

# THE RIGHTS OF WOMEN AND CHILDREN UNDER ARTICLE 18(3) OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

## LOS DERECHOS DE LAS MUJERES Y LOS NIÑOS EN EL ARTÍCULO 18(3) DE LA CARTA AFRICANA SOBRE LOS DERECHOS HUMANOS Y DE LOS PUEBLOS

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## Abstract

Human and peoples' rights as argued under the African Charter on Human and Peoples' Rights apply to everybody, including women and children. However, compared to other regional and international human rights treaties, the African Charter does not address in more details the specific rights of women and children, except under article 18(3) which enjoins State parties to ensure the protection of the rights of women and children as stipulated in international declarations and conventions. Therefore, the present study investigates the extent to which women's and children's rights, as stipulated in other international declarations and conventions, may form part of the African Charter on Human and Peoples' Rights.

**Keywords:** Women's rights; Children's rights; African Charter on Human and Peoples' Rights.

## Resumen

Los derechos humanos y de los pueblos, como surge del texto de la Carta Africana sobre los Derechos Humanos y de los Pueblos, se aplican a todos, incluidos las mujeres y los niños. Sin embargo, en comparación con otros tratados regionales e internacionales de derechos humanos, la Carta Africana no aborda con más detalle los derechos específicos de las mujeres y los niños, excepto en el artículo 18(3), que ordena a los Estados parte garantizar la protección de los derechos de las mujeres y niños estipulados en declaraciones y convenciones internacionales. El presente estudio investiga hasta qué punto los derechos de las mujeres y los niños, como se estipula en otras declaraciones y convenciones internacionales, pueden formar parte de la Carta Africana sobre los Derechos Humanos y de los Pueblos.

**Palabras clave:** Derechos de las mujeres; Derechos del niño; Carta Africana sobre los Derechos Humanos y de los Pueblos.

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## 1. Introduction

**A**rticle 18(3) of the African Charter on Human and People’s Rights<sup>2</sup>, which enjoins State parties to “also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions” entails some implications of practical relevance. First, it extends the list of protected rights under the African Charter to include women’s and children’s rights that are stipulated under both international declarations and conventions. Unlike the African Charter, other international and regional human rights treaties and declarations such as the International Covenants on Civil and

2 African Charter on Human and Peoples’ Rights (hereinafter the African Charter), 1986.

Political Rights<sup>3</sup>, the International Covenant on Economic, Social and Cultural Rights<sup>4</sup>, the European Convention on Human Rights<sup>5</sup>, the 1981 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) the American Convention on Human Rights<sup>6</sup>, the 1948 Universal Declaration of Human Rights<sup>7</sup> and the 1959 Declaration of the Rights of the Child, expressly provide some specific rights of both women and children, including equality between spouses. Except by reference through article 18(3), the African Charter does not mention children's rights to measures of protection, special protection to mothers and children, prohibition of death penalty upon children and pregnant women or child's right to nationality. Secondly, article 18(3) can be interpreted as a third way of protecting human rights under the African Charter alongside the two well-known traditional ways<sup>8</sup>, namely the explicit enumeration of some protected rights under articles 1 to 27 of the Charter and the implicit protection of some rights as part of those explicitly protected rights<sup>9</sup>. Therefore, it partly fills in some of the gap in the Charter's protection of some rights<sup>10</sup>. Thirdly, article

3 International Covenant on Civil and Political Rights (hereinafter the ICCPR), 1976, arts. 6 (5), 18 (4), 23 and 24.

4 International Covenant on Economic, Social and Cultural Rights (hereinafter the ICESCR), 1976, art 10.

5 European Convention on Human Rights, 1950, arts. 5 (d) and 12.

6 American Convention on Human Rights, 1978, arts. 4 (5), 12 (4), 17 and 19.

7 Universal Declaration of Human Rights, (hereinafter UDHR), 1948, arts. 16 and 25.

8 SSENYONJO, M. *The protection of economic, social and cultural rights under the African Charter*. In D. Chirwa and L. Chenwi, eds. *The protection of economic, social and cultural rights in Africa: international, regional and national perspectives*, Cambridge University Press, 2016, 91–120, pp. 95 and 117. YESHANEW, Sisay Alemahu. *Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives*, African Human Rights Law Journal, 2011, Vol. 11 (2), 317–340, pp. 318 and 336.

9 Although not expressly recognised by the African Charter, the African Commission has interpreted arts. 14, 16 and 18 (1) of the Charter as impliedly protecting the right to housing, while the right to food is impliedly recognised through arts. 4, 16 and 22 of the Charter. See Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights against Nigeria (hereinafter SERAC case), 2001, paras.. 60 and 64.

10 For instance, the African Charter does not expressly provide for some rights such as the rights to adequate

18(3) extends the State's obligations by making women's and children's rights, as protected under both international declarations and conventions, an integral part of the African Charter. Fourthly, and last, article 18(3) extends the jurisdiction of both the African Commission on Human and Peoples' Rights (African Commission)<sup>11</sup> and the African Court on Human and Peoples' Rights (the African Court)<sup>12</sup> to deal with women's and children's rights protected under international conventions and declarations as part of the African Charter.

The present paper is a contribution to some existing scholars' works on article 18(3) of the African Charter, which read this provision both restrictively<sup>13</sup> and broadly<sup>14</sup>. However, unlike the existing scholars' works on article 18(3) that do not consider the practices of State parties, the African Commission and that of the African Court<sup>15</sup> with respect to this Charter's provision, the present study interprets this provision in light of some State's practices in terms

standard of living, adequate food, right to consent to marriage and equality of spouses during and after marriage.

11 African Charter on Human and Peoples' Rights, arts. 30 and 45.

12 Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (hereinafter the African Court Protocol), 2004, art 3.

13 KAIME, Thoko. *The African Charter on the Rights and Welfare of the Child: a socio-legal perspective*, Pretoria University Law Press, 2009, p. 22, SSENYONJO, M. *Culture and the human rights of women in Africa: between light and shadow*, Journal of African Law, 2007, 51 (1), 39-67, pp. 43-44, CHIRWA, D.M. *Combating child poverty: the role of economic, social and cultural rights*, in SLOTH-NIELSEN, J., ed. *Children's rights in Africa: a legal perspective*, Aldershot: Ashgate, 2008, 91-108, p. 96.

14 MURRAY, Rachel. *Human rights in Africa from the OAU to the African Union*. Cambridge: Cambridge University Press, 2004, p. 152, LLOYD Amanda. *A theoretical analysis of the reality of children's rights in Africa: an introduction to the African Charter on the Rights and Welfare of the Child*, African Human Rights Law Journal, 2002, Vol. 2 (1), 11-32, p. 13, CHIRWA D. *Reclaiming (Wo)manity: the merits and demerits of the African Protocol on Women's Rights*, Netherlands International Law Review, 2006, 53 (1), 63-96, p. 70, SLOTH-NIELSEN, J. *Children's Rights in Africa*, in SSENYONJO, M., ed. *The African Regional Human Rights system: 30 years after the African Charter on Human and Peoples' Rights*, Leiden-Boston, 2012, 155-176, pp. 157-158.

15 Unlike the African Commission, there was no Court judgement on article 18(3) available to us as to August 2019.

of periodic reports<sup>16</sup> and the practice of the African Commission in terms of communications<sup>17</sup> and concluding observations<sup>18</sup>. Thus, using these practices as focal points, this study argues that women's rights and children's rights, whether generally or specifically, as provided under international declarations and conventions form part of article 18(3) of the African Charter. Therefore, non-compliance with these rights is a violation of the African Charter itself<sup>19</sup>, rather than just a violation of an international declaration or convention. It must be recalled that, while the African Court may simultaneously find violations of any other relevant human rights instruments ratified by the State party concerned<sup>20</sup>, both the African Commission and the African Court have no jurisdiction to assess violations of international declarations or non-ratified conventions. Article 18(3) is of most use to a State that is not a signature party to those conventions and treaties expressly providing women and children's rights, such as the CEDAW and the 1990 Convention on the Rights of the Child (CRC). Therefore, making violations of international declarations and conventions also violations of article 18(3). In addition to this article's general conclusion (6.), the present analysis deals respectively with protected women's and children's rights under the African Charter (2.), the relevance of article 18(3) (3.), State's practice in respect with this article through some State's periodic reports (4.),

16 Republic of Djibouti combined initial and periodic report under the African Charter on Human and Peoples' Rights (hereinafter Djibouti Report), 2013, paras. 216–251. See also Republic of Rwanda, the 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> periodic reports on the implementation status of the African Charter on Human and Peoples' Rights and the initial report on the implementation status of the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa (hereinafter Rwanda Report), 2009–2016, paras. 146–142.

17 Communication 227/99: Democratic Republic of Congo v. Burundi, Rwanda, Uganda, 2003 (hereinafter the DRC case). Communication 323/06: Egyptian Initiative for Personal Rights and Interights v. Egypt, 2011 (hereinafter the Egypt case).

18 African Commission Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, 2012 (hereinafter Sudan Concluding observations). African Commission: Concluding Observations and Recommendations on the 2nd, 3rd, 4<sup>th</sup> and 5<sup>th</sup> Periodic Reports of the Republic of Mauritius, 2009 (hereinafter Mauritius Concluding observations).

19 Communication 227/99: Democratic Republic of Congo v. Burundi, Rwanda, Uganda, 2003, para. 86.

20 African Court Protocol, arts. 3 (1) and 7.

and the practice of the African Commission through the examination of some communications and the issues of some concluding observations (5.).

## **2. Protected women's and children's rights under the African Charter**

Under the African Charter, protected women's and children's rights comprise those expressly enumerated by the Charter itself (2.1) and those provided under international conventions and declarations through article 18(3) (2.2).

### **2.1 Expressly protected women and children's rights**

Following the principle of non-discrimination, the African Charter entitles every individual, including men, women, adults and children to all its expressly protected human and peoples' rights<sup>21</sup>. This is further supported by the neutral language of the African Charter, which respectively refers to the rights-holders as "every individual, every human being, no one, every citizen, non-national, the aged and disabled, the family and all peoples"<sup>22</sup> the use of this neutral language seems to ignore the particularity of women<sup>23</sup> and children<sup>24</sup> who need special protection. That is, the neutral language does not contribute to distinguish between human rights that can be enjoyed by everyone and those specific rights for women<sup>25</sup> and children<sup>26</sup>. Moreover, there are no expressly set limitations to protect children from the exercise of some rights. For instance, article 15 of the African Charter discussing everyone's right to work does not provide children protection from being admitted to employment before an appropriate minimum age<sup>27</sup>. To fill

21 African Charter on Human and People's Rights, art 2.

22 African Charter on Human and People's Rights, Chapter I.

23 See for instance, the need to deal with women's rights through specific human rights treaties such as CEDAW.

24 According to principle 2 of the 1959 Declaration of the Rights of the Child, a child shall enjoy special protection.

25 See for instance, special protection to be accorded to mothers during a reasonable period before and after childbirth. ICESCR, art 10 (2).

26 For instance, the child's right to be registered immediately after birth and to have a name. ICCPR, art 24 (2).

27 See principle 9 of the 1959 Declaration of the Rights of the Child and art 10 (3) ICESCR.

in this gap, the African Charter opted to expressly include the clause requiring State parties to ensure the protection of the rights of women and the children as stipulated in international declarations and conventions as discussed below.

## **2.2 Women's and children's rights under international declarations and conventions as part of article 18(3) of the African Charter**

According to article 18(3) of the African Charter, "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions". Compared to other Charter's provisions, article 18(3) does not expressly list the rights of women and children it refers to. Instead, it refers to these rights as stipulated in international declarations and conventions. That is, article 18(3) neither limits the rights it refers to, nor does it limit international conventions and declarations providing for these rights.

Indeed, various international declarations and conventions deal with a panoply of women's and children's rights. These include inter alia, the 1924 Geneva Declaration on the Rights of the Child, the UDHR, the 1959 Declaration of the Rights of the Child, the 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1993 Declaration on the Elimination of Violence against Women, 1995 Beijing Declaration and Platform for Action, the 1954 Convention on the Political Rights of Women, 1964 Convention on the Consent of Marriage, Minimum Age of Marriage, and Registration of Marriages, the ICCPR, the CESCRC, CRC and CEDAW. Examples of women's rights herein protected include: inter alia; women's equal rights as to marriage; during marriage and at its dissolution; special care and assistance to motherhood<sup>28</sup>; right to appropriate services in connection with pregnancy; confinement and the post-natal period; the right to be free from all forms of traffic<sup>29</sup>; as well as conditions for safe abortion in circumstances where abortion is not against the law<sup>30</sup>.

Protected children's rights in these international declarations and

28 UDHR, art 25 (2), CEDAW, art 16 (1).

29 CEDAW arts. 6, 11, 12, 13, 16. See also art 10, ICESCR.

30 Beijing Declaration, para. 106 (K).

conventions include among others, special care and assistance to childhood, equal social protection to all children born in and out of wedlock, children’s right to free education in the elementary and fundamental stages<sup>31</sup>, the right to know and be cared for by his or her parents<sup>32</sup>, the right to have a name, the right to necessary protection after dissolution of the parents’ marriage<sup>33</sup>, protection from economic and social exploitation<sup>34</sup>, the right to love and understanding, as well as the priority to be among the first to receive protection and relief in all circumstances<sup>35</sup>. Taken together, protected women’s and children’s rights in these international declarations and conventions supplement each other. Moreover, as will be discussed below, all these rights enjoy the same status irrespective of their protection through binding human rights instruments or non-binding human rights instruments such as international declarations.

### **3. Relevance of article 18(3) of the African Charter for women and children’s rights in Africa**

Out of the 26 articles of the African Charter dedicated to human rights, article 18(3) is the only one to expressly use the words “women and children”, and to expressly address the specific protections given to the rights of women and children, although other Charter’s provisions on human rights apply to women and children as well. Therefore, article 18(3) may be interpreted to cover all human rights not expressly protected under the African Charter, whether general<sup>36</sup> or specific to women and children, as provided by both general and specific declarations and conventions, adopted before or after the coming into force of the African Charter. As far as international conventions are concerned, in addition

31 UDHR, arts. 25 (2) and 26 (1).

32 CRC, art 7.

33 ICCPR, art 24.

34 ICESCR, art 10 (3).

35 Principles 2, 3, 6, 8 and 9 of the 1959 Declaration of the Rights of the Child.

36 General rights such as the rights to social security, adequate standard of living and food not expressly provided by the African Charter are incorporated through article 18(3) with the only restriction that they cannot be claimed by “adult men”.

to not being expressly subject to the clause of ratification by State parties, they should be understood to include both human rights treaties and other conventions dealing directly or indirectly with women's and children's rights. The same applies to international declarations which are not subject to ratification. Taken together, article 18(3) may be interpreted as providing broad protection to the rights of women and children. To this, Chirwa rightly points out that, "the Charter allows scope for the recognition of a wider range of women's rights than is often supposed by its critics. For example, article 18(3) can be construed to mean that States are bound to implement the rights of women as articulated in international covenants to which they are parties or not, as well as declarations adopted both before and after the adoption of the Charter. The effect of this would be that virtually all rights recognised in the international declarations and treaties including the CEDAW can be enforced under the African Charter"<sup>37</sup>. Therefore, it can be argued that, human rights protected under international declarations and conventions form part of the African Charter, especially its article 18(3). Moreover, as part of the African Charter, these rights can be enforced before both the African Commission and the African Court.

However, there are some criticisms of article 18(3) at hand. For instance, it is argued that, in addition to only protecting women's rights in the context of the African family<sup>38</sup> which represents an oppressive environment within which serious human rights abuse against women and children are committed<sup>39</sup>, article 18 falls short by not expressly providing for some specific women's rights, such as the right to consent to marriage and equality of spouses during and after marriage<sup>40</sup>. To counter this criticism, one may argue that, the right to consent to marriage and equality of spouses form part of "the rights of the woman as stipulated in international declarations and conventions" article 18(3) refers to. Moreover, Kaime writes that,

37 CHIRWA D. *Reclaiming (Wo)manity: the merits and demerits of the African Protocol on Women's Rights*, op. cit., p. 70.

38 SSENIONJO, M. *Culture and the human rights of women in Africa: between light and shadow*, op. cit., pp. 43-44.

39 CHIRWA, D.M. *Combating child poverty: the role of economic, social and cultural rights*, op. cit., p. 96.

40 SSENIONJO, M. *Culture and the human rights of women in Africa: between light and shadow*, op. cit.

"A debate ensued regarding whether, by virtue of this provision, State parties to the African Charter became legally bound by the provisions of the 1959 United Nations Declaration and subsequent instruments that dealt with women's or children's rights. Whilst some authors sought to give a generous interpretation to the article, it is difficult to see how States could become bound by these declarations or conventions without formally submitting to the prescribed ratification process of the concerned instruments. Indeed, the Vienna Convention on the Law of Treaties which is considered the definitive statement on the law of treaties, would not regard the situation envisaged under article 18(3) of the African Charter as evincing an intention to become legally bound by subsequent instruments"<sup>41</sup>.

This quote calls for some comments. To begin with, the author falls short by not expressly highlighting that international declarations are not subject to the Vienna Convention's provision on the ratification of international conventions. Moreover, reaffirming a State's primary obligation to implement the rights of women and children stipulated in international declarations and conventions, Julia Sloth-Nielsen rightly points out that,

"... if reference to international declarations meant to refer intentionally to the prior Declaration on the Rights and Welfare of the African Child, adopted a mere two years earlier by the very same body (although an argument is to be made that cross-reference included the 1959 UN Declaration on the Rights and Welfare of the Children), such deduction would imply that the Declaration by definition a non-binding instrument, acquires by incorporation a degree of legal status"<sup>42</sup>.

One may argue from this quote that, article 18(3) incorporates women's and children's rights protected under international declarations, thereby giving the rights a degree of legal status. Furthermore, with respect to the ratification

41 KAIME, Thoko. *The African Charter on the Rights and Welfare of the Child: a socio-legal perspective*, op. cit., p. 22.

42 SLOTH-NIELSEN, J. *Children's Rights in Africa*, op. cit., pp. 157-158.

issue, it must be stressed that State parties are bound to the provisions of article 18(3) rather than to that of other international conventions. To this end, the Vienna Convention expressly provides that every active treaty must be binding upon the signatory parties and must be performed by them in good faith, and a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its objectives and purpose<sup>43</sup>. In other words, the provision of article 18(3) of the African Charter, which has been in force since 1986 is binding to all State parties to the Charter. To this end, the African Commission ruled that,

“... the African Charter was drafted and acceded to voluntarily by African States wishing to ensure the respect of human rights on this continent. Once ratified, States Parties to the Charter are legally bound to its provisions. A State not wishing to abide by the African Charter might have refrained from ratification. Once legally bound, however, a State must abide by the law in the same way an individual must”<sup>44</sup>.

Moreover, article 18(3) must be interpreted in a compatible manner with the African Charter, which itself does not make any reference to ratified conventions. This is supported by the preamble to the African Charter, where State parties reaffirm their adherence to the principles of human and peoples’ rights and freedoms contained in the declarations, conventions, and other instruments adopted by the Organization of the African Unity (OAU) and the United Nations (UN).

It must be emphasized that, although article 18(3) only talks about the obligation to protect human rights, all human rights under the African Charter give rise to the State’s obligation to protect, promote, and fulfil<sup>45</sup>. Moreover, as part of chapter I of the African Charter dedicated to “human and peoples’ rights”, article 18(3) is subject to the general obligation of article 1, which enjoins

43 See arts. 26 and 31 (1) of the Vienna Convention.

44 See Communication 137/94–139/94–154/96–161/97: International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights against Nigeria, 1998, para. 116.

45 Communication 323/06: Egyptian Initiative for Personal Rights and Interights v. Egypt, 2011, para. 273.

State parties to adopt legislative or other measures that give effect to them<sup>46</sup>, as discussed in the next section.

#### **4. States' practices towards article 18(3): an illustration of State's reports from Rwanda and Djibouti**

Article 62 of the African Charter enjoins all State parties to submit a report every two years on the legislative, or other measures taken to promote the rights and freedoms herein protected. When applied to article 18(3), article 62 implies that State parties are required to report on adopted legislation and other measures that give effect to the rights of women and children as stipulated in both international declarations and conventions. It must be emphasized that State's practices regarding such measures are not uniform. That is, while some States do not refer at all to any international conventions or declarations<sup>47</sup>, some refer either to some international declaration, such as the Millennium Development Goals<sup>48</sup>, to some specific ratified treaties such as the CEDAW or CRC<sup>49</sup> or to both "international declarations and conventions" in general and some specific ratified conventions<sup>50</sup>. Moreover, some States' report on adopted measures that promote some specific women's and children's rights not expressly provided by the African Charter, such as protection of women's

46 LLOYD Amanda. *A theoretical analysis of the reality of children's rights in Africa: an introduction to the African Charter on the Rights and Welfare of the Child*, op. cit., p. 13.

47 The Republic of Angola, 6<sup>th</sup> and 7<sup>th</sup> combined periodic reports to the African Commission on Human and Peoples' Rights, 2017, para. 105-107, Republic of Botswana, 2<sup>nd</sup> and 3<sup>rd</sup> periodic reports to the African Commission, 2015 and Democratic Republic of the Congo 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Periodic Reports to the African Charter on Human and People 'Rights, 2015, paras. 53-57.

48 Nigeria 6<sup>th</sup> Periodic country report: 2015- 2016 on the implementation of the African Charter on Human and Peoples' Rights, chapter 16.

49 See a combination of Report of Burundi to the African Commission on Human and Peoples' Rights covering the period of 2002 to 2008, 2010.

50 United Republic of Tanzania, the consolidated second to tenth periodic report submitted to the African Commission for Human and People's Rights, 2006.

integrity, dignity and liberty, and children's protection against sexual abuse<sup>51</sup>. Taken together, these State's practices suggest that State parties are under a treaty's obligation to actualize women's and children's rights that article 18(3) refers to. For illustrative purposes, this article's focus will be on reports submitted by Rwanda and Djibouti.

Like the African Charter itself, State's reports from Rwanda and Djibouti make a distinction between the rights of women and children and all human rights as adopted measures aiming at giving effect to article 18(3) are concerned<sup>52</sup>. Accordingly, they provide information on women's and children's rights as argued under ratified human rights treaties expressly dedicated to the rights of both women and children<sup>53</sup>. These include inter alia, the protection of women and children from human trafficking<sup>54</sup>, the incorporation of the CRC's principle of the "best interests of the child" into the family law<sup>55</sup> as well as the incorporation of a minimum age for certain things in line with the International Labour Organization Minimum Age Convention<sup>56</sup>. Read in the light of article 18(3) of the Charter, the above suggests that by mentioning ratified treaties on the rights of women and children, State parties understand article 18(3) as entitling those women and children living within their jurisdictions to the rights protected by the provision. Therefore, like these State's reports, women and children in these two countries can also submit complaints and communications based on article 18(3) of the Charter before both the African Commission and the African Court for violations of their rights recognised under these ratified treaties. The same argument may apply to all State parties to the African Charter that have ratified other conventions providing for women's and children's rights. Moreover, the above expressly mentioned

51 Ibidem.

52 See Rwanda Report, paras. 145–154 and Djibouti Report, paras. 216–251.

53 These include inter alia, CEDAW, the African Women Protocol, the CRC and its additional protocols, the African Charter on the Rights and Welfare of the Child. See Rwanda Report, paras. 145–146 and Djibouti Report, paras. 217 and 219. Djibouti Report, paras. 241, 243 and 248 and Rwanda Report, para. 150.

54 Djibouti Report, paras. 219 and 221.

55 See Djibouti Report, para. 241.

56 Ibidem, para. 243.

women's and children's rights materialise the abstract nature of article 18(3) which does not enumerate the rights it refers to. However, by reporting only on the implementation measures of the women's and children's rights protected under ratified treaties, State parties seem to adopt a reductionist and minimalist approach which excludes women's and children's rights protected under international declarations and non-ratified conventions. The shortcomings of such a minimalist approach have been partly addressed by the African Commission as discussed below.

## **5. African Court and African Commission's understanding of article 18(3)**

Using some selected cases, the present section aims to illustrate the African Commission's understanding of article 18(3) of the African Charter through the examination of some communications from States<sup>57</sup> (5.1), other communications<sup>58</sup> (5.2), and State's reports<sup>59</sup> (5.3).

### **5.1 Communications from States and article 18(3) of the African Charter: the DRC's case**

The Democratic Republic of the Congo (DRC) case was submitted by the DRC in 2003 against Burundi, Rwanda, and Uganda charging them with violations of inter alia and, some provisions of the African Charter<sup>60</sup>. It is worth mentioning that, the communication itself does not expressly mention the violation of article 18(3), although it contains information on rape and killings of both women and children<sup>61</sup>. Such omission could be justified by the fact that the communication already referred to the violation of article 2 of the African Charter, which proscribes discrimination based on inter alia, sex, birth or other status. However, the African Commission did not interpret article 2 from a

57 African Charter, arts. 47-54.

58 Ibidem. arts. 55 to 59.

59 Ibidem, art 62.

60 These include articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22 and 23 of the African Charter. Communication 227/99: Democratic Republic of Congo v. Burundi, Rwanda, Uganda, 2003, para. 8.

61 Ibidem, para. 5.

woman's or child's perspective, in that it only established discrimination based on the national origin of the victims<sup>62</sup>.

However, a closer look at the case reveals that, the African Commission also dealt with women's and children's rights in isolation from article 2 of the Charter. To this end, it argues that, "the raping of women and girls, as alleged and not refuted by the respondent States, is prohibited under article 76 of the first Protocol Additional to the Geneva Conventions of 1949, which provides that women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault. It also offends against both the African Charter and the CEDAW. And on the basis of articles 60 and 61 of the African Charter the African Commission finds the Respondent States in violation of inter alia, article 18(3) of the Charter"<sup>63</sup>. Contrary to some views that the African Commission has never decided any case concerning women's rights under the African Charter<sup>64</sup>, this case is an illustration of the Commission's ruling on both women's and children's (girls) rights. Moreover, the African Commission confirms that women's and children's (girls) right to special respect and to special protection against rape, forced prostitution and any form of indecent assault protected under the Vienna Convention and CEDAW, are all part of the African Charter. Most importantly, the Commission ruling addresses the issue of ratification of international conventions in two ways. First, although the Respondents States were already parties to the CEDAW<sup>65</sup>, the African Commission ruled that non-compliance with women's and children's right to special protections as protected under both the CEDAW and the Protocol to the Vienna Convention constitutes a violation of article 18(3) of the Charter. As shown, the African Commission made no reference to the impact of a such ratification for State parties. Secondly, by using the 1949 Vienna Convention

62 Ibidem, para. 80.

63 Ibidem, para. 86.

64 MANJOO, Rashida. *Women's human rights in Africa*. In SSENYONJO, M., ed. *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights*, Leiden-Boston, 2012, 137–154, p. 143.

65 All the Respondents were already parties to the CEDAW which they ratified respectively in 1981 (Rwanda), 1985 (Uganda) and 1992 (Burundi).

without considering whether it had been ratified or not by respondent States, the African Commission understands article 18(3) to also include international conventions adopted before the coming into force of the African Charter. In sum, from the African Commission ruling, one can argue that when dealing with women's and children's rights before the African Commission and the African Court, international conventions and declarations referred to in article 18(3) should serve as source of inspiration and interpretation that should help to specify the content of this Charter's provision as argued under articles 60 and 61 of the African Charter.

### **5.2 Other communications and article 18(3) of the African Charter: The Egypt case**

The Egypt case was brought on behalf of the victims on May 2006 by the Egyptian Initiative for Personal Rights and INTERIGHTS and explicitly alleged violations of inter alia, article 18(3) of the African Charter. That is, it alleges that the victims were subject to incidents of insults, violence, intimidation, and sexual harassment that occurred in the presence of high-ranking officers of the Ministry of Interior and the Riot police who failed to protect them<sup>66</sup>. Unlike the DRC case, the Commission, decided to deal with both articles 2 and 18(3) of the African Charter together, since they both have an element of discrimination<sup>67</sup>. It further read these Charter's provisions in the light of inter alia, the African Protocol on Women's Rights and the CEDAW<sup>68</sup>, and concluded that the violence against the victims constituted a form of discrimination against women. To this end, it ruled that, "sexual assaults against the victims were acts of gender-based violence, perpetrated by State actors, and non-state actors under the control of State actors, that went unpunished. The violations were designed to silence women who were participating in the demonstration and deter their activism in the political affairs of the Respondent State which in turn, failed in its inescapable responsibility to take action against the perpetrators. For these reasons, the African Commission finds the Respondent State in violation of articles 2

66 Communication 323/06: Egyptian Initiative for Personal Rights and Interights v. Egypt, 2011, paras. 4-140-141.

67 *Ibidem*, para. 115.

68 *Ibidem*, paras. 121-123.

and article 18(3) of the African Charter”<sup>69</sup>. The following points can be drawn from the Commission’s observations. First, protecting women from gender-based violence in terms of sexual assaults, which is not expressly provided by the African Charter, falls within the list of women’s rights protected under article 18(3) of the African Charter. Secondly, like in the DRC case, one can argue that using its power to draw inspiration from other human rights instruments under article 60 of the African Charter, the African Commission uses both the CEDAW and the African Women’s Protocol to not only interpret article 18(3) of the African Charter, but also to fill in and specify its content. This is because, although Egypt has ratified the CEDAW since 1981<sup>70</sup>, the African Commission has no jurisdiction to rule over other human rights treaties such as CEDAW. Therefore, it could only find a violation of article 18(3) of the African Charter.

### **5.3 African Commission’s concluding observations to Sudan and the Republic of Mauritius in respect of article 18(3) of the African Charter**

It is worth mentioning from the beginning that, in the African Commission’s concluding observations of Sudan and Mauritius, the African Commission does not expressly refer to article 18(3) of the African Charter. However, a close look at its practice suggests that it considers women’s and children’s rights in three ways. First, it expressly addresses them in terms of both “areas of concern” and “recommendations”<sup>71</sup>. Secondly, although it does not expressly provide the impact of the ratification of some treaties, such as CEDAW, African Protocol on Women’s Rights and the CRC, the African Commission either commends<sup>72</sup> or recommends<sup>73</sup> their ratification. Thirdly, it recommends the implementation of some women’s and children’s rights not expressly provided by the African Charter but recognised by other international conventions whether ratified or not as well as international declarations. For instance, although Sudan is not

69 Ibidem, 165–167.

70 Egypt has ratified the CEDAW in 1998.

71 See for instance, Sudan Concluding Observations, paras. 34 and 69.

72 See Mauritius Concluding Observation, paras. 12 and 47.

73 For instance, Sudan is recommended to ratify both the African Women Protocol and CEDAW. See Sudan Concluding Observation, paras. 72–73.

party to both the CEDAW and African Women Protocol, the African Commission recommends it to take legislative and other measures that address rape, the low level of literacy among the girl-child, women's participation in the political affairs of the State, child labour and recruitment of child soldiers, female genital mutilations, and violence against women<sup>74</sup>. Moreover, while not stressing on the ratification by Mauritius of some treaties on women's and children's rights, the Commission recommends the Mauritius government to inter alia, take urgent measures to address the high number of children who are victims of drug abuse, especially street children, implement the recommendations of the UN Committee on the Rights of the Child regarding discrimination against children with disabilities, aid children affected and/or infected by HIV/AIDS and children from disadvantaged families, and review laws relating to abortion for unwanted pregnancies by expunging the punitive provisions imposed on women who undergo abortions in accordance with the Beijing Declaration and Platform for Action<sup>75</sup>. Taken together, the above suggests that these identified rights of women and children as protected under other international human rights treaties form part of the African Charter. Thus, article 18(3) of the Charter is the only legal basis that can justify the legality and legitimacy of the Commission's recommendations resulting from its concluding observations. Moreover, although the African Commission encourages State parties to ratify some treaties on women's and children's rights, it also recommends them to implement these rights irrespective of whether they are provided by ratified treaties or not. Finally, by invoking the State party's consideration of inter alia, the Beijing Declaration and Platform for Action with respect to the issue of abortion, the African Commission affirms the Charter's prescription that State parties shall ensure the rights of women and children stipulated under international declarations as well.

## 6. Conclusion

Contrary to the view that the African Charter provides inadequate protection for women and children and that the African Commission fails to consider

74 *Ibidem*, paras. 74-79.

75 Mauritius Concluding Observation, paras. 62-66.

their position, article 18(3) of the Charter, is broad enough to allow for a more dynamic use of the Charter to promote and protect the rights of women<sup>76</sup> and children. That is, all women's and children's rights protected under international conventions and declarations are part of article 18(3) of the African Charter, which all State parties must protect, respect, and fulfil. The violation of any of these rights by State parties entitles women and children, or their representatives to utilize both the African Commission and the African Court for any violation of article 18(3) of the African Charter. Regarding the rights of women and children, if the African Commission and the African Court determine that a State party's behaviour is not compliant with any women's or children's rights protected under one of the international declaration and convention, they shall find a violation of article 18(3) of the African Charter, rather than a violation of these international instruments, which are simply be used to fill in and specify the content of article 18(3) of the African Charter. This is the legal consequence following the ratification of a binding human rights instrument such as the African Charter.

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<sup>76</sup> MURRAY, Rachel. *Human rights in Africa from the OAU to the African Union*. Op. cit., p. 152.

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