁶⁷ *Id.*

⁶⁸ *Id.* quoting Liu Hiaqiu: Head of Chinese Delegation, Address at the World Conference on Human Rights, Vienna (June 14-25, 1993), See also Richard Klein, *Cultural Relativism, Economic Development and international Human rights in the Asian Context*, 9 *Touro Int’l L. Rev.* 7 25 (2001).

Moderate cultural relativists are of the view that some human rights standards are universal and must be respected by all. In their view, there is an overlapping of values, which can be used to establish a common core of human rights.⁶⁹

One of the greatest organized challenges to the universal concept of human rights has come from the Asian culture. The Asian states in the Bangladesh Declaration of April 1999 stated, “While human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”⁷⁰

The famous 1993 Bangkok Declaration at the regional meeting for Asian – Pacific States preparation for WCHR, alleges that it is hardly disputable that a universal law of human rights has the potential to erase cultural diversity. It refers to the 1947 American Anthropological Society caution to the UN Commission on Human Rights about this danger during the drafting of the Universal Declaration on Human Rights (UDHR). The society pointed to the west history of ‘ascribing cultural inferiority’ to non- European peoples,

⁶⁹ Ghai, supra note 57.

⁷⁰ Symonides, supra note 58, at 25.

which has led to the demoralization of human personality and the disintegration of human rights.⁷¹

The Bangkok declaration went further to advocate for a statement of human rights that will do more than just respect for the individual rights alone.

International human rights, according to the Bangkok declaration, must also take into full account the individual as a member of the social group of which he/she is a part. It must recognize and embrace the validity of many different ways of life.⁷²

On the other hand, the African states in the Tunis Declaration adopted in Nov 1992, stressed that the universal nature of human rights is beyond question; adding however that no ready-made model can be presented at the universal level since the historical and cultural realities of each nation and traditions, standards and values of each people cannot be disregarded.⁷³

However, the Vienna Declaration of 1993, finally adopted by consensus by the world conference, confirmed the universality of human rights and rejected the notion of cultural relativism. The declaration in its first paragraph reaffirms the solemn commitment of all states to fulfill their obligations to promote universal respect for and observance and protection

⁷¹ Dianne Otto, *Rethinking the Universality of Human Rights Law*, 29 Colum. W. Rts. L. Rev. 1 (1997).

⁷² Otto, *supra* note 73.

⁷³ Symonides, *supra* note 58, at 25.

of all human rights and fundamental freedom for all.⁷⁴ Furthermore, the fifth paragraph of the declaration and program of action, adopted at that World Conference on Human Rights went on to declare that “all human rights are universal, indivisible, interdependent, and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁷⁵

The fear and concern of the opponents of the relativism concept is that some countries would apply this relativism to the promotion, protection, interpretation, and application of human rights which could be interpreted differently within different cultural, ethnic and religious traditions. In the view of the universalists, this approach would pose a great danger to the effectiveness of international law and international system of human rights that has been painstakingly constructed over the decades. If cultural tradition alone governs state compliance with international standards, then widespread disregard, abuse and violation of human rights would be given

⁷⁴ Id.

⁷⁵ UN Secretary General , Report of the World Conference of Human rights, UN Doc.A/Conf. 157/24,1993. See also Symonides, *supra* note 58, at 17.

legitimacy. To this extent, the promotion and protection of human rights perceived as culturally relative would only be subject to state discretion, rather than international legal standard/imperative. By disregarding their legal obligations to promote and protect universal human rights, states advocating cultural relativism could raise their own cultural norms and particularities above international law and standards.⁷⁶

The fear of the universalists that relativism will lead to human rights abuses in my view is unfounded. Cultural relativist position is that although the concept of human right is a universal concept, its meaning and application should take into account societal and local diversities of our world. Cultural relativism is not an escape clause for human rights abuses as some Universalists are alleging, neither is cultural relativism an opportunity to be promoting some human rights abuses and practices that are detrimental to the dignity of the human being.

There is no doubt that what an American or European considers offensive may not be offensive to someone born in Africa or Asian.

The controversy and disagreement between the universalism and cultural relativism notwithstanding, there are still some unresolved questions concerning the application and operation of international human rights.

⁷⁶ Ayton-Shenker, *supra* note 56.

These questions, among other issues include: Are human rights relevant only to a particular type of culture? This question is not all about the source of our idea of human rights, but the practical problem of their current relevance. Are the rights mentioned in universal declarations and other subsequent bill of rights a product of capitalist society that has no relevance to African communal societies and socialist states based on Marxist principles? Do the rights, which are considered important in developed countries of the west, reflect values which are alien to the cultures of Africa and Asia or if their value is admitted, are they luxuries which the people of Africa or Asia cannot afford? Is it true that the rights which are considered important in the developed countries of the west are inappropriate elsewhere or if they might be of value, that they are luxuries which the people of the developing world cannot afford? Is there a set of human rights of universal applicability?⁷⁷

The modern day concept of Human rights is alien to non European /American countries/cultures and cannot be evaluated or successful without taking into account the complexity of local, cultures and traditions. There is no denying that human rights are universal, but how can we bring legitimacy

⁷⁷ Symonides supra note 56, at 1-38

and acceptance to it in African and Asian countries, without making it look as if we are promoting European or American idea and value.

1 (F) Human Rights: United Nations and Human Rights Protection.

The United Nations was established primarily to maintain world peace and protect the human rights of man.⁷⁸ The establishment of the UN set in motion the idea that the protection of human rights knows no international boundaries and that the international community has an obligation to ensure that governments guarantee and protect human rights wherever they may be violated.⁷⁹

The preamble to UNO Charter states: “We the people of United Nations determined—to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of the nations large and small—have resolved to combine our efforts to accomplish these aim.”⁸⁰ Article 55 of the UN Charter states that the United Nations shall promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction of race, sex, language or religion.⁸¹

⁷⁸ See Generally United Nations Charter of 1945.

⁷⁹ Symonides *supra* note 27, at 4.

⁸⁰ Preamble to United Nations Charter.

⁸¹ Art. 55 of United Nations Charter.

The 1948 Universal Declaration on Human Rights was adopted by resolution 217(111) of the general assembly. A leading commentator on UN argues that “There seems to be an agreement that the Declaration is a statement of general principles spelling out in considerable detail the meaning of the phrase ‘human rights and fundamental freedoms’ in the charter of United Nations. As the Declaration was adopted unanimously, without a dissenting vote, it can be considered as an authoritative interpretation of the charter of the highest order. While the Declaration is not directly binding on UN members, it strengthens their obligations under the Charter by making them more precise.”⁸²

Since 1948, the Universal Declaration has acquired a greatly reinforced status not only as a common standard of achievement for all people and all nations, but also as a statement of principles which all people and nations shall observe.⁸³

It has been argued that establishment of United Nation as an international organ is a revolutionary idea⁸⁴ and it marked a turning point in the protection of international human rights.

⁸² Robertson et al., *supra* note 12, at 29 quoting L. B. Hohn, *A Short History of United Nations Documents on Human Rights in The United Nations and Human Rights*, 18th Report of the Commission to study the Organization of Peace, 71 (1968).

⁸³ *Id.* at 29.

⁸⁴ *Id.* at 1.

Prior to the establishment of the UN, the idea of international protection of individual human rights was something the states were not interested in its enforcement. The idea and notion that states would be concerned with the protection of human rights was something which was not popular before the formation of United Nations. According to Oppenheim a leading authority in international law, “the so called rights of man not only do not but cannot enjoy any protection under international law, because that law is concerned solely with the relations between states and cannot confer rights on individuals.”⁸⁵

The birth of the United Nations brought the protection of International Human Rights under one global insurance.

1 (G) International Human Rights: Definition and Meaning: Myth Or Reality.

Presently many legal scholars, philosophers and moralists believe that irrespective of culture, tradition or civilization, every human being is entitled to at least in theory, some basic human rights.⁸⁶

⁸⁵ Robertson et al., supra note 12, at 1 quoting Oppenheim 1st edition work on Treatise of International Law in 1905.

⁸⁶ Claude et al., supra note 49 at 15.

There is no single best accepted definition of international human rights, but there is widespread acceptance of the principle of human rights both on the domestic and international plane.⁸⁷

According to Claude & Weston, despite the lack of consensus among legal scholars on the meaning of human rights, the nature of human rights have been described to (i) represent individual and group demand for shaping and sharing of power, wealth, enlightenment and other cherished values of the community, which imply claim against persons and institution (ii) refer to a wide continuum of value claim ranging from most justifiable to most inspirational (iii) be a general or universal right possessed by all human beings everywhere (iv) be qualified by limitations; that the rights of any particular individual or group in a particular sense are limited as much as necessary to secure the comparable rights of others and the aggregate common interest (v) be fundamental in some vague sense.⁸⁸

Human rights have been defined as those rights held by individuals simply because they are part of the human species. They are those rights shared equally by everyone regardless of sex, race, nationality and economic background.⁸⁹

⁸⁷ Id.

⁸⁸ Claude et al., *supra* note 49, at 17

⁸⁹ Ishay, *supra* note 1, at 3.

According to Tijani, “Human rights are rights that are taken to be inherent in human beings solely on account of their being human.”⁹⁰

International Human rights in modern usage means those rights mentioned in the 1945 Charter of United Nations and later recognized in the 1948 Universal Declaration of Human Rights, other subsequent treaties, covenants by United Nations and other international organizations.⁹¹

International law of human rights is simply the sum total of various treatise, procedures, principles of customary law and case law, that regulate the regime of international human rights.⁹²

Conclusively, International human rights can be described as those universal rights which every human being is entitled to by reason of humanity and which are protected by international laws.

The first time human rights were mentioned or referred to in the constitution of an international organization was in the signing of the Charter of United Nation, but the 1948 Universal Declaration of Human Rights Charter sought to define what international human rights are.⁹³

The Universal Declaration on Human Rights of 1948 was the first international interpretation and text to list what international human rights

⁹⁰ Human Rights Democracy and development in Nigeria Vol. 1, Legal Research & Resource Development Lagos Nigeria, 68 (1999).

⁹¹ Robertson et al., supra note 12 at 330-331

⁹² Id.

⁹³ Robertson et al., supra note 12, at 331-332.

are.⁹⁴ Other subsequent UN covenants like the covenant on civil and Political Rights, and other regional covenants like the European Union covenants later expanded the scope and meaning of international human rights.⁹⁵

Human rights encompass not only those elementary rights which are considered to be indispensable for the development of the individual but also those rights which are necessary for the development of groups of individuals and the world community at large.⁹⁶

The core claim of international human rights law is that every person is entitled to certain rights by virtue of being human.⁹⁷

As noted earlier, International human rights came into being from the problems of slavery and warfare.⁹⁸ To this extent, it can be said that international human rights rose out of humanitarian issues and it is a by product of world war events.⁹⁹

Among international scholars and educators, there is a debate as to whether international law is a reality or a myth.¹⁰⁰ This debate is in part because of

⁹⁴ Id. at 324.

⁹⁵ United Nations Conventions on the Rights of the Child 1989, Convention on the Elimination of All Forms of Discrimination against Women 1979, International Covenant on Economic, Social and Cultural Rights 1966.

⁹⁶ Shapiee, supra note 6 at xi.

⁹⁷ Ignatieff Michael, Human Rights as Politics and Idolatry, Princeton University Press 141 (2001).

⁹⁸ Avery, supra note 4, at 12-28.

⁹⁹ Shapiee, supra note 6, at 15.

¹⁰⁰ Rorbertson et al., supra note 12, at 330.

the peculiarity of international law, which is not as effective as the national or domestic law. The answer to this depends on one's perception or philosophy of international law.

If we are to define international law to mean the sum total of various treaties, procedures, principles of customary laws and case laws, then one can argue that international law is a reality.¹⁰¹ Those who argue on the reality of international law, cite various treaties, covenants and case laws which have defined and regulated international issues and laws between nations and organizations. Supporters of the reality of international laws use United Nations, humanitarian interventions doctrine of international law, international trial of those who have committed genocide and human rights abuses as evidences of the reality and living legacy of international human rights.

On the other hand, if one thinks of international law in terms of its current practice, the failures and ineffectiveness of international law, then one can think of international human rights as a myth.¹⁰² Those who argue that international human rights is a myth point out the failures of international

¹⁰¹ Id. See also Rosemary F. Dybwad. Human Rights: Myth or Reality: available at: <http://www.disabilitymuseum.org/lib/docs/2017card.htm> (last visited 10/21/06)

¹⁰² Watson James Shand, *Theory and Reality in the International Protection of Human Rights*. Transnational Publishers 1-5 (1999). In the view of Watson, International Human Right is just bet a myth. He points out to the failure of international community and international human rights to stop human rights abuses going in many African countries like Rwanda, Burundi, Uganda, Sudan etc

law and international human rights regime to intervene in many international human rights abuses or problems in many countries of the world.

It is my view that international law is a reality, its failures and handicaps notwithstanding.

1(ii) Africa: Past, Present and International Community.

A brief History of Modern Africa. The Place of Family and Community in Africa: Individualism & Communalism.

According to historians and evolutionists, Africa is generally believed to be the birth place of modern man.¹⁰³ Before the foundation of modern nation states, African states like Egypt and Ethiopia had long existed and these states had their own legal and governmental systems, which lasted for many decades.¹⁰⁴

Modern African nations are the creation of the colonial powers which colonized African states from the 15th century-to the 19th century. James Paul states that “Sub Saharan African states are products of recent and exogenous historical process. The colonial powers drew territorial boundaries without much reference to indigenous factors, and they

¹⁰³ Online Encyclopedia, History of Africa available at [Http://en.wikipedia.org/wiki/History_of_Africa](http://en.wikipedia.org/wiki/History_of_Africa). (lasted visited 11/12/06)

¹⁰⁴ Id., See also Max Gluckman (ed), Ideas and Procedures in African Customary Law, Oxford University Press 44-45 (1969).

arbitrarily aggregated different ethnic and cultural groups under the sovereignty of an alien government. These regimes expropriated indigenous structures of governance or subverted and converted them into institutions of colonial control.”¹⁰⁵

In the popular Berlin Conference of 1884-85, the scramble and partition for Africa went on unrestrained and with renewed vigor.¹⁰⁶

It was in this Berlin conference that a lot of the territorial map and political makeup of many African states were determined. No single African Country was consulted during the partitioning of Africa. During this conference, a treaty was signed that disregarded the ethnic, social and economic composition of the people of Africa.¹⁰⁷

The modern African nations, to a very great extent, are the creation of the colonial powers that ruled African states during the 14th - 19th centuries.

In traditional Africa, the family is the most important unit of the social system. The family is the backbone of the traditional African government. In African culture, ones family of origin determines their rights and privileges.

¹⁰⁵ James C. N. Paul , Participatory Approaches to Human Rights in Sub-Sahara: in *Humans in Africa: Cross Cultural Perspectives*, Abdullahi Ahmed An-Na'im and Francis M. Deng (eds), The Brooklin Institution, 222 (1990).

¹⁰⁶ Id.

¹⁰⁷ Online Encyclopedia, History of Africa, supra note 105.

The family and customary law define the basic rights of every individual in the Africa community.¹⁰⁸

In Africa, unlike in European nations, the interest of the community takes precedence over the interest of individual persons. The African individual is completely merged into the community and he does not have an identity distinct from the community.¹⁰⁹ In many African communities, an individual does not have rights outside the community; the individual owes his duty to the community.¹¹⁰

1(iii) Africa and the Rise of Modern Nation State: Modern Africa, New World and International Law: A clash of values and ideas: A mixing of oil and Water.

The modern African state is a creation of the colonial powers that ruled the African nations in the 14th and 15th centuries. When European powers colonized Africa, they imposed in them their own form of government, culture and language. Most colonial powers exploited, abused and dehumanized the African people. They ruled African states with oppressive

¹⁰⁸ Gluckman, supra note 106, at 44-45.

¹⁰⁹ Fitnat Naa-Adjeley Adjetey, *Religious & cultural Rights: Reclaiming the African Woman individuality: The struggle between Reproductive Autonomy and African Society and Culture*, 44 Am.U.L. Rev. 1351 (1995), See also Ebow Bondzie –Simpson, *A critique of the African Charter on Human and Peoples Rights*, 31 How. L. J. 643–648 (1988).

¹¹⁰ Adejetey supra note 111, See also Rhoda E Howard. *Human Rights in Commonwealth Africa*. New York University Press, 17 (1986), who contends that the group is more important than the individual and decisions are made by consensus rather than by competition.

and coercive powers. This situation led to a very long mark of human rights abuses on the emerging African nations and their leaders. Some scholars have even blamed the current human right abuses and conditions in Africa on the legacy of colonial powers.¹¹¹ African culture, customs and political system, as they exist today, are a blend of African customs and political system, imported colonial common and civil law notions, religious concepts from Christianity, Islam and traditional African religions.¹¹²

1(iv) The Birth of Organization of African Unity as Africa Attempts to meet up with the new world Order

The organization was formed in 1963¹¹³ as Africa's attempt to meet up with emerging new world order. African governments explicitly stated their adherence to the universal declaration on human rights when they ratified the Charter of the organization of African Unity (OAU) and they reaffirmed that allegiance as well as recognized the validity of the covenants in

¹¹¹ Many African and politicians are of the view that current political problems and human rights situation in Africa can be traced to African colonial era.

¹¹² Adjetey supra note 111, at 2.

¹¹³ See Art. 1 of OAU Charter.

international African Charter of Human and People's Rights (Banjul Charter), adopted by OAU in 1981.¹¹⁴

Before the formation of OAU, African countries have been under the domination of colonial powers. Africa which was once the cradle of civilization, through decline and imperialism, became a puppet and slave of western powers.¹¹⁵

OAU was primarily formed to protect the territorial sovereignty of new independent African states, and to liberate African nations that were still under colonial dominations.¹¹⁶ There is no doubt that OAU occupies a place of honor in the liberation struggles that led to political independence of many African States, including an end to an inglorious apartheid regime in South Africa.¹¹⁷ OAU once boasted about its achievement, that “through huge sacrifice and heroic struggles, Africa has broken the colonial yoke, regained its freedom and embarked upon the task of nation building.”¹¹⁸

The Organization of African Unity has been criticized for being little more than an organization for the protection of the rights of the head of state.¹¹⁹

¹¹⁴ Paul, *supra* note 107, at 215-216.

¹¹⁵ Rachel Murray, *Human Rights in Africa: From OAU to the African Union*, Cambridge University Press 9 (2004)

¹¹⁶ *Id.*

¹¹⁷ Nsongurua J. Udombana, *Can the Leopard Change Its Sports?: The African Union Treaty and Human Rights*, 17 *Am. U. Int'l L. Rev.* 1177 (2002).

¹¹⁸ Udombana, *supra* note 119.

¹¹⁹ Howard, *supra* note 112, at 44 quoting Aluko Olajide in a 1981 article in *Round Table: The Organization of African Unity and Human rights*, 234-42 283 *The Round Table*.

By the composition of OAU, they were to organize annual meetings, which in most cases are very expensive, both to the host state and the attending nations.

One of the chief objectives of OAU was to preserve the sovereignty and territorial integrity of all member states.¹²⁰

While a lot of criticism¹²¹ has been leveled against OAU with its obsession with the preservation of its state members national sovereignty and assistance to liberation movements, one should take into cognizance the period and circumstance of events under which the body was formed. Many African states have just secured their independence from many years of colonial rule and many African states still remain under colonial rule and domination.

In the light of the situation, it is proper for African states to ensure that sovereignty will never again be abused and to further help others who are still under colonial rule, to gain their political independence.¹²²

¹²⁰ See Preamble to OAU Charter , Arts 2 & 3 of OAU Charter.

¹²¹ J. Oloka- Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 Cal. W. Int'l L. J. 1 (1995). Although OAU has often championed the lofty ideals of unity, cooperation, economic developments, human rights and other worthy objectives, it has failed seriously towards the realizations of these objectives. The African continent is still today one of least developed continent of the world and ranks among the worst continent in terms of human abuses and protection.

¹²² Oloka- Onyango supra note 123.

From its inception till the end of the 1970s, OAU had a limited concern for human rights. No human rights body was created and human rights were not a primary concern of any OAU organ.¹²³

In summation, OAU was primarily formed to bring African region into the league of civilized communities and to muster regional power that is capable of speaking for Africa in the global community.

1(v)Africa and Human Rights:

Meaning, concepts, philosophy and perspective

Human right, in modern usage in international law, has become a common term. Because human right is a common term in international relations and community, it should not be taken for granted that it has a universal meaning and concept worldwide. As a former United Nations Secretary states, “The issue of human rights is of fundamental importance. But we must not overlook the difficulties of applying this concept in a world of differing ideologies, political systems and concepts of society.”¹²⁴

The philosophical foundation of the concept of modern human rights has its origin in the liberation democratic tradition of western European tradition

¹²³ Curtis F. J. Doebbler, *African Union and the New Pan Africanism: Rushing to Organize or timely shift: A complex Ambiguity: The relationship between the African Commission on Human Right and Peoples' Rights and Other African Union Initiatives affecting respect for Human rights*, 13, *Transnat'l L & Contemp. Probs.* 7 (2003).

¹²⁴ Avery, *supra* note 4, at 2 quoting kurt Waldeim a former Secretary General of United Nations.

which is itself the product of Greek philosophy, Roman law, Judaism, Christian tradition, humanism of the reformation and the age of reason.¹²⁵ Conceding that man's interest in human dignity and justice can be traced to the ancient civilizations and that the nature and theory of human rights was tackled by most of the earliest/classic philosophers, it is common knowledge that contemporary international human rights law was developed from the body of customary laws of Nations evolving from the practice of European nations in the 18th and 19th centuries. The concept of human rights as enshrined in the basic international instruments appears to be drawn from the same western European thinking.¹²⁶

However, it should be noted that the concept of human rights is not limited to western civilization. In fact we can find the notion of human rights in all societies and at all times in Africa and Asia, in ancient and modern Chinese philosophy, in Hinduism, Buddhism, Judaism, Christianity and Islam.¹²⁷

The idea of human dignity and rights is common to all beliefs and cultures, except that it manifests itself in different concepts and environments of the society which is practicing it.¹²⁸

¹²⁵ Robertson et al., supra note 12, at 2.

¹²⁶ Shapiee, supra note 6, at 13.

¹²⁷ Shapiee, supra note 6, at 14.

¹²⁸ Id, See also Joseph K. Pahr, *Human Rights in a Pluralistic World*. Human Rights Journal 77 (1985).

Some have argued that there is a specific African concept of human rights;¹²⁹ grounded in a unique African culture, but others have argued that human rights are universal and inherent in one's humanity and the argument that different societies have different concepts of human rights is based on an assumption that confuses human rights with human dignity.¹³⁰

According to Howard, all societies have concepts of human dignity, but few accept the notion of human rights in the sense that individuals have the right to make claims on the state.¹³¹

Advocates of the African version of human rights postulates the existence of a communitarian ideal in Africa, where the group is more important than individual, decisions are made in consensus rather than by competition and economic surpluses, are disposed of in a distributive way, rather than in a profit-oriented basis.¹³²

There is the idea that pervades the discussion of human rights in Africa, which is that there is a unique African concept of human rights based on

¹²⁹Kwasi Wiredu, An Akan Perspective to Human Rights, in Abdullahi Ahmed An-Na'im & Francis M. Deng(eds) Human Rights in Africa.Cross Cultural Perspectives at 243-258 (1990)

¹³⁰ Howard, supra note 112, at 17.

¹³¹ Id. referring to Rhoda E. Howard and Jack Donnelly, Human Dignity, Human Rights and Political Regimes in America Political Science Review, 9 (1986).Howard disagrees with notion of African version of human rights.He argues that the so called African concept of human right is actually a concept of human dignity.

¹³² Howard, supra note 112, at 17-18.

traditional African values, which is fundamentally different with the western values underlying the international human rights norms.¹³³

The key difference between African concept of human rights and western concept of human rights is that traditional African culture is group oriented in contrast to the western individualistic values.¹³⁴

One critical difference between African tradition and western tradition is the importance of the human individual. In liberal democracies of the western world, the ultimate repository of rights is the human person. The individual is held in a virtually socialized position. There is perpetual and obsessive concern about the dignity of the individual, his worth, his autonomy, and his property.¹³⁵

In traditional Africa, on the other hand, the community is above the individual. According to Khushalani, African law in general is a law of group, not because it applies to micro- societies (lineage, tribe, ethnic, clan, family) but also because the role the individual plays in it is insignificant. In traditional African societies the importance of the community is emphasized and the individual rights had to be viewed within the context of the community, for this reason human rights in traditional African society have

¹³³ James Silk, Traditional Culture and the Prospect for Human Rights in Africa: in Abdullahi Ahmed An-Na'im & Francis M. Deng (eds) Human Rights in Africa- Cross Cultural Perspectives at 308.

¹³⁴ Id. at 309.

¹³⁵ Id.

their own distinctive cause, aim and function.¹³⁶ This notion should not be construed that the African society has no respect for the rights of the individual. The principle of individual right within the frame work of the legitimate concern of the community has long been a part of African life. Suffice it to say that African culture stresses the rights of individuals and groups within their economic and cultural dimensions.¹³⁷

The fact that African concept of rights is more community oriented should not be construed to mean that it is totally different from the modern concept of universal human rights¹³⁸ The African traditional society has the notion of individual rights but somewhat different from the western notion.

As Mojekwu contends, the concept of human rights in Africa was fundamentally based on ascribed status. It is a person's place of birth, his belonging to a particular locality and within a particular social unit that gave content and meaning to his human rights—social, economic and political. A person had to be born into a social unit or somehow belong to it in order to have rights which the law could protect.¹³⁹

¹³⁶ Yougindra Khushalani: *Human rights in Asia & Africa*: Human Rights Law Journal Vol.4 (1983).

¹³⁷ Id, See also Abdullahi Ahmed An-Na'im et al, *supra* note 136 at 310.

¹³⁸ It just like in our modern day where before you can enjoy the rights of a nation, you must be a citizen of that state. In the same way, traditional Africa society tries to protect the rights of an individual through communal or group values. In every African society, the right and dignity of the individual is of paramount importance to the community or group.

¹³⁹ James Silk, *supra* note 136 at 312 quoting Chris C. Mojekwe, in an article *International Human Rights :The African perspective* at 86 by Jack L. Nelson & Vera M.Green(eds) *International Human Rights: contemporary Issues* , Human Rights Publishing Group (1980)

It has been argued that the concept of rights that is dependent on membership of a particular group is very different from the modern concept of universal human rights and any idea of human rights where protection of individual rights is dependent on group membership is defective.¹⁴⁰

Furthermore, it has been argued that the notion of a person, to whom individual right can apply, is fundamentally different from the western concept.¹⁴¹ According to Menkiti, a person really becomes a person only after a process of incorporation. Without incorporation into the community, individuals are considered to be mere danglers to whom the description “person” does not fully apply. Personhood is something which has to be achieved, and this is not given simply because one is born of human seed—thus it is not enough to have before us the biological organism, with whatever rudimentary psychological characteristics are seen as attaching to it. We must conceive of this organism as going through a long process of social ritual transformation until it attains the full complement of excellence seen as truly definitive of man.¹⁴²

In traditional Africa society, the human rights of an individual, was of primary importance to the community and the people did every thing they

¹⁴⁰ Id.

¹⁴¹ Id.

¹⁴² Ifeanyi A. Menkiti, Person and Community in African Thought, in Richard A Wright (ed) African Philosophy : An Introduction (3rd ed) University Press of America 172 (1984).

can to make sure that every individual was treated with utmost respect and dignity.

1(vi) African Legal System: The Place of Customary Law in the African Legal System.

Most African Legal systems are rooted on legal pluralism. Legal pluralism is a system where in contemporary Africa, most parts of African nations and peoples of different ethnic, cultural and religious groups live within the same political unit under different systems of law.¹⁴³

Many African nations have different varieties of customary or indigenous African laws which operate side by side with official state legal system.

Many Africa states operate the legal system they inherited from their colonial masters, side by side with traditional African customary laws. This situation brings into play conflicts in administration of justice.¹⁴⁴

However, any law or rule under the customary law which is adjourned by a judge or law makers to be incompatible with the rule of natural justice or equity will be declared inapplicable and inoperative under the legal system of the land.

¹⁴³ Hans W. Baade (ed) African Law. New Law for New Nations Duke University, 14 (1963).

¹⁴⁴See generally Hellum Anne(ed) Women's Rights and Legal Pluralism in Africa: Mixed Norms and identities in infertility Management in Zimbabwean, Mond Books (1999), See also Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States Obligations under the African Charter*, 40 J. Int'l L. 105 (2004).

1(vii) Customary Law and Human Rights in Africa: Is human Right a new concept in Africa or New imperialism?

Customary law has been in practice in the African continent even before the emergence of modern day nation state and concept of Human rights; which raises the question as to whether traditional African society and customary law are compatible with modern day human rights practices. Put in another way, can modern day human rights be practiced under customary law? It has been argued that traditional African society embodies values that are consistent with and supportive of modern day human rights ¹⁴⁵ and that different societies have their concept of human rights. ¹⁴⁶

Traditional African states have deep respect for the dignity and well being of its fellow human being, which is the core aim of our modern day human rights. Former President Kaunda once declared that the tribal community was a mutual society which was organized to satisfy the basic human needs of its entire member and to discourage individualism. Chiefs and tribal elders adjudicated between conflicting parties and took whatever action was necessary to strengthen the fabric of social life. ¹⁴⁷

¹⁴⁵ James Silk, *supra* note 136, at 292.

¹⁴⁶ Howard, *supra* note 112, at 17.

¹⁴⁷ *Id.* at 18, See also Julius K Nyerere, *Ujamaa: Essays on Socialism*, Oxford University Press, 11 (1968).

It has been argued that many ancient nations have their own concept of human rights. As Subedi contends, the absence of sufficient literature unearthing and analyzing the practices of ancient states of Asia, Africa and other parts of the world does not signify that human rights have their origin only in christian western civilization. It is true the great civilization of the western world, perhaps more than any other civilization, has made a significant contribution to the development of modern international human rights standard. However, that is not to say that other civilizations had no practice of human rights or knowledge of the concept itself.¹⁴⁸

Some Africans believe that Human right was a basic foundation of the customary law legal system of Africa and the traditional African community.

1(viii) **Human Rights in traditional African Community.**

It has been argued that human rights have always existed in traditional African society.¹⁴⁹ However, some people dispute this notion.¹⁵⁰ African

¹⁴⁸ Surya P. Subedi, *Are the Principles of Human Rights "Western Idea"? An Analysis of Claim of the Asian concept of Human Rights from the Perspective of Hinduism*, 30 Cal. W. Int'l L. J. 45 (1999).

¹⁴⁹ Bennet, *supra* note 55, at 1-4. See also Wai. M. Dunstan, "Human Rights in Sub- African" In *Human Rights: Cultural and Ideological Perspectives* : Adamantia Pollis and Peter Schwab (eds), 117 Praeger (1980).

¹⁵⁰ Osita C. Eze, *Human Rights in Africa: Some selected Problems*, Nigerian institute of International Affair, Lagos in cooperation with MacMillan Nigerian Publishers 10-14 (1984) where he argued that traditional African legal system were quite advanced, norms of conduct were not markedly different from modern norms, and human rights existed but disputed the idea that these observation can support a broad inference that human rights were recognized and protected in traditional African society. See also Chris C. Mojekwe, in an article *International Human Rights :The African perspective* at 86 by Jack L. Nelson & Vera M.Green(eds) *International Human Rights: contemporary Issues* , Human Rights Publishing Group

culture may not share the same prestige enjoyed by modern day concept of human rights;¹⁵¹ but according to Bennet, “The absence of rules and an emphasis on tradition do not necessarily mean that the individual (African individual) will suffer mistreatment or abuse.”¹⁵²

Several writers including former Presidents of Zambia and Tanzania contend that Africa has its own indigenous doctrine of rights, one which the European colonist overlooked because they were too blinded by a sense of superiority to realize that Africa too could evolve ethical systems. This notwithstanding, it is clear that in some instances, African standards of behavior coincided with the notion of human rights and that in others, the standards expected in Africa exceeded what would be regarded as sufficient in the west.¹⁵³

According to Wai, traditional African societies supported and practiced human rights.¹⁵⁴

(1980) where he argued that the concept of human rights in Africa was fundamentally based on ascribed status.

¹⁵¹ Bennet, supra note 55, at 1. See also Ayittey B. N. George, *Indigenous African Institution* Transnational Pub. Inc, 22 (1991). Where he argued that each African enjoyed certain basic rights which were established by customary law and tradition., which included the right to equal protection of the law, right to a home, right to land sufficient for earning livelihood forself and family, right to aid in time of trouble, right to petition for redress of grievances, right to criticize and condemn any act by authorities or proposed new laws, and right to reject the community final decision on any matter and to withdraw from the community's unmolested.

¹⁵² Bennet supra note 55 at 3,

¹⁵³ Id.

¹⁵⁴ Wai, supra note 152 at 117, where According to him, there is no point of belaboring the concern for rights, democratic institutions, and rule of law in traditional African politics. See also Asante supra note 30 at 75 where he argued that African conception of human rights was an essential aspect of African Humanism.

James Silk in an article, “Traditional Culture and the Prospect of Human Rights in Africa”, argues that traditional African society practiced human rights which are consistent with modern norms of human rights and that respect for human rights is inherent in traditional African legal system.¹⁵⁵

The notion of due process of law permeated indigenous law; deprivation of personal liberty or property was rare; security of the person was assured, the customary legal process was characterized not by unpredictable and harsh encroachment upon the individual sovereignty, but by meticulous procedures for decision making. The African concept of human rights was an essential aspect of African humanism sustained by religious doctrine and principle of accountability to ancestral spirits. In any case, indigenous African culture revolved around the family and the clan, government by the sovereign was essentially limited. The concept of accountability of the chief was well settled and so there was little opportunity for violation of human rights. Violation of community norm invariably led to the deposition of the chief.¹⁵⁶

1(ix) Customary law and international human rights: Can Human Rights be protected under Customary Law? Contradictions, Clash of Culture and Conflicts of Law.

¹⁵⁵ Silk , supra note 136, at 306.

¹⁵⁶ Silk, supra note 136, at 307. See also Mojekwe supra note 153, at 87-88.

Can international human rights be practiced within the context of traditional and customary laws of Africa, conceding the fact that the modern day concept of human rights looks foreign to African culture? It has been argued that international human rights law is grounded in an alien western jurisprudence and that the rights enshrined in international human rights exalt principles of individual freedom at the cost of collective values rooted in African cultures.¹⁵⁷ It is without doubt that the concept of rights, as developed in international human rights and western jurisprudence, may be in some respect alien to African culture, but the underlying interests that universal rights are designed to protect are not alien to sub-Saharan African cultures and they are surely of paramount importance today.¹⁵⁸ Rights have been defined as a claim that people are entitled to make on others or on society at large by virtue of their status and human rights are defined as claims that people are entitled to make simply by virtue of their status as human beings.¹⁵⁹

In principle, traditional and customary Africa supports the principles of universal human rights; though in practice a different rule seems to apply.

The fundamental value underlying the Universal Declaration and covenants is the notion of inherent dignity and integrity of every human being. Equality

¹⁵⁷ Paul, at supra note 102, at 216.

¹⁵⁸ Paul, supra note 107, at 232.

¹⁵⁹ Wiredu, supra note 131, at 243.

is another implication of the inherent dignity and integrity of human being, which in turn requires non discrimination on grounds such as race, sex, religion, national and social origin.

The cultural values of Africa overriding goal for human life and its sense for human dignity had the same notion of modern day human rights.

It must be conceded that to some extent, the African culture lacks the fairness which the modern day human rights demand.¹⁶⁰

As the golden rule demands, all human beings are entitled to equal respect, but in some African culture this was not the case, e.g. the killing of a person to use his head to bury the king was practiced in some cultures.¹⁶¹

Furthermore, there was no freedom of speech for women and children in many traditional African cultures and this is at variance with the principles of international human rights.¹⁶²

One of the shortcomings of African traditional society is the inability of women to have a legitimate voice in the political system and decision making.

1(x) Modern African States and international human Rights. Trends and issues.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Some have argued that women were also discriminated and treated differently in the western and American regions.

Most African states have adopted and ratified a lot of the major international human rights covenants.¹⁶³ It is a fact that in principle, Africa can be considered a continent that encourages and respects the modern day concept of human rights and rule of law. But this principle contrasts with the practice of human rights in many African nations. African countries have become notorious for human rights abuses and undemocratic government.¹⁶⁴ As Doebbler states, “The African continent, taken as a whole, has the worst health and economic indicators of any region in the world. The problem of human rights in Africa is more complex than the problem of human rights in many parts of the world”¹⁶⁵

African conducts and practices in human rights have been such as to elicit charges that African states and government adhere to a double standard.¹⁶⁶

There is a trend and a culture of many African states disregarding most international human rights covenants and instruments which they have signed.

Despite the fact that many African States have adopted and ratified international laws on women and children rights, African women and

¹⁶³ See generally International Convenants on Economic, Social and Cultural Rights 1966, International Convenants on Civil and Political Rights 1966, Convention on Elimination of All Forms of Discrimination Against Women 1979, International Convention on the Protection of the Rights of All Migrant Workers and their Families 1990.

¹⁶⁴ Gluckman supra note 106, at 54-70.

¹⁶⁵ Doebbler, supra note 125, at 2.

¹⁶⁶ Howard, supra note 112.

children continue to rank as one of the most poorly treated with respect to human rights standard. There is a big gap between theory and practice of international human rights in many African countries. This is the major issue this paper will be examining in larger details in a subsequent chapter in this paper.

1(xi) The coming into being of African Charter on Human and Peoples Rights, formation of African Union and Africa's latest attempts to keep up with world standard on Human Rights of Women and Children.

Africa has done a lot in the last two decades to meet up with the world standards of human rights and move the continent in the right direction as the global and regional community becomes increasingly unified. One of the greatest steps taken by African continent toward the promotion and protection of human rights is the adoption of the Banjul Charter in 1981 otherwise known as African Charter on Human and Peoples Rights.¹⁶⁷ The African Human Rights Charter is the primary normative instrument for the promotion and protection of human rights in the African continent.¹⁶⁸

¹⁶⁷ See generally African Charter on Human and Peoples Rights which came into being in 1986. See also Malcolm D. Evans & Rachel Murray (eds) *The African Charter on Human and Peoples Rights: The System in Practice, 1986-2000*, Cambridge University Press 1-30 (2002). The African Charter on Human and Peoples Rights was adopted by OAU in 1981, but it came into force in 1986.

¹⁶⁸ Vincent O Nmeielle: *A decade in Human Rights Law: Development of the African Human Rights System in the last Decade*, 11 Hum.Rts.Br. 6, (2004) See also U. O. Umozurike, *Current Development: African Charter on Human and Peoples Rights*, 77 A..J. I.L. 902(1983)

The provisions of the African Charter on human rights is in substantial accord with similar provisions of many international and regional human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), the international Covenant on Economic, Social, and Cultural Rights (ICESR), the American Convention on Human Rights (American Convention), and the European Convention for Human Rights and Fundamental Freedom (European Convention).¹⁶⁹ The African charter on human rights has been characterized as revolutionary and a unique chapter in the history of human rights in Africa.

In the views of Vincent, “The fact that African charter contains elaborate provisions for the substantive protection of human rights in all areas without being hampered by the traditional divide between civil and political rights on the one hand and economic, social, and cultural rights on the other remains one of its unique characteristics. Its extension of human rights protection to what has been termed as ‘group or collective’ rights that were not classified as falling either within civil and political rights, or economic, social, and cultural rights, is also an enduring legacy.”¹⁷⁰

¹⁶⁹ Id at 170, See also Obinna Okere, *The Protection of Human Rights in Africa and Africa Charter on Human and Peoples Rights: A Comparative Analysis with the European and American Systems*, 6 Hum. Rts. Q. 142 (1986)

¹⁷⁰ Nmehielle supra note 170, See also Nsongurua J. Udombana, *The Institutional Structure of African Union: Alegal Analysis*: 33 Cal. Int’l L. J. 45(1999)

The birth of African Union (AU) was greeted with great joy and fanfare.¹⁷¹

The African treaty¹⁷² was adopted with a record setting pace¹⁷³ and many member states and leaders have expressed their hope for the African Union.¹⁷⁴

It is hoped that the African Union will be a turning point in all facets of African nascent development. Some see the adoption of the African treaty and the coming into being of African Union as the “second war of liberation” in Africa against the abuse of power, violation of human rights, economic failure, and hardship, and a deep longing for peace and order.¹⁷⁵

There is no doubt that African Union was Africa’s ambitious attempt to regionalism just like the European Union.¹⁷⁶

These high hopes notwithstanding, many writers and people have greeted the birth of African Union with doubts and skepticism, taken into consideration the poor record of African Union grand father OAU.¹⁷⁷

¹⁷¹ Adrien Katherine Wing & Tyler Murray Smith: *The African Union and the New Pan- Africanism: Rushing to organize or Timely Shift: The New African Union and Women’s Rights*: 13 *Transnat ‘1 L. & Contemp. Probs.* 33 (2003)

¹⁷² The African Treaty Union Act of July 11,2000,entered into force May 26 2001,(OAU Doc.CAB/LEG/23.15) available at:<http://www.africa-union.org>

¹⁷³ It was adopted with out much objections and the internal leadership fightings that has characterized African organizations.

¹⁷⁴ Adrien Katherine Wing et al., *supra* note 173.

¹⁷⁵ *Id.* at 2.

¹⁷⁶ Rachel Murray, *supra* note 117 at 31. See also O.A Barinde:Analyzing the proposed African Economic Community: Lessons from the experience of European Union,paper for Third ECSA-World Conference on The European Union in a Changing World,sponsored by the European Commission:,D-G.X,Brussels,19-20 september 1996,<http://www.ecsanet.org/conference /babarinde.htm> at 5, Okere, *supra* note 169, at 142.

¹⁷⁷ Udombana, *supra* note 173.

As Doebbler argues, “The African Union is the latest attempt by African leaders to do some good for Africa. Despite publicly displayed good intentions, however these efforts nevertheless raise the spectra of business as usual. Much of the skepticism is based on the monumental task facing African leaders, especially the task of securing basic economic and social rights for their people.”¹⁷⁸

One of Africa’s latest attempt to keep with the current development on women’s right issue is the adoption of draft protocol at the 26th session of the African Commission on Human Rights and the subsequent adoption of the protocol by African Union at its summit in Maputo Mozambique in July 2003. The AU has opened it for its members for signature and ratification. On October 2005, the protocol entered into force after Togo became the fifteenth state to ratify the protocol on 26th of October 2005, 30 days after the deposit of the 15th instrument ratification. Amnesty international called it a milestone in the promotion and protection of the rights of women in Africa.¹⁷⁹

¹⁷⁸ Doebbler, supra note 125, at 2.

¹⁷⁹ Africa: Entry into Force of Protocol on the Rights of Women in Africa Positive towards Ending Discrimination: available at <http://web.amnesty.org/library/index/engaf010042005> (last visited 12/13/06) Amnesty international sees the entry into force the protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the protocol) as an important step in the efforts to ensure the promotion and respect of the human rights of women in Africa. The protocol fills a major gap in African human rights system by providing a comprehensive framework for the promotion and protection of women’s human rights. The protocol recognizes and guarantees a wide range of women and political rights as well as economic, social and cultural rights; these rights include right to life, integrity and security of person; protection from harmful traditional practices; prohibition of discrimination; and the protection of women in armed conflict.

Another major step taken by African states towards improving its human rights record was the adoption of Child Right Charter 17 years, to specifically provide for the protection of children as a particular class of persons that was not adequately protected under the human rights charter¹⁸⁰ The Child Rights Charter was Africa's enlistment to the ideals of the UN convention on the Rights of the Child (UN Child rights Convention) but with an African emphasis because of the perceived exposure of the African child to a particular set of dangerous circumstances.¹⁸¹

The Charter deals with all aspects of children's rights, ranging from civil, political, social, economic, rights to prohibition of child soldiers, prohibition to harmful social and cultural practices, the recognition of the best interest of the child principle, protection from child labor, protection from sexual exploitation, etc.¹⁸²

The Child Charter entered into force in 1999 and it has a supervisory mechanism, an eleven –member African committee of expert on the Rights and Welfare of the Child, known as the African Committee of Experts on the

Furthermore, the protocol guarantees to every woman the right to respect as a person and full development of her personality; prohibition of exploitation or degradation; access to justice and equal protection before the law; participation in the political and decision making process. The protocol also guarantees the right to health and reproductive right of women, right to food and security and right to adequate housing.

¹⁸⁰ Nmehielle supra note 170, at 5. See also The African Charter on the Rights and Welfare of the Child 1990.

¹⁸¹ Id.

¹⁸² Id.

Rights and Welfare of Child right (ACRWC). The function of the committee is akin to that of the African Commission.¹⁸³

1(xii) **PLIGHT OF WOMEN AND CHILDREN IN AFRICA**

- **The place of women and children in traditional African societies.**

Rights of women and children in traditional African community and modern Africa.

The status of the African woman is dictated by a deeply entrenched tradition of patriarchy;¹⁸⁴ which gives a whole lot of power to men over women. The empowerment of men entails a corresponding disempowerment of women, who are deprived of the capacities necessary to deal with the world at large. In traditional African system, women are assimilated to the status of children and like children, they are subordinated to the control of senior male guardian.¹⁸⁵

Customary laws do not regard women as slaves or chattels as is believed by some western scholars and writers. On the contrary, if a woman were

¹⁸³ Id.

¹⁸⁴ Bennett, supra note 55, at 80. Patriarchy has been generally understood to mean the deference due to men or A social system in which the father rules the family or clan and in which descent is traced through male line.

¹⁸⁵ Bennet supra note 55, See also generally Hippel Theodor Golllieb Von, On Improving the status of Women, Wayne State University Press (1979).

wronged, her dignity as a human being would be recognized and she would be entitled to claim redress for any damage she suffered. She would not be allowed to take action directly; in all such cases, the woman's guardian would have to act for her.

However, in many traditional African societies, women were not eligible for political offices and positions of authority. A woman cannot directly negotiate her marriage, terminate it or claim custody of her children.¹⁸⁶

Customary laws and traditions determine a woman's right in traditional African society. Customary laws are customs and traditions which have developed into rules followed by a certain community or tribe.

Customary laws related to various aspects of family life are based on the social relations between men and women, or more specifically, on relations between husbands and wives. Customary laws are the unwritten social rules and structures of a community, which derive from shared values and traditions.¹⁸⁷

¹⁸⁶ Bennet, *supra* note 55. See also Rebecca J. Cook, *Human Rights : National and International Perspectives*, University of Pennsylvania Press (1994)

¹⁸⁷ Martin Scheinin & Markku Suks, *Human Rights in Development*: Martinus Nijhoff Publishers, 153(2005), See also Langley Winston, *Women's Rights in International Documents*, A source book with Commentary, Macfarland Publishers (2003)

Women don't own property in traditional society. A notable feature of African customary law is the dominance of older male members of the community over property and lives of women and children¹⁸⁸

1(xiii) A Continent in Crisis: Women and Children Rights Problems in Africa.

Africa has become a symbol of human rights abuses. The human rights of women and children in Africa have not improved for good despite the coming into being of the African Charter, the protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and African Charter on the Rights and Welfare of the Child. Grave human rights violations especially that of women and children continue to be the way of life in many African countries.¹⁸⁹ According to Amnesty international, the protocol to the African Charter on Human and Peoples' Rights on the Rights of women in Africa entered into force in 2006, but continuing violations of women's human rights, including female genital mutilation (FGM),

¹⁸⁸ Id., See also Lockwood Carol Elizabeth et al., *The International Human Rights of Women: Instrument of Change*, American Bar Association, Section of International Law and Practice (1998)

¹⁸⁹ Amnesty International Report 2006; the state of the world's Human Rights, Published by Amnesty International NY USA 25 (2006).

domestic violence, rape, trafficking and sexual violence during conflicts, made the development nominal rather than substantive.¹⁹⁰

In many African nations women remain without adequate protection in law and practice, and continue to face violence and discrimination. Women were raped and subjected to other forms of sexual violence by government agents as well as partners and employers and others¹⁹¹

In Nigeria, it is reported that the rape of women and girls by both the police and security forces, and within their homes and communities is acknowledged to be endemic in Nigeria. This observation and finding is not only by human rights defenders but also by some government officials at both federal and state levels. The Nigerian government is failing in its obligation to exercise due diligence; the perpetrators invariably escape punishment, and women and girls who have been raped are denied any form of redress for the serious crimes against them. Amnesty international has found that the Nigerian police force and security forces commit rape in many different circumstances, both on and off duty. Rape is at times used strategically to coerce and intimidate entire communities. Amnesty international, during their most recent visit to Nigeria between January and

¹⁹⁰ Id.

¹⁹¹ Id.

February 2006, has met some of the women and girls who have been raped.¹⁹²

Girls in Africa are particularly vulnerable to various forms of violence - both by virtue of their gender and because of the socio-economic and cultural conditions prevailing in their communities. African girls experience violence in the classroom, at home and in the community and in times of conflict and crisis, are special targets of violence.¹⁹³

The African children are still one of the most vulnerable people in the whole world. Child labor and trafficking is still common. Child abuse and neglect is rampant in many African countries. Many children in Africa still live in abject poverty and extremely unhealthy homes.

Children are recruited because they are perceived as cheap and have unquestionable obedience. Child soldiers are often chosen for most dangerous assignments. Children are forced to carry ammunition. The African Charter on the Rights and Welfare of the child prohibits the recruitment and use of children under 18 in both national and international

¹⁹²Nigeria: Rape-The Silent Weapon: available at <http://web.amensty.org.library/print/ENGAFR440202006>(visited 12/06/06)

¹⁹³ Born to High Risk: Violence against Girls in Africa: available at: <http://www.africanchildforum.org> (last visited 12/06/06)

conflicts. The Charter is an important complement to other international standards prohibiting the use of child soldiers.¹⁹⁴

In modern Africa, a lot has been done in theory in recent years to improve the Human rights of women and children in Africa, but more hurdles and mountains need to be crossed before African women and children would enjoy the full potentials of their human rights and dignity.

In summation, it can be said that the international human right of women and children in Africa is both deplorable and discouraging. A realistic and practical solution to this problem will require both domestic and international attention and approach. This is what this paper will set out to explore in the subsequent chapters.

¹⁹⁴Childhood Denied: Child Soldiers in Africa available at <http://web.amnesty.org/pages/childsoldiers-africanchild-eng>(last visited 12/13/06)

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Chapter 2
THE RIGHTS OF AFRICAN WOMEN AND THE FEMALE CHILD
UNDER INTERNATIONAL TREATIES AND INSTRUMENTS.

Aim: The broad aim of this chapter is to look at the various provisions of international treaties and conventions with respect to the rights of African women and the female child.

Introduction: International women's Rights.

Women's human right is a new concept in international human rights.¹

Women, whether in Africa or the western world, were denied certain rights for centuries. Women and children were treated alike and they enjoyed fewer rights than adult males. In old English law, women were treated as chattel and were denied the right to vote or hold property for centuries.²

In traditional international and early days of international law and international human rights, individuals had no legal standing in international law. They were viewed as objects rather than subjects of international law.

Carol & others assert that "In the beginning, there was little law upon which women's rights activists could base their claims, for international law was

¹ Carol Elizabeth Lockwood et al (eds.) The International Human Rights of Women: Instrument of Change. American Bar Association Section of International law and Practice, P. 5 (1998)

² Id., See also Renee Hirschon (ed) Women and Property-Women As Property, Croom Helm Ltd 1984.

traditionally based on the rights and obligations of nation states and not on states' duties towards individuals.”³

It is generally agreed that in approaching the subject of human rights of women, one of the best ways of addressing the issue of women rights or giving legitimacy to women human rights issues is the use of international legal instrument.⁴ Leaving women rights to national or domestic law will surely leave women's rights at the mercies of national and cultural prejudice.

According to UN report entitled ‘The state of World's Women 1979,’ “women and girls constitute one-half of the world's population and one third of world's labor force. They perform two-thirds of the world's work hours.⁵ This notwithstanding, women in most nations of the world, whether developed or developing nations, continue to suffer neglect and under representation in most areas of government and life.

Universal protection of human rights is a worldwide concept in modern day international law, though it has been argued that it remains to be seen whether the issue of the protection of the rights of women have been

³ Carol Elizabeth Lockwood et al, Supra note 1 at P 5.

⁴ Maria Suarez Toro, “ Popularizing Women's Human Rights at the Local Level: A Grassroots Methodology for Setting the International Agenda” in Julie Peters & Andrea Wolper (eds.), Women's Rights Human Rights: International Feminist Perspectives, Routledge Inc. NY P. 189 (1995)

⁵ Winston E. Langley. Women's Rights in International Document: A source book with Commentary, McFarland & Co., Inc., Publishers, P. xviii, (1991) See also, Burns H. Weston, Richard Falk, and Anthony A. D'Amato. International Law and World Order, St Paul, Minn: West Publishing Co., P.578-580 (1980)

addressed as a major issue of human rights under the concept of universal protection of human rights.⁶

The objective of universal protection of human rights is to ensure that human rights is enjoyed by all and protected for all without discrimination based on color, race, sex, religion, language, political affiliation, national or social origin.⁷

Meaning of International Human Rights of Women:

International human right is a product of post world war II which, to a great extent, is a departure from the traditional international law.⁸

International human rights of women simply refer to those international instruments that deal specifically with women, which are mainly elaborations of the norms of formal nondiscrimination.⁹ Winston asserts that women rights denotes those area of human right which have evolved since world war II to express the global community's commitment to outlawing of sex based discrimination.¹⁰

⁶ Chaloka Beyani, "Towards a More Effective Guarantee of Women's Rights in the African Human Rights System" in Rebecca J. Cook. (ed.) Human Rights of Women: National and International Perspectives, University of Pennsylvania Press, P. 287 (1994)

⁷ Id. at P. 287.

⁸ Hilary Charlesworth, "What are "women's International Human Rights" ? in Rebecca J. Cook (ed) Human Rights of Women, University of Pennsylvania Press, P. 58 (1994)

⁹ Id. at P.59

¹⁰ Winston E. Langley, Supra note 5 at P.ix

International human right of women is an attempt by international law and international human rights regime to address the unfairness of our legal, cultural and political system to women rights and needs.¹¹

In summation, women's international human rights can be taken to refer simply to those international instruments that deal specifically with women, providing that in particular or general contexts, women should be treated the same as men.¹²

Rationale for International Human Rights of Women.

International human right has been criticized for being insensitive to the plights and injustices suffered by women by reason of their being women.¹³

Due to this failure, international law has been accused of failing to be universal.¹⁴

There are those who argue against special international human rights for women. This argument is predicated on the fact that human right is universal and is not restricted by sex or race or nationality. The logic of the argument

¹¹Id.

¹² Hilary Charlesworth, *Supra* note 8 at 59-60.

¹³ Rebecca J. Cook. "Women's International Human Rights Law: The Way Forward" in Rebecca J. Cook (ed) *Human Rights of Women*, University of Pennsylvania Press, P.3,(1994)

¹⁴Id.

is based on the fact that human right is universal and it covers the rights of women.¹⁵

On the contrary, those who favor women international human rights argue that international human right is male oriented to the detriment of women rights and women worldwide suffer discriminatory treatment.¹⁶

Some feminist advocates and human rights activists have argued that women are in inferior position because they have no real power either in public or private world.¹⁷

Furthermore, the lopsided application of human rights has led to advocates of special regime of international human rights to deal with the issue of protection of women rights.¹⁸

Very few governments are committed to women's equality and human rights as a basic human right.¹⁹ As Charlotte states, "No government determines its policies toward other countries on the basis of their treatment of women, even where aid and trade decisions are said to be based on country's human rights record."²⁰

¹⁵Hilary Charlesworth, *Supra* note 8 at P. 58.

¹⁶ *Id* at P 60.

¹⁷ Hilary Charlesworth, *Supra* note 8 at P. 60.

¹⁸ Cheloka Beyani. *Supra* note 6 at P. 289.

¹⁹ Charlotte Bunch *Transforming Human Rights from a Feminist Perspective*, P 12 (Julie Peters & Andrea Wolper (eds.) *Women Rights, Human Rights:International Feminist Perspective*) (1995)

²⁰ *Id*.

It has been argued that these developments are not enough to address the subordination of women worldwide. Apart from the promise of formal equality and creation of specialized branch of human rights for women, women continue to suffer marginalization. These developments are not enough to address the subordination of women worldwide. Women are in an inferior position because they have no real power in either the public or private worlds, and international human rights law, like economic, social, cultural and legal constructs, reinforces this powerlessness.²¹

The Rights of African Women and the Female Child under Customary International law.

Customary international law is a customary rule that gains legal force through general practice accepted as law.²² Customary law is based on consensus and when a majority of states expressly or implicitly demonstrate general acceptance of a rule and a belief in its binding force, a customary rule is born.²³

The general acceptance or general practice does not require universal acceptance, but essentially requires a majority of states to engage in a

²¹ Chaloka Beyani, *Supra* note 6 at P. 288.

²² Melissa Robin, *Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement*, 9 Cal. W. Int'l L.J. 275, (2005) See also *Statue of the International Court of Justice*, June 26, 1946, Art. 38(1) (b), available at [http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partIchapterI/treaty3.asp\(lastvisited 5/6/07\)](http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partIchapterI/treaty3.asp(lastvisited%205/6/07)), *Fisheries Jurisdiction Case (UK V Ice, 1974 I.C.J. 3, 89-90.*

²³ *Id.*

consistent practice corresponding with the rule. This majority rules process results in customary rules being created which binds all states without the need for all states to consent to such rules.²⁴ Accordingly, states are no longer entitled under international law to defensively claim they are not bound by a customary rule, even if those states expressed opposition to the rule before it was formed.²⁵

Simply put, customary international law may be shown through state practice over time, in the form of state adherence to international treaties, declarations, or general assembly resolutions; through the enactment of domestic legislation, executive action and through a state's own judicial decisions.²⁶

Under international customary law, states are responsible for violations of international treaties and conventions even if they have not ratified the treaty or convention.²⁷ To this extent, states cannot violate women rights which have become part of customary international law, even if they have not ratified the international legal instrument.

²⁴ Melissa Robin, Supra note 23 at P. 9.

²⁵ Id.

²⁶ Andrea Vesa. "International and Regional Standards for Protecting Victims of Domestic Violence" 12 Am. U.J. Gender Soc. Pol'y & L.309. (2004)

²⁷ Rebecca J. Cook. "State Responsibility for Violations of Women's Human Rights," 7 Harv. Hum. Rts. J. 125 (1994), See also Draft Article on State Responsibility: at http://untreaty.un.org/ilc/summaries/9_6.htm (last visited 5/6/07), 1969 Vienna Convention on the Law of Treaty available at <http://untreaty.org./English/bible/englishinternetbible/partI/chapterXXXIII/treaty1.asp> (last visited 5/6/07)

According to a draft Article 3 on State Responsibility “ There is an international wrong act of a state when: (a) conduct consisting an action or omission is attributable to the state under international law; and (b) That conduct constitute a breach of an international obligation of the state.²⁸

If a specific article of the Universal Declaration is an expression of international customary law, that provision would be binding on a state regardless of it being a party to a specific treaty provision.²⁹

In the North Sea Continental Shelf Cases, the international Court of Justice stated: “general or customary law rules and obligations by their very nature, must have equal force for all members of the international community, and cannot therefore be subject to any of the right of unilateral exclusion exercisable at will by any one of them in its own favor.³⁰

African women and female child are fully protected under the rights of women and female child which have matured to international customary law.

The Rights of African Women and Female Child Under International Treaties and Instruments.

²⁸ Rebecca Cook, Supra note 27 at P.7.

²⁹ Geraldine Van Bueren. The International Law of the Rights of the Child, Martinus Nijhoff Publishers Dordrecht, P. 18 (1995)

³⁰ 1969 ICJ Reports 38-39, See also Geraldine Van Bueren. The International Law of the Rights of Child P 18.

The Vienna Convention on the Law of Treaties:

The Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.³¹ When states enter into international treaty conventions, or assume membership in international human rights conventions, they agree to give effect to treaty obligations in their legal system.³²

Express and concrete international effort for women's right began in the early 20th century. International concern for women's rights was one of the issues in the Hague Convention of 1902, which addressed the issue of conflicts in national laws on marriage, divorce and child custody.³³

Furthermore in 1904 and 1910 conventions that were aimed at stopping traffic in women for the purposes of prostitution.³⁴ Apart from the role played by slavery, the International Labor Organization (ILO) played a key role in the development of women's rights. Between 1910 & 20s, ILO made rules and standards, that prohibited women from night work and working in

³¹ Article 31(1) of The Vienna Convention on the Law of Treaties 1155 UNTS at 340, available at <http://untreaty.org/English/bible/englishinternetbible/partI/chapterXXXIII/treaty1.asp>(last visted 5/6/07)

³² Rebecca J. Cook. Supra note 27.

³³ Carol Elizabeth Lockwood et al, Supra note 1 at P.5.

³⁴ Id.

mines in order to prevent them from working in hard and unhealthy environment.³⁵

Prior to UN, there were conventions prohibiting the traffic in women and children in 1921 and slavery in 1926.³⁶

Prior to the formation of UN, political rights for women were the exception rather than the rule.³⁷ In many cultures and countries, women were excluded from political offices.

In summation, under the Vienna Convention of Treaties, African countries are bound to respect various treaties which they have ratified ,which accord women equal and nondiscrimination rights with men, notwithstanding the cultural practices of African society.

The United Nations:

The UN's recognition of the right of nondiscrimination as one of the foundational principles in international human rights, predates even the adoption of the Universal Declaration of Human Rights, appearing first in the U.N. charter itself.³⁸

³⁵ Id.

³⁶ Geraldine Van Bueren, *Supra* note 30 at P.27, See also generally Geraldine Van Bueren. *International Documents on Children 1993* Martinus Nijhoff Publishers Dordrecht. (1993).

³⁷ Katarina Tomasevski, *Women's Rights* P. 231(Jansuz Symonides (ed.) *Human Rights : Concept and Standards*, Ashgate) (2000).

³⁸ Johanna E. Bond. *International Intersectionality : A Theoretical and Pragmatic exploration of women's international Human Rights Violations*. P. 9, 52 Emory L. J. 71 (2003).

The preamble to the Charter of United Nation states, “The people of the United Nations have determined to reaffirm faith in the fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small.”³⁹

The primary reason for the formation of the United Nations is to promote and protect the fundamental human rights of all human beings and the equal rights of men and women.⁴⁰ Article 55 (c) of the UN Charter states that member states shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

UN expressly forbids its members and organs from discriminating against persons based on gender.⁴¹ According to Jansuz, the United Nations affirms explicitly the equal rights of men and women, in its preamble and included sex among the prohibited grounds of discrimination, along with race, language and religion.⁴² Article 56 of the Charter demands all member states to take joint and separate action in cooperation with the United Nations for the achievement amongst others things, of “universal respect for

³⁹ Preamble to 1945 United Charter hereafter called(UN Charter 1945) available at <http://untreaty.un.org/ENGLISH/englishinternetbible/partI/chapterI/treaty1.asp> last visited (5/6/07)

⁴⁰See preamble to UN Charter, See also Leigh A. Trueblood: Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory. P.5, 28 Denv. J. Int'l L. & Pol'Y 437 (2000).

⁴¹ Article 55(c) UN Charter 1945.

⁴² Katarina Tomasevski, Supra note 38 at P.232.

and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.⁴³

Since the formation of UN, gender has been introduced into international and domestic laws, as a way of protecting the rights of women and other vulnerable. Katarina states that gender has today become an integral part of global policies, not only in human rights, but in development, environment and housing, or with regard to combating violence or refugee protection.⁴⁴

UN and the international community's realization that women are discriminated based on gender has increased the inclusion of gender in international instruments as discriminatory tool which UN & the international community opposes.⁴⁵

The 1948 Universal Declaration of Human Rights:

The 1948 Universal Declaration of Human Rights (UDHR)⁴⁶ clearly elaborates on the international community understanding of human rights.⁴⁷

This fundamental and foundational instrument clearly states the world's commitment to treat all human beings as equal, without any regards to ones sex or gender.⁴⁸ One of the things which all signatory to UDHR agreed upon

⁴³ Chaloka Beyani, Supra note. 6 at 287.

⁴⁴ Katarina Tomasevski, Supra note 37 at P. 231.

⁴⁵ Id.

⁴⁶ See Generally Preamble to 1948 Universal Declaration of Human Rights hereafter called (UDHR) adopted by UN General Assembly Resolution 217A(III) of 10th Dec. 1948.

⁴⁷ Charlotte Bunch, Supra note 4 at P. 13.

⁴⁸ Id.

is a commitment or a pledge to recognize that “all human beings are born free and equal in dignity and rights.”⁴⁹

Article 2 of the UDHR Charter expressly allows all human being the rights, privileges and freedom set out in the Charter, without regards to their sex or gender.⁵⁰

In many societies in Africa, women are denied the right to inherit family land and property. But the Universal Declaration of Human Rights, which is the basis of all human Rights instruments, allows the right to property under the Charter, an issue most societies in Africa denies most of the women.⁵¹

UDHR recognizes that “everyone has the right to recognition everywhere as a person before the law⁵² and that all are equal before the law and entitled without any discrimination to equal protection of the law.⁵³

It has been argued that African women in female genital mutilation (FGM) practicing societies do not have equal protection before the law and that societies practicing female genital mutilation violate many norms of international human rights.⁵⁴

⁴⁹ Art. 1 1948 UDHR, See also Andreea Vesa. Supra note 27.

⁵⁰ Charlotte Bunch. Supra note 4 at P.13, See also Andreea Vesa. Supra note 27.

⁵¹ Paivi Koskinen. To own or to be Owned: Women and Land Rights in Rural Tanzania P. 158, (Martin Scheinin & Markku Suksi (eds) Human Rights in Development Yearbook 2002) (2005)

⁵² Art. 6 UDHR, See also Andreea Vesa .Supra note at 27 at P.6 .

⁵³ Art.7 UDHR, See also Andreea Vesa.Supra note 27 at P.6.

⁵⁴ Leigh A Trueblood, Supra note 39

Article 17 of UDHR Charter allows everyone the right to own property, either alone or with others, and further prohibits that no one should be arbitrarily deprived of his or her property.⁵⁵ According to Paivi Koskinen, the basis of all human rights instruments, the Universal Declaration of Human Rights, sets the record of right to property in Art. 17.⁵⁶ Article 17 of UDHR is one of the few international provisions on global level to explicitly recognize the right to property.

This UDHR provision runs contrary to many practices in African societies that deny women the right to inherit or own family property.

UDHR recognizes the equality of women in marriage. Article 16 of UDHR provides that women should be treated equally with men both during marriage and at time of its dissolution.⁵⁷ THE UDHR further calls for equal rights in marriage by stipulating that marriage shall be entered into only with the free and full consent of intending spouses.⁵⁸ Furthermore UDHR calls for equal pay for equal work⁵⁹ and for the protection of motherhood.⁶⁰ By

⁵⁵ Paivi Koskinen, Supra note 51 at P. 158.

⁵⁶ Id.

⁵⁷ Article 16 UDHR, See also Paivi Koskinen, Supra note 51 at P 158 where he argues that UDHR has several provisions on equality and property right, its efficacy is limited due to the fact that it is not considered a legally binding instrument. But it should be noted that some have argued that UDHR is a legally binding instrument because of its overwhelming acceptance by international community.

⁵⁸ UDHR Art 16, See also generally UN General Ass. Reso. 217A (111) 10 Dec 1948 3rd Session. See also Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 10th Dec. 1962, UNTS Vol. 521, P231, available at

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVI/treaty3.asp> (last visited 5/06/07)

⁵⁹ Art. 23 UDHR para. 2.

⁶⁰ Art. 25 UDHR para. 2.

these provisions, UDHR makes it mandatory for women to receive equal pay with their male counterpart and never to be discriminated against during pregnancy or child birth.

Whether the articles of UDHR are binding international instrument is still a matter of debate among international legal scholars.

Some argue against it because they were passed by the general assembly of UN which has no power to make binding decisions for UN, but others argue that if a specific article of UDHR is an expression of international customary law, that provision would be binding on a state, regardless of it being party to a specific treaty provision⁶¹

It has been postulated that at the inception of UDHR, it took the form of a non binding declaration, which makes it not to have the binding force of a treaty, like other Human rights instruments. With the passage of time, UDHR has risen to the level of customary international law, now making it a legal binding document in international law and international human rights law. In addition to forming part of the body of customary international law,

⁶¹ Geraldine Van Bueren.Supra note 29 at P.18. The International Court of Justice in the North Sea Continental Shelf Cases has held that “ general or customary law rules and obligations by their nature, must have equal force for all the members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favor”-- 1969 ICJ Reports. 38-39

the UDHR also derives its universal binding force from the UN Charter itself.⁶²

According to Andréa Vesa some scholars have argued that the UDHR in particular has a legally binding effect on all United Nations members since it is the authoritative interpretation of the general human rights commitment contained in the United Nations Charter.⁶³

International Convention on Civil and Political Rights

This covenant notwithstanding the general provision of equal protection in UN Charter and 1948 Universal Human Rights Declaration went to expressly state the principle of equality between men and women.⁶⁴

International Covenant on Civil and Political Rights⁶⁵ which entered into force on march 23, 1976 stipulates that all rights enunciated in this covenant will be “exercised without discrimination of any kind as to race, color, sex, language, religion or other status.”⁶⁶ Andréa Vesa states that gender equality

⁶² Melissa Robbin, Supra note 23 at P.4.

⁶³ Andreea Vesa, Supra note 26.

⁶⁴ Chaloka Beyani, Supra note 6 at P. 287.

⁶⁵ International Convenant on Civil and Polilical Rights, Dec 16,1966 U.N.TS. 171, available at <http://www.ohchr.org/english/law/ccpr.htm> or <http://www1.umn.edu/humanrts/instr/b3ccpr.htm>(hereinafter ICCPR) last visited 5/6/07. Forty-Five African states have ratifed the ICCPR with three countries-Guinea-Bissau, Libera, Sao Tome and Principe—have signed but not yet ratified, See generally status of Raifications of principal International Human Rights Treaties, at <http://www.unhchr.ch>

⁶⁶ ICESCR Art 2, See also Leigh A Truebood, Supra note 40.

and the right to be free from gender –based discrimination, appear within several provisions of the ICCPR.⁶⁷

The International Convention on Civil and Political Rights in some of its provision further affirms the world’s support for equality of men and women and disapproval for discrimination based on gender or sex. Art.2 (1) provides that “ each state party to the present covenant undertakes to respect and to ensure that all individual within its territory and subject to its jurisdiction recognize the rights in the present covenant, without distinction of any kind, such as race, or sex, language, religion or other pinion, national or social origin, property, birth or other status.”⁶⁸

Article 3 states, “The present state parties to the present covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political, economic, rights set forth in the present covenant.”

As Chaloka argues, Article 3 of the covenant on civil and political rights clearly affirms and supports the equality of men and women as expounded in the general principle of international law and international human rights.⁶⁹

Despite these general provisions on equality of men and women in international charters and instruments, women discrimination has continued.

Chaloka notes that notwithstanding the general existence of principle of

⁶⁷ Andreea Vesa, Supra note 26 at P.7.

⁶⁸ Art .2(1) ICCPR.

⁶⁹ Chaloka Beyani, Supra note 6 P. 288.

equality of men and women, and the inclusion of sex as a category in which discrimination in exercise and enjoyment of human rights is prohibited, the principles of human rights have not been employed adequately to improve the position and general well being of women in Africa and elsewhere.⁷⁰

Article 7 of the ICCPR states that “no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.”⁷¹ This article and provision raises question on the prevalence of female genital mutilation which is rampant in some African countries. Many feminist and human rights activists have argued that female genital mutilation is a violation of the provision of Article 7 of ICCPR for many African countries that have ratified the convention.

It has argued that by allowing the practice of female genital mutilation on young girls, the states violate its obligation to protect women and children under this covenant.⁷²

ICCPR further provides that every one has the right to freedom of thought, conscience and religion⁷³ and that all are equal responsibility of spouses with respect to marriage.⁷⁴ Article 14 (1) states that all persons shall be equal before the courts administrative tribunals and Article 16 of ICCPR states

⁷⁰ Chaloka Beyani. Supra note 6 at P. 288.

⁷¹ Art.7. ICCPR .

⁷² Leigh A . Trueblood. Supra note 40

⁷³ Art.2. ICCPR.

⁷⁴ Art.23. ICCPR .

that everyone shall have the right to recognition everywhere as a person before the law. This provision clearly gives full legal status to women, which is contrary to the practices in many African societies.

Article 14(1) and Article 16 of ICCPR have been argued to be interpreted as granting women equal rights to own property and conclude contracts regardless of marital status.⁷⁵

This view is supported by UN Human Rights committee, which argues that women's capacity to own property should not be restricted on discriminatory ground.⁷⁶

The Human Rights Committee has found a violation of prohibition of discrimination when a woman did not have access to court in a property dispute because the national legislation in question forbid married women from enjoying such a right.⁷⁷

Art 23 of ICCPR just like Article 16 of UDHR addresses the equality of spouses during marriage and at its dissolution, which allows spouses equal rights and responsibility in all matters of their marriage.⁷⁸

⁷⁵Paivi Koskinen, Supra note 39 at P.159.

⁷⁶ General Comment 28(68) ,2000, on equality of rights between men and women, Report of the Human Rights Committee, Vol. 1, UN Doc, A/55/40, PP. 133-139.

⁷⁷ Paivi Koskinen, Supra note 39 at P.158., See also the Human Rights Committee in the case of Graciela Ato del Avellanal V. Peru (Communication No 202/1986, views adopted 28 Oct. 1988, Report of the Human Rights Committee, UN Doc. A/44/40, pp 196-196 at 196. This case involved a married woman who could not be represented her own property in court due to her gender.

⁷⁸ Paivi Koskinen, Supra note 39 at P. 161.

Article 24 (3) of ICCPR states parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution.⁷⁹

Article 26 of ICCPR affirms that All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

In this respect, the law shall prohibit any discrimination and guaranteed to all persons equal and effective protection against discrimination on any ground such as sex.⁸⁰ Article 26 stipulates that any law which discriminates on the basis of gender is a breach of the covenant and any law which discriminates women in matters of owning or inheriting land or property is a violation of the covenant.⁸¹

According to Andrea Vesa, parties to ICCPR should prohibit any discrimination, and guarantee all persons equal and effective protection against discrimination on any ground such as sex.⁸²

Freedom from discrimination is a central issue in international human rights⁸³ and UN has respect for human rights and fundamental freedoms for all without distinction of sex as its main theme.⁸⁴

⁷⁹ Art 23 (3) ICCPR, See also Andrea Vesa. Supra note 26 at P. 7

⁸⁰ Art. 26 ICCPR, See also Andrea Vesa. Supra note 26 at P.7

⁸¹ Paivi Koskinen.Supra note 51 at P. 161.

⁸² Andrea Vesa, Supra note 26 at P.7

⁸³ See Art 1(3) of UN Charter, Art. 26 of the ICCPR and Art. 3 of the African charter. Freedom from discrimination is a substantive and independent right in the context of human rights instruments. See also Paivi Koskinen. Supra note 51 at P. 161.

International Covenant on Economic, Social, and Cultural Rights (ICESCR)

ICESCR⁸⁵ which went into effect on Jan 3, 1976 further set the principle of non-discrimination⁸⁶ by providing to both men and women equal enjoyment of all economic, social, and cultural rights set forth in the ICESCR.⁸⁷

ICESCR is generally seen as the primary international instrument that upholds women's economic, social and cultural rights.⁸⁸

According to Andrea Vesa, ICESCR guarantee to provide both men and women with equal enjoyment of all economic, social and cultural rights set forth in the ICESCR and the rights to earn a decent living for themselves and families, together with ICCPRS obligation to provide effective legal protections and remedies to all the economic and social dilemma women face.⁸⁹

Article 12(1) demands that states parties to ICESCR recognize the right of everyone to the enjoyment of the highest attainable standard of physical and

⁸⁴Florence Butegwa. Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa P.499, (Rebecca Cook (ed) Human Rights of Women. University of Pennsylvania) (1994)

⁸⁵ ICESCR 1976. This covenant entered into force three months after the date of deposit with the secretary of general of the UN, of the 35th instrument of ratification or instrument of accession; See also United Nations Documents by Treaty, available at <http://www.ohchr.org/english/law/cescr.htm> (last visited 5/6/07)

⁸⁶ Art. 2 Para. 2 & Art. 3 of ICESCR.

⁸⁷ Andreea Vesa, Supra note 26 at P.9.

⁸⁸Id. at P. 8

⁸⁹ Andreea Vessa, Supra note 26 at P.9.

mental health.⁹⁰ Article 12 has been argued to impose an obligation upon states parties to protect women's physical and mental health.⁹¹ According to Paivi, under ICESCR, the states parties are required to avoid interfering with the enjoyment of economic, social, and cultural rights of specific group of individuals. States for example must abstain from measures which obstruct the enjoyment of rights of women like spousal authorization for women access to health care or inheritance by women.⁹²

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women, represent the elimination of effort since the 1930s, to change the traditional law relating to nationality and replace it with the principle of independence and equality.⁹³

CEDAW which has been referred to as the international Bill of women's Rights⁹⁴ was intended to address the differential treatment between men and

⁹⁰ ICESCR Art.12

⁹¹ Andreea Vesa, Supra note 26 at P.8.

⁹² Paivi Koskinen.Supra note 51 at P. 168.

⁹³ Winston E. Langley.Supra note 5 at P.xii..See generally Convention on Elimination of All Forms of Discrimination Against Women 1979 hereinafter CEDAW available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited 5/6/07)

⁹⁴ Paivi Koskinen. Supra note 51 at P.162.

women under international law.⁹⁵ The very essence of CEDAW centers on the right to equality.⁹⁶

It has been argued that CEDAW has both positive and negative elements of global struggle for the emancipation of women.⁹⁷

Many scholars have pointed out that part of the reason for this is that CEDAW was couched within a predominantly male centered axis and employs gender neutral language.⁹⁸ It has been argued that the convention begins with a definition of discrimination intentionally designed to prevent discrimination against women rather than a generalized sex based discrimination approach.⁹⁹

CEDAW disapproves of any kind of discrimination against women and reaffirms equality of all people without regard to gender.¹⁰⁰ The convention on the Elimination of All Forms of Discrimination Against Women notes that the UN charter reaffirms faith in fundamental human rights, the dignity and worth of the human person, and the equal rights of women.¹⁰¹

⁹⁵ J. Oloka-Onyango. "The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa" 24 *Denv J. Int'l L. & Pol'y* 349, P. 5.(1996)

⁹⁶ Leda Hasila Limann. Practices and Rites Related to Widowhood and the Rights of Women in Africa: The Ugandan Experience P.202 (Martin Scheinin & Markku (eds) in *Human Rights in Development Yearbook 2002*, Martinus Nijhoff Publisher) (2005)

⁹⁷ J. Oloka Onyango. *Supra* note 95 at P. 5.

⁹⁸ *Id.*

⁹⁹ Aniekwu Nkolika Ijeoma, " The Convention on Elimination of All Forms of Discrimination Against Women and the Status of Impementation on the Rights to Health Care in Nigeria" 13 *Hums. Rts. Br.*34 (2006), See Generally Anne Hellum. *Women 's Human Rights and Legal Pluralism in Africa*, Tano Asheoug, (1999)

¹⁰⁰ Leigh A Trueblood, *Supra* note 40.

¹⁰¹ *Id.*, See also preamble to CEDAW.

It should be pointed out many states do not really agree on what constitutes discrimination against women and this is one major issue which CEDAW embarked to address.

The preamble to CEDAW convention acknowledges the failure of previous international human rights to eliminate sexual discrimination and concludes with a determination to adopt measures required for the elimination of discrimination in all its forms.¹⁰² The convention defines discrimination as: “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural or other field.”¹⁰³

The convention has many provisions all aimed at eliminating discrimination against women. Article 2 (e) of the Women convention mandates states to eliminate discrimination by all appropriate means and without delay.¹⁰⁴ This article imposes an obligation to state parties.¹⁰⁵

Article 2 which condemns discrimination against women in all its forms and demands that states appropriate legislative and other measures including

¹⁰²Preamble to CEDAW, See also Rebecca Cook, Supra note 27.

¹⁰³ CEDAW Art. 1, See also, Leigh Trublood, Supra note 40

¹⁰⁴ CEDAW Art. 2, See also Rebecca Cook, Supra note 27.

¹⁰⁵ Rebecca Cook. Supra note 27.

sanctions to ensure the elimination all forms of discrimination against women.¹⁰⁶

Article 24 reinforces state obligation under this convention by requiring that states parties undertake to adopt all necessary measures at national level aimed at achieving the full realization of the rights recognized under this convention.¹⁰⁷

The effect of this provision is yet to be in most African states that have ratified or acceded to this convention. It is not enough for states to show some commitment with respect to this provision. They must take practical steps both at the national and rural levels, to ensure that the provisions of this convention are enforced in all facets of the national life.

Article 5 of this convention states that parties to the convention shall take appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, customs and other practices which are based on the idea of inferiority of either of the sexes or on stereotyped roles for men and women.¹⁰⁸ This is one of the greatest obligations and demands of this convention to states which

¹⁰⁶ Article 2(b) CEDAW, See also Rebecca Cook, Supra note 27.

¹⁰⁷ Article 24 CEDAW, See also Rebecca Cook, Supra note 27

¹⁰⁸ Article 5 CEDAW, See also Leigh Trueblood, Supra note 40 at P10.

have ratified this convention. Many African signatories to this convention are yet to show good faith to this article.¹⁰⁹

According to Paivi, Art. 5 of CEDAW recognizes the impact culture and traditions can have on women as well as the critical role these can play in preventing the exercise and enjoyment of basic human rights by women.¹¹⁰

CEDAW requires that states adopt a policy to eliminate discrimination against women and that states change all their discriminatory laws and policies.¹¹¹

In light of Art 5(A) and 2 (F), it has been argued that if states parties to this covenant agree to reform personal status laws and to confront practices which are harmful to women, customary laws and rules which are part of domestic law cannot be used to exempt states from their obligations and requirements in international human rights treaties. The effect of these two articles is that the universality of obligation to protect women's human rights cannot be undermined by cultural diversities and stereotyped attitudes on gender within each state party's domestic society.¹¹²

According to Rebecca Cook, the policy to eliminating discrimination is extended by Art 3, by which states parties agree to take in all fields, in

¹⁰⁹ Rebecca Cook, *Supra* note 27

¹¹⁰ Paivi Koskinen, *Supra* note 51 at P.162.

¹¹¹ Rebecca Cook, *Supra* note 27.

¹¹² Paivi Koskinen, *Supra* note 51 at P. 164.

particular the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedom on the basis of equality and men.¹¹³ The standard of equality required by convention is not limited to formal equality but also provides the basis for realizing women's equal access to opportunities in their political, public, and private lives. The convention addresses the particular disadvantages that women suffer by expanding the requirement of equal treatment, usually measured by how men are treated, to recognize the distinctively gender nature of the discrimination against women.¹¹⁴

States do not really agree on what constitute discrimination against women. According to Rebecca Cook, the women's convention develops the legal norm of nondiscrimination from a women's perspective. The women's convention progress beyond the earlier human rights conventions by addressing the pervasive nature of discrimination against women, and identifies the need to confront the social causes of women's inequality by addressing all forms of discrimination that women suffer.¹¹⁵

¹¹³ Rebecca Cook, *Supra* note 27.

¹¹⁴ Aniekwe Nkolika Ijeoma, *Supra* note 99

¹¹⁵ Rebecca Cook. *Supra* note 44.

By setting standards on equality of men and women as well as equality of the treatment of women in exercising human rights, the convention on elimination of all forms of discrimination against women evidences international acceptance of the principle to alter the present imbalance of power relations between men and women, and to eliminate male stereotype attitudes that prejudice women.¹¹⁶

Women in Africa, just like women in most parts of the world, can lay claim to the right to equality before the law, to freedom from discrimination and to certain economic, social, and cultural benefits and freedom, guaranteed under internal bill of rights.¹¹⁷

In family level, Art. 15 gives women full legal capacity. Article 15 obligates all governments to ensure that all women can exercise the full range of rights necessary to function as responsible adults in the society.¹¹⁸ Art. 15 states that women shall have equality with men before the law, full legal opportunities as men to exercise that capacity and equal rights pertaining to property.¹¹⁹

¹¹⁶ Chaloka Beyani, *Supra* note 6 at P. 293.

¹¹⁷ Adetoun O Ilumoka, *African Women's Economic, Social, and Cultural Rights-Towards a Relevant Theory and Practice* P.313 (Rebecca Cook(ed) *Human Rights of Women*, University of Pennsylvania Press) (1984).

¹¹⁸ Marsha A.Freeman *The Human Rights of women in the Family: Issues and Recommendations for Implementations of Women's Convention* P.151 (Julie Peters & Andrea Wolper (eds) *Women's Rights Human Rights*, Routledge) (1995).

¹¹⁹ Art. 15 (2) CEDAW, Marsha A.Freeman, *Supra* note 118 at P.151.

In the area of marriage and family, Art. 16 of CEDAW confers the women equality with men, and the same rights to enter into marriage only with their free and full consent, to decide freely on the number and spacing of their children and have access to information, education, and other means to enable them to exercise these rights. Women share with men the same rights and responsibilities as parents, regardless of marital status, in matters relating to children as well as guardianship, warship, trusteeship, and adoption of children .Wives and husbands have same personal rights, including rights to choose family name, profession and an occupation. Both spouses have same rights with respect to ownership, acquisition, management, administration, enjoyment and disposition of property.¹²⁰

According to Chaloka , “Article 16 confers equal rights to women with men within the family and matters connected with the family.”¹²¹

In many societies in Africa, especially in the family level, women have very limited rights compared to men. The man, who is usually the head of the family, dictates how the family is run.

In summation, Article 16 of the Convention on Elimination of All Forms of Discrimination against Women, (Women’s Convention) obligates state

¹²⁰ Winston E.Langley, Supra note 5 at P. xiv.

¹²¹ Art. 16 CEDAW, Chaloka Beyani, Supra note 6 at P.293.

parties to take affirmative steps to ensure the equality of men and women in marriage and parental responsibilities.¹²²

It is a fact that many limitations which women face on equality in the family are based on religious and customary personal status law prevalent in many countries.¹²³

CEDAW requires states that individuals can marry under a civil marriage code designed on a basis of equality within the family. All couples should be allowed to marry under the civil code regardless of religion, race or ethnicity. The implication of this provision is that it gives women in states that have ratified this convention the choice of marrying without subjecting them to inequities and inequalities of societal norms.¹²⁴

The Declaration on the Elimination of Violence against Women

(DEVAM)

The Declaration on Elimination of Violence Against Women (DEVAM) is the first international instrument to express international political consensus that states have human rights obligations to prevent gender based violence

¹²²Donna Sullivan, *The Public and Private Distinction in International Human Rights Law* P.128 (Julie Peters & Andrea Wolper (eds) *Women's Rights Human Rights*, Routledge) (1995)

¹²³ Marsha Freeman, *Supra* note 118 at 157

¹²⁴*Id.*

and to redress the harm caused.¹²⁵ According to Sullivan, “The aim of the Declaration is to answer the need for a clear and comprehensive definition of violence against women and a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms and to establish a commitment by states and by the international community to eliminate violence against women.”¹²⁶

This declaration has been described as a crystallization of political and moral commitment to eliminate gender based violence, though it does not fully clarify the scope of state obligations to eliminate gender based violence or the content of the category of violence termed violence against women.¹²⁷

The United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women on Dec 20, 1993.¹²⁸ The 1967 Declaration on Elimination of Discrimination against Women acknowledges the lack of international protections of women’s rights in particular.¹²⁹

¹²⁵ Donna Sullivan, *Supra* note 122 at P 131.

¹²⁶ *Id.*, See also Preamble para 12 on Declaration on Elimination of Violence Against Women Preamble available at <http://www.ohchr.org/english/law/eliminationvaw.htm> hereinafter DEVAM last visited 5/6/07

¹²⁷ *Id.*

¹²⁸ See generally Declaration on Elimination of Violence Against Women , G.A. Res.48/104,UN. GAOR,48th Sess., Art 1,Supp.No. 49, at 217, UN Doc. A/48/49/(1993), See also Andreaa Vesa,*Supra* note 27, G.A. Res. 2263 (XXII) U.N. GAOR, 22nd Sess.(1967)

Leigh states that this convention is the most direct and comprehensive statements of the rights to be applied to ensure the elimination of violence against women in all its forms.¹³⁰

The importance of DEVAM is rooted in the fact, that it acknowledges on a universal scale that violence against women is an “obstacle to the achievement of equality, development and peace.”¹³¹

Article 1 of DEVAM defines for the international community that violence against woman is “any act of gender based violence that results in or is likely to result in physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life.”¹³² According to Andréa Vesa, Article 2 codifies what constitutes violence against women, which include physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non –spousal violence and violence related to exploitation, physical, sexual, psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and

¹³⁰ Leigh A. Trueblood, *Supra* note 40 at P.7., See also DEVAM Art 2.

¹³¹ *Id.* See also Preamble to DEVAM.

¹³² Leigh A Trueblood, *Supra* note 40 at P. 7., DEVAM Art 1.

elsewhere, trafficking in women and forced prostitution; physical, sexual and psychological violence perpetrated or condoned by state wherever it occurs.¹³³

Article 4 requires that states condemn violence and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.¹³⁴ Furthermore, Article 4 (c) imposes a duty upon states to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by state or by private persons.”¹³⁵ This provision makes it impossible for African countries to avoid obligations under the conventions but should take steps to redress societal and cultural inequalities which many women face in many African societies.

Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment

The CAT which entered into force on June 26, 1987, establishes a complete ban on any form of torture or other inhuman or degrading treatment.¹³⁶

¹³³ Art. 2 of DEVAW, See also Andrea Vesa, Supra note 26.

¹³⁴ Article 4 DEVAM, See also Leigh A. Trueblood , Supra note 40 at P.11.

¹³⁵ Art 4(c) DEVAM, See also Rebecca Cook, Supra note 27.

¹³⁶ Andrea Vesa. Supra note 26 at P.13., See also Art. 27 of Convention against Torture and other Cruel,inhuman or degrading treatment or Punishment hereinafter called CAT available at <http://www.ohchr.org/english/law.cat.htm> (last visited 5/6/07)

Article 1 defines Torture as “any act which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, intimidating or coercing him or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹³⁷

Africa:

The status of African women is often dictated by traditions of patriarchy and traditional cultural beliefs concerning the proper role of women in the society.¹³⁸ Gender equality is still a hurdle and a mirage in African society. According to former UN secretary general Kofi Anna, gender equality is “a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance.”¹³⁹ Adrien Wing & co states, “While women play vital roles in the African economy and

¹³⁷ Article 1 CAT.

¹³⁸ Paivi Koskinen. Supra note 51 at P.147., See also Rhoda E. Howard, Women Rights and Rights to Development P. 305 (Julie Peters and Andrea Wolper (eds) Women Rights, Human Rights, Routledge) (1995)

¹³⁹ U.N. Economic Commission for Africa, ECA celebrates 40th Anniversary by focusing African’s Attention on Women’s Economic Empowerment and inaugurating its New Conference Centre, 4 Reg’l Comm’n Dev. Update (1998) available at <http://www.un.org/depts/rcnyo/4nl.htm>., See also Adrien Katherine Wing & Tyler Murray Smith, The African Union and The New –Africanism: Rushing to Organize or Timely Shift: The New African Union and Women’s Rights, P.3, 13 Transnat’l L. & Contemp.Probs 33, 2003

communities, they continue to be repressed by a highly patriarchal culture, denied equal education, discriminated against in the workplace, excluded from remunerated economic activity and given legal minority status.”¹⁴⁰

In many traditional African societies, women are denied property rights and political offices. Discrimination against women or gender discrimination is something that is rooted in our male dominated society. Discrimination against women is not only an Africa affair. Even the so called developed world still practices all forms of women discrimination. Janusz states, “even in the part of the world which calls itself ‘developed,’ translation of norms against gender discrimination into enforceable equal rights for women remains a task for the future.”¹⁴¹

Africa Charter:

There is some controversy and concern on the impact and devotion of African charter on women’s right in Africa.¹⁴² This controversy notwithstanding, it must be conceded that the African adoption of the African Charter shows Africa’s concern with human rights and the recognition of Africans that human rights is not totally a foreign concept as

¹⁴⁰ Adrein Katherin & Tyler Murray Smith, *Supra* note 139 at P.3.

¹⁴¹ Katarina Tomasevski. *Supra* note 37 at P.234.

¹⁴² J. Oloka- Onyango. “ Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?” P.1,6 *Buff. Hum. Rts. L. Revs.* 39(2000) See generally African Charter (Banjul) Charter on Human and Peoples Rights, OAU DOC CAB/LEG/67/3 rev.5, 21 I.L.M.58(1982) which entered into force 21st Oct 1986 available at <http://www1.umn.edu/humanarts/instate/Z1afchar.htm> (last visited 5/6/07) hereinafter called Africa Charter.

is erroneously believed in some quarters.¹⁴³ The importance of the African Charter is the development of a regional instrument to regulate human rights in Africa. By this development and act, African states removed the relationship between its citizens within the exclusive control of domestic law and brought it under the jurisdiction of international law.¹⁴⁴ According to Art. 1 of African Charter, state parties are under obligation to recognize the rights included in the Charter and to undertake legislative and other measures necessary to realize such rights.¹⁴⁵

African Charter as a regional organization is operated under the standards and rules set up by UN. For regional bodies to exist, they must accept to abide by the principles of the UN.¹⁴⁶ This procedure makes it imperative for African Charter and other regional international organizations to operate on the universal principle of international human rights recognized by UN.

It has been argued that “in the event of conflict between the obligations of the members of UN under the Charter, and their obligation under any other international agreement, obligation under the charter shall prevail.”¹⁴⁷ This argument makes protection and promotion of the rights of women a must for African states and an extension of their obligations under the UN Charter.

¹⁴³ Chaloka Beyani. Supra note 6 at P285.

¹⁴⁴ Chaloka Beyani. Supra note 6 at P. 285.

¹⁴⁵ Paivi Koskinen. Supra note 51 at P.164.

¹⁴⁶ Chaloka Beyani. Supra note 6 at P. 289.

¹⁴⁷ Id.

African states through African Charter reaffirm their duty and obligation to the equality of men and women. African Charter in its preamble reaffirms its commitment to fundamental human rights and equality of men and women. The Charter shows Africa's commitment and dedication to the promotion of the equality of men and women; it further reaffirms Africa's commitment to eliminate all forms of discrimination against women.¹⁴⁸ This view is clearly stated in Art. 2 of African Charter which states "every individual shall be entitled to the enjoyment of rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."¹⁴⁹

Article 3 of the African Charter states that every individual shall be equal before the law and shall be entitled to equal protection of the law.¹⁵⁰ This provision is challenging in the light of the plight of women in African societies.

¹⁴⁸ Chaloka Beyani. *Supra* note 6 at P 290., See also Finat Naa-Adjeley Adjetey. *Religious & Cultural Rights: Reclaiming The African Woman's individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture*" 44 *Am.U.L. Rev.* 1351 (1995) where she argued that African Charter gives special protection to Women and Children in African. According to her women under the charter have the right to decide which marriage to enter and the obligation which the Charter imposes on African countries to modify all customs that discriminate against women can be inferred from Articles 2 & 18(3) can be inferred from the charter.

¹⁴⁹ Art.2 African Charter.

¹⁵⁰ Art 3 of African Charter, See Leda Hasila Limamn, *Supra* note 96 at P. 202.

By stating that every individual shall be equal before the law and entitled to equal protection of the law, Art. 3 places the onus on states parties to African Charter to ensure that where some groups of people are being discriminated against, the government of the state should give redress to the said group via the laws and law enforcement agencies of the said state.¹⁵¹

Article 18(3) of the African Charter states “The state shall ensure elimination of every discrimination against women and also ensure the protection of the rights of women and child as stipulated in international declarations and conventions.” It has been contented that Art.18 (3)b sets four rules for African states namely, “First, it lays gender obligation upon states in Africa to eliminate discrimination against women, and not merely on grounds of sex as such. Secondly, the language employed admits of no exception in requiring states to eliminate every discrimination against women. Thirdly, it distinctly acknowledges the existence of the rights of women and children, and recognizes the necessity for the protection of those rights by the state. Fourthly, it incorporates the application, within the African charter, of international standards protecting the rights of women and children as stipulated in international convention and declarations.”¹⁵²

¹⁵¹ Leda Hasila Limamn, Supra note 96 at P.203.

¹⁵² Chaloka Beyani. Supra note 6 at P 290.

It is believed that Article 18 (3) of the Charter is remarkably important to protecting the rights of women because, not only does it make pertinent international conventions applicable, but it also renders certain relevant declarations that do not normally carry the force of law directly applicable.¹⁵³ It is further contended that since the African Charter establishes binding obligations for states parties, the consequence of Article 18(3) is to transform the non-binding declaratory character of such declarations into legally binding instruments.¹⁵⁴ Thus in its text, the African Charter incorporates as law the morally persuasive value of international declarations that are concerned with the rights of women. These declarations include the Universal Declaration of Human Rights, the Declaration on the Elimination of Discrimination against Women (1967) and the declaration that certain customs, ancient laws and practices relating to marriage and family are inconsistent with the principles of UN Charter and UDHR.¹⁵⁵ Art. 28 of African Charter goes a step further by imposing an obligation on every individual in Africa in the fight against discrimination by declaring that every individual shall have the duty to respect and consider his fellow beings without discrimination and to maintain relations aimed at promoting,

¹⁵³ Id.

¹⁵⁴ Id at P.291.

¹⁵⁵ Id.

safeguarding and reinforcing mutual respect and tolerance.¹⁵⁶ By this provision in the African Charter, both state and individuals are imposed the obligation to stop discrimination against women.¹⁵⁷ If the African societies and people will learn to obey and respect the provision of this article, the issue of women discrimination and oppression will be a time of the past in Africa.

Many of African households are headed by women and the African women make up the majority of urban domestic workers.¹⁵⁸

It has been argued that the legal and human right instruments of African legal system largely ignored women's rights until recent years.¹⁵⁹ The 1963 Charter of OAU made no mention of women and the African nations designated region's primary human rights documents—the African Charter was tailored to protect state sovereignty.¹⁶⁰

The African Charter contains several provisions that relate to non discrimination and equality of treatment, only one article out of more than

¹⁵⁶ Art .28 African Charter.

¹⁵⁷ Florence Butegwa. *Supra* note 86 at P. 502.

¹⁵⁸ Brigitte Manbandla, *Women In South Africa and Comstitution –Making Process* P.67 (Rebecca Cook (ed) *Women Rights Human Rights*, Routlge) (1995).

¹⁵⁹ Rachel Rebouche. "Labor , Land and Women's Rights in Africa: Challenges for New Protocol on the Rights of Women," 19 *Harv. Hum. Rts. J.* 235, (2006)

¹⁶⁰ *Id.*, See also Adrein Katherine Wing & Tyler Murray Smith, *The New African Union and Women's Rights*, 13 *Trans nat'l & Contemp. Probs.*33, 58 (2003)

sixty articles makes specific reference to women and it is contained in an omnibus clause that covers both family and upholds tradition.¹⁶¹

The African charter references women only twice—Article 2 includes sex in a broad non discrimination clause and Article 18(3) requires states to eliminate “every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.¹⁶² It has been argued that the lumping together of women and children in one article that deals primarily with the family, reinforces outdated stereotypes about proper place and role of women in the African society.¹⁶³

Though many African states have adopted a lot of international instruments on women rights, the inequality and discrimination against women continue to ride high. Adrien Katherine Wing & others state, “When African states adopt and ratify international conventions and declarations that promise to protect women’s rights- protections which are sometimes even mirrored in the states own constitutions- the conventions and declarations fail to penetrate the deeply rooted patriarchal and predominantly patrilineal African

¹⁶¹ J. Oloka-Onyango, *Supra* note 142.

¹⁶² Rachel Rebouche. *Supra* note 159.

¹⁶³ Christofn Heyns: *The African Regional Human Rights System: The African Charter*, P.4, 108 Penn. St. Rev. 679 (2004).

culture.¹⁶⁴ Thus inspite of the numerous instruments in effect in many African states that promise to protect women's rights, there are cultural barriers at every legal juncture that prevent their enforcement. Moreover, while a number of nations have ratified international legal conventions protecting women, few have enacted implementing laws.¹⁶⁵

According to Udombana, members of the OAU that have ratified the African Charter have the obligation to recognize the rights, duties, and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to them. States are also required to promote and ensure respect for the rights guaranteed by Charter through teaching, education and publication and to ensure that these rights as well as corresponding obligations and duties are understood. The parties recognize by these undertaking that individuals have rights as human beings and agree to give effect to those rights in their domestic legal order.¹⁶⁶

THE AFRICAN PROTOCOL ON THE RIGHTS OF WOMEN

¹⁶⁴ Adrien Katherine Wing & Tyler Murray Smith, Supra note 139 quoting Juliette Agyei, "African Women in "Championing Their Own Development and Empowerment- Case Study, Ghana," 21 Women's Rts. L. Rep. 117, 120(2000)

¹⁶⁵ Id.

¹⁶⁶ Nsongurua J Udombana "Towards the African Court on Human and Peoples Rights : Better Late Than Never" Yale Human Rights & Development Law Journal Vol. 3 (2000) See also Leda Hasila Limann, Supra note 96 at P. 203.

The protocol to the African Charter on Human and Peoples Rights of Women was adopted on 11th July 2003 by Assembly of African Union second session in Maputo Mozambique. On 26th October 2005, Togo became the fifteenth state to ratify the protocol and on 25th November 2005, the protocol entered into force, 30 days after the deposit of the instrument.¹⁶⁷ According to Amnesty International, the protocol fills a major gap in the regional human rights systems by providing a complete framework for the promotion and protection of women's rights.¹⁶⁸ The protocol recognizes and guarantees a wide range of women's civil and political rights as well as economic, social and cultural rights. These rights include the right to life, integrity of person, protection from harmful traditional practices; prohibition of discrimination and protection of women in armed conflict. Furthermore, the protocol guarantees the right to respect as a person and to the full development of her personality; prohibition of exploitation or degrading; access to justice and equal protection before the law; participation in the political and decision making process. The protocol also guarantees

¹⁶⁷ See Protocol on the African Rights of Women available at http://www.ohchr.org/English/law/compilation_democracy/protchart.htm last visited (5/6/07) hereinafter referred as Protocol on the Rights of Women in Africa.

¹⁶⁸ Africa: Entry into force of protocol of Rights of Women in Africa positive step towards ending discrimination , available at :<http://web.amensty.org/library/index/eng afr010042005>(last visited 5/6/07)

reproductive rights of women; the right to food security and the right to adequate health.¹⁶⁹

The protocol prohibits laws that discriminate both in form and in effect.¹⁷⁰

Article 2 states that government “shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures” including curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.¹⁷¹ It has been argued that in addition to the more general prohibition against discrimination, the protocol makes it clear that custom is not an excuse for policies or practices that are harmful to women.¹⁷² Article 2 (2) imposes a duty on states to “achieve the elimination of harmful cultural and traditional practices.” The responsibility of African states to modify harmful cultural practices is reiterated in Art. 5 of the protocol, which require that states “prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards.¹⁷³ As Rachel argues, the protocol creates a positive, freestanding right for women to live in a positive cultural context

¹⁶⁹ Africa: Entry Force of Protocol of Rights supra note 168

¹⁷⁰ Rachel Rebouch. Supra note 164.

¹⁷¹ Protocol on Rights of Women in Africa Art 2(1) & (1B), See also Rachel Rebouche, Supra note 164

¹⁷² Rachel Rebouche, Supra note 159.

¹⁷³ Id. at P 9.

and to participate at all levels in the determination of cultural policies.¹⁷⁴

Article 6 of the protocol addresses women's rights in marriage. It gives women equal right to make decisions in partnership with their husbands in the marriage. Article 6(j) allows a woman the right to acquire her own property and to administer and manage it freely during her marriage.¹⁷⁵

Furthermore, the woman is given rights in divorce; she has the right to child custody and in the case of separation, divorce or annulment of marriage, women shall have the right to equitable sharing of joint property deriving from the marriage.¹⁷⁶ Furthermore Article 21 of the protocol guarantees widows "the right to inherit, in equitable shares, their parents' property and the right to continue in the matrimonial house even upon remarriage."¹⁷⁷

Article 13 attempts to strength women's economic rights, which are described as "equal opportunities in work and career advancement and other economic opportunities. This article gives women rights to equal pay, benefits and freedom from sexual harassment."¹⁷⁸ Furthermore, Article 13 also recognizes the role and value of women's work in the home and

¹⁷⁴ Rachel Rebouche, *Supra* note 159 at P. 9.

¹⁷⁵ Article 6(J) African Women's Protocol, See also Rachel Robouche *Supra* note 159 at P.11.

¹⁷⁶ Art. 7(d) Protocol on Rights of Women in Africa.

¹⁷⁷ Article 21 Protocol on Rights of Women in Africa.

¹⁷⁸ Art. 13 Protocol on Rights of Women in Africa, See also Rachel Robouche.*Supra* note 159 at P. 10.

informal sector.¹⁷⁹ It is believed that Art.13 requires the states to take necessary measures and create conditions to promote and support informal trades, and domestic labor at least recognizes the way in which women's economic well being and informal sector are related.¹⁸⁰

The Women Rights protocol has been described as a positive development in African's continent 'determination to break with traditional notions and conceptions of women.'¹⁸¹

The Rights of the African Female Child under International Covenants & Instruments:

History of the international law of the Rights of the Child.

In many societies, a child in most cases is an infant, a minor or an adolescent, and is regarded as belonging to or even being property of the family. In rare cases, the child has legal rights in many national laws; the legal definition of a child is not stated.¹⁸²

It has been argued that childhood is the most sensitive part of the life of every human being. It is the period of life that every individual is brought

¹⁷⁹ Art 13(E) obliges the state to "create conditions to promote and support the occupations and economic activity of women, in particular within the informal sector, See also Rachel Robouche. Supra note 159 at 10-11.

¹⁸⁰ Id. at P 10.

¹⁸¹ Vincent O. Nmehielle, "A decade in Human Rights Law: Development of the African Human Rights System in the last Decade,"P.5 11 Hum. Rts. Br. 6 (2004)

¹⁸² Yuri Kolosov, Rights of the Child P.259 (Human Rights: Concept and Standards, Ashgate) (2000)

up, educated and adjusted to the realities of life. Children comprise about 50 percent of the world population and are its most vulnerable component and in practice, fully dependent on adults.¹⁸³

The adoption of international standard protecting the rights of the children preceded the adoption of international standards codifying universally recognized human rights.¹⁸⁴ This shows, contrary to popular view, that international children's right is a new development in international human rights law.¹⁸⁵ In the early development of the international law of the rights of the child, children were regarded as recipients of treatment rather than holders of specific rights.¹⁸⁶

The 20th century has seen the development of the international law on the rights of the child. Although international law recognizes in principle that children are entitled to enjoy the full range of civil rights, this has not always been acknowledged in practice by states or by human rights tribunals.¹⁸⁷

This denial of the rights of the child is more pronounced in the child's right to freedom of expression. Closely related to this issue is the international

¹⁸³ Id at P 260.

¹⁸⁴ Geraldine Van Bueren. *Supra* note 29 at P 8.

¹⁸⁵ Id.

¹⁸⁶ Id at P.7.

¹⁸⁷ Id. at P. 1., See also generally Judith Ennew & Brian Milne. *The Next Generation:Lives of Third World Children*, New Society Publishers Philadelphia (1990)

community reluctance to accept the rights of the child to possess sufficient procedural capacity to act on her own behalf.¹⁸⁸

The first international instrument protecting children was the Minimum Age (industry) Convention adopted by the International Labor Conference in 1919.¹⁸⁹ The concept of equality of all human being as embodied in the universal declaration of Human Rights of 1948, presupposes a certain minimum of generally recognized standards in the fields of the treatment of the child.¹⁹⁰

The Charter of United Nations

The United Nations Charter clearly does not contain a clear or express reference to children. Art. 55 (C) of the UN charter set out United Nations commitment to observance of human rights and fundamental freedoms for all without distinction of race, sex, language or religion. To some extent the female child can use this article to argue against any discrimination using UN Charter as her legal frame work. But the UN Charter has no specific article on discrimination based on age or minority which is the most arguable reason by which most children are discriminated.¹⁹¹

¹⁸⁸ Geraldine Van Bueren. Supra note 29 at 1

¹⁸⁹ Id. at P. 10-11.

¹⁹⁰ Yuri Kolosov. Supra note 182 at P 260.

¹⁹¹ Geraldine Van Bueren. Supra note 29 at P. 17.

The Universal Declaration on Human Rights (UDHR)

The UDHR has a whole lot of human rights provisions which apply to all human beings, and which by implication include the African female child.¹⁹² UDHR contains just two articles which expressly refer to children.¹⁹³ Art 25 (2) provides that “Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock shall enjoy the same social protection.” According to Geraldine the entitlement of special care and assistance enshrined in the UDHR echoes the principles contained in the 1924 Declaration on the rights of the Child.¹⁹⁴ The second mention of children is in Art. 26 of UDHR which sets out the right to education, dealing both with access to and the aims of education.

The African female child can most effectively benefit from UDHR by arguing its case under non discrimination provisions.

The International Covenant on Economic, Social and Cultural rights (1966).

¹⁹²Id.

¹⁹³Id.

¹⁹⁴ Geraldine Van Bueren Supra note 29 at P. 18

Just like other international instruments, ICESCR applies to all men and women and by implication to children.¹⁹⁵

ICESCR specifically refers to children in Art 10 (3) by stating that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. ICESCR wants children and young persons to be protected from economic and social exploitation.¹⁹⁶

In Article 10, the states recognize the family as the natural and fundamental group of the society, and therefore accord the widest possible protection and assistance to the family.¹⁹⁷

Art 12(a) provides for the reduction of the still birth rate and infant mortality rate as well as for the healthy development of the child.¹⁹⁸ This article is concerned with the right of every one to the highest attainable standard of physical and mental health and incorporates a specific provision concerning children and states are to take steps to reduce still birth.¹⁹⁹

¹⁹⁵Id. at P. 19 quoting Yo Kabuta, *The Protection of Children's Rights and the United Nations*, 58 *Nordic JIL* 7-24. where he contented that the mere fact that an international instrument can be applied to children, does not mean that it incorporates a coherent child-centered approach setting out all the rights necessary to ensure the basic dignity of children.

¹⁹⁶ Art.10 of ICESCR.

¹⁹⁷ Geraldine Van Bueren, *Supra* note 29 at P.19.

¹⁹⁸ Art. 12 (A) of ICESCR

¹⁹⁹ Geraldine Van Bueren, *Supra* note 29 at P.19

Art 13 (1) of ICESCR provides for the right of everyone to education and provides that primary education should be compulsory and free to all. This is a right which many countries in Africa deny to their female children.

State parties to ICESCR undertake to implement all the rights in the covenant to the maximum of its available resources with a view to achieve progressively the rights recognized in the present covenant.²⁰⁰

According to Geraldine a state party is under a duty to the maximum of its available resources to implement progressively the rights enshrined in ICESCR which is in contrast to the manner of implementations for rights guaranteed in ICCPR, and which places state parties to the covenant under a duty to implement the covenants rights immediately regardless of state parties' resources.²⁰¹

The female child of African member state of ICESCR can easily take every advantage which ICESCR offers to children worldwide.

The International Convention on Civil and Political Rights (ICCPR)

²⁰⁰ Id. at P. 20.

²⁰¹ Id . It has been argued that One of the principal reasons for the difference in implementation obligations is the assumption that measures implementing economic, social and cultural rights will have far greater resource implications than measures implementing civil and political rights.

Art 14 (1) of ICCPR provides an express exception to the right to a hearing in public, when it is in the interests of juveniles or where it concerns the guardianship of children.

Art 14(3) (F) provides that criminal proceeding should take into account a juvenile's age and the desirability of promoting their rehabilitation.

Art 10(3) obligates states to segregate juvenile offenders from adults and to accord them treatment according to their age and legal status.

As with ISECR, the family is recognized as being the natural and fundamental unit of society and as such, is entitled to state protection.²⁰²

According to ICCPR, Art 24(1) every child shall have, without any discrimination as to race, color, sex, language, religion, national, or social origin, property, or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.

It has been argued that by virtue of Art 24, a child is entitled to special measures of protection in addition to the measures which state parties are under a duty to take under Art .2 to ensure that all individuals enjoy the rights enshrined in the covenant.²⁰³

²⁰² Art. 23 ICCPR.

²⁰³ Geraldine Van Bueren Supra note 29 at P.21.

The Declaration of the Rights of the Child (1924)

The League of Nations, in 1924 at its 5th general Assembly, adopted the Declaration of the Right of Child, otherwise known as the Declaration of Geneva.²⁰⁴ This was the first human Rights Declaration adopted by any inter- governmental organization, prior to the formation of UN in 1945 and the 1948 Universal Declaration of Human Rights.²⁰⁵

The Declaration establishes the claim that “mankind owes to the child the best it has to give,” a fact which was further reaffirmed in the subsequent 1959 Declarations of the Rights of the Child and the 1989 Convention on the Rights of the Child. By the present Declaration of the Rights of the Child commonly know as the Declaration of Geneva, men and women of all nations, recognizing that mankind owes to the child the best it has to give, declare and accept it as their duty beyond and above all considerations of race, nationality or creed.

The 1924 Declaration listed five principles for the wellbeing of the child namely:

1 The Child must be given the means requisite for its normal development both materially and spiritually.

²⁰⁴ Id at P 7.

²⁰⁵ Id.

2 The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan must be sheltered and succored.

3. The child must be first to receive relief in time of distress.

4. The child must be put in position to earn livelihood, and must be protected against every form of exploitation.

5. The child must be brought up in the consciousness that its talents must be devoted to service to its fellow men.²⁰⁶

The Rights of the Child Declaration is primarily concerned with the child's welfare hence the declaration is concerned with provision of children's economic, psychological and social needs. The preamble to the Declaration does not refer to it or place the declaration as an obligation to the state; rather it places duties directly on "the men and women of all nations". It should point out that the text introducing the Declaration clearly provides the link with the states but only in bringing attention to its recommendations.²⁰⁷

The League of Nations General Assembly affirms "the Assembly endorses the declaration of the Rights of the Child commonly known as the Declaration of Geneva and invites the States members of the League to be guided by the principles of the work of the child welfare. It is obvious from

²⁰⁶ See generally 1924 Child Declaration. See also Geraldine Van Bueren, *Supra* note 29 at P. 7.

²⁰⁷ Geraldine Van Bueren *Supra* note 29 at P. 7.

the text of the preamble and many records of the Assembly that the Declaration on the Rights of the Child (1924) was never meant to create an instrument which placed binding obligation upon states.²⁰⁸

As Geraldine notes “the duty to provide the child the best it has to give was placed by the league on men and women i.e. adults, to ensure the welfare of the children, because it was assumed without question that children could only rely upon adults to ensure that their rights as defined by the declaration were protected.”²⁰⁹

THE DECLARATION OF THE RIGHTS OF THE CHILD (1959):

On 20th November 1959, the general Assembly of the United Nations adopted the Declaration of the Rights of the Child. In contrast to the Universal Declaration of Human Rights, the Declaration of the Rights of the Child was adopted without abstention.²¹⁰ The Preamble refers to the special safeguards and care including appropriate legal protection needed by children and recalls the original recognition of those needs by the Declaration of the Rights of the Child (1924). The Declaration of the Rights of the child enshrines the principles that children are entitled to special protection and that such special protection should be implemented by

²⁰⁸ Geraldine Van Bueren. *Supra* note 29 at P. 7.

²⁰⁹ *Id.*

²¹⁰ *Id.* at P. 10.

reference to “the best interest of the child, which shall be the paramount consideration.”²¹¹

The Convention on the Rights of the Child (1989):

The convention on the Rights of the Child was adopted on 20th November, 1989 by the United Nations General Assembly resolution 44/25²¹² and entered into force on 2nd September, 1990 after its ratification by 20 states within a year of its adoption by UN General Assembly.²¹³

This convention, just like other conventions, gives the child the right to freedom from discrimination based on sex.²¹⁴ According to Yuri, the Convention on the Rights of the Child stemmed from the league of Nations Declaration of the Rights of Child of 1924, the United Nations Declaration of the Rights of the Child of 1959, and from a whole set of international legal instruments dealing with the promotion and protection of human rights.²¹⁵

The main objective of the convention is the recognition of the child as an active subject of rights rather than as the property of the family or object of

²¹¹ Geraldine Van Bueren. Supra note 29 at P. 11.

²¹² Yuri Kolosov . Supra note 188 at P.259.

²¹³ See generally The 1989 Convention of child Charter. See also Yuri Kolosov. Supra note 182 at P. 260

²¹⁴ Leigh Trueblood. Supra note 40 at P.6., See generally Eugeen Verhellen, Convention on the Rights of the Child, Garant Publishers (2000)

²¹⁵ Yuri Kolosov. Supra note 182 at P.260.

the rights of the adults.²¹⁶ The African female child of member states to this convention can easily use the rights given to them in this convention.

THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD:

The African charter on the rights and welfare of the child was adopted by the Organization of African Unity in 1990, but entered into force in November 1999. It is the first regional treaty on the human rights of the child. Its provisions are modeled on the provisions of the conventions of the Child.

Amongst its provisions are the prohibitions of the imposition of death penalty for crimes committed by children and of social and cultural practices which are prejudicial to the health and life of the child and which are discriminatory to the child on grounds of sex and other statuses.²¹⁷

Its provisions are modeled on the provisions of the conventions of the Rights of the Child. The charter defines a child as a human being below the age of 18 years. It recognizes the child's unique and privileged place in the African society and that African Children need protection and special care. The Charter acknowledges that children are entitled to the enjoyment of freedom

²¹⁶ Id at P.262.

²¹⁷ Amnesty International: *Childhood Denied: Child Soldiers in Africa* available at <http://www.amnesty.org/web/web/nsf/print/44FF06A2A19DCF7E80256EAF00490> last visited (4/26/07)

of expression, association, peace assembly, thought, religion and conscience. It aims to protect the private life of the child and safeguard the child against all forms of economic exploitation and against work that is hazardous, interferes with the child's education, or compromises health or physical, social, mental, spiritual, and moral development. It calls for protection against abuse and bad treatment, negative social and cultural practices, all forms of exploitation or sexual abuse, including commercial sexual exploitation and illegal drug use. It aims at preventing the sale and trafficking of children, kidnapping and the use of children to beg for alms.²¹⁸

Article 21(1) provides for the protection of children against harmful and potentially exploitative cultural practices.²¹⁹

The importance of this provision is that it addresses the situation in which one thing seen as the abuse of children in an area is justified in another area on the basis of culture. The convention also obliges states to establish 18 as the minimum age for marriage and to make registration of all marriage

²¹⁸ Wikipedia, the Free Encyclopedia: African Charter on the Rights and Welfare of the Child: (http://en.wikipedia.org/wiki/African_Charter_on_the_Rights_and_Welfare_of_the_...) last visited (4/26/07)

²¹⁹ Art. 21(1) See also Wikipedia, the Free Encyclopedia: African Charter on the Rights and Welfare of the Child.

compulsory, and thus aims to combat early marriage and forced child marriage.²²⁰

In many societies of Africa and most parts of the world, female children are viewed as a liability and not a blessing. According to Katarina, “gender discrimination starts before birth. A girl child is considered a liability and not an asset to the family into which she is to be born. The low worth of the female child, evidenced in the extreme practice of “femicide” has become one of the principal concerns in international efforts to overcome the continuing prejudice against females in our society.”²²¹

Most patriarchal society especially in Africa gives preference to the male child over the female child.²²²

CONCLUSION:

The rights of women and the female child, whether in Africa or any part of the world, are clearly protected by many international treaties, conventions, resolutions and declarations.

²²⁰ Wikipedia, the Free Encyclopedia: African Charter on the Rights and Welfare of the Child: (http://en.wikipedia.org/wiki/African_Charter_on_the_Rights_and_Welfare_of_the_...) last visited(4/26/07)

²²¹ Katarina Tomasveski, Supra note 37 at P. 246.

²²² Id.

In the last two decades, international law and international community have in theory, taken some concrete steps to ensure that women and the female child receive the same kind of treatment as their male counterparts.

This notwithstanding, evidence and societal practices still point to the fact that men and the male child still receive preferential treatment in most societies.

Can African societies and countries, which place so much premium on men and the male child, in practice, protect the rights of their women and the female child? Taking into considerations all the international treaties and instruments which many African countries have obligated themselves, how can African women and female child enjoy equality of rights just like their male counterparts?

In summation, how can African countries, in reality protect or respect the rights of women and the female child? These questions and more would be addressed in subsequent chapters.

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Chapter 3

HUMAN RIGHTS AND CULTURE: THE PROTECTION OF HUMAN RIGHTS OF WOMEN AND CULTURE IN AFRICA.

Introduction:

(i) Human Rights Protection: Context & Culture

**Can we really have a universal standard for the protection of
Human Rights?**

(ii) Examining the universal standards for the

Protection of the rights of women and female children in Africa

- Women's Rights Protection
- Female Children's Rights Protection.

SCOPE: In this chapter, human rights and culture, its concept of universality and challenges; and the universal standards applicable to African states with respect to the protection of the human rights of women and female children would be considered.

Introduction:

International protection of human rights denotes an ensemble of procedures and mechanisms which, though they have their roots in strata of international law, are primarily designed to protect human rights against their own state.¹

The idea of human rights presupposes a certain concept of the human being. By recognizing legal entitlement to every person, to men and women, the international community has acknowledged that indeed all human beings have something in common. They are all recognized as persons whose dignity must be respected, no matter whether the individuals concerned can take their own decisions on life. Every individual in the society, irrespective of their mental capabilities, has some measure of human dignity.²

In its simplest term, Human rights have been construed as rights which a person enjoys by virtue of being human, without any supplementary condition being required.³

Human right is derived from the inherit dignity of the human person and the struggle to assure a life of dignity is as old as the human society.

¹ Christian Tomuschat. *Human Rights: Between Idealism and Realism*, Oxford University Press, P. 84 (2003), See generally Michael Palumbon, *Human Rights: Meaning and History*, Robert Krieger Pub. Co 1982

² Id. at P. 3

³ Id. at P.2, See also Maurice Cranston, *What are human Rights* (London, Bodley Head, 1973) at 36, Jack Donnelly, "Human Rights, Democracy and Development" 21 HRQ(1999) 608 at 612

It has been argued that the reliance on human rights as a mechanism to realize human dignity is a relative recent development.⁴

Even if we all agree that human rights is the rights bestowed on an individual by virtue of being human, this does not keep it from being a controversial concept.

This definition, though simple and relatively uncontroversial, is more complicated than it seems on the surface.⁵

The concept of human right is a very contentious and amorphous subject.

There is no doubt that every nation and culture believes in human right, but agreeing to the meaning and standards for safeguarding human right has been a thorn in the flesh for human rights scholars and activists.

Objectivity:

Human rights concept and standard is not totally based on pure objective and rational standard. As Avrom argues, it is clear from a review of different human rights standards throughout the world, whether in relation to its regulation or in the actual performance of human rights, objectivity or rationalism is not a factor in the practice and regulation of human rights.⁶

Notwithstanding the 1945 and the 1948 Human rights Charters' affirmation

⁴ Rhoda E. Howard & Jack Donnelly, "Human Rights in World Politics:" in Robert J Art & Robert Jervis (eds) International Politics: Enduring Concepts and Contemporary Issues, 4th ed. New York Harper Collins, P.30 (2000)

⁵ Id.

⁶ Avrom Sherr. "Religion and Human Rights" in Nazila Ghanea & others, Does God Believe in Human Rights? Martinus Nijhoff Publishers, P. 108 (2007)

of the universality of human rights, its application and practice is greatly affected by the culture and people who are interpreting it or applying it to the political system.

The Universality of Human Rights and Its Challenges:

The universality doctrine of human rights holds that human rights are inherently universal and that international instruments provide a basic minimum standard of compliance.⁷

This means that regardless of the cultural context, human rights contained in the Universal Declaration of Human rights, among other international instruments are universally applicable and universally morally binding.⁸

On the other hand, the cultural relativist doctrine of international human rights, believe that an individual nation should have the prerogative of prioritizing human rights in a manner appropriate to its culture, political and economic circumstances.⁹

The notion that human rights are universal has been challenged by cultural relativists who argue that the current human rights principles are the product of the western liberal tradition and do not encompass the notion of wrong

⁷ Melanne Andromecca civic. 'A comparative Analysis of international and Chinese Human Rights Law: Universality versus Cultural Relativism, 2 Buff. Jour. Int'l. 285 (1995-96)

⁸ Id.

⁹ Melanne Andromecca Civic. Supra note 7

and right specific to other cultures, hence the claim to universality is untenable.¹⁰

The argument of the cultural relativists is that human rights are neither sacrosanct nor a monolithic whole and there can be different notions of human rights. They argue that this is supported by the existence of different regional human rights systems such as the European Human Rights system, the African Human Rights System and Inter- American Human Rights system.¹¹ According to the relativist school of human rights and those who are opposed to the universal notion of human rights, genuine voices and concerns from different regions of the world must be accommodated, otherwise the universalism of human rights system will remain a farce.¹²

The notion that human right is a universal concept or principle might not be in doubt, since all cultures or countries of the world lay claim to one form of human rights concept or another.

This notwithstanding, what might be culturally accepted in USA, may be offensive in England or even in Nigeria, and vice versa. As Avrom argues, “It is fairly clear that human rights are not in fact universal: what is appropriate to England in 2005 may not be appropriate to the Republic of

¹⁰Niaz A. Shah. *Women, the Koran and International Human Rights: The Experience of Pakistan*, Martinus Nijhoff Publishers, P. 199 (2006)

¹¹ Id. See also generally African Charter on Human Rights 198, European Commission on Human Rights 1998 and Inter-American Commission on Human Rights 1959.

¹² Avrom Sherr, *supra* note 6 at PP.199-200

Ireland in 2005, let alone Iraq or China or even Hong Kong. What is sexually appropriate for the Netherlands, Denmark or Germany may not be appropriate for England even if all of those countries are covered by the European Convention.”¹³

It is in this context that the cultural relativists build their case against the idea of having one universal concept of human right that will have a world wide application without taking into consideration the cultural nuances of the different countries. And this raises the question of whether we can really have one universal standard for the protection of human rights?

There is a near unanimity that every human being needs some basic human rights, but the issue of the yardstick of measuring the application or conformity to human rights standard is an issue that vexed human rights scholars and practitioners. Conceding that there are a whole lot of universal covenants or rules which many nations have signed, which sets out the standards for respecting and keeping human rights, many of these nations are not in full agreement as to what the interpretations of those covenants are, especially when it comes to what is the best acceptable standard for protecting human rights in their nations and worldwide.

¹³ Id. at P. 109

It has been argued whether human rights can be respected if they are not culturally contextual and if human rights are not universal; would they have any value at all? ¹⁴ I support the idea for human rights to be culturally contextual but it is my view that human rights can be respected even if it is not culturally contextual. Human rights are every human being's entitlement irrespective of its cultural setting. I believe that every human being wants his human right and dignity to be respected notwithstanding his or her geographical or cultural location. The value and respect of human rights is not solely on its universality because it is part and parcel of every human being. No person or human being will support the denial and tramping of his or her human right or dignity on the fact that the present human right system is of western origin or on the notion that his/her nation does not believe on the universality concept of human right.

Supporters of the idea of the universality of human rights or opponents of relative school on human rights have argued that human rights are not such movable feast that they can be changed or are adjustable according to context, culture or political need.¹⁵ It should be noted that what some supporters of cultural relativist are advocating is not "a movable feast or variable kind" of human rights. What true or moderate relativists are

¹⁴ Avrom Sherr, *supra* note 6 at P. 111, See also Youginda Khushalani, 'Human Rights in Asia and Africa'4 Human Rights Law Journal (1983)

¹⁵ Avrom Sherr, *supra* note 6 at P.111

demanding is that when applying the generally accepted norms or standards of international human rights, local or national culture should be taken into consideration.

People who want the culture or the location of the people, where the human rights law is applied to be taken into consideration, or the so-called relative approach to human rights, have argued that human rights should be able to accommodate different cultures and religions. In their view, it is not only the western culture that has the notion of human rights. Each society has a peculiarity that might not be acceptable to another society. For example, it might be acceptable in some African cultures for people to shave their heads for the dead but an English man or North America man might find this practice offensive or odd. It is possible that there are some members of African community, who may not want to shave their head for the dead, on the account that they don't want to follow this tradition or it is offensive to their religion. To this sect of people, any imposition of this culture on them is a violation of their fundamental human rights or their right to freedom of religion and dignity of person. This raises an issue of different competing rights i.e. the rights of indigenous people to keep their culture and custom. It is this type of situation, that when heard in the western nations, it will generate some attention and raises the issue of human right abuse.

Put in another way, in many Jewish communities circumcision of the male is still an accepted practice, what if a single or few Jewish families decide that they are not going to have their male children circumcised, but members of the large Jewish community insist that for them to have commensality or communal relationship with that family they must have their male children circumcised. Depending on the angle you are looking at this case, some will surely argue that insisting on them to have their male children circumcised is a violation of their human rights, while others will argue that this is not a case of human rights violation rather it is a question of being responsible members of the community by keeping to the norms and culture of the community.

It is in type of cultural clashes that some Africans and Asian nations accuse the western of trying to impose their view and culture on them. How do you come to a universally accepted view on whether shaving of head for the dead or circumcision is good or not? For a culture or people who has never practiced circumcision, it is absurd to circumcise a person, how much insisting that one must perform it before you are accepted in the community. It is without doubt that a western or Jewish person's judgment on a case like this will be greatly influenced by his western or Jewish way of life. Another good example is the western culture's acceptance of gay life or different kinds

of sexual orientations. To the western community, gay right or issue is a simple matter of individual right and freedom. But to an African or Asian, gay issue is a matter of communal norm and value. It without controversy that gay issue is still a taboo in many African and Asian communities and cultures. Does the fact that many western cultures have legalized gay rights and same sex marriage make it acceptable for other cultures? Put in a simple way, will the international human rights legal approval to same sex marriage, gay rights and sexual orientations make them morally and culturally acceptable to communities that are against it? What rights have they to impose their views and belief on communities or cultures that are oppose to it?

Another good example in this category is, if a young Nigerian woman has the right not to be coerced into having a clitoridectomy, does a little Jewish baby boy have the right to refuse circumcision? ¹⁶

This issue raises the question of balancing differing competing cultures and values as we attempt to have a universal standard for protection of human rights. How can this be done without making one culture a subject of cultural imperialism? How should society decide what is acceptable here and now or there and then? How do we decide what is acceptable or not

¹⁶ Avrom Sherr, *supra* note 6 at P.111, See also Yash Ghai, 'Universal Rights and Cultural Pluralism: Universalism and Relativism: Human Rights as a framework for negotiating interethnic claims' 21 *Cardozo L.Rev.*1095 (2000)

acceptable. Simply put, what level of cultural imperialism do human rights imply?¹⁷

What right does the West have to condemn the East, Asians and Africans, when they view their actions as incompatible with universal human rights rules, when such actions are morally right and acceptable in their culture? Is it not right for the people of Africa and the Asians to argue that the values and norms of the universal human charters and other international conventions on human rights were the values and cultures of the west, which never took into consideration the values and cultures of other developing countries? This issue raises the question or suggestion that the western is using the economic and political powers to impose their views and cultures on developing nations.

As Javaid argues, “establishing a unified jurisprudence base for human rights raises profound moral, ethical, philosophical and legal questions.”¹⁸

It is a fact, that in the development of international human rights law the prevailing influence has been that of natural law, a philosophy heavily influenced by Greek mythology and Judeo-Christian scripture. In its earliest form, natural law relied heavily upon the commandments of God as

¹⁷ Avrom Sherr supra note 6 at P. 112

¹⁸ Javaid Rehman. ‘Conflicting Values or Misplaced Interpretations? Examining the inevitability of a clash between Religion and Human Rights’ in Nazila Ghanea & others “Does God Believe inn Human Rights?” Martinus Nijhoff Publishers, P.68 (2007)

immutable and unalterable laws of nature.¹⁹ It is based on this foundation that universal human rights declaration and other subsequent human rights covenants were found.

We must concede that the nature of the term human rights is complicated.

The complicated nature of human rights can be seen from many controversies associated with human rights. For example there is uncertainty and controversy as to the nature of fundamental rights such as the right to life and other basic rights.²⁰

The debate on the nature of human rights is bewildering and complex, but an agreement on the substance of human rights has proven impossible.

Diversity and dissent from religious and cultural relativists have continued to rupture the fabric of international human rights law.²¹

Disagreements and divisions pervade the core of human rights, thus raising troubling and irresolvable questions over fundamental rights such as right to life. For example the rights to life is the core right within the architecture of

¹⁹ Id.

²⁰ Id. at P. 69, See also Yash Ghai. *Supra* note 16

²¹ Javaid Rehman, *supra* note 18 at P. 71, See also E. Brems, 'Human Rights Universality and Diversity', *The Hague: Kluwer Law International* (2001), A. D. Renteln, 'International Human Rights: Universalism & Versus Relativism,' Newbury Park, Sage Publications. (1990), A. D Renteln, 'The unanswered Challenge of Relativism and Consequences of Human Rights,' *Human Rights Quarterly* 7(1985)514, H. Gross-Espiell, 'The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches' in B. G. Ramchara (ed), *Human Rights: 'Thirty Years After the Universal Declaration' : Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights*, The Hague, Martinus Nijhoff Publishers, PP.41-65(1979), D. Donohue, 'Relativism versus Universalism in Human Rights: The Search for Meaningful Standards,' *Stanford law Journal* 27 (1991)345, A.Eide, 'Making Human Rights Universal: Unfinished Business,' *Nordic Journal of Human Rights*, 6 (1988) 51, Jack Donnelly, 'Cultural Relativism and Universal Human Rights,' *Human Rights Quarterly* 6 (1984) 400

human rights law and all of the international law instruments without exception vigorously defend the right to life, yet it is one of the most controversial rights, due to the inherent problems in defining its scope at the peripheries—the beginning and end of life.²²

This shows why it is very difficult to formulate or set a universally accepted standard for the protection of human rights. The difficulty displaced in formulating human rights standards has brought to light the malleable and amorphous nature of human rights law.

The lack of consistency in establishing a firm standard on such fundamental human rights as the right to life, the prohibition of torture and cruel, inhuman and degrading treatment, the right to liberty and protection against unlawful detention demonstrates the fragile nature of human rights law and how difficult it is to set a universal standard for the protection of human rights.²³

It has been argued that there is no single unified meaning to the term human rights. There are still a lot of difficulties in ascertaining the substance of human rights. There are considerable divisions that pervade the body of international law on such core rights as right to life.²⁴

²²Javaid Rehman. *Supra* note 18 at PP.71-72, See also R. K. M. Smith. *International Human Rights*, Oxford Clarendo Press, P. 205 (2005)

²³Javaid Rehman, *supra* note 18 at P. 78

²⁴ *Id* at P. 87

The charter of the United Nations proclaims in its preamble faith in fundamental human rights and the equal rights of women and men.²⁵

This notwithstanding, questions do however arise, whether there can be really a universal standard for the protection of human rights for all mankind as a whole?²⁶ It is my submission that there can be “one universal standard” for the protection of human rights of all mankind. It should be pointed out that this one universal standard should take into consideration the cultural and social values of the people or nation concerned. This position or view does not presuppose that we should have different standards for different people or that human rights standard should become a “variable/movable feast” as some have suggested, rather it presupposes that when applying the universal standard of human rights, local and cultural realities should be taken into consideration. I am not unmindful that this view does not sound as simple and straight forward as it is in writing, but it is a practicable step and a better compromise to the conflicting views on the current international human rights standard. Furthermore, I am convinced that it is harder and more difficult to apply the current concept of universal human rights to its logical conclusion if we try to interpret them in their literal form as

²⁵ Christine Ainetter Brautigam, ‘International Human Rights Law: Relevance of Gender’ P. 3 in Wolfgang Benedek & others, *The Human Rights of Women: International Instruments and African Experiences*, Zed Books, London, P.3 (2002)

²⁶ Christian Tomuschat, *supra* note 1 at P.59, Catherine Powell, ‘Symposium in Celebration of the fiftieth Anniversary of the Universal Declaration of Human Rights: Introduction: Locating Culture, identity and Human Rights’, 30 *Colum. Human Rights L Rev.*201 (1999)

envisaged by many international human rights covenants and charters. I am of the view that if we accept the letters of different international human right instruments as they are today “without finding the intention of the writers of the covenants or doing violence to the wordings” we will be definitely imposing the culture and view of a section of the world to the whole world. In my view, this runs contrary to the values and intentions of the human right system which we are trying to promote and preserve.

The need for the current human rights system to take into consideration the national and cultural realities of the people can be seen from the Asian view at the Bangkok conference and African voice at the Tunis Declaration.

At the Bangkok conference, 120 representative of forty-nine Asian nations stated that “We recognized that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of International norm –setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds---*Human rights must take into account a nation’s historical*

background and culture.”²⁷ The Asian view is similar to the African leaders Tunis declaration, which while affirming their commitment to universal

²⁷ Bangkok Declaration on Human Rights, adopted by Asian States March 1993: ‘The Bangkok declaration was made at Bangkok conference, a preparatory meeting by Asian leaders to Vienna World Conference on Human Rights 1993. See also Melanne Andromecca Civic, ‘Comparative Analysis of International and Chinese Human Rights Law: Universality versus Cultural Relativism’ 2 Buff. Jour. Int.’1 L.285 (1995-96)

human rights called for the need to take into consideration the cultural and historical realities of the people. In the Tunis Declaration African leaders stated, “The observance and promotion of human rights are undeniably a global concern and an objective to the realization of which all states, without exceptions, are called upon to contribute. However, no ready-made model can be prescribed at the universal level since the historical and cultural realities of each nation and the traditions, standards and values of each people cannot be disregarded.”²⁸

These two statements shows that despite most cultures or nations acceptance of human rights and its universality, there is still a deep resentment over its application without taking into consideration the cultural and national realities of the nations concerned. It can concluded from these two statements, that the greater population of the world does not want the implementation of the current human rights system without taking into consideration the cultural and historical realities of the people concerned. The difficulty in setting a generally acceptable standard for international human rights protection is rooted on the nature of human right and the disagreement between the universalist and relativist school of human rights.

²⁸ The Tunis Declaration 1992: The Tunis conference was a preparatory meeting of African states to the Vienna World Conference 1993.

It has been argued that the drafters of the UDHR and later instruments which followed the same approach, may have been blinded by their own ambitions, so that they do not realize that existing cultural differences between the many nations and other ethnic communities of this globe could not be reconciled with the kind of uniformity which the establishment of universal principles carries with it as a logical corollary.²⁹

There has been a broad stream of voices which has indeed called into question the idea of establishing human rights on a worldwide scale. It is the view of these critics that varieties in nations, religions and cultural values upheld by human communities was such that no truly common denominator could be found. According to this group, the concept of international human right envisaged in the UDHR and other subsequent covenants can only be possible if we have one universal or homogenous culture.³⁰

A prominent spokesman of the third world human right group, Mohammed Bedjaoui, who later was elected judge of the ICJ (11 Nov. 1987) and later became the president of ICJ from 1994-1997 argues that there is “remnants of cultural imperialism in present day international law.”³¹ In the view of developing countries, the current international human right system is nothing

²⁹Christian Tomuschat, *supra* note 1 at P. 61

³⁰ *Id.*

³¹ *Id.* at PP. 61-66

short of western culture and norm, which never took into consideration other cultures like African and Asian cultures and values into consideration.

This notwithstanding, it should be noted that there are third world voices that vigorously emphasize the universality of human rights. A well known Senegalese Jurist, Keba Mbaye, a former Judge of ICJ has stated that the notion of human rights was not alien to Africa.³²

Furthermore, H.O. Agarwal an Indian writer argues that “neither human rights can be different for eastern countries to western countries nor they can be different for developed countries and for the Third World countries.

Human rights are color blind and direction bond. They know neither right nor left but only human.”³³

Closely related to relativist school who argues against the universality of international human right is the Marxist theory of the law & the State.³⁴ This school just like the relativist school argues that human rights are a product of the culture of a people and as such no one culture or universal rule should be used in determining the rules and standards of human rights.³⁵

³²Karel Vasak, ‘Human Rights in Africa’ in Karel Vasak (ed) *The International Dimension of Human Rights*, Greenwood Press and Unesco, Vol. 1, 583 , P.599 (1982), See also Christian Tomuschat, supra note 1 at P. 60

³³Christian Tomuschat, supra note 1 at PP. 61-63

³⁴Grigorii I. Tunkin, *Theory of International Law*, Cambridge, University Press, P. 82 (1974) where he argues that “The extent and character of human rights within a specific state (they do not exist outside a state) are defined in the final analysis by the nature of the state , and this nature is itself a product of economic system of a given society.”, See also Christian Tomuschat, supra note 1 at P. 60

³⁵ Christian Tomuschat, supra note 1 at PP.61-63, See also Dianne Otto, ‘Rethinking the Universality of Human Rights Law’ 29 Colum. Human Rights L. Rev. 1 (1997)

It has been submitted that the Marxist concept of human rights may have become obsolete, but it is still retained in some countries and intellectual circles, and the victory of western concept of human rights over its most potent adversary does not put an end to legitimate questioning of whether human rights is really universal in the way the west claims its universality.³⁶ Human rights are intimately connected with the value of a given community. It must be asked whether western values can be amalgamated with African or Asian values to produce a blend which is still capable of providing support to a layer of legal rights.³⁷ It is my belief that the Human right that was conceived in the UDHR charter and other international charters presupposes a dynamic legal system that is rooted in the values and legal norms of a given people and nation. It is only when the values of UDHR charter are part of the values and cultures of a given people that the dreams of UDHR will become a reality.

For human rights to succeed in Africa or Asia, it must be accepted and rooted in the cultural and legal system of the African societies. A rule of law which is superimposed on a society just by bureaucratic processes will always appear as a kind of artificial work that can fall off at any moment.³⁸

³⁶ Christian Tomuschat, *supra* note 1 at P.61, See also Dianne Otto. *Supra* note 36

³⁷ Christian Tomuschat, *supra* note 1 at P.61

³⁸ *Id.*

To a great extent, human rights suffer negatively in Africa and other third world countries because the treaties and human rights covenants entered by government are totally different from the cultures and norms of the people. In many countries of Africa and Asia, it has been observed that commitments entered into and declarations made in the course of conducting foreign affairs do not reflect cultural and political realities. There is no doubt that the governmental apparatus constitutes but a thin layer of the society and the relationship between the government and society is most often totally different from what it is expected to be. Most often, especially in Africa, the government, in order to gain internal, external and international legitimacy, simply bows to external pressures by signing some treaties, which they feel they cannot resist. In this way, a kind of two stage political culture can develop.

In many African countries, there are treaties which are formalized through legislative enactments, and which are binding to the states concerned, but in real life and in many parts of the countries, life goes on as it had evolved over centuries, without taking into cognizance the treaties that have been signed by government. If the treaties are enforced in the country, it is in few places which, in most cases, are restricted to big cities. The government, by ratifying some of the treaties, show to the outside world that they belong to

the group of “good countries” a gesture which removes them for awhile from sharp focus of international attention.³⁹

In most African countries, various African governments have ratified many treaties on international human rights and women’s human rights as well as the rights of female children. This theoretically shows their support and their respect for the human rights of women and female children, yet their actual conducts and actions contradict all these pledges. Reports and evidences from many human rights organizations from many African countries, shows undoubtedly that the respect for human rights of women and female children is far from being a reality in many African states.⁴⁰

It has been contended that Third World governments declaring their attachment to human rights do not really mean what they say, but are just paying lip service to some political necessities.⁴¹ Indeed, there is a whole lot of verbalism in this context in many governments and countries of the world and there are indeed instances of such sheer hypocrisy with respect to observance of human rights in Africa. Many African governments have committed themselves to many international covenants on the Human rights

³⁹ Christian Tomoschat, *supra* note 1 at P. 61

⁴⁰ See generally George William Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the Africa Regional Human Rights System*, Transnational Publishers (2003)

⁴¹ Christian Tomuschat, *supra* note 1 at P. 61

of women and female children, but practicing or implementing these covenants is always a big problem.

UNIVERSAL STANDARDS FOR PROTECTING INTERNATIONAL HUMAN RIGHTS OF WOMEN IN AFRICA

General Standards: The historical evolution of the concept of human rights led to the formation of contemporary legal standards, set out, among other things, in the UN Charter, the Universal Declaration of Human Rights, the International Covenants on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, and two optional Protocols to International Covenant on Civil and Political Rights. These standards are derived from universally recognized principles, which state that human rights are attributed to human beings only, that they are attributed to all human beings equally, without any distinction as to race, ethnicity, sex, religion, social or civil status, and that they are rights of which no person can be deprived of and which no one can take away or except as approved by law.⁴²

These initial covenants encompasses a broad catalogue of human rights and freedoms related to all spheres of life –political, economical, social, cultural,

⁴² Dorota Gierycz, 'Human Rights of Women at 50th Anniversary of the United Nations,' in Benedek Wolfgang & others (eds.), *The Human Rights of Women: International Instruments and African Experiences*, Zed Books, P. 31 (2002)

civil and personal. They include such things as right to life, right to freedom of opinion and expression, right to education, etc. These general international human rights however do not directly refer to human rights of women; rather they set standards of human rights protection for everyone and explicitly state the principles of sex equality and non discrimination. Thus they set the foundation for the protection of human rights of women.⁴³

THE UN CHARTER:

The principle of respect for human rights and equality between women and men are enshrined in the UN charter. The charter reaffirms in its preamble “faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small.”⁴⁴ Article 1 paragraph 3 of the charter lists among the main purpose of UN, the achievement of international cooperation in promoting and encouraging respect for human rights and for the fundamental freedoms for all without distinction to race, sex, language or religion.⁴⁵

By this charter, the international community established a universal standard for the protection of human rights of all human beings including the human rights of women and female children in Africa. Most African states are

⁴³ Id. at PP. 31-32

⁴⁴ Preamble to UN Charter of 1945

⁴⁵ Article 1 paragraph 3 of UN Charter 1945, See also Dorota Gierycz, *supra* note 43 at P.31

members of the UN and they have in many occasions and times, pledged to respect the norms and rules of UN and their obligations to this world body.⁴⁶

It is believed that African members of UN have not only covenanted to respect the aims and objective of UN but have also agreed to respect and protect the human rights of African women by their membership of UN.

Conceding that this is implications of African nation's membership of UN, there is still a whole of lip service and neglect by African nations, when their obligations to African women are compared in the light of their membership of UN.

Universal Declaration of Human Rights: (UDHR) 1948

The Universal Declaration of Human Rights (UDHR) is another major universal standard for the protection of the human rights of women and female children in Africa. Some have referred to UDHR as the world or universal ground norm for the protection of human rights.⁴⁷

The Universal Declaration of Human Rights⁴⁸ states that “All human beings are born free and equal in dignity and rights⁴⁹ and that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other

⁴⁶ George William Mugwanya, *supra* note 40

⁴⁷ Diana Ayton-Shenker, ‘The Challenge of Human Rights and Cultural Diversity’ available at <http://www.un.org/rights/dpi1627e.htm>(last visited 9/22/07)

⁴⁸ The Universal Declaration of Human Rights of 1948 (Herein after called UDHR)

⁴⁹ Article 1 of UN Charter, See also Dorota Gierycz, *supra* note 42 at P.31

opinion, national or social origin, property, birth or other status.”⁵⁰

Furthermore the charter states that “All are equal before the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”⁵¹

The UDHR has evolved to be the world standard for the measurement of the protection of human rights and many countries human rights records are judged by how far they conform to UDHR.

It has been submitted that UDHR suffers some sort of birth defect in that it was drawn up in a world organization of 56 states while today there are more than 191 members of UN. In the case of Africa, it was only three African states—Egypt, Ethiopia & Liberia that were there and Asia was represented by 11 states. There is no doubt that Africa and Asia were not fully represented in the development and preparation of UDHR.⁵² If one concedes the fact that UDHR has some birth defects, does it make it unfit as an authoritative standard for the protection of international human rights? In my view, the fact that UDHR has some birth defect does not mean that it is incapable of establishing a universal legal document reflecting the basic needs of all human beings.

⁵⁰ Article 2 of UN Charter, See also Dorota Gierycz, *Supra* note 42 at P. 31

⁵¹ Article 7 of UN Charter, See also Dorota Gierycz. *Supra* note 42 at P.32

⁵² Christian Tomuschat, *supra* note 1 at P. 63

The norms and standards of UDHR have been repeated in many recent international covenants and even African countries have accepted these standards in the African Charter on Human Rights.⁵³

Those that were not at UDHR drafting house may be reluctant to accept UDHR as the authoritative constitutional document for the international community. On the other hand, UDHR has time and again been re-enacted in many recent international charters and resolutions, where most of these countries were present. For example, the world conference on Human rights on 6/25/93 emphasized the importance of UDHR as a common standard of achievement for all peoples and nations. The UN Millennium Declaration of General Assembly solemnly resolved to respect fully and uphold the UDHR.⁵⁴

In all these other occasions, those countries who were not fully represented at the drafting of the initial 1945 & 1948 charters of human rights can no longer use their absence as an excuse. It can be said by their actions, that they have given full support to the 1945 & 1948 human rights documents, unless they can prove coercion or intimidation.

However, it may true that the west invented the legal techniques and norms which today are commonly considered to characterize human rights, but to

⁵³ See generally African Charter on Human Rights 1981

⁵⁴ Christian Tomuschat, *supra* note 1 at P. 64

insist from that premise that human rights is part of the western heritage only and cannot be traced back to other cultures would seem to be an assertion that cannot be validated.⁵⁵ It has been argued that “The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a state neither internally on its law or on any other legislative measures, nor internationally on treaty or custom, in which the express or tacit will of a state constitutes the essential element.”⁵⁶

A UNESCO survey also found that human right is not totally a western value issue and a study of key concepts of great cultures and cultural systems find them in harmony with UDHR.⁵⁷ This notwithstanding, it is still true to say, the UDHR was aimed to create a charter for “western man.”⁵⁸ The controversy surrounding the origin and western nature of UDHR notwithstanding, UDHR has proved to be a good standard or instruments in protecting the rights of women and female children in African. UDHR has been and will continue to be used as a yardstick for calling back African

⁵⁵ Christian Tomuschat, *supra* note 1 at P. 72

⁵⁶ ICJ Reports (1966) 250 at 297, (This is the view of Tanaka, a Japanese Judge in his famous dissenting opinion, which is appended to the judgment by which the ICJ in 1966 rejected the application by Ethiopia and Liberia denouncing the treatment of the inhabitants of the former colony of South-West Africa) See also Christian Tomuschat, *supra* note 1 at P.82

⁵⁷ Christian Tomuschat, *supra* note 1 at P.70

⁵⁸ Christian Tomuschat, *supra* note 1 at P. 63

states that have derailed from their human rights and women's human rights obligations. Indeed many of these African nations are still trying to keep to the human rights standard as stated in UDHR charter, their shortcomings notwithstanding. The story and quest for the protection of the Human rights of women in Africa cannot be complete without mentioning of UDHR and measuring it in the lights of UDHR standards and norms.

International Covenant on Civil and Political Rights (ICCPR)

Another universal standard that has been used to protect the rights of women and female children in Africa is the ICCPR.⁵⁹ Currently there are about 48 African states who are parties to the International Covenant on Civil and political Rights 1966.⁶⁰ Art. 28 of ICCPR which contains what is generally recognized as a non-discriminatory provision that states, "All persons have equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on such grounds as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth

⁵⁹ International Covenant on Civil and Political Rights (1966) adopted by UN General Resolution 2200(XXI) of 1966 (herein after called ICCPR)

⁶⁰ Women's Right available at <http://web/amensty.org/web/nsf/print/treaty-countries-ratification-eng>. See also Fareda Banda, Women, Law and Human Rights, Hart Publishing Portland, P. 45 (2005)

or other status.”⁶¹ By this provision, all signatories to this covenant including African countries signatories agreed not to discriminate against women or female children by reason of their sex or gender.

Conceding that most African countries have in theory signed and ratified this covenant, women and female children equality with men and boys is still far from being a reality. Discrimination or gender based stereotype is a big issue in many African countries.⁶² Women in Africa are still lagging behind in political and social ladder. This notwithstanding, it can be said that ICCPR has been a valuable tool for the protection of the rights of women in Africa, the short comings of African countries notwithstanding.

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Another international standard used for protection of human rights of women and female child in Africa is the Convention against Torture and other cruel, inhuman or degrading treatment or punishment.

⁶¹ UN General Resolution 2200 (XXI) of 12/16/1966, See also Dorota Gierycz, *supra* note 42 at P. 32

⁶² George William Mugwanya, *supra* note 40

The convention against Torture and other cruel, inhuman or degrading treatment or punishment was adopted on 10th of Dec, 1984 by the UN General Assembly resolution and it entered into force on 26th June 1987.⁶³ CAT promotes universal respect for human rights and fundamental freedoms as envisaged by United Nations charter and Universal Declaration of Human Rights.⁶⁴ CAT provides that no one shall be subjected to torture or cruel inhuman or degrading treatment or punishment.⁶⁵ CAT by its provision, forbids torture which it defines as “any act by severe pain or suffering whether physical or mental, which is intentionally inflicted on a person.”⁶⁶ The provisions of CAT are so relevant to African women and female child because of some societal and cultural practices which are considered by modern day human rights activist as degrading and inhumane to women. One contentious issue that easily falls into this provision is the female genital circumcision which is still practiced in many African societies. African women who do not want to perform this ritual and other cultural practices can use this convention to make a case against African states that have ratified this convention.

⁶³ See GA Res 34/46,36 UN GAOR,Supp(No 51),UN Doc .A/39/51 at 197 (1984),reprinted in 23 ILM 1027 1984 (Hereinafter referred as CAT)

⁶⁴ See Preamble to Convention against Torture & other Cruel,inhumam or degrading Treatment or Punishment.GA Res 39/46, (annex,39UN GAOR Supp.(No.51) at 197 UN Doc A/39/51(1984) entered into force on June 26 1987

⁶⁵ Preamble to CAT

⁶⁶ Art. 1 of CAT, See also Angela Bartman, ‘Spare the Rod and Spoil the Child’ Corporal Punishment in school around the world,’ 13 Ind. In’t & Comp. L Rev 283 (2002)

The convention forbids states from deporting any person who is in danger of torture back to the country where the threat of the torture is made.⁶⁷ This provision has been used by some African women to secure asylum in some countries, if valid evidence is presented that they are in danger of torture or inhuman treatment in their country.

CAT relevance to women rights in Africa is rooted in the conflicts between African culture and some international human rights provisions and norms. It has been argued that some of alleged women rights abuses in some African countries with respect to human rights of women are not indeed human rights abuses rather they are just normal cultural practices of some African communities.⁶⁸ This view might be true if a “true objective standard” or the moderate relativist school concept of universal human right is used in judging the case.

The International Covenant on Economic, Social and Cultural Rights: (ICESCR)

The international Covenant on Economic, Social and Cultural Rights was adopted by UN General Assembly in Res 2200A (XXI) on 16th Dec, 1966

⁶⁷ Art. 3 of CAT

⁶⁸ Martin Chanock, ‘Human Rights and Cultural Branding: Who speaks and How’ in Abdullahi A An-Na’im (ed) Cultural Transformation and Human Rights, PP. 39-49, Zed Books Ltd (2002)

and it entered into force on Jan 1976.⁶⁹ The ICESCR is a legally binding treaty that protects a wide range of economic, social, and cultural rights. It forbids discrimination based on creed, political affiliation, gender or race. ICESCR is divided into five parts; Part I recognizes the right to self determination; Part II defines the general nature of states parties' obligations, Part III enumerates the specific substantive rights, Part IV deals with international implementation and Part V contains typical final provision of a legal nature.

Part III recognizes the right to work, just and favorable condition of work, rest and leisure; form and join trade unions, and to strike, social security; special protection for family, mothers and children; an adequate standard of living, including food, clothing, and housing, physical and mental health, education, scientific and cultural life.⁷⁰

Many African nations' signatories to this covenant have obligated themselves to respect the rights of women and female child as stated in this covenant.

⁶⁹ See International Covenant on Economic, Social & Cultural Rights.GA Res 2200A (XX1)21 UN GAOR Supp. (No.16) at 49 UN Doct.A6316 (1966) 993 U.N.T.S.3, entered into force Jan 3 1976. It has been argued that the ICESCR is a legally binding treaty that protects a range of economic, social, and cultural rights without discrimination based on creed, political affiliation, gender, or race. It was adopted by the UN General Assembly in 1966 and entered into force ten years later.

⁷⁰ Henry J. Steiner & Philip Alston, *International Human Rights in Context Law, Politics and Morals*, Clarendon Press, P. 265 (1996)

It is my view that African women and female child can find defense and relief from this convention if African parties to this convention were to live to their treaty obligations. But as with many world treaties and covenants, Africa states parties are very far from fulfilling their obligations under this covenant.

In Africa, almost two thirds of the people lack access to safe water. Poverty is increasing at an alarming rate in Africa. In most of the failures of African states, when a comparison is made between men and women, African women suffer most.⁷¹ There is no doubt that this covenant has not really helped the plight of African women and female child. Much needs to be done by African states to fulfil their treaty obligations to African women as envisaged by ICESCR.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Convention on the Elimination of All Forms of Discrimination against Women⁷² has been widely received in the African continent. All states in

⁷¹ Id.

⁷² Convention on Elimination of All Forms of Discrimination against Women, GA Res. 34/180, 34 UNGAOR Supp. (No. 46) at 193 UN Doc. A/34/46/ entered into force Sept. 3 1981 (Herein after referred as CEDAW)

Africa have ratified CEDAW except Somalia and Sudan.⁷³ This convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly on 12/18/1979, constitutes the central and most comprehensive bill on human rights of women. The spirit and objectives of the convention is derived from the principles of international law, general standard of equality and human rights and the goal of the United Nations. The convention is a product of the work by the UN Commission on the status of women.⁷⁴ The Convention explicitly states in its preamble that extensive discrimination against women exists.⁷⁵

The Convention condemns discrimination in all its forms and obliges states' parties to pursue comprehensive policies and measures to eliminate discrimination against women at all levels, to apply sanctions and other measures to redress discriminatory situations, to repeal legal provision and to modify discriminatory customs regulations.⁷⁶

The main purpose of the convention is for full development and advancement of women; for the purpose of guaranteeing them the exercise

⁷³ Women Rights available at <http://www.un.org/womenwatch/daw/cedaw/states.htm> (visited 12/11/07), See also Fareda Banda, *supra* note 60 at P.46

⁷⁴ Dorota Gierycz, *supra* note 42 at P.34

⁷⁵ Art. 1 of CEDAW

⁷⁶ Art. 2 of CEDAW

and enjoyment of human rights and fundamental freedoms on the basis of equality with men.⁷⁷

The convention went to provide a more detailed agenda for action toward equality of women which covers practically all aspects of human rights.⁷⁸

States' parties to the convention are required to undertake an obligation to suppress all forms of trafficking and sexual exploitation of women.⁷⁹

Despite these provisions, all forms of sexual exploitation of women exist worldwide. Poverty and economic crisis in many parts of Africa have increased prostitution amongst women. Women and increasing number of female children are being exploited by massive sex tourism in many parts of Africa. A shocking record of daily incidents of forced prostitution—kidnapping girls, the selling of children, mainly girls by poor families and various forms of trafficking in women—is provided by daily media reports in many African nations.⁸⁰

The convention focuses on the right of women to equal participation in political life, including decision making at national and international levels.⁸¹ Article 7 focuses on the basic political rights such as the rights to vote, to participate in politics, including decision-making and to hold public

⁷⁷ Art 3 of CEDAW

⁷⁸ Article 16 of CEDAW, See also Dorota Gierycz, *supra* note 42 at P.34

⁷⁹ Art. 6 of CEDAW

⁸⁰ Dorota Gierycz, *supra* note 42 at P.35

⁸¹ Arts. 7 & 8 of CEDAW

office.⁸² Article 8 reflects the new global reality, extending those rights to international spheres such as representation by women of their countries abroad, participation in meetings and negotiations at the international level and employment in international organizations.⁸³ Concerning the participation of women in politics and decision making, the gap is still too wide in many African states. Throughout history, there has been only 25 democratically elected female heads of state and currently only one African state—Liberia has a woman as its head of State.⁸⁴ In 2007, statistics shows that the number of female representation at national level stood at 18 percent globally.⁸⁵ The lack of women participation in governmental affairs is not an African issue. In the United Nation's sixty two years of existence, of the 49 presidents of the General Assembly elected since 1945, only two were women. There has been no woman secretary general of the organization.⁸⁶ Furthermore, in the so-called civilized nations, women ascendancy to top government post is still a herculean task. The US, a leading nation in human rights movement and a big champion of the rights of women and female children, has never elected a woman as her president. Thus, it can be said

⁸² Art. 7 of CEDAW

⁸³ Art. 8 of CEDAW

⁸⁴ Dorota Gierycz, *supra* note 42 at P.35, See also Participation of Women in Political life and Decision Making.: Report of the Secretary- General of UN, E/CN.6/1995/12/21, P.4 (Feb. 1995)

⁸⁵ Ijeoma Ogbonna, "Women still Trailing behind in Politics" available at <http://www.champion-newspapers.com> (last visited 12/18/07)

⁸⁶ Dorota Gierycz, *supra* note 42 at P.35

that although almost no country publicly disavows of the rights of women to political participation, their lack of participation is self evident.⁸⁷

Articles 10-13 of the convention reaffirm the human rights of women in the areas of education,⁸⁸ employment,⁸⁹ health,⁹⁰ economic and social activities,⁹¹ and call for the elimination of ongoing discrimination.⁹²

Article 14 pays special attention to the situation of women in rural areas with regard to those rights.⁹³

Some progress has been made in some African countries with respect to the human rights of women.⁹⁴ In spite of the progress achieved in many African countries, the situation of women in all most areas of human endeavour remains one of discrimination.

Although women have progressed towards equal education, huge gaps still exists between men and women educational achievements. Despite expanded literacy programs for adults in many African countries, literacy rates for women is only two-thirds that of men.⁹⁵ According to UNESCO statistics, women constitute as much as 65% of illiterates worldwide, with

⁸⁷ Id.

⁸⁸ Art. 10 CEDAW

⁸⁹ Art. 11 CEDAW

⁹⁰ Art.12 CEDAW

⁹¹ Art. 13 CEDAW

⁹² Articles 10-13 of CEDAW

⁹³ Art. 14 of CEDAW

⁹⁴ UNESCO Series of World Education Report Paris (1993)

⁹⁵ Dorota Gierycz, *supra* note 42 at P.36, See also UNESCO, World Education Report Paris (1993)

highest illiteracy rates in Africa, Asia and the Pacific. Women have higher dropout rates than men. Young girls leave school because of socio-cultural constraints in order to work in the household, to undertake paid employment to support their families, to take care of siblings and because of early pregnancy and marriage. When families are facing hardships or constraints; they will generally decide to educate only boys. Young women are often more influenced by the tradition and conditioning of their families, which make their choices and opportunity more restricted.⁹⁶

In employment, the convention obliges state parties to ensure equality of men and women, an alienable right to work on the same employment opportunities, free choice of profession and employment, equal benefits, remuneration and conditions of service.⁹⁷ There is no country in the world where these conditions are met as demanded by the convention.

In some countries in Africa, women produce about 80% of the food, but their contributions are not often remunerated with proper contract, work related allowances or even recognized as productive in terms of national economic development.

In general, most women in the world work in under paid, poorly regulated conditions; in occupations with low prestige and salaries. They are often

⁹⁶ Dorota Gieryce, *supra* note 42 at P.36, See also UNESCO World Education Report, Paris (1993)

⁹⁷ Art. 11 of CEDAW

denied equal remuneration and access to training and face discrimination in their career development.⁹⁸

On average, women earn only 50% to 80% less than men. They are poorly represented in decision making positions in the public sector, government and upper levels of the civil service.⁹⁹

In many African states, women are worse in private sector. There are few women chief executive positions among managers of leading corporations in Africa. In some African states, national military forces ban women in combat positions. The situation in the police force is not encouraging.¹⁰⁰

Women are still legally excluded or discriminated against by law in certain fields or certain jobs considered as particularly dangerous or unhealthy to female reproductive roles. The fact that adult female citizens are legally prohibited from certain occupations clearly indicates that women are not regarded as full citizens, who like men, can determine for themselves on individual basis, whether they can accept such employment or assume certain positions.¹⁰¹

⁹⁸ UNESCO World Education Report, supra note 94

⁹⁹ Dorota Gierycz, supra note 42 at P.37, See also "Women in a Changing global economy," 1994 World Survey on the Role of Women in Development, Department of Policy Coordination and Sustainable Development, United Nations, New York, P.45 (1995)

¹⁰⁰ Dorota Gierycz, supra note 42 at P.37, See also ' Women in a Changing Global economy,' supra note 99 at P.50

¹⁰¹Dorota Gierycz, supra note 42 at P.39

Discrimination and violations of the rights of women range from restrictions on women's personal freedom of movement, and deprivation of property and parental rights, to direct violence, involving such cultural and traditional practices as female circumcision.

In many parts of Africa, women are excluded from inheriting property from their family. The inheritance laws and practice whereby property ownership and management pass to male family members only exclude women from ownership of property and from economic self reliance is without doubt discriminatory to women.

Thus, although it can be said that CEDAW has done a lot in setting the standard and tone for the universal protection of women and female children in Africa, a lot still needs to be done for the full realization of the dream and purpose of CEDAW in Africa.

The African Charter 1981

The African Charter is another instrument or standard used for the protection of human rights of women and female children in Africa.

The primary human rights instrument in Africa, the African Charter on Human and Peoples Rights of 1981 has been ratified by all African member states of African Union.¹⁰²

Although the African charter was a major step in human rights development in Africa, the rights of women and female children were not given a major attention. It is only one article that addresses the issue of women in the whole charter.¹⁰³

Art 18(3) of African Charter provides that—the states shall ensure the elimination of discrimination against women and also ensure the protection of the rights of women and children as stipulated in international declaration and conventions.¹⁰⁴

By the inclusion within article 18(3) and article 60 in the Charter which provides the requirement that international Declarations and Conventions be considered in the interpretation of the Charter, African leaders make it clear that while wanting a continent specific human rights document, they want a human rights system within the international framework that demands the enjoyment of charter or treaty-based provisions by all human beings without

¹⁰² See Constitutive Act of African Union.OAU Doc.CAB/LEG/23.5, See also African union available at <http://www.africa-union.org>, See also Farena Banda, supra note 60 at P. 46

¹⁰³ See Art (3) of African Charter

¹⁰⁴ Art. 18 (3) of African Charter

discrimination or sex.¹⁰⁵ Egypt is the only state that has entered a reservation to article 18(3) of the African Charter, making a subject to the Sharia law.

There is no doubt that most African states have covenanted to keep the universal standard of international human rights, whether by African Charter or other treaties they have ratified. In principle, it is so simple to say they have bound themselves to the international principles and standards of the human rights system.

This notwithstanding, many African countries are still struggling with the issue of what manner of standard or procedure they should adopt when implementing the human rights laws and covenants in their legal system.

Many African political leaders have deep resentment about some aspects of human rights. They view some aspects of human charters/covenants including the African Charter on human rights as alien and foreign to African culture and values.

The Unity Dow case is an important case on the usefulness of the African Charter in vindicating women's rights in Africa. The case was brought by Unity Dow against the government of Botswana. The government had passed a citizenship Act in 1984, which provided that children born in

¹⁰⁵ Franda Banda, *supra* note 60 at P. 48, See also F. Viljoen, "The African Commission on Human and Peoples Rights: Introduction to the African Commission and Regional Human Rights Systems in C. Heyns (ed.) Human Rights Law in Africa, The Hague, Martinus Nijhoff, Vol.1. 385 P. 497 (2004)

wedlock acquire the nationality of their father but not that of their mother. Dow was married to an American citizen. Two of their three children were born after the marriage and therefore not Tswana citizens. The Act also provided that whilst a Tswana man can pass on nationality to his alien wife, a Tswana woman could not pass on her nationality to an alien husband. Dow challenged these provisions as being discriminatory on the ground of sex and in contravention of international human rights standards. The government conceded that the Act was discriminatory, but argued that Botswana was a patrilineal society whereby women were expected to follow their husband and children belonged to the father's line. At the time the case was heard, Botswana had not ratified CEDAW. However she had participated in the drafting of the 1967 declaration which preceded CEDAW, and had been a signatory thereto. Botswana had ratified the African Charter. The High court replying on the African Charter was able to point to this engagement with human rights as indicating a commitment to the principles of equal protection before the law and non discrimination on the basis of sex. The court held in favor of Dow, and the decision was upheld on appeal.¹⁰⁶

¹⁰⁶ Franda Banda, *supra* note 60 at PP.48-49, See also *Unity Dow V Attorney General of Botswana* (1991) LRC 574, *Attorney General of Botswana V Unity Dow* 1992 (Const.) 623

It is clear from the constitutive Act 2000 of the African union, that Africa wishes to be seen as being serious with human rights and women's rights¹⁰⁷ and many African states have taken steps to improve their records on the rights of women and female children.

A lot still needs to be done by African states and people in general to improve on the rights of women and female children. A situation where women and female children are treated as second class citizens does not improve the status and rights of the female citizens. There is need for cultural and social reforms in some practices of African communities, in order to make every body feel equal in the community.

The Protocol on the Right of Women in Africa 2003

The African Charter came into being with the aim of promoting human rights value in Africa. Unfortunately, the charter did not give much attention to the human rights of women. Conceding that some of the general provisions on human rights¹⁰⁸ could be used to advance the rights of women in Africa, much attention was not given to the rights of women and female children in Africa. The right of women was briefly mentioned in only Article

¹⁰⁷ See preamble to AU Constitutive Act 2000, OAU Doc.Cab/leg/23.15, See also Art. 3(g), 3(h) and Art.4 (m) of A U Constitutive Act. 2000

¹⁰⁸ See Art. 2 of African Charter which provides that the rights and freedom enshrined in the charter shall be enjoyed by all irrespective of race, ethnic group, color, sex, language, national and social origin, economic status, birth or other status & Art.3 of the African Charter states that every individual shall be equal before the law and shall be entitled to equal protection of the law.

18 of the African Charter.¹⁰⁹ African Human Rights Charter provision on the human rights of women has been described as ineffective and inadequate.¹¹⁰ The protocol on the Rights of women in Africa¹¹¹ was adopted by African Union on July 11, 2003 as a way of remedying the shortcomings of African Charter on the rights of women. The protocol was adopted by OAU¹¹² Assembly of Head of states and governments meeting in its thirty-first ordinary Session in Addis Ababa, Ethiopia on June 1995 in resolution AHG/Resolution 240(XXXI) following the recommendation of the African Commission on Human and people's Rights to establish a protocol on the rights of women.¹¹³

The case for the establishment of a special rapporteur on the rights of women was first tabled in 1995 at the 18th session of the African commission on Human rights. The African Union, which is a successor to OAU adopted the women protocol at its assembly second summit in Maputo, Mozambique in July 2003 and opened the protocol for signature and ratification.

¹⁰⁹ See generally African (Banjul) Charter on Human and Peoples Rights (1981), OAU Doc.CAB/LEG/67/3.Rev.5, 21 ILM.58(1982) The countries that have ratified the Protocol as of 5 January 2006 are Benin, Cape Verde, The Comoros, Djibouti, The Gambia, Lesotho, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Africa and Togo

¹¹⁰ Why A Protocol on Women's Right available at www.reproductiverights.org (last visited 12/06/07)

¹¹¹ The Protocol on the Rights of Women in Africa, Cab/Leg/66.6(sept. 13.2000),reprinted in 1Afr.Hum.Rts.L.J.40

¹¹² See Charter of the Organization of Africa Unity (OAU) 479 U.N.T.S,entered into force Sept 13 1963

¹¹³ See the preamble to Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa.

The protocol entry into force in 25th July 2005 after its ratification by 15 countries shows African attempt to break with traditional notions and conceptions on women and rights of women.¹¹⁴

This protocol is seen as a milestone in the protection and promotion of women rights in Africa. It creates new rights for women in terms of international standards.¹¹⁵ This protocol, for the first time in international law, explicitly sets forth the reproductive rights of women to medical abortion when pregnancy results from rape or incest or when the continuation of pregnancy endangers the health or life of the mother. Furthermore, the protocol explicitly calls for legal prohibition of female genital mutilation which has a wide spread practice in many African countries and prohibits the abuse of women in advertising and pornography. The protocol also set forth a broad range of economic and social welfare rights for women. The rights of vulnerable groups of women, including widows, elderly women, disabled women, and women in distress, which includes poor women, women from marginalized populations groups and

¹¹⁴ Vincent O.Nmehielle, 'A decade in Human Rights Law: Development of the African Human Rights System in the last Decade' 11 Hum.Rts.Br. 6(2004) P 5, See also Protocol on the Rights of Women in Africa, available at < http://www.equalitynow.org/english/campaigns/african-protocol/african-protocol_en.html (last visited 12/08/07)

¹¹⁵ Protocol on the Rights of Women in Africa, supra note 111

pregnant or nursing women in detention were specially recognized in this protocol.¹¹⁶

Conceding that the African protocol on rights of women is a significant development in the human rights of women in Africa, a lot needs to be done by African governments and people to accord women the equality bestowed on them by international human rights and by the mere fact that they are human beings.

In summation, in spite of the obvious fact that the society is composed of women and men and that both belong to the category of human beings, the concept of “human rights of women” is still subject to misunderstanding and misinterpretation.¹¹⁷ In real life, whether in Africa or other countries of the world, equality of women and the human rights of women are far from being observed and recognized.¹¹⁸

One may ask why we talk about the human rights of women? Could it be because their protection is not covered by the provisions of the general human rights? Why did early international human rights instruments like Universal Declaration of Human Rights of 1948 not refer directly to the human Rights of women? The simple answer is that early instruments of

¹¹⁶ Protocol on the Rights of Women in Africa, supra note 111, See also The Protocol on the Rights of Women in Africa at available at < <http://www.reproductiverights.org> (last visited 11/12/07)

¹¹⁷ Dorota Gierycz, supra note 42 at P. 30

¹¹⁸ Id.

international human rights and all other subsequent instruments were thought to be enough to take care of every body.

The 1993 World Conference on Human Rights in Vienna stated in its program of action that “the human rights of women and female children are inalienable; integral and indivisible part of the universal human rights.”¹¹⁹

It can be said that the protection of the human rights of women is rooted in the international standards of equality and the protection of human rights, which are encompassed in both general international and regional instruments and the instruments that specifically address all or selected human rights in relation to women.¹²⁰

The obvious lack of application of international human rights standards to women or their biased and discriminatory application, led to the rise in women’s human rights covenants and movement. This neglect made it inevitable to the drawing of women covenants that will strengthen and enforce the implementation of those standards in regards to women and elaboration of specific regulations aimed at elimination of discrimination

¹¹⁹ Vienna Declaration and Programme of Action: World Conference on Human Rights, Paragraph 18 (June 25, 1993) at UNDoc. A/Conf.157/24 (Part 1) at 220(1999), See also Vienna Declaration available at www.unhchr.ch/html/menu5/wchr.htm (last visited 11/29/07)

¹²⁰ Dorota Gierycz, *supra* note 42 at P.31

against women and the full implementation of human rights of women in all spheres of life.¹²¹

Despite the inclusion of the principle of equality between men and women, and the prohibition of discrimination on the basis of sex in several human rights instruments, many scholars and women do not accept the view that human rights are universal in their application and scope.¹²² Many people especially women see human rights as a one-sided concept. They concede that in theory, human rights conventions and charters affirm the principle of equality of man and woman, but in practice woman equality with man is far from being a reality even in the so-called civilized nations of the world. A good example is the U.S. where despite its good records in upholding the equality of all people, women are still lagging behind in political and economic leadership.

¹²¹ Dorota Gierycz, *supra* note 42 at P.32

¹²² Naiz Shah, *supra* note 10 at P. 200

Examining the universal standards for the protection of the Rights of female children in Africa

Introduction

From Roman times until mid 1800s, under most western legal systems, children were primarily viewed as chattel.¹²³ According to Cohen, before the development of international human rights law, children were shipped off to a sea, exploited, beaten or ignored at the whim of the parents or those persons having responsibility over them. On the national level, early concern for the rights of the child was based on the care and protection equation of children's rights. In mid nineteenth century, the protection of the child shifted to establishment of orphanages and schools for the protection of children who were orphaned, blind or deaf. Around the end of the century, the emphasis shifted to care for delinquent child and the protection of delinquents by ensuring their separation from adult prisoners and in early 1900s attention shifted to care for the working child and protection of children from unsavory working conditions through the abolition of child labor.¹²⁴

¹²³ Cynthia Cohen, 'Developing Jurisprudence of the Rights of the Child' P.3, 6 St.Thomas L.Rev. 1 (1993)
See also Philippe Aries, Centuries of Childhood: A Social History of Family Life, Vintage Publishers (1965)

¹²⁴ Cynthia Cohen, supra note 123 at P. 4

According to Cohen, “The earliest treaties concerning children were drafted in the beginning of the twentieth century and the care component is manifested in the terms of child protection that prohibited slavery and regulated labor. The “child rights care equal protection” equation was supported by the language of the first declaration on children rights.”¹²⁵ The declaration of the Rights of the Child was drafted by an organization called ‘Save the Children International Union’ and was also adopted by the League of Nations in 1924. This declaration reflects the prevailing attitudes toward children. It is filled with acts that must be done to or for the child, but is salient to what the child is allowed to do. The declaration of Geneva as it was called was known as the declaration that urged the child must be — fed, nursed, reclaimed, sheltered and succored. Strangely, the word “right” was not used anywhere in the text of this declaration of children rights.¹²⁶

The rights of the child became a topic of concern for international organization in 1924, when the League of Nations adopted the first declaration of the rights of the child commonly known as the “Declaration of Geneva.”¹²⁷

¹²⁵ See Geneva Declaration of the Rights of the Child of 1924 adopted sept 26 1924, League of Nation OJ spec. supp.21 at 43 (1924)

¹²⁶ Cynthia Cohen, *supra* note 123 at P.4

¹²⁷ Cynthia Price Cohen & Susan Kilbourne, ‘Jurisprudence of the Committee on the Rights of the Child: A Guide for Research & Analysis,’ P. 2 19 Mich. J. Int.I L. 633, (1998)

- **Universal Standards for female Child Right Protection in Africa.**

The Declaration of the Rights of the Child 1924

One of the universal standards for the protection of the female children in Africa is the 1924 Declaration on the Rights of Child. In 1924, the League of Nations adopted the Declaration of the Rights of the Child in its 50th Assembly.¹²⁸ This is the first international human rights attempt on the rights of children by any inter-governmental organization.¹²⁹ This declaration affirmed that “mankind owes to the child the best it has to give” and this was echoed in both the 1959 declarations of the rights of the child and the 1989 Convention on the Rights of the child.¹³⁰ The text of the five principles of the 1924 declaration is principally concerned with the provisions of the children’s economic, psychological and social needs.¹³¹ The Declaration established the international concept of the rights of the child, thereby laying the foundation for the future international standard setting in the field of children’s rights. Furthermore, the declaration is significant because it illuminates as a fallacy the contention that international right of the child is a new development in international human right law.¹³²

¹²⁸ Geraldine Van Bueren, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers/Kluwer Academic Publishers, P. 6 (1995)

¹²⁹ *Id.*

¹³⁰ Geraldine Van Bueren, *supra* note 128 at P. 6

¹³¹ *Id.* at P.5

¹³² *Id.* at P. 6

It has been argued that the adoption of international standard protecting the rights of the child preceded the adoption of international standards codifying universally recognized human rights.¹³³

The effect of this declaration for the protection of the rights of female children in Africa is so minimal since it is not as effective as a treaty and many Africa states may not have all the resources to meet up with its demands and declaration.

The Declaration of the Rights of the Child 1959

Another universal instrument used in the protection of the rights of female children in Africa is the 1959 Declaration of the Rights of the Child. This is closely related to the 1924 Declaration of the Rights of the Child and has the same effect.

On 19th Oct, 1959, the UN General Assembly adopted the Declaration of the Rights of the Child. Unlike the universal declaration of human rights, this declaration was adopted without absention.¹³⁴

The 1959 declaration of the rights of child consist of a preamble and ten principles, which include among other things the principle that every child is entitled to a name and nationality, adequate nutrition, housing, recreation and medical services. The Declaration of the rights of the child states that

¹³³ Geraldine Van Bueren, *supra* note 128 at P.6

¹³⁴ *Id.* at P. 10

children are entitled to “special protection” and that such special protection should be implemented by reference to “the best interest of the child” which “shall be the paramount of consideration.” The declaration has a broad non-discrimination clause.¹³⁵

The 1959 Declaration of the Rights of the child contains ten principles for the well being of the child. Principle one prohibits discrimination in applying the standards enumerated in the other nine principles. Principle 4 gives the child the right to adequate nutrition, housing, recreation and medical services. Principles 3, 4, & 7 state that the child is entitled to a name, nationality, health and education. The 1959 declaration which prohibits against discrimination and recognition of the child’s right to a name and nationality might be said to be the first step towards ensuring individual personality rights of the child. The 1959 declaration was rooted in the philosophy that “child rights equal care and protection.”¹³⁶

Just like the 1924 Declaration, this declaration has limited application and lacks full legal force of a binding treaty. African countries that are willing to implement its demands can easily use economic and political constraints to shy away from implementing its demands.

¹³⁵ Geraldine Van Bueren, *supra* note 128 at P. 11

¹³⁶ Cynthia Cohen, *supra* note 123 at P.4

UN Convention on the Rights of the Child 1990

The UN Convention on the Rights of the Child 1990 is another universal instrument available for female children in Africa for their human rights protection.

The UN General Assembly adopted the convention on the rights of the child by consensus on 20 November 1989, and the convention entered into force in record time on 2 September 1990.¹³⁷ Almost all African countries have ratified the United Nations Conventions on the Rights of the Child 1979.¹³⁸

The 1990 convention of the Rights of the child is concerned with four “Ps” namely, the participation of children in decision affecting their own destiny; the protection of children against discrimination and all forms of neglect and exploitation; the prevention of harm to children; and the provision of assistance for their basic needs.¹³⁹

The UN convention on the Rights of the Child is an international human rights treaty containing an unprecedented large and comprehensive body of promises to children by the nations of the world including African

¹³⁷ See The Convention on the Rights of the Child, GA Res. 44/25 annex 44 UN GAOR, Supp. No.49 at 167, UN Doc. A/Res/44/49(1989) entered into force 2nd Sept.1990 (Hereinafter referred as the Convention) Every country has ratified the 1990 Child Convention except Somali & US

¹³⁸ Fareda Banda, supra note 60 at P.46, Somali is the only African country yet to ratify the UN Child Right Convention.

¹³⁹ Geraldine Van Bueren, supra note 128 at P.15

countries.¹⁴⁰ Most countries in the world including African countries have failed the children in this regard.

The Convention on the Rights of the Child is the main international human rights addressing the protection of rights of children.¹⁴¹

Children's rights became a topic of international concern when the League of Nations adopted the first declaration of the rights of the child in 1924, commonly called the Declaration of Geneva.¹⁴²

According to Batman "The convention on the Rights of the child expanded the basic concepts of the Declaration of Geneva as the convention continued to define children's rights in terms of protection and care."¹⁴³

The drafting of the convention began in 1979 under the support and help of a working group from the commission on Human Rights and it was completed ten years later. The Convention worked from concepts that were previously recognized, further developing them into a theory that "depicts the child as an individual with the right to have opinion, be a participant in decisions affecting his or her life, and to be respected for his or her human dignity."¹⁴⁴

¹⁴⁰ Gerald Abraham, 'Giannella Lecture: The Cry of the Children,' P. 5, 41 Vill. L. Rev. 1345, (1996)

¹⁴¹ Angela Bartman, *supra* note 66

¹⁴² *Id.*, See also Cynthia Cohen & Susan Kilbourne, *supra* note 127 at PP. 635-636

¹⁴³ Angela Batman, *supra* note 66, See also Cynthia Cohen & Susan Kilbourne, *supra* note 127 at P.637

¹⁴⁴ Angela Batman. *supra* note 66, See also Cynthia Cohen & Susan Kilbourne. *Supra* note 127 at P. 638

The convention stands as one of the single most widely ratified treaty in existence.¹⁴⁵ The 1990 Child's Right Convention includes a child's right to life, to be free from torture or cruel, inhuman or degrading treatment or punishment and right to education.¹⁴⁶

The preamble recognizes that young children are entitled to special care and assistance and should be afforded the inherent dignity and the equal and inalienable rights of all members of human family.¹⁴⁷

It is believed that the Convention on the Rights of the Child is written in the language of a constitutive instrument, meaning that it is intentionally inexplicit and amenable to interpretation.¹⁴⁸ The linguistic interpretation by committee on the Rights of the child is a central element of its emerging jurisprudence. For example, while it is clear that under the convention the child has a right of protection from abuse, the exact acts that constitute abuse are not a part of the convention text.¹⁴⁹

The implementation of the convention on the Rights of the child is monitored by a quasi –judicial body, known as the committee on the rights of the child.¹⁵⁰

¹⁴⁵ Angela Batman, *supra* note 66, See also Human Rights Watch: Children's Rights (1999) available at <http://www.hrw.org/wr2k/crd.html> (last visited 11/23/07)

¹⁴⁶ See generally 1990 UN Convention on the Rights of the Child, *supra* note 137

¹⁴⁷ Angela Batman, *supra* note 66

¹⁴⁸ Cynthia Cohen, *supra* note 123 at 4

¹⁴⁹ *Id.* at PP. 4 - 9

¹⁵⁰ *Id.* at P.3

The convention makes numerous references to the best interests of the child and it is implied as the standard with which to measure state party compliance with all of the convention's articles. The major theme of the convention is non discrimination of the child and discrimination based on gender, respect for the child's human dignity, and best interest of the child. The convention is unique in recognizing the child's individual personality rights and recognition of the child as holder of the right and not the adult who cares for the child. The convention recognizes the child's right to a caring family and nurturing family. Although the convention is pro family, the child is no longer the property of the family, but recognized as a separate human being, who is entitled to respect for his or her human dignity.¹⁵¹

The African female child has more latitude under 1990 UN Convention on the Rights of the Child to seek for her rights protection. This is a legal binding treaty/convention which most African countries have ratified. Every female child in Africa can find redress in 1990 Child Rights Convention when her human rights are in jeopardy. Some African states have some practical efforts to meet up with the demands of the Convention. For example, some countries started free primary education for the children.

¹⁵¹ Cynthia Cohen, *supra* note 123

It is my view that notwithstanding the provisions of the 1990 UN Convention on the Rights of the Child and African states effort to meet up with the demands of the Convention, the African female child still has a lot of hurdles and valleys to cross before they can see their needs and rights achieved as envisaged by the 1990 Convention on the Rights of the Child.

The African Charter on the Rights and welfare of the Child 1999

The African charter on the Rights and welfare of the Child is one the most important instruments available to the African female child for the protection of her rights. This is a unique instrument in the sense that it was prepared by Africans and is devoted exclusively to African children. The primary aim of the charter was to address the peculiar and special needs of African children.

The African Charter on the Rights and Welfare of the Child was adopted by organization of African Unity (OAU) in 1990¹⁵² and it is modeled after the provisions of the United Nations' Convention on the Rights of the Child.¹⁵³

The Charter entered into force in 29th Nov. 1999 and it has a committee called the African Child's Right Committee, which has a supervisory role on the operation of the charter. This committee consists of eleven member

¹⁵² See The African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990)

¹⁵³ See generally 1990 UN Convention on the rights of the Child, supra note 137

African committee of experts on the rights and welfare of the child.¹⁵⁴ The function of the committee is akin to the Africa commission on human rights. It has been argued that an early evidence of the inadequacy of the normative content of the African Charter was the adoption of the African Child Rights Charter thirteen years later to specially provide for the protection of children as a particular class of persons that was not adequately protected under the Human Rights Charter.¹⁵⁵ The African Child Charter was African's enlistment to the ideals of the UN Convention on the Rights of the Child but with an African emphasis because of the perceived exposure of the African child "to particular set of dangerous circumstances."¹⁵⁶

The charter defines a child as human being below the age of 18 years. The charter recognizes the African child's unique and privileged place in the African society and that African children need protection and special care.¹⁵⁷ The charter recognizes the African child's rights to enjoyment of freedom of expression, association, peaceful assembly, thought, religion, and conscience.¹⁵⁸

¹⁵⁴ See African Charter on the Rights and Welfare of the Child 1990, supra note 152

¹⁵⁵ Vincent O. Nmehielle, "A decade in Human Rights Law: Developments of the African Human Rights System in the Last Decade" 11 Hum.Rts.Br.6 (2004)

¹⁵⁶ Id.

¹⁵⁷ African Charter available at <

http://en.wikipedia.org/wiki/African_Charter_on_the_Rights_and_Welfare_of_the_Child (last visited 12/02/07)

¹⁵⁸ See African Charter on the Rights and Welfare of the Child 1990, supra note 152

The charter attempts to protect the private life of the child and safeguard the child against all forms of economic exploitation and against work that is hazardous, interference with the child's education, compromise of his/her health and all forms of economic exploitation. The charter calls for protection against abuse and cruel treatment, negative social and cultural practices, all forms of exploitation or sexual abuse, etc.¹⁵⁹

The child monitoring mechanism of the African child charter has been criticized as needless duplication that should have been covered under the mandate of the African human rights commission.¹⁶⁰ The African child charter committee has been affected in its work because of lack of adequate resources which has been characteristic of African organizations.¹⁶¹

The recognition of the rights of the child as a component norm of the African system is a welcome development, but African states need to go beyond their mere ratification of the charter and do every thing they can to fulfill the dreams and objectives of the African child's charter. Conceding that African states have taken a great step by establishing the African Child Human Rights charter, a lot needs to be done in reality in many African states in order to protect the rights of the female child in Africa.

¹⁵⁹ Id.

¹⁶⁰ Vincent Nmehielle, supra note 155, See also Dr Cynthia Price Cohen, '16th Annual International law Symposium, 'Rights of Children in New Millennium:' Implementing the UN Convention on Rights of Child' 21 Whittier L Rev.95 (1999)

¹⁶¹ Vincent Nmehielle, supra note 155

In many countries of Africa, cultural prejudice is still overwhelmingly against the female child. In Africa, the birth of a female child is not considered a real blessing as opposed to the birth of a male child. In most communities in Africa, the female child is still considered a liability rather than an asset. A woman who gives birth to all female children is in the danger of her husband marrying another wife. Female education is not encouraged because of the notion that the girl will eventually marry and take her education to her husband's home.

The governments of African states should take practical steps to ensure that the treaties and covenants they have signed with the outside world on the rights and privileges of the female child are in actual fact translated into practical realities.

Women and female children are of the same value as men and male children. African governments owe them a duty of treating them as equal members of our society. It is not enough to sign treaties, covenants and protocols. Proper education and concrete efforts should be taken to redress the inequalities and discriminations suffered by African women and female children.

It is a fact that customs and norms are hard to change, but with concerted efforts, African governments and the world in general can reorient our

communities that women and female children are of the same value as men and male children.

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Chapter 4

The Plight and Reality of Women and Female Child Rights in Africa.

It is believed that in last two decades, Africa has made some significant progress with respect to human rights in general and women's right in particular.¹ Africa has accepted the general conception of human rights idea which has found full expression in 1948 universal declaration of Human rights.² It has been argued that while western and non western governments alike have embraced the Universal Declaration of Human Rights, both have failed to respect, implement and enforce the full range of human rights guaranteed in this declaration and other international charters.³ Many African states have signed and ratified a wide range of international human rights treaties on women and

¹ Adrien Katherine Wing & Tyler Murray Smith, *The African Union and the New Pan-Africanism: Rusing to Organize or timely shift: The New African Union and Women's Rights*, P.10, 13 *Transnat'l L.& Contemp. Probs.*33

² Catherine Powell "Symposium in Celebration of the fiftieth Anniversary of the universal Declaration of Human Rights: Introduction: Locating Culture, Identity, and Human Rights, P1, 30 *Colum. Human Rights L.Rev.*201, Spring 1999

³ Catherine Powell , P 2

children.⁴ It is believed that the widespread ratification of the African charter, which is African boldest step in human rights developments indicates a willingness on part of African governments to abide by international norms and suggest at least a formal commitment by African States to conform their national law and practice to international standard.⁵ Africa took another big step in women's human right when it ratified the African Women's protocol in 2003 or 5.⁶

These developments led to the impression that African states have indeed embrace the current norms and developments in the international human rights and human rights of women and female child in particular.⁷

A look into some current practices in Africa with respect to human rights women and female child in Africa, will make one to have some serious reservation on whether African states are indeed

⁴ Nsongurua J Udombana, Social Rights are Human rights: Actualizing the Rights to Work and Social security in Africa, P 10, 39 Cornell Int'l L. J. 181, Spring 2006, See also

⁵ Udombana P 10 (39 Cornell Int'l L. J. 181) See also Carlson Anyangwe, Obligations of States Parties to the African Charter on Human and Peoples' Rights, 10 Afr. J. Int'l & Comp. L. 625, 626 (1998)

⁶ See African Protocol on Women

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serious about women's rights and ready to fulfill their current obligations under international women and female child treaties. In this chapter, attempt will made to highlight some African practices on women which are contrary to the many international women's and female child rights instruments which many African states have ratified. Put simply, this chapter will try to examine African current culture as it affects the human rights of women and female child. At end of the highlights one will be able to judge whether African women and female child are enjoying their rights as stated in many international charters.

Women and Human Rights of Women in Africa:

The progress made in human rights development in Africa⁸ within the last two decades notwithstanding, the reality and protection of rights of women in Africa is at best very disappointing.⁹

Notwithstanding, African states promises, international pressures on African governments to protect the rights of women, or the

⁸ For example in Nigeria All the state High Court Laws in Nigeria provide for the enforcement of only customary laws that are not repugnant to Natural Justice, equity and good conscience. See example of S.3 Cap 60 Laws of Western Nigeria 1959; Cap 49 Laws of Northern Nigeria 1963.

⁹ Chrisof Heyns, The African Regional Human Rights System: The Charter' P2, 108 Penn St. L.. Rev.679, Winter 2004

signing of various international human rights treaties and instruments by African states, women's rights observances and respect is still a mirage and far from a reality.¹⁰ It has been argued that the "human rights abuses against African women currently encompass the whole , horrific gamut of violations, affecting the civil and political rights as well as their economic, social and cultural rights."¹¹ A quick look at some current African practices will shade light into the plight and reality of African women's rights.

African Customary Laws and Women:

Most African states have dual or parallel legal systems.¹² There is the customary or native law and the statutory or formal law. Most customary laws are unwritten and runs counter to the statutory or formal laws. It is in the customary law that African women suffer the greatest injustices or human rights abuses. Most of customary

¹⁰ Aderien Katherine Wing & Tyler Murray Smith, Symposium: The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift: The New African Union and Women's Rights P 3, 13 *Transnat'l L. & Contemp. Probs.* 33 (Spring 2003)

¹¹ Aderien Katherine Wing & Tyler Murray Smith, Symposium: The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift: The New African Union and Women's Rights P 3, 13 *Transnat'l L. & Contemp. Probs.* 33 (Spring 2003)

¹² Aderien Wing & other (13 *Trans L & Contemp. Probs* 33)

law are deep and long held traditional and cultural practices that subjugate women to their male or men counterpart.¹³

In Africa, customary laws are mostly unwritten and constantly evolving norms that exist in parallel with statutory law but derive legitimacy from traditions and customs rather from a government act. There are as many customary laws as there are tribal communities and each has its own nuances and specifics.¹⁴ It should be pointed out that because African traditional institutions are very diverse, women's rights and abuses vary from society to society.¹⁵ It has been asserted that “ while women play vital roles in the African economy and communities, they continue to be repressed by highly patriarchal culture, denied equal education, discriminated against in workplace, excluded from remunerated economic activity, and given legal minority status.”¹⁶

In most African nations and among the general public, fixed and

¹³ Fatnat Naa-Adjeley Adjetey (44 Am. U.L. Rev. 1351) Spring 1995

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¹⁵ Fatnat Naa-Adjeley Adjetey (44 Am. U.L. Rev. 1351) Spring 1995

¹⁶ AderienWing & others, P10, See also Fitnan Naa – Adetey, Religious and cultural Rights: Reclaiming the African women's individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture, 44 Am.U. L. Rev. 1351(spring 1995)

regressive attitude remained prevalent –that women in social life and within marriage had an inferior status.¹⁷

It has argued that African laws has so long relegated women’s rights to the “ private sphere of domestic resolution” leading to an apartheid of gender.”¹⁸ It is believed that modern African states government ability to redress the wrongs suffered by African women whether by their obligation to international human rights community by the signing of African Charter will be dependent on its willingness to compromise state sovereignty in tackling deeply rooted cultural and institutional biases against African women.¹⁹

Many African states incorporate customary law in their modern institutions and statutes; consequently customary law continues to thrive today. These laws perpetuate, reaffirm, and institutionalize discrimination against women on various fronts, including marriage, reproductive rights, domestic violence, access to

¹⁷Takyiwaa Manuh, African Women and domestic violence available at http://www.opendemocracy.net/article/5050/ghana_domestic_violence (last visted 6/09/08)

¹⁸ Aderin Wing & Co (13 Trans), See also J Oloka-Onyango, The Plight of the Larger Half: Human Rights , Gender Violence and the Legal status of Refugee and Internally Displaced Women in Africa, 24 Den.J.Int’l L.& Poly 349,393-394(1996)(quoting Ms Karen Poo, Deputy Executive Director of UNICEF on Oct. 17, 1994)

¹⁹ Aderine Wing & Co, P2

education, economic independence and political participation.²⁰

There is the belief that male dominated societies in Africa employ customary law to hold women captive.²¹

In many African communities, under customary law, most women do not own property.²² Despite, African states attempt to embrace the current developments on human rights of women, in most contemporary African communities and societies, women are still perceived as property in many African homes.²³ Furthermore many contemporary African communities and cultures continue to see women as property to be inherited or traded.²⁴ In African, women are subjugated to leviratic marriages or widow inheritance whereby “ a man is obliged to marry his brother’s widow, sororate marriage, whereby a wife who left her marriage or died before giving birth must be replaced by her sister and child marriage,

²⁰ Aderin Wing & Co P3, See also L. Amede Obiora, *New Skin, Old Wine: Engaging Nationalism, Traditionalism, and Gender Relations*, 28 *Ind. L.Rev.* 575,587-90(1995)

²¹ Fatnat Naa-Adjeley Adjete P 5(44 *Am. U.L. Rev.* 1351) Spring 1995, See also Rebecca J.Cook, *International Protection of Women’s Reproductive Rights*,24 *N.Y.U. J. Int’l L. & Pol.* 645,655(1992)

²² Aderin Wing & Co (13 *Transnat; l L & Contemp.Probs.*33), See also Uche U Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African women, Human Rights and the “New” International Trade Regime*, 20 *Berkeley Journal J Gender L & Just.* 75, 2005

²³ *Daily Guide* 2008, P 88, Reading for 6th of May 2008, Scripture Union Nigeria

²⁴ Aderin Wing *Supra* P3

whereby infant and adolescent females are betrothed to men of their parents choice.²⁵ For example, in some communities in Africa, female circumcision has continued because elderly women and men in various communities are insisting that the tradition must continue.²⁶

In many African communities, failure to follow or participate in this tradition can attract such punishment as social excommunication or abandonment. In most African communities, social acceptance and interactions are so important, that even the highly educated or “westernized” will not want to be inflicted with this type of punishment. The desire to be part of a community is so important that even the unwilling, nonconformist or reluctant are forced to conform to dictates of the community, lest they be ostracized or “excommunicated.”

In Africa, people have used traditions and customs to perpetuate women rights abuses and male domination. Tradition, the

²⁵ Aderien Wing Supra P 3

²⁶ What's Culture got to do with it? Excising the harmful tradition of Female Circumcision” P3, 106 Harv.L. Rev. 1944 (June 1993) –A field research in Nigeria on Female circumcision

reluctance to break with old practices that symbolize the shared heritage of a particular ethnic group—is the most frequent reason that diverse ethnic groups cling fiercely to practice that inflicts significant pain and suffering on women and children.²⁷

In many African countries, their legal system formally recognizes customary laws.²⁸ In Nigeria, the constitution allows recognition of customary laws in so far as they are not repugnant to equity and natural justice.²⁹ For example in Kenya, The Judicature Act provides that customs must be exercised in conformity with the constitution, statutes and other sources of formal law, adding that courts should be guided by customary law so far as it is “applicable and is not repugnant to justice and morality or inconsistent with any written law.”³⁰

In Kenya, a customary practice of wife inheritance and ritual cleansings is still practiced in some parts of Kenya. The original

²⁷ What has culture to do with it (106 Harv L. Rev 1944),

²⁸ ----- See also Chrisof Heyns, The African Regional Human Rights System: The Charter’ P2, 108 Penn St. L. Rev. 679, Winter 2004

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³⁰ Double standard-Kenya P12

practice of wife inheritance was a communal way of providing widows economic and social protection. Since widows were not entitled to inherit property in their own right, being inherited was a way to access land. An inheritor was supposed to support the widow and her children. Wife inheritance generally refers to long term union of a widow and a male relative of the deceased, and ritual cleansing typically refers to a short term or one time sexual encounter with a man paid to have sex with a widow. These practices reflect the common belief that women cannot be trusted to own property and beliefs that widows are contaminated with evil spirits when their husbands die.³¹ Wife inheritance and cleansing practices can take a number of different forms depending on country or clan. In Kenya, first there is non sexual wife inheritance, whereby the coat of inheritor is placed in a widow 's house over night to symbolically cleanse her. This generally applies to widows beyond child bearing age. Second, there is inheritance involving long term sexual relations, typically with a brother of the deceased, in

³¹ Double Standard—Kenya P12

what amounts to a marriage. Thirdly, there is a combination of cleansing and inheritance, whereby a widow first has sex with a social outcast, who is paid to have sex with her to cleanse her of her dead husband's spirits and is then inherited by a male relative of the dead husband.³² One women's rights advocate in Kenya says "women have to be inherited to keep any property after husband die. They have access to property because of their husband and lose that right when husband dies"³³ In Ghana, according to customary law which governed intestate succession for customary marriage until 1985, when a man dies without leaving a will, his self acquired property becomes lineage property and distributed accordingly, but when a wife dies, the husband possession and control of their property –land, their home their business is usually uninterrupted. The Law treats the property as belonging to him, not as part of her estate. In contrast when a husband dies, the property acquired by the couple during the marriage is subject to the rules of

³² Double Standard—P12

³³ Human Rights Watch interview with Wambui Kanyi, Collaborative Centre for Gender and Development, Nairobi, Oct, 27 2002, See also Double Standard: Kenya P 12

intestate succession, which under customary law, entirely disposes the widow.³⁴ In Ghana- although statues of English common law have superceded it in certain context, customary law still largely determines the requirement for marriage, the rights and duties of husband and wives, the obligation towards and custody of children, ownership of property acquired during marriage and many aspects of life in Ghana. This was radically changed in 1985 by a statue that was intended to protect more fully the interests of spouses particularly widows.³⁵ This statutory changes notwithstanding, under the current statutory regime, customary law still govern intestate succession for the vast majority of estates, govern both ownership of property acquired during marriages and composition of inheriting group including who accounts as legal wife, and distribution of estates in Ghana.³⁶ In summation, notwithstanding African states signing of African women rights protocol, which is African strongest attempt on women's rights, and its attempt to join

³⁴ Jeanmarie Fenrich & Tracy E Higgins, Special Report: Contemporary African Legal issues: Promises unfilled: Law and Culuture, and Women's inheritance rights in Ghana, P 7 25 Fordham Int'l L.J. 259, Dec 2001

³⁵ Jeanmaries Fenrich & Tracy E Higgins P 4.(25 Fordham Int'l L.J. 259 Dec 2001)

³⁶ Jeanmaries Fenrich & Tracy E Higgins Supra P 4

the women's rights movement of the 20th and 21st century, most of African customary laws still treat women as if they are still in the 10th and 15th centuries.

Women and Land in Africa. Land is another area where African women have continued to be denied their human rights contrary to many international human rights instruments which African countries and leaders have signed.³⁷ Land has a special place in social, economic and political life of many African societies. Women's ownership and rights to land are rooted in African traditions and customs. Generally, there is a very ancient and parochial belief in Africa that women don't own land. This belief has continued unabated in many Africa countries, notwithstanding, their signing of many international human rights instrument affirming women's right to own land.

In Africa before the colonial rule, land ownership and access took diverse forms, but they were largely vested in lineages, clans and families, with male exercising day to day control. Members of

³⁷ African charter, African Protocol, ----

a particular lineage or clan would seek rights to use land from those community or family leaders.³⁸

In Africa, land rights were typically only inherited by sons. Women rarely had full land rights. They were seen as secondary claimants, through male relatives. Before getting married, a woman might have access to her father's land but in many communities she lost that right with marriage on the assumption that she would then gain access to the land of her husbands or family. In most traditional African societies, When a husband dies, his land passes only to his sons or male inlaw if there were no sons.³⁹ According to

Ewelukwa, 'today many African women rarely own land, when they do their holding are frequently smaller, less accessible and less fertile than those of men'⁴⁰ The Food and Agricultural Organization reports that "In sub Africa women are particularly disadvantaged compared with men because they farm smaller plots of land with uncertain tenure. Women access to land is limited by legal and institutional factors such as legal discriminations against their ownership and inheritance of land. Although legislative

³⁸ Mary Kamini (See ref below)

³⁹ Mary Kamini Supra

⁴⁰ Uche U Ewelukwa, Centuries of Globalization; Centuries of Exclusion: African women, Human Rights and the "New" International Trade Regime, 20 Berkeley Journal J Gender L & Just. 75, 2005

changes permit women to own property, in many countries in the region traditions and customs continue to prevent women from having effective ownership”⁴¹

The advent of colonial system led to the introduction of western system of land tenure system in African states. At independence some Africa states proclaimed state, ownership of all land. In Kenya and South Africa private ownership existed alongside lineage or clan ownership. In Nigeria, clan and lineage ownership coexisted with both state and private ownership, especially in urban areas.⁴²

Many African countries recognize both “traditional rule of land ownership and western type statutory laws. In Nigeria, the state assumed ownership of all lands after independence in 1960. Although this weakened customary land tenure system, traditional or customary law still were recognized by government in areas of long established clan and lineage ownership.”⁴³ Such

⁴¹ Food and Agriculture Organization, of UN, The state of Food and Agriculture 2002 62(2002) available at <http://gilws05.fao.org/docreptest/fao/004/y6000e07.htm#Topofpage> , See also Uche U Ewelukwa, Centuries of Globalization; Centuries of Exclusion: African women, Human Rights and the “New” International Trade Regime, P 18, 20 Berkeley Journal J Gender L & Just. 75, 2005

⁴² Mary kamini Supra, See B.O Nwabueze, Nigerian Land Law, Nwamife Publishers Enugu, Nigeria 1982, See also Finine Fekumo: Principles of Nigerian Customary Land Law (2002), F & F Publishers, Port Harcourt

⁴³ Mary Kamini Supra

dual systems of western and traditional or religious system law have often disadvantaged women. A joint study by United Nations Development Program (UNDP) and World Bank in 2000 on gender and agriculture in Africa cite the example of Kenya Succession Act. The law stipulates that both men and women have equal rights to inheritance. But it also states that if the man dies without a will, the customary law of the group relating to land and inheritance will prevail. Since few men write will in Africa, and most Kenyan communities do not allow a woman to inherit property from her husband or father, the equality provisions of the Succession Act generally do not apply. In reality, the study argues inheritance rights for women in Kenya do not exist.⁴⁴

This law type of Kenya law which is common in many African nations obviously gives special and superior rights to men and places women and widowers as second class citizens.

According to Kwasi Wiredu, in traditional times in Africa land was regarded as so important an issue that matters relating to its

⁴⁴ Mary Kamini Supra

ownership were not left to individual lineages alone.⁴⁵ The right to land was one of the deepest bases of attachment to a particular location.⁴⁶ In most African states and nations, women can't inherit land from their parent. Land inheritance in most African communities is patrilineal. A married woman can not inherit land from her parents, since it is assumed that her husband's family will provided for her.⁴⁷ As An-Na'im puts it, in many African countries, ownership of land is overwhelmingly male dominated. Customary norms still govern inheritance rights. Family land often go to a male child of a deceased person. African cultures regards a male child as perpetuating the family lineage and therefore keep the land within the family. Girls are viewed in terms of marriageability, that's is they destined to leave their respective families and get married.⁴⁸ In most African Culture, family land is

⁴⁵ Kwasi Wiredu, in "An Akran Perspective on Human Rights" P 254 in Abdullahi Ahmed An-Na'im (ed) Human Rights in Africa :Cross- Cultural Perspective

⁴⁶ Kwasi Wiredu Supra P 254

⁴⁷ Double Standards: Women Property Rights violations in Kenya P7 available at www.hrw.org, Vol15, No5(A) March 2003

⁴⁸ Abdullahi A An- Naim,(Ed) Cultural Transformation and Human Rights in Africa.P 111

shared among the sons to the exclusion of female children.⁴⁹ As Abby puts it” “land and housing in most traditional African culture is regulated by customary law. Although varying to a certain degree from culture to culture, women are generally prohibited by customary law from owing or inheriting land or other property. Land ownership is traditionally passed through male heirs. A woman’s right to access and use land has customarily been defined solely by her relation to men. While married, a woman enjoys the use of land belonging to her husband; while single she has access to that of her father or guardian. When a husband or father dies, a woman’s right to land is suddenly placed in jeopardy.”⁵⁰ It should be pointed out that in some African cultures, unmarried female child could get some land, but not on the same amount or proportion with male.⁵¹ Men typically control land allocation. In Nigeria for example, the land is shared among

⁴⁹ Abby Morrow Richardson: Women Inheritance Rights in Africa: The Need to intergrate Cultural understanding and Legal Reform, P2 “11 Hum.Rts.Br.19 (Winter 2004)

⁵⁰ Abby Morrow Richardson: Women Inheritance Rights in Africa: The Need to intergrate Cultural understanding and Legal Reform, P 2-3 “11 Hum.Rts.Br.19 (Winter 2004)

⁵¹ Double Standards: Women Property Rights Violation in Kenya P 7 available at www.hrw.org

the male to the exclusion of female children.⁵² It has been argued that a considerable hurdle to the realization of women's rights in Africa is the pervasive denial of a woman's right to inherit land and other property.⁵³ It must be conceded that in many African societies, women who have the means or independent means can purchase land if they so wish, but this respect a small percentage of the entire African women.⁵⁴ However it should be noted there are some African communities where women can't even purchase land even if they have the resources to purchase it.⁵⁵

It has been reported by experts that women contribute about 70 % of food production in Africa. They also account for nearly half of all farm labor and about 80-90 per cent of food processing and transport in Africa.⁵⁶ This notwithstanding they continue to be denied ownership and equal management/access of land with

⁵² Reginald Akujobi Onuoha, Discriminatory Property inheritance under customary law in Nigeria: NGOs to the Rescue, *The International Journal, of not -for-Profit Law*, Vol.10 Issue 2, April 2008 available at : http://www.icnl.org/knowledge/ijnl/vol10iss2/art_4.htm (last visited 8/08/08)

⁵³ Abby Morrow Richardson, Women 's inheritance Right in Africa: The Need to integrate cultural Understanding and Legal Reform, P2 ,11 *Hum. Rts. Br.* 19 , Winter 2004

⁵⁴ Abdullahi P 110, See also

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⁵⁶ Mary Kimani, Women Struggle to secure Land Rights in Africa(Hard Fight for access and decision making power) available at <http://www.un.org/ecosocdev/geninfo/afrec/vol22no1/221-women-struggle-to-secure-land-rights.html>

African men. In many African states, women often lack rights to land, Land rights tend to be held by men or kinship groups controlled by men, and women have access mainly through a male relative, usually a father or husband.⁵⁷ In some communities in Africa, it is reported that women are routinely obliged to hand over the process of any farm sales to a male and have little say over how those earnings are used.⁵⁸ Stories of women and widows land deprivations abound in many Africa countries. For example, “Felitus Kures is a widow living in Kapchorwa, northwestern Uganda. Her husband’s death left her solely responsible for their children. To meet their needs, she depended on the small piece of land she and her husband farmed together. But just months after his funeral, her inlaws sold her husband’s land without her knowledge.⁵⁹ The case or plight of Ms kures’s is common occurrence in Africa. In most cases, many never regain

⁵⁷ Reginald Akujobi Onuoha, Discriminatory Property inheritance under customary law in Nigeria: NGOs to the Rescue, *The International Journal, of not –for-Profit Law*, Vol.10 Issue 2, April 2008 available at : http://www.icnl.org/knowledge/ijnl/vol10iss2/art_4.htm(last visited 8/08/08

⁵⁸ Mary Kimani Supra

⁵⁹ Mary Kimani Supra

access or right to matrimonial land lost after divorce or the death of a spouse.⁶⁰

In Kenya, according to Human Rights Watch report, women's rights property are unequal to those of men in Kenya. Their rights to own, inherit, manage and dispose of property are under constant attack from customs, laws, and individual—including government officials—who believe that women cannot be trusted with or do not deserve property. Many women are excluded from inheriting land, evicted from their lands and homes by in-laws, stripped of their possessions and forced to engage in risky sexual practices in order to keep their property.⁶¹ When they divorce or separate from husbands, they are often expelled from their homes with only their clothing. Married women can seldom stop their husbands from selling family property. A woman's access to property usually hinges on her relationship to a man. When the relationship ends, the

⁶⁰ Mary Kamini Supra

⁶¹ Double Standards—Kenya P1

woman stands a good chance of losing her home, land, livestock, household goods, money and other property.⁶²

Another widow, according Human Rights Watch shares her plight in this form, “When Emily Owino’s husband died, her inlaws took all her possessions-including farm equipment, livestock, household goods and clothing. The inlaws insisted that she be “cleansed” by having sex with a social outcast, a custom in her region, as a condition of staying at home. They paid a herdsman to have sex with Owino, against her will and without a condom. They later took over her farmland. She sought help from the local elder and chief, who did nothing. Her inlaws forced her out of her home, and she and her children were homeless until someone offered a small leaky shack. No longer able to afford school fees, her children dropped out of school.” (Interview with Emily Owino Nov 2 2002

A complex mix of cultural, legal and social factors underlies women’s property violations in Africa. In many Africa Kenya constitutions prohibits discrimination on the basis of sex, but

⁶² Double standards Kenya P1

undermines this protection by condoning discrimination under personal and customary laws. The few statutes that could advance women's property rights differs to religious and customary property laws that privilege men over women.⁶³

It is reported that in Zambia more than one third of widows lost access to family land when their husbands died.⁶⁴

It is reported that the spread of HIV/AIDS and the stigma associated with the disease have also made women's right land ownership more precarious in Africa. Widows of men who die from disease have often been accused of bringing the malady into the family, possibly leading to confiscation of their land and property.⁶⁵ According to Human Rights Watch report on HIV/AIDS and women in Kenya shows the precarious women land ownership and subordinate status of women in Africa.⁶⁶

⁶³ Double Standards—Kenya P 2, See also Christopher Heyns, *The African Regional Human Rights System: The African charter*, supra

⁶⁴ Mary Kamini *Supra*

⁶⁵ Mary Kamini

⁶⁶ Double Standards: Women's Property Rights violations in Kenya (HRW watch Report Vol 15, No 5 (A) March 2003

When women loss access to their land in Africa as result of their husband's death, they and their children are forced to survive on society's margins. When they loss access to land, they are forced to start selling food on the streets or do all kinds of odds things to survive.⁶⁷ According to one UN officer “ They often lose access and must get by selling food on the streets. They have no place to sleep. This creates problem of food security”⁶⁸

It without controversy that quality of women's lives in Africa and the world in general can improve by according them more decision power making over land. In Botswana and Swaziland it was found that sexual commerce and risky behaviors declines dramatically when women have secure assets and property rights.⁶⁹

To overcome the shortcoming of the African customary land law rights, it has been suggested to give individuals land title or land titles to individuals. A land rights researcher at Havvard law school, argues that government in East and South Africa followed

⁶⁷ Mary Kamini Supra

⁶⁸ Mary Kamini Supra

⁶⁹ Mary Kamini Supra

the course of land titling, in effort to help women secure legal rights to property that they owned or inherited.⁷⁰

In Africa, as the legal land title holder, the man can do whatever he wants with the land. Many men in Africa just sell the family land without informing their wives.⁷¹ It has been suggested that one way to give women guaranteed access to land is to separate formal land ownership of land from ability to use it. Thus while the land may be registered in the name of a man, he would be barred from selling it without the consent of his wife or wives or other heirs. The problem with suggestion and other suggestions is that in African having good policy is not the problem, the issue is on the implementation or enforcement of policy. For example, Ghana has a “head of family accountability law” that is intended to ensure that family property cannot be sold without others being informed, giving consent or benefiting from proceeds.⁷² This

⁷⁰ Mary Kamini

⁷¹ Mary Kamini *supra*

⁷² Mary Kamini

notwithstanding, women in Ghana have continued to suffer from land deprivation and ownership.

These ideas are good, but most of these ideas are easier proposed than implemented. First they require change in law. Activists for women's land rights have tried to have laws passed in many Africa countries with little or mixed results.⁷³ In Uganda, where there was very active lobbying by Uganda Land Alliance for both men and women to be listed in title deeds as co-owners, when the bill came to parliament, it repeatedly failed each time it made to the parliament. The repeated failure of the bill was in part due to resistance by private sector.⁷⁴ It has been argued that in Africa where progressive laws have passed, things do not necessarily get easier. In Mozambique, civil society groups helped craft a law in 1997 entitling women to secure access to land and property. According to Lorena Magane of Rural Association of Mutual Support, "We saw the land law as a victory." But a report on gender and land in Mozambique, says that while the law was fine

⁷³ Mary Kamini

⁷⁴ Mary Kamini Supra

in theory, implementing it proved very difficult because traditional courts, which most rural women use, still consider the man the head of the household and therefore the rightful authority over land.⁷⁵ In Zimbabwe, the government amended the inheritance law to make the surviving spouse, whether male or female the legitimate heir, but it has been argued that “lack of information means many women in rural areas are not aware of it.”⁷⁶ It is reported that in Ghana in 1985 Intestate Succession Law and the Head of Household Accountability Law were both intended to create greater security for widows and children. If a man died without a will, the succession law decreed that property would be equally divided and distributed among his widow, children and other members of extended family. But an FAO study in Ghana’s Upper Volta Region found that few women knew of either law and that customary practices continued to determine inheritance. This left many women without access to land after the death of their

⁷⁵ Mary Kamini

⁷⁶ Mary Kamini Supra

partner.⁷⁷ It is generally believed that progressive laws in Africa suffers from lack of appropriate implementations. In countries where lobbies are trying to get the governments to pass progressive laws, there is still a lot of resistance. Some have argued that, what women need is for their basic rights to be entrenched in the constitutions and for equal rights of property ownership to be clearly stipulated in the law.⁷⁸ This notwithstanding, in many Africa African countries where this has been done, women continue to suffer but some argue that it is necessary to bring all inheritance and land law into harmony with the constitutions, so that they can say the same thing.⁷⁹ Furthermore it suggested that institutions responsible for implementing the land laws need to operate equitably, be friendly to women and operate not only in cities. In most cases in Africa the law is highly centralized, which does not agur well for easy access for local women. Legal institutions responsible for implemtenting the land laws need to

⁷⁷ Mary Kamini

⁷⁸ Mary Kamini

⁷⁹ Mary Kamini, Reginald Akujobi Onuoha, Discriminatory Property inheritance under customary law in Nigeria: NGOs to the Rescue, *The International Journal, of not-for-Profit Law*, Vol.10 Issue 2, April 2008 available at : http://www.icnl.org/knowledge/ijnl/vol10iss2/art_4.htm (last visited 8/08/08)

operate equitably, be friendly to women and operate not only in cities.⁸⁰ But it has argued that present system in most countries are very centralized and it is men who are incharge of the dispute resolution systems.⁸¹ Activists who are fighting to introduce or strengthen laws intended to give women more access to land are combating social norms and practices that stand in their way. It has been argued that the most important thing is to sensitize women on their rights and what they could do or where they could get help.⁸² A general cultural change is so vital if African cultural practices are to changed.⁸³ There is need for African men to change their orientation on women land ownership and need for them to accept men and women as co-equal in land ownership. It seems that African men don't seem ready and very sensitized to the idea that women can be decision makers when it pertains to land. The paradox is that "women 's labor is key to productivity in Africa,

⁸⁰ Mary Kamini

⁸¹ Mary

⁸² Mary Kamini Supra

⁸³ MARY kmini, Reginald Akujobi Onuoha, Discriminatory Property inheritance under customary law in Nigeria: NGOs to the Rescue, The International Journal, of not -for-Profit Law, Vol.10 Issue 2, April 2008 available at : http://www.icnl.org/knowledge/ijnl/vol10iss2/art_4.htm(last visited 8/08/08

yet land is literally out of reach for African women and African males do not seem to see this as a problem.⁸⁴

It has been argued that to address the land rights in Africa, you need to address the unequal power relations within families. Unless you change the power relations, the legal definition of who has rights may not make much of a difference. These norms are very deep and gender relations are the most difficult social relations to change.

Family:

In Africa, the family is the strongest social institution and transmitter of norms and values. A good discussion on the plight of women in Africa cannot be complete without discussing the place of women in African families.

It has been strongly advocated and argued that discussion on solving women rights abuses in Africa cannot be achieved without improving or stopping the abuses they suffer in their families.⁸⁵ In many African societies the concept of family consist of all people

⁸⁴ Mary Kamini

⁸⁵ Aderien & other

who trace their descent from common ancestor.⁸⁶ In Africa, the family and community is the most significant transmitter and guardian of norm.⁸⁷ According to Connie Parker, “The family in Africa ---is connected by blood, marriage, adoption, and shared cultural---and psycho-social tools for adaptation. The role of families in social support, moral judgements--- and as the unit carrying important values and practices being used by communities today is clear. The African family, where African values and traditions are reproduced and transmitted, is one that is very real.”⁸⁸

As Aderien & others puts “many of the most severe violation of African women’s human rights are rooted within the cultural and family system, bolstered by community norms of male privilege and frequently justified by religious doctrines or appeals to custom

⁸⁶ Fitnat Naa –Adjetei (44 Am.U.L..Rev.1351(spring 1995), See also Kwasi Wiredu, An Akan perspective of Human Rights, in Human Rights in Africa: Cross –Cultural Perspectives,243,248(Abdullahi A An-Na’im & Francis M Deng eds., 1990)

⁸⁷ Corninne Parker “Understanding the socialcultural and Traditional Context of Female Circumcision and the Impact of the Human Rights Discourse” P 225 in Obioma Nnaemeka and Joy Ngozi Ezeilo “Engendering Human Rights” Cultural and Socioeconomic Realities in Africa” Palgrave Macmillan 2005

⁸⁸ Corninne Parker “Understanding the socialcultural and Traditional Context of Female Circumcision and the Impact of the Human Rights Discourse” P 225 in Obioma Nnaemeka and Joy Ngozi Ezeilo “Engendering Human Rights” Cultural and Socioeconomic Realities in Africa” Palgrave Macmillan 2005

and tradition.⁸⁹ A good example of this will be Dr Irene Modupeola Thomas story in Nigeria, shortly after she returned to Nigeria from London after medical education. Dr Thomas was practicing Gynecologist at Massey Street Maternity Hospital Lagos. One day she came face to face with a 26-year old woman who was 26 weeks pregnant and had just been subjected to “circumcision” by excision of the clitoris and part of the labia minora. The operation was botched and the young girl was bleeding to death. When she asked the young girl, why she allowed them to circumcise her. With tears coming out of her face, she said “I could not do anything” On further her inquiry, she realized although circumcision was not customary or mandatory for the young woman ethnic group, her husband mother insisted that grand child could not be born without prior excision of the pregnant woman and the husband could not oppose his mother.⁹⁰

⁸⁹ AderienWing & others, See also Fitnan Naa – Adetey, Religious and cultural Rights: Reclaiming the African women’s individuality: The Struggle between Women’s Reproductive Autonomy and African Society and Culture, 44 Am.U. L. Rev. 1351(spring 1995)

⁹⁰ Claude E Welch Jr, Protectinh Human Rights in Africa(Strages and roles of NGOS) P 98

According to Diana, “Women’s human rights activists do indeed emphasize the idea of personal autonomy, precisely as a means of addressing the oppression of individual women within the family unit where women’s rights are frequently violated through domestic violence, restrictions to resources and in matters of marriage, divorce and property rights”⁹¹ According to Diana, “although attention to the realm of family in Africa is central to any discussion of women’s rights, this focus should not distract from other sources of abuse against women which occur outside the local cultural context. To place a spotlight on the family as the exclusive sources of discrimination against women puts disproportionate blame on this particular cultural domain, to the exclusion of other violations of women’s integrity.”⁹²

The place of family in African communities cannot be overemphasized. It is the bedrock of traditional and modern African states. It should be pointed out that the family is such

⁹¹ Diana Fox “Women’s Human Rights in Africa: Beyond the debate over universal or relativity of Human Rights” available at <http://web.africa.ufl.edu/asq/v2/fox> last visited 6/01/08

⁹² Diana Fox Supra

an intergral and most important institution Africa, that in most cases many African including men are more likely to follow the views or norms of their family over their personal views.

It should be pointed that “women’s struggle for human rights in Africa often position them in opposition to family and social networks where their roles and rights have been defined; however because of the sanctity of family, they often choose not to seek empowerment and freedom which sets them against their kin.”⁹³

According to Diana it is crucial to find ways for women to be protected as individuals against familiy abuses but doing so should not mean that family will be undermined as an important social institution.⁹⁴ As Coomaraswamy puts it, “the family is the place where the individuals learn to care, to trust and to nurture each other. The law should protect and privilege that kind of family and no other.”⁹⁵ A good example where family has a strong role in the life of African woman is in their reproductive rights. For example

⁹³ Diana Fox, *Supra*

⁹⁴ Dina Fox, *supra*

⁹⁵ Coomaraswamy, Radhika, “To Bellow like a Cow: Women, Ethnicity and the Discourse of Rights,” pp52-53, in Cook, Rebecca J., ed., *Human Rights of Women: National and international Perspectives*: Philadelphia: University of Pennsylvania Press, 1994., See also Diana Fox *supra*

the reproductive labor of a woman is considered a duty to the family. This tradition has become a major form of discrimination against women in matters relating to family relations. In traditional African women don't have the right to decide the number of children she will have, the spacing of her birth, whether or not she will have some form of birth control are all determined by the desires of her husband or the family.⁹⁶ In many African countries, family relations are regulated largely by customary law, traditional law indigenous to the region, though varying in particular among ethnic groups and communities.⁹⁷ For example, The practices of female circumcision in Africa has continued because women don't want to be excluded from their families, As Harvard Law report in Nigeria puts it, "In some communities circumcision is the traditional ritual that confers full social acceptability and integration into the family upon the female. The ability to identify with one's heritage and enjoy recognition as a full member of one's ethnic

⁹⁶ Fitnat Naa- Adjeley Adjetey Supra P 5

⁹⁷ Jeanmaries Fenrich and Tracy E Higgins, Special Report: Contemporary African Legal Issues: Promise unfulfilled: Law, Culture and Women's inheritance Rights in Ghana, P 4, 25 Fordham Int'l L.J. 259 Dec 2001

group, with just claim to its social privileges and benefits, is very important to most African families.⁹⁸ For many women and and young girls, circumcision statisfies this deep seated need to belong and ensures that they are not ostractized.⁹⁹ In Africa, kinship is extremely important concept, the entire community is considered one family, whether they are blood relative or not. Attachment to and respect for family, community beliefs, and ancestral beliefs are strong.¹⁰⁰ Family system in Africa, although the bedrock of Africa societal and political system, is with doubt the root cause and promoter of African women's rights problem. Conceding, that every society needs a strong family system, there is need for African families to be receptive to the equality of women. Furthermore ,African family system can still be conservative while at same time be welcoming and accommodating on the rights and privileges of women. Women

⁹⁸ Whats culture to do with it(106 Harv L Rev 1944) P 3

⁹⁹ What culture to do with it(106 Harv L Rev 1944) P 3

¹⁰⁰ Corninne Parker "Understanding the socialcultural and Traditional Context of Female Circumcision and the Impact of the Human Rights Discourse" P 228 in Obioma Nnaemeka and Joy Ngozi Ezeilo, "Engendering Human Rights" Cultural and Socioeconomic Realities in Africa" Palgrave Macmillan 2005, See also Naa-Adjeley Adjetey , Fitnat, Reclaiming the African Woman's Individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture " The American University Law Review 44 (4) 1351-1382

should not to be treated as unequal partners and wives should not be see as husband property which can be used any how and any time.

African Women and Domestic Violence:

African progress on women rights notwithstanding, African women continues to suffer a lot of domestic violence.¹⁰¹ Wife battering is, which is one of the commonest type of domestic violence in Africa is calculated act of violence and unrestrained terror by men against women in the family.¹⁰² It is believed that inferior and unequal position of African women has contributed to increase women abuse and domestic violence against women.

It has been argued that customary and religious perception of women as marital property in Africa has led men to abuse African women. This has even led African women to tolerate domestic abuse at hands of male.¹⁰³ In a survey on domestic violence

among Nigerian women, it was found that domestic violence or

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¹⁰² Mojisola F Taiamiyu P “ Prevalence of Wife Battering among workers in a Nigerian University: issues in Wiomen;s Right” P261 in Obioma Nnaemeka and Joy Ngozi Ezeilo “ Engendering Human Rights” Cultural and Socioeconomic Realities in Africa, Palgrave Macmillan 2005

¹⁰³ Fitnat-Naa-Adeley Adjetey P4

wife battering is very common in Nigeria even among Nigerian educated men.¹⁰⁴

In South Africa, it is reported or admitted that violence against women is at very high levels, yet remains very seriously underreported. As in most African countries constitution, South Africa constitution even grants the right to be free from public and private violence.¹⁰⁵ This notwithstanding, customary cultural norms permitting violence against women as male property makes it difficult to eliminate this practice.¹⁰⁶ Although activists working for women around the world have won the adoption of international agreements as well as national laws in some countries that protect women against domestic violence. Millions of women in Africa continue to suffer in the hands of their male partners and counterparts. In 2005, the world health organization found that half of women in Tanzania and 71 per cent of women in Ethiopia's rural

¹⁰⁴ Mojisola F Taiamiyu P "Prevalence of Wife Battering among workers in a Nigerian University: issues in Women's Right" P261 in Obioma Nnaemeka and Joy Ngozi Ezeilo "Engendering Human Rights" Cultural and Socioeconomic Realities in Africa, Palgrave Macmillan 2005

¹⁰⁵ See S/A constitution, Art 12(1) (c)

¹⁰⁶ Fitnat Naa-Adeley P4

areas reported beatings or other violence from husbands or other intimate partners. According to Amnesty International, one woman in south Africa is killed by her husband or boy friend every six hours. In 2003 almost half of all homicides reported in Kenya were caused by domestic violence.¹⁰⁷ The African Platform for Action (Dakar Declaration) of 1994 was a landmark document to highlight the problem of violence against women in Africa. Before this however, such violence has often gone unreported and until recently there were across Africa few supporting piece of legislation or official practice that could be used to challenge it.¹⁰⁸ Conceding that several African states had signed or ratified international conventions and treaties such as the convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979 or African Charter on Human Rights, African Protocol on Women, but many of these instruments have

¹⁰⁷ Mary Kimani, (United Nations African Renewal in Accra) Stopping Violence Against Women In Africa, available at <http://allafrica.com/stories/printable/200708201121.html> (last visited 6/09/08)

¹⁰⁸ Takyiwaa Manuh, African women and domestic violence available at http://www.opendemocracy.net/article5050/ghana_domestic_violence (last visted 6/09/08)

not been incorporated into domestic law.¹⁰⁹ For example, in Nigeria a treaty does not become part of Nigeria domestic law even after it has been ratified by Nigeria government. It has to be enacted into the domestic law before the treaty can take effect.¹¹⁰ To this effect although Nigeria, has ratified CEDAW since 1985, until this 2008 CEDAW has not be domesticated into Nigerian laws and CEDAW cannot be used for domestic violence case prosecution or trial because of its non domestication into Nigerian law.

The phenomenon of domestic violence is wide spread in Africa and it is one aspect of the discriminatory practices and unequal relations women in Africa face. It is believe that constant war situations in Africa has also led to increase of domestic violence against women. In many war torn countries of Africa, women have been subjected to systematic assault and abuse.¹¹¹

¹⁰⁹ Takyiwaa Manuh, African Women and domestis violence available at http://www.opendemocracy.net/article/5050/ghana_domestic_violence (last visted6/09/08)

¹¹⁰ See Nigerian Constitution ----

¹¹¹ See war report in Congo, Liberia, Sundan and Sierria Leone at www.---

Efforts to legislate or make good policy rules on this issue has been hindered in many African country. In Nigeria for example, a draft domestic violence bill by Legislative Advocacy Coalition on Violence Against Women has been lodged in the lower House of parliament(House of Rep) since 2003, but has not been listed in the order for hearing. The provision on marital rape, which some view as western against the culture of Nigeria has been invoked to explain the slow progress of the bill, to allow the bill to pass into law. The contradiction here is that Nigeria has already ratified the protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, which prohibits marital rape without any reservations.¹¹² In most Nigeria communities, wife battering goes unrecognized, unreported and underreported.¹¹³ One in ten wife battering incident is unreported. A report of that examined domestic violence in two semi-rural communities in Nigeria, shows that wife battering is prevalent, batterers were

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¹¹³ Mojisola F Taiamiyu P “ Prevalence of Wife Battering among workers in a Nigerian University: issues in Women;s Right” P261 in Obioma Nnaemeka and Joy Ngozi Ezeilo “ Engendering Human Rights” Cultural and Socioeconomic Realities in Africa, Palgrave Macmillan 2005

aged 22-41 years and battering occurred in families with at least four children.¹¹⁴

The Ugandan situation is another good example. In December 2003, a domestic relation bill was tabled before parliament, containing a host of provisions to deal with discriminatory laws and practices in marriage, divorce, inheritance, property ownership and violence and equality within marriage and family. When the bill reached the committee stage in 2005, it generated massive controversy in the country and media. This led to a demonstration in 29th of March 2005 by hundreds of women in the streets of Kampala. They described the bill as a “coup against family decency” and swore to oppose its passage. A few weeks later, the parliament shelved the bill for more extensive consultations. Later in 2006, President Yoweri Museveni declared during the election in 2006 that “the domestic –relation bill was not urgently

¹¹⁴ Mojisola F Tiemiye :” “ Prevalence of Wife Battering among workers in a Nigerian University: Issues in Women’s Rights” P 261 in Obioma Nnaemka and Joy ngozi Ezeilo Engendering Human Rights (Cultural and Socioeconomic Realities in Africa, Palgrave Macmillan 2005, See also Omorodion, I.F., The Social Context of Wife Battering, Zaria Nigeria, 1992 Tamaza Publishing Company, Kalu W.J, Battered Spouse as a Social Concern in Work with Families in Two Semi Rural Communities of Nigeria” Journal of Family Violence, 8 361-373 (1993)

needed”and the debate was effectively closed.¹¹⁵ A more positive legislation outcome was witnessed in Ghana. Here a domestic violence bill was subjected to more than three years of extensive national consultations led by the government ministry of women’s and children affairs; the Domestic violence coalition formed to support the passage of the bill, also played a key role. There was early resistance from surprising source, the then woman minister of women affairs, who argued that the law would destroy families. Those opposed to bill portrayed it and its gender activists supporters as purveying foreign ideas that threatened Ghana cultural practices and in particular the sanctity of marriage and men’s right within it.¹¹⁶ In 2007, The UN Development fund for Women found that only 17 countries in sub-Shara Africa and total of 89 worldwide had adopted laws specifically outlawing domestic violence. Among them is South Africa, Where Domestic Violence Act was adopted in 1989 when there was the lowest number of

¹¹⁵ Takyiwaa Manuh, African Women and domestis violence available at http://www.opendemocracy.net/article/5050/ghana_domestic_violence (last visted6/09/08)

¹¹⁶ Takyiwaa Manuh, African Women and domestis violence available at http://www.opendemocracy.net/article/5050/ghana_domestic_violence (last visted6/09/08)

female parliamentarians since end of apartheid in 1994. In New York during 2007 session of the UN Commission on the status of women, Kenya Member of Parliament Njoki Ndugu spoke about the challenges of getting parliaments to pass law addressing the situation of women in Kenya. According to Ndugu, “The motion to amend the sexual violence act had been introduced several times since independence and failed; each time it was seen by the male members of parliament as giving too much power to women.”¹¹⁷

This notion shows how women and women’s issues are treated in many Africa countries.

Women And Female Genital Mutilation (FGM)

Many female children and women in Africa still suffer from female circumcision or female genital mutilation. This is very contentious issue with respect to plights of women in Africa.¹¹⁸

According to Ifeyinwa, “While there has always been debate about the hows, whys and of the effects of the procedure, in recent times

¹¹⁷ Mary Kimani, (United Nations African Renewal in Accra) Stopping Violence Against Women In Africa, available at <http://allafrica.com/stories/printable/200708201121.html>(last visited 6/09/08)

¹¹⁸ Ifeyinwa Iweriebor, Brief Reflections on Clitorodectomy P2 (Black Women in Publishing New York) available at <http://www.ccsu.edu.Afstudy/upd3-2.html>(last visted on 6/08/08)

the genital surgery of women and girl children has been embroiled in contentious controversy.”¹¹⁹ Female genital mutilation or circumcicion is a very long or old age cultural practice in Africa. It has been argued that it more of a cultural practice than a religious practice.¹²⁰ It is believed that throughout much of Africa, social and cultural norms remain strongly in favor of female circumcicion.¹²¹ In Africa age of performing female circumcicion varies within localities and communities.¹²² In most cases it ranges from birth to age 15.¹²³ It is believed that circumcicion may be performed during infancy, during adolescence or even during a woman’s first pregrancy, the procedure is usually carried out on girls between ages four and 12. The operation is generally performed by a traditional birth attendant or an elder village woman.¹²⁴

¹¹⁹ Ifeyinwa Iweriebo Supra

¹²⁰ Female Genital Mutlilitation: available at <http://members.tripod.com/~Wolvesdreams/FGM.html>(last visited)

¹²¹ Corninne Parker “Understanding the socialcultural and Traditional Context of Female Circumcision and the Impact of the Human Rights Discourse” P 225 in Obioma Nnaemeka and Joy Ngozi Ezeilo “Engendering Human Rights” Cultural and Socioeconomic Realities in Africa” Palgrave Macmillan 2005

¹²² Obiora Supra P5

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¹²⁴ Frances Althaus, Supra

Female circumcision is a cultural practice that is well ingrained in many African cultures, and it defines members of these culture and in order to stop this practice one must first eliminate the cultural beliefs that surrounds this practice.¹²⁵ In many Africa communities, it is believed that a girl will not become a woman without the ritual of female circumcisiom.¹²⁶ FGM or circumcision is the partial or total cutting away of the external female genitalia. It generally one of the elements of rite of passage preparing a young girl to womanhood or marriage.¹²⁷ Generally, there are three or four types of female genital excision but the practice vary within communities and ethnic groups. First is clitoridectomy, part or all of the clitoris is amputated, while the second often refferd as excision, both clitoris and labia minora are removed. Infibulation, the third type, is the most severe-after excision of the clitoris and labia minora, the libia majora are cut or scraped away to create raw

¹²⁵ Female Genital Multilation supra at(members.tripod.com), See also John Tochukwu Okwubanego, "Female circumcision and the girl child in Africa and the middle East : the eyes of the world are blind to the conquered.", *International Lawyer* 33 (1) Spring 1999 : 159-187

¹²⁶ Female Genital mutilation available (supra) at (members.tripod .com)

¹²⁷ Frances A Althaus: Female Circumcision: Rite of Passage or Violation of Rights,?(International Family Planning Perspectives ,Vol 23,No 3,Sept 1997, Special Report) available at <http://www.guttmacher.org/pubs/journals/2313097.html>

surfaces which are held in contact until they heal, either by stitching the edges of the wound or by tying the legs together. As the wounds heal, scar tissue joins the labia and covers the urethra and most of the vaginal orifice, leaving an opening that may be as small as a matchstick for the passage of menstrual blood.¹²⁸

It is important to note not all groups in Africa practice female circumcision. It is practiced in 28 of 53 African countries.¹²⁹

Many practitioners of FGM see it as an integral part of their cultural and ethnic identity and some perceive it as a religious obligation.¹³⁰ To most Africans, FGM has nothing to do with human rights or international women's rights of women. In many African countries, female circumcision is seen as a cultural and social life practice, and as such it should not be controlled by international politics or rules. This is a good case of where cultural practice clashes with international human rights. Many African opponents of western views on female circumcision believe that external

¹²⁸ Frances Althaus Supra, See also *Eliminating Female genital Mutilation: An interagency statement* available at http://www.unifem.org/attachments/products/fgm_statement_2008_eng.pdf (last visited 8/31/08)

¹²⁹ Dr Adeline Apena Supra

¹³⁰ Frances A Althaus, Supra

interference or interest on this cultural practice is a clear case of western domination, arrogance and cultural imperialism.¹³¹

It must be stated that some Africans have argued against the use of the word mutilation as offensive to a vital aspect of African cultural identity.¹³² According to Obiora, “Female circumcision is embedded in an intricate web of habits, attitudes and values and along with having both functional and symbolic connotations. In Africa, the practice is validated and undergirded by a wide spectrum of principles, in addition to temporal and spiritual beliefs. Recurring themes such as sexuality and fertility express preeminent indigenous values like solidarity among women, public recognition of life cycle change, and procreation for social community.¹³³ In some African communities, that perform circumcision as an integral element of the rites of passage, one is not simply born a “woman.” One becomes a respected person and integrated female only after implementing the socially designated

¹³¹ Many

¹³² Obiora supra P6, See also, Marie-Angelique Savanne, Why we are against the international Campaign, 40 Int'l. Child Welfare Rev. 37 (1997), Kay Boulware Miller, Female Circumcision: Challenges to the Practice as a Human Rights Violation, 8 Harv. Women's L.J. 155,164 (1985)

¹³³ Obiora Supra P 7

course of dignity and status.¹³⁴ There are many reasons or rationale for female circumcision in Africa. As Ifeyinwa puts, in Africa the rationale for the genital surgery are as diverse as the continent itself. For some cultures it is a component of a rite of passage to socially acceptable adulthood. For others, it is a nuptial necessity. For yet others, it is a mark of courage, particularly where it is carried out on older people. For some it is a reproductive aid increasing fertility. For others it enhances sexuality. Many parents want surgery done on their daughters because it protects them from would be seducers and rapists.¹³⁵ According to Aisha, “some practitioners of female circumcision carry it out for as many reasons as, “it is our culture” “or it is our religious obligations” or “All our people have done it or It makes you clean, beautiful, better sweet-smelling” or “you will be able to marry, be presentable to your husband, able to statisfy and keep your

¹³⁴ Obira Supra P7

¹³⁵ Ifeyinwa Iweriebo, P2 Supra

husband, able to conceive and have children.”¹³⁶ In some cultures in Africa, intermarriage with non circumcised men and women is usually not allowed or is extremely rare, When it occur, the circumcising group usually only permits it if the non –circumcising future spouse becomes circumcised. Those who are not circumcised are seen as traditionally prostitutes or members of outcast or slave group.¹³⁷ In this situation, one can easily see a motivating reason while many family will like to have their daughters to be circumcised. This should also be seen from African culture where the ability of a girl to marriage is very much important to the family name and dignity. Furthermore, unlike the western countries, Where single parenthood is a norm and way of life, in many African communities women single parenthood is a big shame to any family.¹³⁸

In some parts of Africa FGM serves a test of courage and endurance in simulation and preparation for birth pains, if a

¹³⁶ Aisha Samad Matias,,Female Circumcision in Africa, P3 available at <http://www.ccsu.edu/Afstudy/upd3-2.html> (last visited 6/08/08)

¹³⁷ Aisha Samad Matias, Supra P3

¹³⁸

woman exhibits any fear, her marriage arrangement is canceled, among the Swahili massai, it is believed that female circumcisions renders the body fertile and fits for its assigned place within the social order, among the Bantu and Sudanese, circumcision is practiced for purification, some it is for self indication; like an adult Sudanese woman who considers female circumcision indicative of her femininity or personhood and proudly refers to it as “nafsi”literaly myself, some see circumcision as status conferring, some also see as kind of cosmetic surgery akin to ear piercing. Among the yorubas of Nigeria it seen as contraceptive device, some communities believe that a girl is ripe for sexual relations only when ushered into womanhood by circumcision.¹³⁹

In some Africa, FGM is practiced because this procedure will reduce a woman’s desire for sex and in doing so will reduce the chance of sex outside the marriage. Some view the clitoris and labia as male part of a female body, thus removal of these parts

¹³⁹ Obiora Supra P 8, See also Asim Zaki Mustafa, Female Circumcision and infibulation in Sudan, 73 J of Obstetric and Gynaecology British Commonwealth 302,303 (1966) See Bertha C.A. Johnson, Seminar on traditional Practices Affecting the Health of Women and Children in Nigeria,(in WHO , Seminar on Traditional Practices Affecting the Health of Women and Children, Baasher et al)

enhances the femininity of the girl. Some believe that unless the female undergoes this procedures, she is unclean and will not be allowed to handle food or water, Some believe that un mutilated female cannot conceive, therefore the female should be mulilated in order to become fertile.¹⁴⁰ Female circumcison is a cultural ritual whose nature varies among different groups which practice it. As an essential part of cultural values, it affects the the intergrity and survival of the communities. It relates to the essence of womanhood, family system, religious beliefs, age, class and power; social identity and responsibilities. It is part of the corpus of female education and health care.¹⁴¹

African feminist opponents of FGM has been argued that female circumcison is a scourge on African women, which has a strong cultural and religious base, which is closely tied to men domination over women in Africa; a practice African men would

¹⁴⁰ <http://members.tripod.com/~Wolvesdreams/FGM.html>

¹⁴¹ Adeline Apena, Supra P 6

like it to use to continue their domination of African women.¹⁴²

According to Thomas, “ The women who support and perpetuate this practice are unaware that “some of the practices which they promote were designed –to control their sexuality and to maintain male chauvinistic attitudes in respect of marital and sexual relations.”¹⁴³ Western feminist have argued that female genital mutilation shows an attempt to confer inferior status to women by branding them with mark that diminishes them and is a constant reminder to them that they are inferior to men, that they do not even have any rights over their bodies.¹⁴⁴

It should noted that not all African feminist and women believe on the views of people like Thomas and other western view on FGM in Africa.¹⁴⁵ Writing on editorial on Female Circumcision in Africa, Gloria Emeagwali argues that there is need for a holistic perspective into this topic in order to fully understand or

¹⁴² Olayinka Koso –Thomas, *The Circumcision of Women: A strategy for Eradication*, pxvi, 109, Zed books, London, 1987

¹⁴³ Olayinka Koso Thomas Supra P 1, See also <http://www.jstor.org/pss/3601762> (last visited 6/08/08)

¹⁴⁴ Isabel Coello, *Female Genital Mutilation: Marked by Tradition*, *Cardozo J. Int'l & Comp. L* 213

¹⁴⁵ Prof Glorial T Emeagwali, Chief editor *African Undate on Editorial: Female Circumcision in Africa P 1* available at <http://www.ccsu.edu/Afstudy/upd3-2html>(last visited on 6/08/08)

appreciate the rich, complex and diversified nature of African culture.¹⁴⁶ According to a Nigerian feminist and literary critic, Molaria Ogundipe-Leslie, in article entitled “Recreating ourselves: Women and Critical Transformation” (AWP, 1994) she wonders at the growing popularity of “narratives of victimhood” about African woman in Euro-American discourse, over and above their other experiences—a discourse totally isolated from the “violence done to women’s bodies in western cosmetic surgery and disembodied from roles and activities of African women in other non-sexual domains”¹⁴⁷ According to Ogudipe- Lesil, it remains unexplained and questionable why the west does not talk about injustices or human rights abuses done to western women bodies but are more interested in talking about the plight of African women bodies.¹⁴⁸ While some defenders of this practice are not just putting a blind defence of this social practice, they contend that there is need for a holistic perspective into this practice. This

¹⁴⁶ Prof Glorial T Emeagwali, Chief editor African Untdate on Editorial: Female Circumcision in Africa P 1 available at <http://ww.ccsu.edu/Afstudy/upd3-2html/> (last visited on 6/08/08)

¹⁴⁷ Prof Gloria Emegwali, P 1 Supra

¹⁴⁸

approach will bring a better understanding into this issue and the entire rich, complex and diversified nature of African culture.¹⁴⁹

Advocates of better understanding of female circumcision in Africa like Ifeyinwa asserts, “There has in recent times been a hue and cry about the practice of genital surgery on women in Africa. The prevailing perspective in America has been absolute condemnation. What is bothersome is not much that people have a negative opinion of the practice, but that the issue is misrepresented as a form of child abuse or a tool of gender oppression. The language and tone of the outcry in most cases reflects a total lack of respect for the culture of other people. Even more bothersome is the false portrayal; the falsification of statistics and a successful demonization of the practitioners.¹⁵⁰

According to Ifeyinwa there may be an on-going debate on the effects or necessity for the procedure, but the essential truth is that practitioners do not perform genital surgery on their girls to

¹⁴⁹ Gloris T Emeagwali Supra P1

¹⁵⁰ Ifeyinwa Iweriebor, Brief Reflections on Clitorodectomy P2 (Black Women in Publishing New York) available at <http://www.ccsu.edu.Afstudy/upd3-2.html>(last visted on 6/08/08)

oppress them or do them an harm. For them the procedure is carried out for the noblest of reasons, the best of intentions and in good faith¹⁵¹ Conceding to ifeyinwa that there is need for a better understanding of the practice, but the fact that it is done with the best of intentions or good faith does not make it unhuman and unoppressive if in actual fact the practice is oppressive, dehumanizing or if fact a grown up woman has no right to determine whether she wants to have circumcision or not.

It has been argued that the way western discourse has presented the topic of female circumcicion in Africa to the outside world has led to the notion that African women as ignorant and powerless.¹⁵²

According to Adeline, Female circumcision has described by western authors as act of barbarism, slavery, torture and maiming which deprives African women of their femininity, especially with regards to sexual sensitivity and pleasure.¹⁵³

¹⁵¹ Ifeyinwa Iweriebor, Supra P 2

¹⁵² Dr Adeline Apena, Female Circumcision in Africa and the problem of Cross –cultural Perspectives, P6 available at <http://www.ccsu.edu/Afstudy/upd3-2-html> (last visited 6/08/08)

¹⁵³ Dr Adeline P 6 Supra

It is argued that these conclusions are affected by two major factors namely, one the use of western cultural perspectives in assessing an African experience and secondly the discussion of the experience in isolation of its full cultural experience.¹⁵⁴ It believed that assessing cultural values of people through different cultural frameworks have often led to distortions, misinterpretations and misrepresentations, an exact case of the current case of female of circumcision and the African woman.¹⁵⁵ Those who argue in favor of better understanding of female circumcision in Africa argues that Female circumcision is an intrinsic part of a total experience and any discussion on it can be effectively taken as a part of an entire cultural experience.¹⁵⁶

Some supporters of female circumcision argue that contrary to western notion and view that female circumcision is not an abuse of individual rights.¹⁵⁷ According to this group, female circumcision, is an intergral part of African cultural identity and

¹⁵⁴ Adeline P 6 supra

¹⁵⁵ Adeline P6 Supra

¹⁵⁶ Adelina Apena

¹⁵⁷

experience. The west should stop dehumanizing the practice and making it a women's right issue.¹⁵⁸

According to this group, African societies exist as a network of mutually interrelated and dependent groups, emphasizing community rather than self and individual. This value is evident in the family system characterized by polygamy and extended household, ancestral veneration, communal land ownership and residential systems. The rights of individuals are not isolated questions and are not normally asserted against interest because, traditionally, the group protects the individual. Therefore like other cultural rituals, female circumcision is a collective experience. It is argued that western cultural perspective, which emphasizes the individual and self, see female circumcision as an individual experience and concludes that it is a violation against individual rights.¹⁵⁹ Consequently, the young girls and women who undergo circumcision do not have individual legal status and rights apart from those of their communities and cannot challenge the

¹⁵⁸ Adelina

¹⁵⁹ Adeline Apena

collective wisdom of their communities. Such an exercise amounts to serious deviation from the norms of the society. In the view of this group circumcision is an issue that goes beyond gender, being affected by age, class and power.¹⁶⁰

Finally it is argued that female circumcision is not the African anomaly that critics would have one to believe. Practice of genital alteration have existed in recent times in Australia, Asia, Latin America, America and Europe. Female circumcision is a world wide and time-honored practices, although it is more prevalent in Africa, with about 27 African countries practicing it.¹⁶¹

Plight of Female child:

Discrimination:

Female child or girl in most parts of the world face discrimination before they are born. This evidence by growing number of female foeticide and sex selective abortion in many parts of the world.¹⁶²

¹⁶⁰ DR Adeline Apena, *Supra P6*, See also Olayinka Koso-Thomas, *The Circumcision of Women: A strategy for Eradication* (1992)

¹⁶¹ L. Amede Obiora. *Colloquim: Briding Society, Culture and Law: The Issue of Female Circumcision: Bridges and Barricades: Rethinking Polemics and Intransigence in Campaign against Female Circumcision*, P5, 47 Case W Res. 275, Winter 1997

¹⁶² *State of the Children 2007*

Discrimination against female child within the family is probably the most difficult and prevalent of all the issues, that female child faces in Africa and the world in general. The root cause of discrimination against girls in African families is rooted on belief that female child is somehow of less value than boy. Discrimination against girls that happens within home, is often hidden and almost impossible to legislate. It is believed that discrimination from home or family is bedrock on which other forms of female child and women discrimination are built.¹⁶³ For children the most important influence and people to them are not world leaders but their parents and family members/care givers. How parents and family members raise and nurture the family determines their world view and developments.¹⁶⁴ The convention of the Right of a child recognizes the primary and fundamental role of the family in the life of a child as the first and ideally the last place of protection for a child. Hence, It calls on parties to recognize the right of the

¹⁶³ Beuase I am Girl: The state of Girl child 2007 P 34 available at <http://www.plan.org.au/ourwork/about/research/becauseiamagirl> (last visited 6/

¹⁶⁴ The state of world children's 2007 P12 (Middle East/ North Africa Edition) available at http://www.unicef.org/sowc07/docs/sowc07_mena.pdf (last visited 7/25/08)

parents/family and where applicable extended family members /community to give guidance to their children.¹⁶⁵

In Africa, discriminatory laws or customs in Africa deny female children equal opportunity in the family. Most African families give preferential treatment to their male children. Girls are seen as inferior or not too important.¹⁶⁶

In Africa families and communities, the birth of male child is celebrated with more joy and thanksgiving than that of a female child. Gender discrimination is a common part of African traditional system which give preference to male child.¹⁶⁷ The story of this female child is common to what most African girls and other girls where preference is given to male child over that of a female child faces, According to this girl,“ I am the first child of my parents.I have a small brother at home.If the first child were a son, my parents would be happy and would be confident as their future is

¹⁶⁵ Convention on the Rights of Child 1959

¹⁶⁶ State of world Female Children 2007 P 12 available at http://www.unicef.org/sowc07/docs/sowc07_mena.pdf (last visited 6/12/08)

¹⁶⁷ African Children(Their Faces and their thoughts) P 18

assured by having a son. But I am a daughter. I complete all the household tasks, go to school, do the household activities in the evening and at night do my school homework. Despite all these activities, my parents do not give value or recognition to me. They only have praise for my brother, as he is the son”—Girl age 15 from Nepal¹⁶⁸ Generally, in African girls are mostly discriminated in rural areas where traditions weigh heavily against the girl and in favor of male child.¹⁶⁹ In a Kenyan report to UN in 1992, the Kenyan government openly admitted wide spread discrimination against girls in Kenya. The government conceded that although the laws of Succession Act (Cap 160 Laws of Kenya) treats boys and girls equally, but in reality Kenya is still basically a patriarchal society; where inheritance rights is still greatly restricted to male members of the society.¹⁷⁰ In a similar report to UN in 1992, the Ghanaian, government submits, “There is no institutionalized

¹⁶⁸ Beuase I am Girl: The state of the girl 2007, P 24 available available at <http://www.plan.org.au/ourwork/about/research/becauseiamagirl/> (last visited 6/12/08)

¹⁶⁹ Uche U Ewelukwa ‘The Girl child, African States and International Human Rights law- Towards a New Framework for Action’ P 134 in Obioma Nnaemeka and Joy Ngozi Ezeilo, “ Engendering Human Rights” Palgrave Macmillan 2005

¹⁷⁰ Uche U Ewelukwa ‘The Girl child, African States and International Human Rights law- Towards a New Framework for Action’ P 134 in Obioma Nnaemeka and Joy Ngozi Ezeilo, “ Engendering Human Rights” Palgrave Macmillan 2005

form of discrimination in Ghana. They exist in forms that refer mainly to cultural practices such as denying girl right to education. This practice is prevalent in all parts of Ghana.”¹⁷¹ In Malawi, a country with progressive constitution and where children are even mentioned in the constitution, the Malawian governments admits in her UN report “Discrimination against girl and children with special needs is rampant. The key determining factor is culture. In paternalistic cultures, a girl or woman does not have the right to inherit. In general, girls education is considered not important. A girl is not encouraged to continue with her education, she is instead encouraged to marry.”¹⁷² Even in a better developed country of south Africa, female children still experience discrimination. Conceding that Section 9 of South African

¹⁷¹ Uche U Ewelukwa ‘The Girl child, Africn States and International Human Rights law- Towards a New Framework for Action’ P 134 in Obioma Nnaemeka and Joy Ngozi Ezeilo, “ Engendering Human Rights” Palgrave Macmillan 2005

¹⁷² Uche U Ewelukwa ‘The Girl child, Africn States and International Human Rights law- Towards a New Framework for Action’ P 134 in Obioma Nnaemeka and Joy Ngozi Ezeilo, “ Engendering Human Rights” Palgrave Macmillan 2005

Constitution guarantees equal protection, but in law and reality, there exist widespread discrimination against girl child.¹⁷³

Early Marriage:

In many African communities, it is a common practice to give little girls as young as 10 years to marriage. Many communities and families practice early female marriage for several reasons. This practice without doubt deprives the female child of childhood and ability to choose when to marry and whom to marry.

It has been argued that early marriage violates a girl's right to childhood. Furthermore, the right to voluntarily enter into marriage is inherent to a woman's dignity.¹⁷⁴

It is reported that about 60% of girls in Africa between the ages of 15-19 are believed to be married.¹⁷⁵ A study by UNICEF in six west Africa countries showed that 44% of 20-24 year old women

¹⁷³ Uche U Ewelukwa 'The Girl child, African States and International Human Rights law- Towards a New Framework for Action' P 134 in Obioma Nnaemeka and Joy Ngozi Ezeilo, " Engendering Human Rights" Palgrave Macmillan 2005

¹⁷⁴ Tamar Ezer & others "Report: child Marriage and Guardianship in Tanzania: Robbing Girls of their Childhood and infantilizing women, P11-12, 7Geo J. Gender & L 357, 2006

¹⁷⁵ The State of World Children 2007 available at

were married under the age of 15.¹⁷⁶ There are many reasons for early marriage in Africa. According to one report, some of reasons for early marriage include; the need to follow tradition, reinforcing ties among or between communities and protecting girls from out of wedlock pregnancy. In the communities studied, all the decisions on timing of marriage and choice of spouse were made by the fathers.¹⁷⁷ According one report in Human Right watch project on early marriage in Africa, a girl named Amadou reports, 'Khadja was my older sister sister. she died two years ago. She was only 14 years when she married but all the girls in our community marry young. As the pregnancy advanced, my sister's husband wanted her to rest but my aunt refused, saying that Khadja was not the only woman who ever got pregnant. One day her water broke when she was splitting wood. She carried on as if nothing had happened because she did not understand what this meant. A

¹⁷⁶ Because I am a girl: The state of the girl child 2007 P 45 available at available at <http://www.plan.org.au/ourwork/about/research/becauseiamagirl/> (last visited 6/12/08, See also Early Maariage: Child Spouses, Innocent Digest No7 March 2001, UNICEF

¹⁷⁷ Because I am a girl: The state of the girl child 2007 P 45 available at available at <http://www.plan.org.au/ourwork/about/research/becauseiamagirl/> (last visited 6/12/08, See also Early Maariage: Child Spouses, Innocent Digest No7 March 2001, UNICEF

couple of days later, khadja had horrible pains. We did not take her to hospital, which was far from the village. She died two days later, without any one trying to save her. I think that the baby died inside her. My mother said this must have been meant to be but deep down inside she has never accepted it and she still suffers” (Amadou telling about her sisters death in Mali”¹⁷⁸ The prevalence of early female child marriage in African communities is a deep cultural rooted practice, though some recent economic situation may have escalated the practice. In traditional Africa, early child marriage was practiced not for economic reasons but as way of choosing the best for the child and put the child on the right part for posterity sake.¹⁷⁹

Female Child Labor: Child labor is a growing social concern around the world. Estimate of the number of child labor in the world ranges from 100-200 million children in the whole world. Africa has the highest estimate of about 40% of all children between the ages of 5-14

¹⁷⁸ Because I am a girl: The state of world girl 2007 P 29 available available at <http://www.plan.org.au/ourwork/about/research/becauseiamagirl/> (last visited 6/12/08), See also Save the Children. May 2004” “The state of the World’s mothers 2004: Children having Children” P10 available at <http://www.scribd.com/doc/338140/Save-the-Children-State-of-the-Worlds-Mothers-2004> (last visited 9/01/08)

¹⁷⁹

regularly engaged in work. Child labor is very prevalent in Africa especially in the agricultural sector. The ILO estimates that there are about 23 million child workers in Africa.¹⁸⁰ Most of the child labor cases in Africa ¹⁸¹are mainly female children.

In Nigeria for example it is reported that “child labor flourished unabated---despite prescriptions to the contrary by children and young persons law of Nigeria. This notwithstanding, it is difficult to see how such a law will be enforced given the harsh economic climate which compels parents and guardians to engage their wards prematurely in strenuous and hazardous economic activities, to the detriment of their full development in order to supplement meager family incomes. Hundreds of thousands of children, many of them below the age of 10, hawked various goods on the street of several Nigerian towns and cities and along major highways. Many children who roamed the streets are exploited by unscrupulous persons, especially for cheap labor. The female among them suffered sexual abuse.¹⁸²

¹⁸⁰ Line Eldring, Sabata Nakanyane, Malehoko Tshoaedi, Child Labor in the growing tobacco industry in Africa (Report prepared for the IUF/ITGA/BAT conference on the elimination of child labor, Nairobi 8-9th October 2000) available at <http://www.fao.no/pub/rapp/654/654.pdf> (last visited 6/18/08)

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¹⁸² Chukwuemeka Gahia/ Civil Liberties Organisation: “ Human Rights in Retreat in Nigeria” A report on the Human Rights Violation of Military Regime of General Ibrahim Babangida P157-159, 1993

Female Child Trafficking:

Female child trafficking is a common world wide practice In many parts of Africa, Women and girls are often most transported and sold into sex industry.¹⁸³ It must be stated that it not entirely an African vice. Female children world wide are traded for various reasons around the world. The randomness of female child trafficking is one of the reasons while it is specifically outlawed in the Child Rights Convention. Article 35: Of CRC—states that parties shall take national bilateral and multilateral measures to prevent the abduction of, sale of or traffic in children for any purpose.¹⁸⁴ According to one report in “Because I am a Girl report in Africa” a girl by name Kemayao, a child trafficking victim age 10 from Lome, Togo states “There was a woman who came to the market to buy charcoal. She found me and told my mother about a woman in Lome who was looking for a girl like me to stay with

¹⁸³ Tiffaby St Claire King, *The Modern Slave Trade*, P 5 8 U.C. Davis J. Int'l L. & Pol'y 293 Spring 2002

¹⁸⁴ Art 35 of Convention on the Rights of the child 1959

her and do domestic work work. She came to my mother and my mother gave me away. The woman gave my mother some money, but I don't know how much.¹⁸⁵ In another story, Carol was 14 years old when she was trafficked to Bangui in central African Republic. Her mother said: "I gave my daughter to her father's cousin so that she could have a better future. I was divorced and overwhelmed."¹⁸⁶ In West Africa, a long tradition of sending one's children to work in home of a better –off relative or friend has facilitated the trafficking of ever-increasing numbers of children, especially for domestic work.¹⁸⁷

Generally about 1.2 million children every year are victims of trafficking, both internationally and within national borders. Some of 80% of those being trafficking globally are girls and women.

A Special look at the Plight of Nigerian Female children as case point: In Nigeria, female child continues to suffer just like

¹⁸⁵ Because I am a girl : The state of World Girls 2007 P 97. available at <http://www.plan.org.au/ourwork/about/research/becauseiamagirl/> (last visited 6/12/08), See also Trafficking in Human beings specially women and children in Africa available at <http://www.unicef-irc.org/publications/pdf/insight9e.pdf> (last visited 9/01/08)

¹⁸⁶ The state of world girl P 97

¹⁸⁷ Tiffany St. Claire King, "The Modern Slave Trade" 8 U.C. Davis J. Int'l L. & Pol'y 293 Spring 2002

many African female child. It is argued that, "Nigerian government have paid lip services to the rights of the child. The effect is that Nigerian children faces special circumstances. According to UNICEF about 10 million Nigerian children of school age are out of school. Child labor is still in practice. Children are still openly exploited as hawkers and peddlers in most cities. There is a growing population of Nigerian children on the streets living dangerously as traders, beggars or homeless street kids. Child trafficking has grown in recent times. As for the girl child, her predicament is even more precarious. In some parts of the country, under girls age are given out in marriage to men old enough to be their grand fathers. This often results in all kinds of health problem, the most notorious being Vesico-Vagina Fistulae(VVF). The rape of young girls is rampant. Son preference even by educated families ,remains the norm and this places the girl child at risk.¹⁸⁸ According to guardian editorial, "The national

¹⁸⁸Nigerian Children- Nigerian Guardian online editorial on 2008 children's day(5/27/08) available at http://www.guardiannewsngr.com/editorial_opinion/article01/270508 (last visited

Assembly passed the Child Rights Bills into law in 2003, but since then, the necessary adoption of the same law by states has met stiff resistance by forces of conservatism. In some states, the child Rights bill became controversial, because certain provisions in it relating to child marriage, discrimination against female child, girl-child abuse and child labor were thought to be a violation of culture and tradition. Culture should be dynamic, it should not be an obstacle to human rights.”¹⁸⁹ Writing on a similar issue about the plight of Nigerian children, Sun News Publishing, wrote an editorial entitled “A cheerless Children’s day” “Today, Nigeria celebrates her children under the auspices of the United Nations General Assembly – recommended Children’s Day, which is a day set aside, since 1954, to celebrate children and draw attention to their problems. Everywhere in the country, the pitiable state of children in Nigeria is evident. In the Northern part of the country,

6/15/08)

¹⁸⁹ Nigerian Children- Nigerian Guardian online editorial on 2008 children’s day(5/27/08) available at http://www.guardiannewsngr.com/editorial_opinion/article01/270508 (last visited 6/15/08)

hapless student, beggars, “almajiris”, roam the landscape. In Lagos and other urban centers of the country, children are often to be found in markets and in the streets, engaged in trading and other strenuous activities that are well beyond their tender frames.¹⁹⁰

They have been reportedly discovered to be working in cement and stone factories, some have been discovered in brothels, sleeping with men in exchange for money that goes to their “benefactors”, while thousands are engaged as househelps and in other forms of forced labour on farms, factories and in private homes. Children are raped, maltreated and sold at the whims and caprices of depraved adults. They are largely unprotected by the state and their rights to life, basic education and the rights not to be used for forced labour, child trade, child trafficking etc, as provided for under the Convention on the Rights of the Child (CRC) 1989, are routinely flagrantly flouted.¹⁹¹ Arguing further the paper said, the

United Nations Declaration on the Rights of the Child that

¹⁹⁰ A cheerless Children’s day (Sun News Publishing editorial on 2008 Children;s day in Nigeria) available at <http://www.sunnewsonline.com/webpages/opinion/editorial/index.htm> (last visited 5/27/08)

¹⁹¹ A cheerless Children’s day (Sun News Publishing editorial on 2008 Children;s day in Nigeria) available at <http://www.sunnewsonline.com/webpages/opinion/editorial/index.htm> (last visited 5/27/08)

“mankind owes the child the best it has to give” has little meaning in Nigeria. The exploitation and maltreatment of children in Nigeria have not escaped the attention of international agencies and the rest of the world.¹⁹²

Statistics continually released by both international and local agencies regularly draw attention to the dismal state of the Nigerian child. A few of these will suffice. The most recent, released by the United States-based global humanitarian organization, “Save the Children” said one million children, a tenth of the global child mortality figure, die in Nigeria, every year.

Nigeria was rated as the country with the second highest number of children who were not getting access to adequate basic health care, with 16 million deprived of basic medicare. Other statistics say that 40 per cent of Nigerian children of school age are out of school. Other disheartening statistics say Nigerian children are among the most under-nourished in the world while they continue to fall victim to easily preventable diseases, while the nation has

¹⁹²A cheerless Children’s day (Sun News Publishing editorial on 2008 Children;s dayin Nigeria) available at <http://www.sunnewsline.com/webpages/opinion/editorial/index.htm> (last visited 5/27/08)

been adjudged the last bastion of polio in the world, by international health agencies.¹⁹³ Efforts to improve the condition of the Nigerian child have been met with stiff resistance in many states, in the country. Five years after the signing of Child Rights Act 2003, which is the most comprehensive legislation in respect of child rights in Nigeria, less than half of the states in the federation have passed the Act into law in their domain, because of religious and cultural excuses.

Even the existing child protection laws, like the Children and Young Persons (Street Trading) Law, are hardly enforced.¹⁹⁴

According to Felix , “Nigeria despite being a signatory to the convention on the Rights of the Child (CRC) since 1991, and the African Charter on the Rights and Welfare of the Child since 2001, the rights of the Nigeria child are still far from being respected. Nigeria through child Act of 2003, abolished child labour, human trafficking, child prostitution

¹⁹³ A cheerless Children’s day (Sun News Publishing editorial on 2008 Children;s dayin Nigeria) available at <http://www.sunnewsonline.com/webpages/opinion/editorial/index.htm> (last visited 5/27/08)

¹⁹⁴ A cheerless Children’s day (Sun News Publishing editorial on 2008 Children;s dayin Nigeria) available at <http://www.sunnewsonline.com/webpages/opinion/editorial/index.htm> (last visited 5/27/08)

and many abuses the Nigerian children had suffered, but despite this and Nigeria being a signatory to the convention on the Rights of the Child (CRC) since 1991, and the African Charter on the Rights and welfare of the child in 2001, the rights of the Nigeria child are far from being respected.¹⁹⁵ Experience has shown that the practice of giving out children in marriage at very early stages of their lives, without formal education or a trade, is still rampant among the local people, and may be less common among the rich and powerful lawmakers. The rights of the child can no longer be negotiated based on the culture or political interests, if the condition of the Nigerian child is to change. The protection and promotion of the rights of the child secures a future for such a child as well as the nation at large. The way the right of a child is handled in this country portrays what the future

¹⁹⁵Felix Ugwuoke” “Nigerian Children still yearning for their rights” available at http://www.guardiannewsngr.com/focus_record/article01/270508 (last visited 6/12/08) (The Child Right Act was first drafted in 1993 but it was only adopted as law 10 years later in 2003. Three years later three states, Ogun, Lagos, and Edo enacted it into law. As of last count in June 2008 only 14 out of Nigerian 36 states have passed the act into law. , See also Bayo Olupohunda, The Hypocrisy of Children’s Celebration available at http://www.guardiannewsngr.com/editorial_opinion/article04/250508 (last visited 6/12/08)

holds for such and the nation. Nigeria's signature of the United Nations Declaration of Human Rights puts an obligation on her to spread, display and incorporate human rights in institutions of learning, yet this has not been accomplished. Nigeria's obligation to educate children on human rights as spelt out in articles 4, 7, 19 and 29 has also been shunned with impunity.¹⁹⁶ A recent UNICEF publication, "Progress for Children", reporting on progress made on primary education, shows that the current rate of progress in Nigeria is too slow to achieve gender parity by the end of 2005 and universal primary education by 2015, the target dates for Nigeria's achievement of the UN Millennium Development Goals. In Nigeria, about 7.3 million children do not go to school, of whom 62 per cent are girls.¹⁹⁷

¹⁹⁶ Felix Ugwuoke, "Nigerian Children still yearning for their rights" available at http://www.guardiannewsngr.com/focus_record/article01/270508 (last visited 5/27/08)

¹⁹⁷ Felix Ugwuoke, "Nigeria Children still yearning for their rights" available at http://www.guardiannewsngr.com/focus_record/article01/270508 (last visited 5/27/08)

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A look at the constitutions of most African countries will suggest in theory that Africa is a continent committed to the protection of the human rights of its people. African nations devotion to human rights protection can be evidenced by the numerous international human rights instruments which African leaders and states have signed.¹ According to Udombana “ When the African Charter on Human and Peoples Rights (African Charter) was born in Kenya, African countries had sufficiently jolted to join the human rights club of nations. Its quick ratification and entry into force on Oct 21 1986, five years after its adoption showed a remarkable degree of consensus among the African states. The Charter has enjoyed almost universal acceptance in Africa. It has been ratified by all member states of African union both participant and non participant signatories.”² It is believed that the widespread ratification of the African charter indicate a willingness on

¹Christof Heyns, *The African Regional Human Right System: The African Charter*, 108 Penn. St. L. Rev.679 Winter 2004, See also African (Banjul)Charter on Human Rights and Peoples Rights, adopted June 27 1981,OAU Doc.CAB/LEG/67/3 rev.5, 21 I.L.M.58 (1982) entered into force Oct.21, 1986

² Nsongurua J Udombana , *Between Promise and Performance: Revisiting States Obligations Under the African Human Rights Charter*,P 2, 40 Stan. J. Int'l L. 105 (Winter) 2004

part of African governments to conform their national laws and practices to international standards.³

As Paul puts it “African governments explicitly stated their adherence to the Universal Declaration on Human Rights when they ratified the Charter of the Organization of African Unity and reaffirmed that allegiance as well as recognized the validity of the covenants in the international African Charter of Human and People’s Rights (Banjul Charter), adopted by the OAU in 1981.”⁴

According to Udombana, “The OAU adoption of the Banjul Charter in 1981 and its subsequent entry into force five years later in 1986 was and remains the single most important event in the evolution of human rights in Africa. The charter was the first and most seriously potentially significant attempt by African leaders towards taking human rights seriously.”⁵ The Charter has been described as “one of the finest gems designed by African with a view to endowing itself with proper self awareness, creating a new image in the chain of peoples of the world, giving itself a place of choice in the concert of

³ Nsongurua J Udombana , Supra note 2 at P.2

⁴ James C.N. Paul, Participatory Approaches to Human Rights in Sub-Saharan Africa, P 215-216 in Human Rights in Africa (Cross Cultural Perspectives) Abdullahi Ahmed An-Na’im & Francis M Deng eds) 1990

⁵ Nsongurua J Udombana, Supra note 2 at P.7

nations, and playing, hence forward, a significant role in the management and conduct of the world's affair.”⁶

The African Charter recognized the importance of women's rights, but it has been widely acknowledged to be inadequate on the area which women need protection and gender equality.⁷

This situation made the establishment of African women's protocol very imperative. The African protocol on women is believed to be the boldest African attempt at redressing the injustices and inhuman treatments of African women. The protocol through articles 2, 3, 18(3) and 60 makes African to look a place where women are the queen and really equal with men. In article 2 otherwise known as the non-discrimination clause, the protocol provides that the rights and freedoms enshrined in the charter will be enjoyed by all irrespective of their sex. Article 3, states that every individual will be equal before the law and be entitled to the equal protection of the law. Article 18(3) provides for the protection of the family and promises to ensure the elimination of discrimination against women and protect their rights. Article 60 states that the African Commission on Human

⁶ Id. quoting Isaac Nguema in “Africa, Human Rights and Development” 7 Rev. Afr. Comm'n Hum. & Peoples' Rts. 91(1998)

⁷ Gender: News From Africa: Press Review: Reviewing the Protocol on the Rights of Women in Africa Available at http://www.newsfromafrica.org/newsfromafrica/articles/art_10688.html (last visited 6/25/08)

and Peoples' Rights will draw inspiration from international human rights instruments such as CEDAW⁸

The establishment and ratification of African protocol on women; coupled with its bold and good articles brought the notion that the end of African women's misery has come to an end.

Some believe that the African protocol on women will play a strategic role in changing negative power relations, gender in equality, women disempowerment and impoverishment of women in Africa.⁹

According to a review on the importance of the African women protocol, "For countries that have ratified, it is important to recognise that it is in these countries and its implementation success that the promise of the Protocol will be either fulfilled or betrayed.¹⁰ Experience has shown that African countries have an abysmal record when it comes to putting into practice the principle of international human rights into real life reality.

A Ugandan activist Sarah Mukasa analysizing the chances of African women protocol has noted, that there is often a "disconnection between the pronouncements made at regional level and the action taken nationally and locally; and in many African countries, domestication and implementation is

⁸ Gender: News From Africa, supra note 7, See also African Protocol to the African Charter on Human Rights on the Rights of Women in Africa adopted by the 2nd ordinary session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept.13,2000) entered into force Nov.25 2005

⁹ Gender: News From Africa, supra note 7

¹⁰ Gender: News From Africa, supra note 7

riddled with challenges that are hard to overcome if the protocol is to benefit the women it seeks to protect".¹¹

The bold step of the African women protocol notwithstanding, it has been argued that the protocol faces three major obstacles in most countries namely; weak public appreciation of the centrality of constitutionalism and the rule of law; inadequately resourced national gender machinery and lastly the precedence of entering reservations on progressive clauses"¹²

The recent African progress on human rights developments notwithstanding, African continent has continued to face persistent doubts from the outside world on its seriousness and commitment to the human rights of its people and that of women and female children in particular.

It is without doubt that in theory the African countries have shown a great sense of commitment to the promotion and enforcement of human rights, but events and practices in African with respect to human rights and in particular women's rights still raises a lot of doubts to Africa's commitment to the protection and promotion of human rights of women and female child.

¹¹ Gender:News From Africa:Press Review,supra note 7

¹² Gender:News From Africa:Press Review, supra note 7

According to Paul “African political leaders and some African intellectuals have displayed ambivalence and sometimes hostility, toward the principle that all states must be governed by a regime of universal human rights law”¹³

In most African states, there are many reasons for the ambivalence among African leaders towards international human rights which include alleged incompatibility of many universal rights with social conditions in African societies, international human rights law being grounded in alien western values/jurisprudence, and that these rights exalt principle at the cost of collective values rooted in African cultures.¹⁴ This ambivalence raises some unanswered questions on the parts of African leaders; why will they sign charters and treaties they fully know to be incompatible with African values and cultural norm? Does this provide the clue why there is a big gap between human rights theory and practice implementation in many African states?

According to Udombana “By almost any criteria Africa still highlights the stark gap between theories of universal human rights and the continued practices of human rights.”¹⁵

¹³ James C. N Paul, Participatory Approaches to Human Rights in Sub Saharan Africa P 216 in Human Rights in Africa: Cross Cultural Perspectives (An-Nam & Deng eds) 1The Brookings Institution, 1990.

¹⁴ James C N Paul supra at P. 216

¹⁵ Udombana, supra note 2 at P. 11, See also Paul Williams, Indifference and Intervention: International Society and Human Rights in Africa, Int’l J Hum.Rts. L. 140 (2001)

Many believe that Africa alligence to human rights development and promotion is only in theory and not in practice. To some skeptist on African's good intention with respect to human rights practice, a review of human rights practices in many African states will show that African human rights records is incompatible with what many African states have pledged to do in theory.

There are those who believe that the African charter and other international human rights instruments have been used by African states to make them look like a continent that promotes human rights, while in actual fact Africa is not ready to reform its traditional practices.¹⁶

African charter on human rights which is Africa's greatest positive move in human rights development has been argued not advanced the cause of human right in Africa. It has been argued that the adoption of the African charter on human rights has largely proved to date to be a false dawn in the promotion and protection of human rights in Africa.¹⁷ According to Obinna Okere, "the African charter on human is but "modest in its objective but

¹⁶ J. Oloka-Onyango. "Human Rights and sustained Development Affair.A New Dawn or Retreating Horizons" 6 Buff.Hum. Rts.L. Rev. 39(2004),See also Nsongurua J. Udombana. Towards The African Court on Human and Peoples Rights: Better late Than Never" Yale Hum. Rights & Develoment Law Journal Vol.2000.

¹⁷ Gino J Naldi, "Future Trendes in Human Rights in Africa:The increased Role of OAU? P. 5 in "The African Charter on Human and Peoples' Rights:The System in Practice,1986-2000 (Malcolm D. Evans & Rachel Murray Eds) Cambridge University Press (2002)

flexible in its means”¹⁸ According to Udombana “ If however, the effectiveness of a regulatory strategy is defined by how well it actually mitigates the problem it was designed to address, then the African charter has failed, as there is still a wide gap between the promise in the charter and the performance of African states. Egregious, cyclic, and massive human rights violations still plague the continent.¹⁹

According to Heyns, “the struggle for human rights on African continent is far from over or complete. The continent is plagued by widespread violations of human rights, often on massive scale”²⁰

It is not enough for African countries to sign human rights instruments as way of showing its commitment to human rights improvements of its women and female child; they must take practical and concerted actions in making the principles of the instruments a daily reality in Africa.

African states needs to take practical and concrete efforts to improve on the human rights of it women and female children. A situation where in theory African states affirms their commitment to the human rights of women and female child but in the daily and practical lives of most African nations and

¹⁸ Obinna Okere: The protection of Human Rights in Africa and African Charter on Human and Peoples Rights: A comparative Analysis with European and American Systems, HRQ 6 (1984)141 at 158, See also generally, U Oji Umozurike: The African Charter on Human and Peoples Rights, Martinus Nijhoff Publishers Hague (1997)

¹⁹ Nsongurua J. Udombana, Between Promise and Performance, supra note 2, See also Christof Heyns, supra note 1

²⁰ Christof Heyns, supra note 1

communities women and female human rights are violated or are still treated as property or unequal partners does not promote the cause of human rights which they have signed to promote.

To the outside world, Africa has become an epitome of contradiction in terms when it comes to women and female child 's human rights development. The only way to change this notion is to make the ideals and norms of international human rights charters a living and daily realities in the lives of African women and female child.

According to Udombana "It is obvious that the road to the realization of the ideas, in particular the human rights ideas, proclaimed in the AU Treaty or other similar treaties, does not lie in the proposed AU or in any other future contraption. The aim of Union is admirable, however, it is in the implementation of the Act that the System must be known and seen as to be active, constructive and unyielding. Any treaty or enactment by whatsoever name international or municipal, that does not translate into the advancement of the common good of the continent's citizens is a mere ploughing of the sand and sowing of the ocean, a meaningless vanity and vexation of the spirit."²¹ Talking about Africa's notorious record on human rights and failures in putting theory into practice Udombana said "The below the average

²¹ Nsongurua Udombana, *supra* note 2 at P.19

human rights record of most African leaders past and present, make it difficult for Africans to repose any confidence in this new conception or more appropriately contraption. Such poor performance constitute the greatest threat to the survival of the newly conceived body.²² Arguing further Udombana said “If AU is to succeed in its self appointed enterprise of taking rights seriously, then it has to replace the “culture of impunity with culture of accountability.—That means making sure that the nice words of its constitutive Act and NEPAD come to life.”²³

A CASE STUDY OF THEORY AND REALITY OF WOMEN’S AND FEMALE CHILD RIGHTS IN NIGERIA.

In theory, it would seem that Nigeria is a country deeply committed towards the promotion and protection of the human rights of women and female child. As a leading nation in Africa and a major signatory of many international human rights on women and female child²⁴, Nigeria can be seen as leader or champion of women rights. As a participant in the world conference on Human rights in Vienna (25th of June) 1993, Nigeria was part of this great declaration, “The human rights of women and of the girlchild

²² Nsongurua Udombana, supra note 2 at P.20

²³ Nsongurua Udombana, supra note 2 at P.20

²⁴ See Generally Convention on Elimination of All Forms of Discrimination Against Women, Dec 18 1979, UNTS Vol. 1249 P.13

are an inalienable, integral, and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community”²⁵ Nigeria was one of the 171 states that on June 25th of June 1993 that adopted by consensus the Vienna Declaration and Programme of action of the world conference on Human rights, where at the close of two weeks world conference on human rights, the international community came out with a common plan of actions and programmes for strengthening of human rights work around the world.²⁶ Furthermore as a participant in Beijing Women’s Conference in 1995, Nigeria was a champion of women’s rights²⁷ where the major agenda was women empowerment and equality. Finally, Nigeria is among the few African countries that has ratified the African Protocol on women’s rights.²⁸ The African protocol on the rights of women has been described as one of the finest documents on the rights of women in Africa and in the world in

²⁵ World conference on Human rights Vienna available at <http://www.unhchr.ch/html/menu5/wchr.htm> (last visited 9/8/08)

²⁶ World conference on Human rights Vienna, supra at note 25

²⁷ The United Nations 4th Women conference on Women Beijing China 1995 available at <http://www.un.org/womenwatch/daw/beijing/platform/plat1.htm> (last visited 9/8/08)

²⁸ See African protocol on women, supra note 8, See also AU protocol on women enters into force available at <http://www.refugee-rights.org/Newsletters/LawandPolicy/V2N4-AUWomenProtocol.htm> (last visited 9/8/08)

general.²⁹ The protocol has a strong protection for African women in the fields of sexual and reproductive rights and contains first explicit prohibition of female genital mutilation in international law. The protocol allows African women the right to family planning, right to control their fertility, right to use any method of contraceptions and right to abortion in case where pregnancy is the result of rape.³⁰ Nigerian as a signatory to the protocol have committed herself and her citizens to an undisputed loyalty to the promotion of rights of women and female children in her country. Going by these above description one will think, that Nigeria is a land where women's and female rights are highly respected and obeyed, a land void of women's rights abuses and injustices, a country where women are treated on the same equal basis like men.

In this section an attempt will be made to look at what Nigerian government in theory or official policy says about women's and female rights and what is the reality and practice in most Nigerian communities and cities.

Nigerian just like most African, have "a very good official policy" or law on the rights of women and female child, but in reality the theory or policy is far from being implemented or practiced. A good indictment of Nigerian's practice with respect with women rights can be seen from COHRE report on

²⁹ AU protocol on women enters into force, supra note 28

³⁰ AU protocol on women enters into force, supra note 28

the state of theory and practice in Africa. According to COHRE, “As in many African countries, regardless of what the statutory law says on paper, it is often ignored in reality.”³¹ Writing in support of a similar position by COHRE, Adrien Wing & Tyler Smith argues “When African states adopt and ratify international conventions and declarations that promises to protect women’s rights—protections which are sometimes even mirrored in states’ own constitutions- the conventions and declarations fail to penetrate the deeply rooted patriarchal and predominately patrilineal African cultures. Thus, in spite of the numerous instruments in effect in many African states that promises to protect women’s rights, there are cultural barriers at every legal juncture that prevent their enforcement.”³² A look at few human rights principles will show the discrepancies between human rights theory and practice in Nigeria.

EQUALITY: Equality of women with men is one of major human rights issues African nations are still struggling to come to terms. Almost all major human rights covenants affirm the equality of men and women. One of cardinal objectives of CEDAW which has been described as the

³¹ Bringing equality Home: Center on Housing and Evictions: Promoting and protecting inheritance rights of women. (A survey of law and practice in sub Saharan African) available at http://www.cohre.org/store/attachments/COHRE_Bringing_Equality_Home.pdf (last visited 9/9/08)

³² Adrien Katherine Wing & Tyler Murray Smith, Symposium: The African Union and New Pan Africanism: Rushing to Organize or Timely Shift: The New African Union and Women’s Rights, P4, 13 Transnat’l L. & Contemp. Probs. 33, Spring (2003)

international bill of rights for women is the formal recognition that all human rights and fundamental freedoms apply to women and men equally.³³ This concept has been stressed and promoted in many international human rights conventions and conference. The 1995 Beijing women conference was specially geared towards reducing the gap between women and men inequality. Modern international law has made women equality a cardinal issues in its present fight for development of international law and human rights. It can be said without equivocation that modern international law can't claim any meaningful success if women around the globe are still treated differently from men. Nigeria as a signatory to most these conventions has affirmed her commitment and determination to give women the rights due to them. In many ways in Nigeria, women equality with men is far from being a reality. Women are still seen as inferior to men. In most private and public life in Nigeria, they are treated as second class citizens. A good example of this attitude or practice is the Nigerian inheritance law. It must be conceded that in official policy, it will look as if men and women are equal in Nigeria, but a close look at the Nigerian cultural and daily practices will reveal the injustices and unfair treatments Nigerian women are facing in their daily lives. A good example of the inequality of Nigerian women with

³³ Aniekwu Nkolika Ijeoma, The Convention on the Elimination of All Forms of Discrimination Against Women and the Status of Implementation on the Right to Health Care in Nigeria, P2, 13 Hum. Rts. Br..34, Spring (2006)

Nigerian men can be seen from the inheritance law prevalent in most Nigerian communities despite Nigerian's commitment and declarations to uphold the equality of women in the country.

Inheritance law: Women in Nigeria are generally not allowed to inherit family land or property. This is premised on the fact that they will eventually marry and move over to their husband's house. Nigeria has ratified some women treaties that oppose this practice. For example under Article 21 of the protocol to the charter on the rights of women in Africa, which Nigeria has ratified, a widow shall have the right to equitable share in the inheritance of the property of her husband and continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. Furthermore, women and men share have the right to inherit, in equitable shares, their parents' properties.³⁴ According to Oby Nwankwo, in spite of this and other provisions, women in some communities, particularly Igbo speaking parts of Nigeria have been denied inheritance from their father's or husband's property under the guise of culture.³⁵ This is one area where women's rights are violated with

³⁴ See Art. 21 African Women's protocol, supra note 8, See also Oby Nwankwo, Nigeria's Obligation to Women Under Human Rights Treaties and Instruments-Issues, Realities and Challenges, P.20 available at http://aaacoalition.org/DOCS/PDFS/MicrosoftWord-Nigeria's_Obligation_to_Women.pdf (last visited 10/17/08)

³⁵ Oby Nwankwo, supra note 34 at P 20

impunity. There are variations in the prevailing customary law of succession in various parts of Nigeria but the main principles are basically the same. Customary law of succession in Igboland for example is by primogeniture that is succession by first male issue. Under this principle, landed property including matrimonial home are said to belong to the eldest son of the deceased or to his male next of kin where he is not survived by any male issue. The widow is only allowed to stay in the matrimonial home for as long as she is alive, does not remarry and in some cases, subject to her "good behaviour" as may be determined by the male members of her deceased husband's family. The reason often given to justify this highly discriminatory practice is preservation of family property within family lineage.³⁶ The usual adage in many communities in Nigeria is that "devolution follows the blood" and women as wives and daughters are treated as outsiders because marriage requires them to move from their original homestead of their blood relations to a new family.³⁷ Another good example is the inheritance law in Esan people of Midwestern Nigerian. As Christopher and Nathaniel puts it, "in native Esan law and custom, men are receivers of inheritance in Esanland, female children have no status or position in the family. According to some Esan idioms, "a woman never

³⁶ Oby Nwankwo, supra note 34

³⁷ Oby Nwankwo, supra note 34

inherits the sword” or you do not have a daughter and name her the family keeper, she would marry and leave not only the family but the village a wasted asset.”³⁸ In Esanland, it is believed that when a woman marries, all her possessions go to her husband, thereby draining the family's wealth. A spiritual dimension is employed to validate the disinheritance of Esan women. It is believed that women are inferior to men in both the physical world and the spiritual realm.³⁹ Indeed, what a woman gets is not by right, but as an act of goodwill. No matter her status, she herself is an inheritable property, especially in widowhood. In many Nigerian cultures, widow inheritance is prevalent. The Esan culture places a premium on the superiority of the first son. Thus, where a man dies intestate, and there is evidence placed before a customary court that the deceased was subject to the customary law of his place of origin or where he lived and died, any application before the customary court for an order to administer the estate of the deceased will normally be granted in favour of the first son and other children of the deceased. An application brought by the other children of the deceased without the support of the first son will not succeed. There are two reasons for this. First, under the customary law of the Esan speaking people, if a man dies intestate, the first son becomes a trustee of the estate of the

³⁸ Christopher E. Ukhun & Nathaniel A Inegbedion, Cultural authoritarism, Women and Human rights Issues Among the Esan People of Nigerian, 5 African Human Rights Journal, 2005)

³⁹ Christopher & Nathaniel, supra note 37

deceased pending the time the final burial rites of the deceased are performed by the first son. In the interim he administers the estate for and on behalf of himself and the other children. Therefore based on this custom, an application to the customary court to administer the estate of the deceased is a mere formality that will be granted as a matter of course, except where there are other extenuating circumstances that may prevent the court from making such a grant; for instance, where the legitimacy of the first son is in dispute. Second, after the final burial rites of the deceased are performed, the elders of the extended family of the deceased distribute the properties of the deceased. Again, the first son occupies a prominent place in the affair. As a matter of right, he takes the house of the deceased. Given the above scenario, a female child of the deceased has very little role to play. She has little or no inheritance rights, as the major assets of the deceased are shared among his sons. Women are generally discriminated by this inheritance practice.⁴⁰ In Esanland and many Nigerian communities, women are losers in matters of inheritance and they have no rights.

Theory and policy: In theory many Nigerian local laws and other international treaty obligations affirm the right of every Nigerian to equal ownership or inheritance of property. The Land use Act of 1978 grants every

⁴⁰ Chrispopher & Nathaniel, supra note 37

Nigerian equal access to land.⁴¹ This is based on the false premise of gender equality in Nigeria, but land in Nigeria still remain in the hands of men while it remains largely inaccessible to women.⁴² Land in Nigeria is held either by statutory or customary occupancy and is subject to customary or statutory law. The Registration of Titles Act of 1925⁴³ governs how and under what circumstances all land including state and customary land is to be registered.⁴⁴ Section 34 of the Registration of Title Act states that at death, the land registration must be transferred into the name of the deceased's legal representative; that is the executor or administrator having lawful or customary right to administer the real estate of the deceased.⁴⁵ It has been argued that the registration of customary rights of occupancy threatens the rights of women who only have usufructuary rights, especially as these cannot under the Act be converted into ownership rights.⁴⁶

It is the official policy of Nigeria that on no account should a woman or female child be counted or treated unequal with a man or male child. In theory Nigerian constitution, which is the supreme authority of the land

⁴¹ Land Use Act 1978, CAP 202 1990

⁴² Bringing Equality Home, supra note 31

⁴³ Registration of Title Acts, CAP. 546.1990 edition.

⁴⁴ Bringing Equality Home, supra note 31

⁴⁵ See Art. 43 of Registration of Title Acts CAP 546.1990 edition, supra note 43

⁴⁶ Bringing Equality Home, supra note 31

affirms equality of all people.⁴⁷ Article 15 (2) states that discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.⁴⁸ Article 17(2) of Nigerian Constitution affirms equality of rights, obligations and opportunities for all her citizens.⁴⁹ Furthermore, discrimination is prohibited in Article 42(1) which states that a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person be subjected either expressly by or in the practical application of, any law in force in Nigeria, or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject.⁵⁰ The Nigerian constitution confers on every Nigeria the right to acquire or own property any where in Nigeria.⁵¹ Chapter iv of Nigerian constitution affirms equality of all citizens irrespective of gender or age.⁵² Women of Nigerians who denied this constution rights have equal access to the court and can freely institue legal actions to seek redress for wrongs done to them.⁵³

⁴⁷ 1999 Nigerian constitution , chapter 4

⁴⁸ Art 15(2) 1999 of Constitution of Federal Republic of Nigeria

⁴⁹ Art. 17(2)a of 1999 Constitution of Federal Republic of Nigeria

⁵⁰ Art 42(1)a of 1999 Constitution of Federal Republic of Nigeria

⁵¹ Art.43 of 1999 Nigerian Constitution

⁵² Chapter iv of 1999 Nigerian constitution

⁵³ Chapter iv of 1999 Nigerian Constitution

Equality of men and women is one of the cardinal objectives of CEDAW and Nigeria as a signatory of CEDAW, agreed to make the principle of equality of women and men a practical and daily reality for all her citizens irrespective of sex or gender. Nigerian commitment to equality of women with men can be seen from the following provisions of CEDAW which Nigeria promised to keep and enforce. In Article 6 of CEDAW, Nigeria(parties to this) covenant to take all appropriate measures, particularly legislative measures, shall be taken to ensure that women married or unmarried, have equal rights with men in the fields of civil law in particular and the right to acquire, administer, enjoy, dispose of inherit property, including property acquired during marriage.⁵⁴ In Article 2 Nigeria (State Parties)condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end, undertake:(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b)To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c)To

⁵⁴ Art. 6 of CEDAW supra note 24 , See also Bringing Equality Home, supra note 31

establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.⁵⁵ Furthermore, in article 5, the convention requires state parties to modify the social and cultural patterns of conduct of men and women, with view of achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of sexes or stereotyped roles for men and women.⁵⁶ Finally article 16 of CEDAW provides that states parties shall take all appropriate measures to eliminate discrimination against women in matters relating to marriage and

⁵⁵ Art .2 CEDAW supra note 24

⁵⁶ Art. 5 CEDAW, supra note 24, See also Bringing Equality Home, supra note 31

family relations and in particular shall ensure on a basis of equality of men and women.⁵⁷

A look at the reality of equality of women in Nigeria will show that Nigeria has not fulfilled its promises and obligations under CEDAW. Nigerian as signatory to 1948 UN Convention on Human rights and African Charter affirms equality of all its people and citizens.⁵⁸ The Universal Declaration of Human Rights (UDHR) which is one of the most important international documents on human rights states “Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵⁹ Nigeria as signatory to UDHR promises to guarantee every man and woman the right to equality before the law, equal protection to all, the right to equality in marriage and right to own property.⁶⁰ Nigeria as a party to both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) also expressly and explicitly recognize the right to equality between men and

⁵⁷ Art. 16 CEDAW, supra note 24, See also Bringing Equality Home, supra note 31

⁵⁸ The United Charter of 1945, See also African Charter, supra note 1

⁵⁹ Art. 2 of UN Charter of 1945

⁶⁰ Bringing equality Home, supra note 31

women and the right to non discrimination.⁶¹ Article 3 of the ICCPR (entitled ‘Equality of Rights between Men and Women) explicitly requires that “state parties to the ICCPR must also ensure equality in regard to the dissolution of marriage which excludes the possibility of repudiation. The grounds for divorce and annulment should be the same for men and women, as well as decisions with regards to property distribution, alimony, and the custody of children. Women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by death of one of the spouses.”⁶² Nigeria through the African Charter affirms the same policy. In Article 2 of African Charter, African states affirm, “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 other opinion, national and social origin, fortune, birth or any status.”⁶³ There is no doubts that African charter wants all African parties to the charter to eliminate any or all kinds of discrimination and apply international standard in it national laws. Article 18(3) of African charter states “ The state shall ensure the elimination of every discrimination against women and also

⁶¹ See International Covenant on Civil and Political Rights (ICCPR) 16 Nov 1966 UNTS Vol.999 P.171 and Vol. 1057 P.407, See also International Covenant on Economic, Social and Cultural Rights, (ICESCR) 16 Dec. 1966, UNTS Vol. 993 P.3, Bringing Equality Home, supra note 31

⁶² Art. 3 of ICCPR, See also Bringing Equality Home, supra note 31

⁶³ Art. 2 of African Charter, supra note 1

ensure the protection of rights of the women and child as stipulated in international declarations and conventions.”⁶⁴ The African Protocol to the African Charter on the Rights of Women in African which Nigeria has ratified went to solidify some of these above declarations.⁶⁵ In Article 16 the protocol affirms that African women should not suffer any discrimination based on their gender or sex, or marital status.⁶⁶ In article 21, the protocol states that “A widow or widower shall have the right to inherit each other’s property. In the event of death the surviving spouse has the right, whatever the matrimonial regime to continue living in the house.”⁶⁷ Article 21 makes it clear that the end of regime of only boys inheritance of family property and land has come in Africa. Under Article 21 women and girl are ensured the right to inherit their parents properties in equal shares with boys, which is contrary to the prevailing and dominant culture and customs in most African states and communities.⁶⁸ From the above situation, It can be said without equivocation that in theory and policy, Nigerian government through its constitution and other international charters and treaties which it has signed or ratified promotes and recognizes equality of women with men.

⁶⁴ Art 18 (3) African Charter, supra note 1

⁶⁵ See African Protocol on Rights of Women in Africa, supra note 8

⁶⁶ Art. 16 of African Protocol on Rights of Women in Africa, supra note 31

⁶⁷ Art .21 of African Protocol on Rights of Women in Africa, supra note 31

⁶⁸ See Art. 21 of African Protocol on Rights of Women, supra note 31

REALITY: As can be seen above, it seems obvious from Nigeria constitution and other international human rights documents which Nigeria has bound its self that Nigeria government officially promotes policy of non discrimination. A look at Nigerian daily lives of Nigerian women or Nigerian cultural practices on how women are treated will leave no one in doubt that Nigerian does not practice what her constitution say or what she has signed in many international treaties on human and women rights. Nigeria it should be noted is a patriarchal and very conservative traditional society, notwithstanding its reception or embrace of western values and modern days culture. In traditional African societies, women are not accepted or seen as equals with men.⁶⁹ In Nigerian culture and custom, women's rights and privileges traditionally accrues to them through men. In most traditional African society, equality of woman and man is burden or concept too big to swallowed. Most African culture still view women as property and to this extent they can't in reality have the same rights and privileges like men. Nigerian's developments and attempts to be seen as a human right and modern nation notwithstanding, Nigeria is still far from a country or nation where men and entire population treat women as equals with men. Inheritance rights in Nigerian is mostly governed by

⁶⁹ Scripture Union Nigeria Daily Guide 2008, P58-59, SUPB Ibadan Nigeria (2008)

customary law. The majority of marriages in Nigeria are entered into under customary law and it is this code that determines the law of inheritance or rights of spouses and family members. There are about 250 ethnic groups in Nigeria with different inheritance law varying from one community to another. Most often the male members of the community are the interpreters and adjudicators of this customary laws, thereby denying women the opportunity to put the ideas across in this domineering custom.⁷⁰

Nigeria operates a legal system that is based on English common law, Islamic sharia law (predominantly in Northern States) and traditional civil or customary law. Nigeria is a federal republic, with three levels of government namely; federal, states and local (county) governments. The three tiers of government have law making powers. Federal laws apply throughout the country; state laws apply only to their particular states area, local laws are valid only within local municipality or areas. Within the states and local government laws is the customary law, which vary widely within states and within individual communities and states. Within these competing tiers of government there are many kinds of discriminatory customary practices that exist in most communities in Nigeria. The existence of numerous ethnic groups with different and conflicting discriminatory cultural practices,

⁷⁰Bringing Equality Home, supra note 31

makes almost impossible for any government regulations on discrimination or inequality to succeed.⁷¹ Nigerian legal pluralism has created a big grey area and much leeway in permitting choices of laws. While certain laws in Nigeria are of general application, state and local laws are more often accessible. The nature of Nigerian federalism makes it difficult to know when a federal or state or local or customary law takes precedence. It is without doubt that the interest of Nigerian women with respect to inheritance rights is greatly affected by the operation of this multiple legal systems governing family law. Depending on a woman's place of residence, type of marriage, ethnic group or religion her rights in marriage, her rights to inheritance and ownership as well as the treatment she receives as result of widowhood practices may be governed by completely different rules with very different consequences in comparison to a woman elsewhere in the country and in another social setting.⁷² In Nigeria discrimination is officially prohibited, but in practice discrimination goes on daily basis because the three tiers of government is ineffective to implement any official policy on non discrimination. In effect government officials pretend as if they don't know what is going on in the community. This situation is further complicated by the fact that the constitution of Nigeria allows courts to uphold

⁷¹ Bringing Equality Home, supra note 31

⁷² Bringing Equality Home, supra note 31

customary practices that is not against equity, fairness and good consciousness. As COHRE puts “especially in matters of personal law, further complications arises because Nigeria’s federal system of government places customary law within the legislative competence of the states, but retains federal jurisdiction over statutory marriages.”⁷³

Suffice to state that in reality, Nigerian government has not taken any real concrete efforts to make equality of women and men a reality, notwithstanding, the signing of many treaties on women. Nigerian government has in theory purported to promote equality of women, the same government have by their actions and programs perpetuated women’s inequality. Women who make up about half of Nigerian population are not well represented in political and government offices. In many wages, or salaried position in Nigerian, women still earn less than men. Nigerian has not taken many concrete steps required by CEDAW to promote the equality of women with men

In Nigeria, many laws and practices still legitimizes women inequality, notwithstanding Nigerians signing of numerous international human rights treaties. Many Nigerian laws, in principle affirms equality of all people

⁷³ Bringing Equality Home, supra note 31

irrespective of sex, gender or tribe. In bail bond policy, Nigerian law affirms that everyone can provide bail for any person, but in practice at police stations and courts, it is extremely impossible for women to provide bail or surety to accused person. It is argued that in Nigeria the police would rather allow unqualified man or under age boy to stand for surety rather than allow a woman serve as a surety to an accused person in the police station.⁷⁴ It is believed that some Nigerian laws seem to legitimize inequality and women discrimination. For example the Penal code law, Laws of Northern Nigeria 1963 provides “Nothing is an offence which does not amount to infliction of grievous hurt upon any person, which is done by a husband for the purpose of correcting his wife, such husband and wife being subject to any native law or custom in which such correction is recognized as lawful.”⁷⁵ This law sanctions or endorses wife beating as a corrective measure. It is argued that the provision equates the relationship of husband and wife with that of master and servant, school master and pupil, child and ward.⁷⁶ Furthermore, the Police Act Cap 359, Laws of the Federation of Nigeria requires a police woman to seek the permission of the commissioner of police in her area of service before she can marry.⁷⁷ This

⁷⁴ Oby Nwankwo, *supra* note 34 at P. 16-17

⁷⁵ Section 55(1) 1963 Penal Code of Law of Northern Nigeria

⁷⁶ Oby Nwankwo, *supra* note 34 at P.16-17

⁷⁷ Police Act CAP 359, Laws of Federation of Nigeria 1990

law has no similar provision to male police officers. This provision has not been amended despite the public outcry against it. A similar provision is in the immigration laws which would require married women to obtain the consent of their husbands in writing to be entitled to a passport or travel document.⁷⁸ The Income Tax and Regulations would not allow a woman to claim deductible allow for children unless there is a written evidence from her husband that he is not claiming it, while there is no such requirement if the man is claiming the children in his tax return.⁷⁹ In Nigeria, women are still subjected to oppressive widowhood practices. Many Nigerian widow are still subjected to all kinds of humiliation, torture and cruel and inhuman treatment on the death of their husbands. Widowhood practices include physical and emotional torture, which a widow is subjected to ranging from violent shaving of her hair including pubic region, to making her drink the water used to bathe the corpse of her deceased husband. Other forms of established widowhood practice include disinheritance, forced marriage to inlaws (wife inheritance), prolonged mourning periods, restrictions to the house, forbidden from eating certain food items, forced to sleep with the corpse, required to wear dark/dull mourning clothes, forced out of

⁷⁸ Nigeria Immigration Law 1990, Laws of the Federation

⁷⁹ Oby Nwankwo, *supra* note 34 at P. 16-17

matrimonial homes, and deprivation of basic hygiene like not allowing to take her baths for days.⁸⁰

THEORY AND POLICY:

DISCRIMINATION:It can be said that discrimination is one of the greatest injustices which Nigerian women suffer in modern day Nigeria.

Discrimination against Nigerian women runs deep in Nigerian and permeates every corner and part of Nigerian society.⁸¹ Discrimination, has been aptly defined by CEDAW as, “Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁸² The African union went a step further by expanding the meaning of discrimination, when the protocol to the African charter on the rights of women in Africa defined discrimination, as “any distinction, exclusion, or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition,

⁸⁰ Oby Nwankwo, *supra* note 34 at P.18

⁸¹ Theory and Reality of Nigerian women Right available at www.reproductiverights.org (last visited 7/04/08)

⁸² See Art 1 CEDAW, *supra* note 24

enjoyment, or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.”⁸³ Nigeria as a signatory to CEDAW,⁸⁴ African protocol on women rights in Africa⁸⁵ and other international documents on international human rights unequivocally rejects discrimination of women whether by reason or gender or any other means as stipulated in the convention.⁸⁶ In Article 2 of CEDAW, Nigeria as a member of CEDAW or State Party condemns discrimination against women in all its forms, and agrees to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.⁸⁷

Nigeria as state party to Cedaw undertook to (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other

⁸³ See generally African Protocol on Women Rights, supra note 8, See also Oby Nwankwo, supra note 34

⁸⁴ See generally CEDAW supra note 24. Nigerian government ratified CEDAW in 1985 without reservation. Furthermore the government signed the optional protocol to the Convention in 2000 and ratified it in 2004 available at <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm> (last visited 12/21/08)

⁸⁵ See African Protocol on Women’s Rights, supra note 8

⁸⁶ See CEDAW, supra note 24, See also Art. 18 of African Charter supra note 1

⁸⁷ See Art.2 CEDAW supra note 24

public institutions the effective protection of women against any act of discrimination;(d)To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;(e)To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;(f)To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;(g)To repeal all national penal provisions which constitute discrimination against women.⁸⁸ On local level Nigerian constitutions strongly disapproves discrimination of against women.This recognized as one of such fundamental rights that cannot be taken away from any Nigerian except in times of emergency.⁸⁹ Every woman in Nigeria is guaranteed the freedom from discrimination on ground of sex, gender and among other factors. Nigeria by being a party to many international and regional human rights instruments recognizing women's right, which prohibits sex based discrimination, Nigeria has shown in theory that it is very much part of the global action which disapproves of discrimination against women.⁹⁰ Nigeria

⁸⁸ Art. 2 of CEDAW, supra note 24

⁸⁹ Chapter iv of 1999 Nigerian Constitution

⁹⁰ Women And Female Rights in Nigeria available at http://www.wacolnigeria.org/women_and_children_right.doc.(last visited 6/28/08)

by being a signatory to the landmark African protocol on women rights in Africa is by outside world as a country deeply and truly committed to women's rights.⁹¹ Going by above description, any outside person who has not lived or studied Nigeria women rights issue, will easily think that Nigerian women are enjoying all privileges and rights espoused in many of the international and regional women's rights which Nigeria has signed or ratified.

REALITY: A look at the lives of Nigeria women will show a different right in comparison with the real rights of Nigerian women under many conventions which Nigeria have signed or ratified. In modern day Nigeria, women still suffer a lot of discrimination notwithstanding, Nigerian government official policy on women's rights. It can be said in theory that Nigerian government is committed to non discrimination of women by reason of all the international human rights documents it has signed. In actual fact, average Nigerian woman is still far from reaching to the promise land as stipulated in various international women's conventions and Nigerian laws. Most Nigerian women still leave under cultural and societal discrimination. Just like in most African societies or communities, Nigerian women are discriminated in many areas of their daily lives. In Nigeria,

⁹¹ Nigeria like most African countries has a good policy and law on women's right, but the crux of the matter is translating it into reality

women cannot inherit family land. They are still seen as property to be inherited.⁹² This could also be seen from High Courts of Nigerian decisions on this issue. It has been asserted that “Judicial attitudes until recently tend to perpetuate the gender discrimination in Nigeria.”⁹³ For example in *Nezianya v. Okagbue*⁹⁴ the court held that under the native law and custom of Onitsha, a widow cannot deal with her property without the consent of his family, which may be actual or implied from the circumstances. Further, if a husband dies without a male issue, his real property descends to his family; his female issue does not inherit it. Also in the case *Nzekwu v. Nzekwu*,⁹⁵ the Supreme Court of Nigeria restated the principle that the widow’s dealings with her husband’s property however must receive the consent of the family, and she cannot by the effluxion of time, claim the property as her own. She has however a right to occupy the building or part of it, but this is subject to her good behaviour. In the case of *Onwuchekwe v. Onwuchekwe*⁹⁶ the Court of Appeal refused to reject as repugnant a custom where a wife is owned with her properties by her husband. But the recent case of *Augustine Nwofor Mojekwu v Caroline Mgbafor Okechukwu Mojekwu* decided by the Court of Appeal Enugu on 10th April 1997 may change the tide. In the case now

⁹² Scripture Daily Guide 2008, supra note 69

⁹³ Women And Female Rights in Nigeria, supra note 90

⁹⁴ See *Nzeianya V Okagbue*, (1963) NLR 352., See also Women and Female Rights in Nigeria, supra note 90

⁹⁵ *Nzekwe V Nzekwe* (1989) 2 NWLR p. 373, See also Women and Female Rights in Nigeria, supra note 90

⁹⁶ *Onwuchekwe V Onwuchekwe* 1991) 5 NWLR pt. 197 at 739, See also Women and Female Rights in Nigeria, supra note 90

reported⁹⁷ the court decided the “Oli-ekpe” custom of Nnewi in Anambra State under which males and not females inherit the father’s property is unconstitutional. Niki Tobi J.C.A. delivering the lead judgment asked the following questions: “Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilized sociology does not discriminate male against women? Day after day, month after month and year after year, we hear of and read about customs, which discriminate against womenfolk in this country. They are regarded as inferior to the men folk. Why should it be so?”⁹⁸ According to the learned Justice of the Court of Appeal, “All human beings – male and female – are born into a free world, and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi “*Oli-ekpe*” custom relied upon by the appellant, are not consistent with our civilized world in which we all live today, including the appellant. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees

⁹⁷ Augustine Nwofor Mojekwu V Caroline Mgnafor Okechukwu Mojekwu (1997)7 NWLR Pt. 512 P. 283, See also Women and Female Rights in Nigeria, supra note 90

⁹⁸ Augustine Nwofor Mojekwu V Caroline Mgnafor Okechukwu Mojekwu (1997)7 NWLR Pt. 512 P. 283

with the divine truth, believe that – God, the creator of human being, is also the final authority of who should be male or female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. On my part, I have no difficulty in holding that the “*Oli-ekpe*” custom of Nnewi, is repugnant to natural justice equity and good conscience.”⁹⁹This case is a landmark decision in advancement of women’s right in Nigeria. The *Mojekwu case* went to Nigerian Supreme Court and the Supreme Court reaffirmed the Court of Appeal decision.¹⁰⁰The case of *Muojekwu v. Ejikeme*¹⁰¹ affirms the decision of the Court of Appeal that a female child can inherit from the deceased father’s estate in Igboland without the performance of the *Nrachi* ceremony. In this case the court took liberty to interpret the constitutional nature of freedom from discrimination vis a vis the “*Ili-Ekpe* or *Oli-Ekpe*” custom of Nnewi that does not recognize female inheritance unless *Nrachi* ceremony has been performed on the female. The Court held that:By section 42(1) of the Constitution of the Federal Republic of Nigeria, 1999, a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person, be subjected either expressly by, or in the practical application of,

⁹⁹ Augustine Nwofor Mojekwu V Caroline Mgnafor Okechukwu Mojekwu, supra at P. 288

¹⁰⁰ Mpjeke V Mojekwu, supra

¹⁰¹ Muojekwe V Ejikem (2000) 5 NWLR PT. 657 P.402.

any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria or other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject. In the instant case, the fact that the appellants were born out of wedlock was immaterial. That cannot be used against them in inheriting the estate of the deceased. As blood relations, the property of the deceased should devolve on the appellants. Also, the Nnewi custom relied upon by the respondents, which permitted them to inherit the estate of the deceased merely because he had no male child surviving him, is repugnant to natural justice, equity and good conscience. Such a custom clearly discriminated against Virginia, the daughter of the deceased and is therefore unconstitutional in the light of the provisions of section 42 of the Constitution of the Federal Republic of Nigeria, 1999¹⁰². Following the above statement the court held that “Virginia, the mother of the 3rd appellant, and grandmother of the 1st and 2nd appellants, a victim of the Nnewi *nrachi* ceremony, cannot be discriminated against on grounds of her female sex. By the application of the custom, Virginia was subjected to disabilities or restrictions, which the provision of section 42(1) of the constitution forbids. The above apart, Virginia has protection under Article 2

¹⁰² Muojekwe V Ejikem (2000) 5 NWLR PT. 657 supra note 101 at P.410

of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). By Article 2 of CEDAW, state parties condemn discrimination against women in all its forms and agree to pursue a policy of eliminating discrimination against women. By Article 5, state parties are called upon to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either sex or on stereotyped roles for men and women. In my humble view, Virginia is a victim of the prejudices anticipated in Article 5. In view of the fact that Nigeria is a party to the Convention, courts of law should give or provide teeth to its provisions. That is one major way of ameliorating the unfortunate situation Virginia found herself, a situation where she was forced to rely on custom not only against the laws of Nigeria but also against nature.”¹⁰³ This case is considered a major advancement to women’s rights in Nigeria because this one of such rare occasion an International Convention on women’s human rights was judicially recognized. The Nigerian rural woman, the poorest of the poor, has been gravely neglected. Many Nigerian women are educationally disadvantaged and they do not have the same job opportunities as their male

¹⁰³ Muojekwe V Ejikem (2000) 5 NWLR PT. 657 P.402

counterpart. Politically, women are under-represented. Even the seemingly gender consciousness of Nigerian society aroused by Better Life Programme, Family Support Programme and Beijing Conference has not improved Nigerian women status.¹⁰⁴

Treaty Obligations: International covenants and conventions becoming binding, contractual treaties with the authority of law only when the necessary and predetermined number of states agree by their own free will to accept the obligations contained therein.¹⁰⁵ Nigeria has signed and ratified many international human rights treaties and instruments, which in theory shows Nigerians clear intentions of enhancing and promoting the human rights of women and female children. Nigeria has committed her self to women's rights protection and developments by signing such international treaties on women like CEDAW and African Protocol on Women's right. Nigeria is among the few African states which has ratified the African protocol on women rights, which is believed to one of the most far reaching regional women's rights instruments.¹⁰⁶ Nigeria in theory has shown great commitment towards women's right, but a look at reality of women's right

¹⁰⁴ Women and Female Rights in Nigeria, supra note 90

¹⁰⁵ Paul Gordon Lauren, *The Evolution of International Human Rights, Visions Seen*, P.257, University of Pennsylvania Press, Philadelphia (1998)

¹⁰⁶ Africa: Entry into force of Protocol on the Rights of Women in Africa positive step towards ending discrimination available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGAFR010042005> (last visited 12/22/08)

and the implementations of these instruments will clearly show that there is a clear difference between theory and practice.

REALITY: A look at the practice of international human rights in Nigeria will show a marked difference between intentions of the instruments and the practice of women rights in Nigeria. In many communities in Nigeria women are still being treated as if Nigeria never entered into any international human rights. Nigerian women are still being treated as if Nigeria is in the stone age era. Nigeria still has a lot of customary laws and regulations which contradicts many international human rights instruments which Nigeria has signed or ratified. Most Nigeria customary law are at variance with the very law which the international human rights treaties tend to correct or abolish. A good example is CEDAW which enjoins all member states “to take appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”¹⁰⁷ Nigerian has not taken any major effort to bring its local or national law in conformity with CEDAW notwithstanding that Nigeria ratified the convention since 1985.¹⁰⁸ Despite the fact that CEDAW members are expected to take steps to abolish offensive women practices, many tribes and communities in Nigeria still

¹⁰⁷ Art. 2 of CEDAW, supra note 24, See also, Oby Nwankwo, supra note 34 at P.14

¹⁰⁸ Oby Nwankwo, supra note 34 at P.14-19

practice early child marriage, genital mutilation or circumcision, oppressive widowhood rites and denial of inheritance to women.¹⁰⁹ According to Nwankwo, “These customary law deny women the right to life, right to equality, right to inherit property, right to bodily integrity and dignity. Even where statutory law exists to outlaw some of these obnoxious customary and religious practices, enforcement level is very low; suggesting lack of political will on the part of government and its agents. The result is a legal framework for the protection of human rights that is incoherent and sends conflicting signals that confuse the people including those whose values and conducts the law is designed to regulate.¹¹⁰ A good example is CEDAW, Nigeria has ratified CEDAW which is considered to be the bedrock of international women’s right in the whole world¹¹¹ since 1985 but more than 24 years after ratifying the treaty it is yet to become law in Nigeria. In Nigeria treaties do n’t become automatically incoportated into the domestic law by reason of ratification. Section 12 of Nigerian Constitution provides that “No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treat has been enacted into law by the national Assembly.”¹¹² The implication of this that no treaty

¹⁰⁹ Oby Nwankwo, supra note 34 at P.14

¹¹⁰ Oby Nwankwo, supra note 34 at P.14

¹¹¹ CEDAW is considered as groundnorm or the bill of rights for women’s rights world wide

¹¹² Section 12 of 1999 Nigerian Constitution.

entered by Nigerian government is enforceable in Nigeria except it has been enacted or incorporated into national /municipal law. This has resulted in non domestication and implementation of many treaties which Nigerian government has ratified. It argued that so far, it is only the African Charter and Child's Convention are only two treaties which has been domesticated in Nigeria.¹¹³ In one remarks of CEDAW committee meetings, which considers reports of different states as stated in the CEDAW instrument, the committee expressed concern that although Nigeria ratified the convention in 1985, the convention still has not been domesticated as part of Nigerian's municipal law. The committee recommended that Nigeria legislature take steps to incorporate the provisions of the convention into its municipal laws so as to strengthen the legal framework of the protection and promotion of the rights and integrity of women in Nigeria.¹¹⁴ The committee went on to note that unless the convention is domesticated, the convention is unenforceable and is of no effect in Nigeria; it called on Nigeria government to hasten the process of the domestication.¹¹⁵ According to Oby Nwankwo, When Nigeria signed and ratified CEDAW, it committed itself to embody

¹¹³ Oby Nwankwo, *supra* note 34 at P.14

¹¹⁴ See Recommendations Nos. 18 and 19 of the Concluding Comments: Nigeria of the Committee on the Elimination of Discrimination against Women, Thirtieth session 12-30 January 2004, published as CEDAW/C/2004/I/CRP.3/Add.2/Rev.1 of 30th January 2004., See also Oby Nwankwo, *supra* note 34 at P.10

¹¹⁵ See Recommendation Nos. 18 & 19 of the Concluding Comments, *supra* 114, See also Oby Nwankwo *supra* note 34 at P.10

the principles of equality of women and women in its national constitution or other appropriate legislations and to ensure, through the law and other appropriate means the practical realization of this principle.¹¹⁶ In light of the failures of human rights and women's rights in Africa, is there any hope that a time will come in Africa when the women rights of women will indeed be a reality? Some skeptics believe it will be impossible to have the reality of women's right in Africa as envisaged in the many international charters in light of African culture and economic condition.¹¹⁷ This view notwithstanding some believe it is possible to have a functional or situational working human rights in Africa.¹¹⁸ This group contend that women rights are observed in Africa except that the west who claim that women rights are not observed in Africa are using a different culture and norm to judge human right practices in Africa.¹¹⁹ These differences in view notwithstanding, many African countries have started taking step to improve the human rights of women in Africa.¹²⁰ For example, some African governments have begun to take steps to eradicate female circumcision either by prohibiting the practice as it is the case in Burkina Faso, Ghana,

¹¹⁶ Oby Nwankwo, supra note at P.10

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¹¹⁸ Situational human right does take into account the cultural and historial difference of different regions in accessing or arriving at the judgement on Human rights situation in a given region., See also Tiffany M. McKinney Gardner, The Commodification of Women's work: Theorizing the Advancement of African Women, 13 Buff. Hum. Rts. L. Rev. 33 (2007)

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Central African Republic and Sudan or by sometimes supporting only moral campaigns carried by non governmental organizations.¹²¹ Currently branches of the inter African Committee on Traditional Practices affecting the Health of Women and Children can be found in twenty-two African countries, where it develops training and information programs aimed at local activists.¹²² One of the major method to tackle the poor practice of human right in Africa is through education. According to Fran Hosken protection from female genital mutilation cannot be done by talking or publishing articles or making movies and videos or holding conferences and meetings in the rest of the world. In the final analysis, this can only be done in Africa by coordinated long term and continuing effort to educate the people involved and to teach them on their own terms about health, about their own bodies and how reproduction functions. And then they will decide for themselves that these mutilations will stop. A long, hard and laborious process of education is needed. This is necessary and has to be done if we are serious about the goal—to eradicate female genital mutilation permanently so it will never and nowhere be practiced again.¹²³ As Howard

¹²¹ This approach is an attempt to use non conventional attempt to change some harmful cultural practices affecting the rights of women in Africa.

¹²² Isabel Coello.,Female Genital Multilation: Marked by tradition P 2, 7 Cardozon J Int;l & Comp L.213, Fall 1999

¹²³ Fran Hosken, The Hosken Report: Genital and Sexual Mutilation o f Females,P.376,(Lexington, MA: Women 's International Network, News 4th edition (1994,) See also Claude E Welch Jr, Protecting Human Rights in Africa(Strategies and Roles of NGOS) P87,University of Pennsylvania Press (1995)

puts it, “for the moment at least, an educational campaign directed at health professionals, school girls and patients in maternity clinics would be the most appropriate manner of beginning elimination of the custom. Legislation banning female genital operation might merely drive the operation underground.”¹²⁴

Since the mid 1980, when the Inter African Committee on Traditional Practices Affecting the Health of Women and Children(IAC) was found, they have develop a strategy of working from below to eliminate a variety of harmful practices affecting the life of women and female children in Africa. They target change in social values.¹²⁵

It is believed that effort to eliminate female circumcision in African has been unsuccessful in some parts of Africa because opponents of the practice ignored its economic and social context. It is argued that external intervention has strengthened the resolve of communities to continue their genital cutting rituals as a way of resisting what they perceive as cultural imperialism.¹²⁶ It is argued that the way western feminist and foreign human rights organizations have approached the issue in Africa have yielded

¹²⁴ Rhoda E Howard, *Human Rights in Commonwealth Africa*, P 205, Totowa, NJ: Rowan & Littlefield, 1986, See also Claude E. Welch Jr, *Protecting Human Rights in Africa* supra note 123 at P. 87

¹²⁵ Claude E. Welch Jr , *Protecting Human Rights in Africa*, supra note 123 at P. 87

¹²⁶ Frances A. Althaus, *Female Circumcision: Right of Passage or violation of Rights* (International Family Planning Perspectives, Vol 23, No3, Sept 1997 Special report) available at <http://www.guttmacher.org/pubs/journals/2313097.html>(last visited 6/08/08)

negative results. Some African women have perceived some efforts of these feminist as condescending and derogatory toward their culture. According to one infibulated Somali woman, “If Somali women change, it will be a change done by us, among us, When they order us to stop, tell us what we must do, it is offensive to the black person or the muslim person who believes in circumcision. To advice is good, but not to order.”¹²⁷ The west have been accused of bias in their publications and opinions on female circumcision in Africa. One anthropologist observes “ African women are --- depicted as aberrant, while infact western women who abuse their bodies have their sexuality affirmed as the norm.”¹²⁸ Furthermore, it is argued that “when western women also subject themselves to medically unnecessary, hazardous procedures such as cosmetic surgery and insertion of breast implants, to increase their sexual desirability it does not raise such scrutiny.”¹²⁹

This conception warrants that a new approach be adopted in trying to find a lasting solution to harmful cultural practice among differing people in Africa. In the case of female circumcision in Africa, a new approach on how to stop this practice has to be developed if we want to stop female circumcision in Africa. The approach or strong reaction and depiction of

¹²⁷ Frances Althaus, *supra* note 126

¹²⁸ Frances Althaus, *supra* note 126

¹²⁹ Frances Althaus, *supra* note 126

African cultures practicing female circumcision as savage, violent and abusive of women and children have to give way to new and gentle approach to the issue, if the world and women's rights activists in particular wants to win the war on female circumcicion in Africa.¹³⁰

Some international organizations have adopted indirect approach by supporting local actvisit groups with fund, training and and technical expertise rather than choosing direct involvement.¹³¹ Education as form or tool for eradicating female circumcision can take different shapes and forms. Community education can be very good type of education in tackling the issue of female circumcision in Africa. It is reported that a nationwide study conducted in 1985-86 by National Association of Nigerian Nurses and Midwives found that female circumcision was practiced in all states and that five of the then 11 states at least 90% of women had been cut. In light of this, the organization designed an eradication campaign with support from population Action International and Program for Appropriate Technology in Health. The project trained health workers to teach individuals about harmful effect of female circumcision and work through religious organizations, women organizations and social clubs to mobilize communities against the

¹³⁰ Tiffany M. McKinney Gardner, *supra* note 118

¹³¹ Francies A Althaus, *supra* note 126

practice. This yielded some positive results.¹³² Other suggested methods of fighting human rights abuses of women include drama. In Burkina Faso, the director of a local theater developed a play based on experience of his niece, on the consequences of female circumcision, the play aimed particularly at men. In some communities, alternative ritual was set up. In Meru district of Kenya in 1996, some 25 mother-daughter pairs participated in a six-day training session that included information on consequences of female circumcision and how to defend the decision not to be circumcised or to be circumcised. The session culminated in a coming of age celebration planned by the community, excluding circumcision but including party and gifts.¹³³

In the case of female circumcision, it is believed that a clear policy declaration by governments and professional bodies is essential to send a strong message of government disapproval but majority of the societies still need to be convinced that female genital mutilation does not serve the common good of the society.¹³⁴ It is believed that in many African communities, the use of legal sanctions that incriminate practitioners and families may be counterproductive. In this situation, public information campaigns and counseling of families may work better. Furthermore, substantial change is more likely to occur with improvement in the status of women in the

¹³² Frances A Althaus, *supra* note 126

¹³³ Frances Althaus, *supra* note 126

¹³⁴ Frances Althaus, *supra* note 126

society. In most countries, women with higher level of education and those of higher income are less likely than other women to be circumcised and less likely to have their daughters circumcised.¹³⁵

It is reported that during colonial era in Africa some Africa government attempted to ban female circumcision but were met with resistance. A good example of the short coming of using legal sanctions in eradicating female circumcision can be seen from the stiff resistance that occurred in Sudan during the British colonial rule. In Sudan, when a law banning infibulation was about to be proclaimed in 1946, many parents rushed to midwives to have their daughters infibulated in case it becomes impossible later. When some midwives were arrested for performing circumcision, anticolonial protest broke out. The British colonial government fearing a massive nationalist revolt such as those that occurred in Egypt and Kenya eventually let the law go unenforced.¹³⁶

¹³⁵ Frances Althaus, *supra* note 126

¹³⁶ Frances Althaus, *supra* note 126

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- (2) Convention on the Elimination of All Forms of Discrimination Against Women Dec 18 1979, UNTS Vol. 1249 P.13
- (3) Convention on the Rights of the Child 20th Nov. 1989 UNTS Vol.1577 P3
- (4) Charter of the United Nations 26th June 1945.
- (5) International Covenant on Civil and political Rights 16 Nov.1966 UNTS Vol.999 P.171 and Vol.1057 P.407
- (6) International Covenant on Economic, Social and Cultural Rights. , 16 Dec.1966, UNTS Vol.993 P.3
- (7) The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted by the 2nd ordinary session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept.13,2000) entered into force Nov. 25 2005
- (8) The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women available at <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm> (last visited 12/22/08)
- (9) The 1999 Nigerian Constitution
- (10) The 1963 Penal Code of Law of Northern Nigeria
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- (3)Christof Heyns, *The African Regional Human Right System:The African Charter*,108 *Penn. St.L. Rev.*679 Winter 2004
- (4)Christopher E Ukhun & Nathaniel A. Inegbedion, *Cultural Authoritarianism:Women and Human Rights Issues among the Esan People of Nigeria*, 5 *African Human Rights Journal* (2005)
- (5)Isabel Coello: *Female Genital Multilation: Marked by tradition* P 2, 7 *Cardozon J Int;l & Comp L.*213, Fall 1999
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Conclusion

Human rights in Africa has been a contested and controversial topic. It is correct to affirm that human rights has always existed in some forms in Africa even before the foundation of modern human rights. The controversy surrounding the practice of human rights in Africa is rooted in the nature of human right. The major controversy with respect to human right practice in Africa is whether African countries are practicing human right as envisaged in the international documents which they have signed and ratified.

The implementation of international human rights in domestic and local laws have being a long time headache for promoters and advocates of international law. International Human rights world wide have long struggled between the distance between theory and practice.

The issue of women's rights in International human rights law is something that have taken a new level of attention in last two decades. Women world wide continue to feel that women have less rights than men just because they are women. In Africa, women's right in the last three decades has in theory attracted the attention of African leaders and human rights activists.

The issue of human rights and human rights of women/female child in Africa is something that can not be solved by merely signing of charters, treaties and conventions. While it is necessary to establish the means of implementing human rights treaty obligations through monitoring mechanism of experts elected by ratifying states, this is not enough in most cases in ensuring the full realization of the intents of a convention or treaty. The practice and growth of human rights of women in Africa requires something more than African states signing international conventions and treaties with fanfare and glory. Women's rights in Africa is still rooted in the conservative traditions and norms of African society notwithstanding that Africa has ratified one of the most powerful protocol on the human rights of women. The wide gap between theory and practice of women's rights in African can not be improved unless a concerted effort is made in the entire Africa communities to promote equality and human rights of women. The problem of women rights in Africa is something that is deeply connected to the nature of African community. This problem cannot be solved from top, that is by African leaders signing many treaties and conventions on women's right; it can only be solved from the bottom when African societies are reoriented or educated to accept women as equal partners in life journey. The quest for women's rights of African can only be

achieved through sustainable economic development, which must start from African villages and communities. The fight for women rights in Africa have in most cases be concentrated in the cities and towns of Africa, but any meaningful struggle for human improvement must start from the villages and the need to improve their economic lives. The talk about women's human right will be meaningless to an African village woman if she can not even afford the next meal to feed her self and children. What has human rights mean to a dieing and starving person, when the most important issue to him is the need to be alife for the next few hours. As Justices P.N Bhagwati puts it "To the large majority of people who are living in almost sub-human existence in conditions of abject poverty and for whom life is one long, unbroken story of want and destitution, notions of individual freedom and liberation, through representing some of the most cherished values of a free society, wound sound as empty words brandied about in the drawing rooms of the rich and well to do, and the only solutions for making these rights meaningful to them was to remake the material conditions and usher in a new social order where social justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be

secured.”¹ The need for a meaningful women’s right in Africa goes beyond the signing of beautiful covenants and convention. The gap between theory and reality in protecting women rights in Africa can be better addressed when we are able to close the gap in poverty in Africa. As a noted African humanist and leader Julius Nyerere said “ What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medicare care or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and the right to human dignity become a fact of human dignity.”²

The visions of international human rights for African women will only be realized when international community and so called developed countries stop paying lip service to the issues of poverty and economic development in Africa. African leaders on their part should stop deceiving themselves by pretending to the international community that they are thoroughly committed to human rights and women’s rights in particular, when in actual fact they are they are more interested in playing to the gallery.

¹ Claude E Welch Jr. quoting Indian supreme court justice in 1980 indian supreme court decision in Protecting human rights in Africa, Strategies and roles of nongovernmental organizations, P264, 1995 University Of Pennsylvania Press, Philadelphia

² Julius K. Nyerere, Stability and Change in Africa 1969; P 280 of Claude

How can African leaders purport to be promoting the rights of women by the signing of many international covenants on the rights of women when in actual fact women's rights are determined by traditions and customs which are not regulated or affected by the constitution or the conventions? It is one thing for African leaders to sign the most wonderful convention in the world on the rights of women, but it is an entirely different thing on how that convention will effect the life of the average African woman or how they intend to change the African culture and tradition which in every day life determines the rights and privileges of an African woman. The quest for women's equality or human right in Africa goes beyond the fanfare of signing of international conventions on women's right. I am of the view that it is possible to breach the gap between theory and practice of women and child's right in Africa. Women equality with men in Africa is a possibility but before that will take place, a lot has to change in the way African people regard or treat women. African is a complex society with varying kinds of cultures and traditions. The current human right as envisaged by universal human charter and other international treaties and conventions is rooted on western view of human right. To deny that Africa or other parts of world have practiced one form or other forms of human rights before the

codification of the current human right is like denying that earth is spherical. Human rights as it is presently codified in many international treaties and conventions is not a true reflection of what human is all about. At best it represents a fragment of what human right is all about. For Africa the difference in practice and theory of human is rooted in a complex problem of poor economic development and the differences in the concept and norms of human right which are at variance with African norms and culture.

In conclusion, this study believes that true women rights and equality with men can only occur in Africa when African traditional system accepts the reality of the concept of equality of women and female children with men and boys.

Considering the diversity and pluralism among African culture, there is no claim in this paper for a universal approach in solving African women's rights problem. This notwithstanding, there is some commonality or shared experiences. Patriarchy is a good example of a common problem which most African women share or encounter. No meaningful progress will occur in improving the rights of African women, without a reorientation of the current practice of African patriarchy system.