

The Rights of Older Persons within the African Union

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Karere kagokurerawo

(Look after it and it will look after you)

Introduction

Historically, the human rights of older persons,¹ as a unique, separate, social group, have received little attention in the international discourse on human rights.² This reality has begun to change in the last decade following a series of discussions,³ articles,⁴ and activities of nongovernmental organizations (NGOs).⁵ In very recent years, this development has reached a climax with the establishment and activity of the **United Nations Open Ended Working Group (OEWG)** since 2010,⁶ and with the

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¹ The question who is an "older person" or what is the threshold for being "old" is a challenging question of its own. There are different legal and sociological approaches to answer this question. For the purposes of this article, the approach of the Chicago Declaration on the Rights of Older Persons will be adopted (Online: <http://www.jmls.edu/braun/pdf/chicago-declaration-v11.pdf>):

"Article 10: Definitions: (a). For purposes of this Declaration, an "older person" is generally any person who due to chronological age or status is considered under local or national law to be an older person or is perceived as being an older person."

² For a general overview of the historical lack of interest and attention to the human rights of older persons see: Diego Rodriguez-Pinzon & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 Am. U. Int'l L. Rev. 915, 915 - 1008 (2003). For the call to develop this field see: Israel Doron, From National to International Elder Law, 1 Int. J. Ageing, Law & Policy 45, 45 - 72 (2005).

³ See for example the report on the UN expert group in this field: UNDESA. *Report of the Expert Group Meeting "Rights of Older Persons."* (5-7 May 2009), Bonn, Germany: United Nations Department of Economic and Social Affairs Division for Social Policy and Development Programme on Ageing, (2009).

⁴ See for example: Kwong-Leung Tang, *Taking older people's rights seriously: the role of international law*, 20(1) JOURNAL OF AGING AND SOCIAL POLICY. 99, 99-117(2008). See also: Jaclynn M. Miller, *International Human Rights and the Elderly*, 11(2) MARQ. ELDER'S ADVISOR 343-365 (2009)..

⁵ See for example the rich activities of HelpAge International and its active campaign to promote the rights of older persons: Online: <http://www.helpage.org/get-involved/campaigns/towards-a-convention> (Last viewed: 14 February 2015).

⁶ For an analysis of this recent development see: Israel Doron & Benny Spanier, *International convention on rights of older persons: Where we were, where we are and where we are going?* 8(1) GLOBAL AGEING 7, 7-16 (2012); (Hereinafter "Doron & Spanier"). See also the protocols and summaries of the discussions of the OEWG in its web-site: UNDESA, Seventh Working Session Open-

appointment of **The Independent Expert on the Enjoyment of all Human Rights by Older Persons** in May 2014.⁷

The increasing interest in the rights of older persons in the international arena is expressed also in regional developments in this field. This includes the activity of the Organization of the American States, which has just approved (on June 15, 2015) the new, unique and first of its kind Inter-American Convention on Protecting the Human Rights of Older Persons.⁸ In Europe, things have also been dynamic and in 2014, the **Committee of Ministers of the Council of Europe** published a specific recommendation on older persons' rights in Europe.⁹ Finally, a discourse on the subject is also beginning to develop in sub-regions of Asia.¹⁰

One of the interesting regional international frameworks is that of Africa under the legal mantle of the African Union (AU).¹¹ The scope of gerontology

Ended Working Group on Ageing, (14 February 2015), United Nations Human Rights Office of the High Commissioner, > <http://social.un.org/ageing-working-group/> >.

⁷ For a full description of the activities and reports of the Independent Expert, see her web-site: United Nations Human Rights Office of the High Commissioner, Independent Expert on the enjoyment of all human rights by older persons, (14 February 2015)

<<http://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/IEOlderPersons.aspx> >

⁸ See the press release on this matter along with the full text of this new convention, online: Organization of American States The Americas Becomes First Region in the World to Have an Instrument for the Promotion and Protection of the Rights of Older Persons, 15 June 2015, http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-198/15. For the historical process that preceded the approval of the convention see the discussions and protocols of the OAS Working Group on Protection of the Human Rights of Older Persons, online: Permanent Council of the Organization of American States Committee on Juridical and Political Affairs, Working Group on Protection of the Human Rights of Older Persons, (20 August 2015) <<http://www.oas.org/consejo/cajp/personas%20mayores.asp>>.

⁹ See: Recommendation CM/Rec 2(2014) :The Promotion of Human Rights of Older Persons. Online : Steering Committee for Human Rights, Drafting Group on Human Rights in Culturally Diverse Societies, 27 March 2015

<https://wcd.coe.int/ViewDoc.jsp?id=2162283&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

¹⁰ See for example the meeting of ESCAP – Economic and Social Commission for Asia and the Pacific, regarding the human rights of older persons. Online: United Nations Economic and Social Commission for Asia and the Pacific Workshop on the Social Integration and Rights of Older Persons in the Asia Pacific Region (14 February 2015)

<<http://www.unescap.org/events/workshop-social-integration-and-rights-older-persons-asia-pacific-region.>>

¹¹ The African Union (AU) is the new political, judicial and economic organization for Africa, which replaced in 2002 the Organization of African Unity (OAU) which has united all African states since 1963. The AU comprises, among other institutions, the Pan-African Parliament, the Court of Justice,

research in general, and in the context of older persons' rights in particular, was until recently relatively sparse in regard to this continent¹² In light of the general regional developments in the field of human rights for older persons, and in light of the relatively limited research literature on older persons' rights in Africa, in this article, we will attempt to examine a relatively narrow research question: To what extent are issues of human rights for older persons expressed in activities of formal AU institutions for the protection of human rights? Namely, the African Court on Human and People's Rights and the African Commission on Human and People's Rights—all within the legal framework of the **African Charter on Human and People's Rights**.¹³ This question becomes significant especially because of the AU's relatively recent initiative to create a new, unique regional protocol on older persons' rights and its decision to adopt a new protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (a decision that will be described extensively later in this article).

The answer to the research question will be structured in this article as follows: In the first section, we will present the unique challenges facing the African continent in everything concerning older persons' rights. In the second section, we will review the ways in which older persons' rights are protected today through the AU and the African Charter on Human and People's Rights. In the third section, we will describe the methodology through which the research question was examined, and will answer the question regarding the extent to which older persons' rights in

and the Central Bank. See more in Corinne A.A. Packer and Donald Rukare, "The new African Union and its Constitutive Act" 96(2) (2002) *The American Journal of International Law* 365-379.

¹² For a discussion regarding the limited research in the field of gerontology in Africa see: Nana Apt, *30 Years of African research on ageing: History, achievements, and challenges for the future*, (2005) 15(2) *GENERATIONS REVIEW*, 1, 1-5 And in similar lines see also: Isabella Aboderin, *Global ageing: Perspectives from Sub-Saharan Africa*, In *THE SAGE HANDBOOK OF SOCIAL GERONTOLOGY* 407, 407-419 (Dale Dannefer & Chris Phillipson ed., 2005).

¹³ See the African (BANJUL) Charter on Human and Peoples' Rights, (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) 21 ILM 59 Hereinafter: ACHPR.

Africa are expressed in the African Court on Human and People's Rights and the African Commission on Human and People's Rights. In the final part of the article and based on the previous sections, we will suggest directions for the legal activity required for the continued promotion of older persons' rights on the African population.

Part I: The aging African continent: Unique challenges

1.1. Aging Africa: Demographic aspects

Africa is the second largest continent in the world (after Asia) both in area and in population. Its population to date stands at over one billion residents in 54 countries. Like the rest of the world, the African continent is expected to experience dramatic demographic changes in the coming decades. Major changes will include population growth, accelerated urbanization, decrease in fertility and mortality rates, increase in life expectancy, and "aging" of the continent.¹⁴

The population of the continent is expected to grow from approximately 1.1 billion, as of 2014, to approximately 1.6 billion in 2030. Nevertheless, the annual population growth is forecast to decrease from the current 2.5% to 2% by 2030. These trends are explained by a combined decrease in fertility and mortality rates.¹⁵ The penetration of medical innovation to the continent, the increased awareness of personal hygiene, and the widespread fight against the spread of AIDS and malaria

¹⁴ For a general overview of the demographic characteristics of the African continent and its aging elements compared to the rest of the world see: Kevni Kinsella & Wan He, *AN AGING WORLD: 2008*, (2008). For a more specific report focusing on the African dimension of aging see: Valerie Golaz, Laurent Nowik, & Muriel Sajoux, *Africa, a Young but Ageing Continent*. 491 *POPULATION & SOCIETIES* 1, 1-4 (2012). (Hereinafter: Golaz, Nowik & Sajoux). For more information in this field see also: Benoit Kalasa, *POPULATION AND AGEING IN AFRICA? A POLICY DILEMMA?* (2004). Hereinafter: Kalasa.

¹⁵ See: UN DESA, *WORLD POPULATION PROSPECTS: THE 2010 REVISION*,: United Nations, Department of Economic and Social Affairs, Population Division (2011) CD-ROM Edition

are expected to cause a decrease in infant mortality from 116 cases per 1,000 births to 75 cases per 1,000 births by 2030.¹⁶

In a global comparison, Africa is currently considered the “youngest” continent. Only 5.5% of the entire population is over 60, as opposed to Asia and Latin America, where the rate of older persons is almost double, and in some of the developed countries, such as Europe and North America, it is even three times as large or more.¹⁷ In addition, the rate of young people below the age of 15 is nearly 40% (compared to 27% in the rest of the world). It is well established that Africa is on the brink of significant aging processes. The reasons for this are well-known; mainly the combination of a decrease in fertility rates alongside an increase in life expectancy and improved public health, nutrition, and health services.¹⁸

The current average lifespan in Africa is the lowest in the world, approximately 60 years. However, the United Nations report predicts a quantum leap in lifespan in the next 40 years, which will be 68.9 years by 2050.¹⁹ The lifespan of African women in 2050 is predicted to be 70.8 years—higher than that of men, at 67 years. Another interesting datum is average life expectancy. A young person who succeeds in “surviving” until age 60 can currently expect to live a further 16 years, i.e., to age 76, and by 2050, will be expected to live approximately a further 19 years, to age 79.

¹⁶ See online: African Development Bank Group,

[http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/FINAL%20Briefing%20Not](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/FINAL%20Briefing%20Note%204%20Africas%20Demographic%20Trends.pdf)

¹⁷ For example, in Africa, the percentage of total older population (aged 65 and over) in 2015 was 3.5%, compared to 17.4% in Europe, 15.1% in North America and 12.5% in Oceania. See Wan He, Danieal Goodkind, and Paul Kowal. (2016). AN AGING WORLD. Washington DC, USA: US Census Bureau.

¹⁸ See Kalasa, *supra* note 14, at 2.

¹⁹ *Ibid*, at 3. See also: WORLD POPULATION PROSPECTS: THE 2006 REVISION, at 3.

The significance of combining the aforementioned trends is that the rate of older persons on the African continent is expected to undergo a sharp increase, both in percentages and in numbers. According to the UN report for 2013, the rate of population growth among older persons in Africa (above age 60) was 3.2% per annum. In 2013, the elder population in African countries was approximately 60 million. According to the forecast, by 2030, it is expected to have increased to approximately 103 million, and by 2050, will have more than doubled itself, reaching approximately 212 million.²⁰

Africa is a huge continent. It includes many different societies and region. Therefore, in many contexts, the African continent is divided into four separate regions because of their significant cultural, ethnic, historical, and geographical differences: North Africa, East Africa, West Africa, and South Africa. As presented below, regional differences can be observed in their aging dimensions as well.

According to the UN report for 2013, the elder population size in North, West, and East Africa is almost identical, at 16,170,000 (7.7%), 15,237,000 (4.6%), and 17,540,000 (4.7%) respectively, whereas in South Africa, it stands at 4,954,000 (8.2%). In contrast, the percentage of older persons in the general population in East and West Africa is very low, with an average of 4.5%, whereas in more developed countries such as in South and North Africa, the percentage of older persons in the population is almost double, and stands at around 8%.

The differences between the different regions of the continent lead to different expectations in population growth rates. The sharpest increase will occur in North Africa, where elders (60+) will constitute approximately 17% of the population by 2050. The rate of very old people (80+) is expected to increase from its current

²⁰ *Ibid.*

marginal rate (0.4%) to 2.2% by 2050. In South Africa, older persons will constitute approximately 14.9% of the population by 2050, in East Africa 8.2%, and in West Africa, the elder population will grow from 2% to 6.4%. The significant differences in the "aging experience" in different countries and regions of Africa is well exemplified in Table 1 below:

Table 1: Comparison of four specific countries from the four different regions

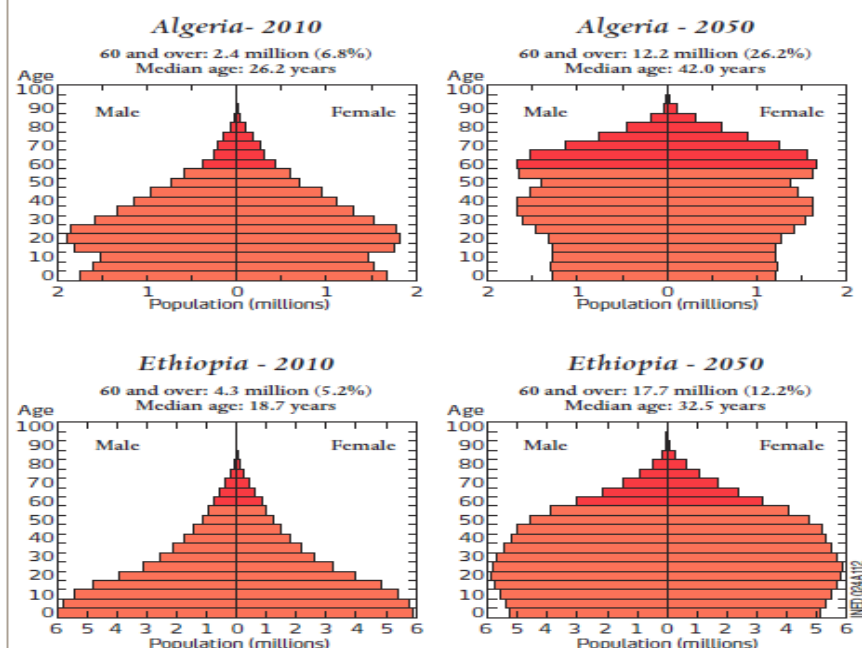
	Algeria (North Africa)	South Africa	Ethiopia (East Africa)	Benin (West Africa)
General population size in 2013 (thousands)	39,208	52,776	94,101	10,323
Elder population size in 2013 (thousands)	2,901	4,538	4,893	474
Rate of older persons (%) by 2030	11.6	10.8	6.1	5.6
Rate of older persons (%) by 2050	20.5	15.6	10.3	8.0
Rate of older persons (%) by 2015 (rural/urban)	7.8/8	8.4/9.7	4.8/5.3	3.8/5.3
Age of life expectancy in 2013	70.9	57.1	63.3	62.3
Age of life expectancy by 2050	74.6	68.2	74.5	64.2

Source: UN: AGE PROFILE 2013

Finally, another way to emphasize the different aging experience within the African continent, can be through presenting the expected demographic pyramids. Two examples from the demographic pyramids of Algeria and Ethiopia present a good illustration of the change that African countries are expected to undergo during the next century in everything concerning population composition. Elders over 60 constituted less than one million people in 2010 in Algeria, whereas by 2050, this population will be almost two million. A similar trend can be seen in Ethiopia. The data apply to men and women alike²¹. See **Figure 1** below:

²¹ The source of Figure 1 is: Golaz, Nowik & Sajoux, *supra* note 14, at 1.

**Figure 1. Two examples of expected population ageing in Africa.
Estimates for 2010 and median scenario for 2050**



1.2. Unique aspects of the challenges of aging on the African continent

Several unique aspects of aging in the African population can be observed on the following dimensions: 1) the cultural dimension, which examines the state of older persons in African society in light of modernization and urbanization processes; 2) the implications of the AIDS virus on the social position of older persons, and 3) gender and poverty-related aspects of old age. We will elaborate on these points below:

1.2.1 The cultural change in the state of elders: Modernization and urbanization

Historically, older persons held important status in African society. For many years, the high mortality rates on the continent among people aged 18–49 turned the population of elders who survived to an advanced age into a unique group in the social fabric. African society generally appreciated older persons’ knowledge and experience of life. Moreover, they fulfilled an important social role of consultancy,

leadership, and cultural continuity, which accorded them respect, appreciation, and protection from the surrounding society.²²

This reality has long since changed, however. A combination of social and political changes has brought about an overall change in the role and status of elders in African society. First, due to increased life expectancy and modernization on the continent, elders in many locations are no longer perceived as “the chosen” or as different in the public landscape. In many senses, and in the context modernization, their status has been reversed, and elders are perceived as “old-fashioned,” irrelevant, and even as a social burden on the younger generation.²³

Second, as part of the colonial regime, which brought changes in the education pattern (such as the penetration of a formal education system with professional teachers) alongside Church activity (which attempted to instill values and faith), the structure of the traditional African family changed, which also contributed to the erosion of older persons’ status in the family. This status change was significant especially in conservative, traditional African societies, where, within a very short time, the knowledge, memory, culture, and property, which had been held by the elders of the community for hundreds of years, lost their importance and their role due to phenomena such as modernization, urbanization, and the penetration of innovative technology²⁴.

²² For a general overview of the historic social role of older persons in the African context see: Tavengwa. M. Nhongo, *THE CHANGING ROLE OF OLDER PEOPLE IN AFRICAN HOUSEHOLDS AND THE IMPACT OF AGEING ON AFRICAN FAMILY STRUCTURES*, in *THE AGEING IN AFRICA CONFERENCE*, (2004). See also in: Economic Commission for Africa. *THE STATE OF OLDER PEOPLE IN AFRICA 2007 – REGIONAL REVIEW AND APPRAISAL OF THE MADRID INTERNATIONAL PLAN OF ACTION ON AGEING*. (2007). Hereinafter: *The State of Older People in Africa 2007*.

²³For an analysis on the social change in the status of older persons in Africa see: Caroline.V. Dullemen, *Older people in Africa: New engines to society?*, (2006) 18(1) *FEMINIST FORMATIONS*, 99, 99-105.

²⁴ See in: Tavengwa M. Nhongo, *PAPER PRESENTED AT THE 2002 EAST AND SOUTHERN AFRICA CONFERENCE ON CHILDREN AFFECTED BY HIV/AIDS* (2002).

Third, the end of the colonial period and the countries' transition to independence increased the power of young people, who had mainly led the political revolutions. Attention was turned to the future and the possibility of development in light of the new, modern global reality. In this new context, the older persons' historical experience and knowledge were no longer required and, in many cases, they were left isolated and unprotected.²⁵

Therefore, it is not surprising that various studies in Africa began to point to the phenomenon of elder abuse and neglect. Thus, for example, research in South Africa showed that 60% of older persons (men and women alike) reported having experienced at least one type of abuse during their lifetime. The data revealed that the most prevalent types of abuse among men are economic and physical abuse. Approximately 28.5% of men reported experiencing economic abuse and 22.8% reported physical abuse. The prevalent types among women are economic and emotional abuse. Approximately 30.7% of women testified to having experienced economic abuse, as well as 13.1% of women who reported experiencing emotional abuse.²⁶

The change in the social and cultural role of older persons in Africa can be also explained by urbanization. This refers to the population's transition from a traditional, usually rural, lifestyle, to a modern, up-to-date lifestyle, usually in large, developed, industrial cities, even though technology has advanced to a lesser extent on the African continent than in the Western world. Studies indicate a significant changing trend on the continent in the last 20 years in everything related to change in residential habits. Today, approximately 47.8% of the population in North Africa live

²⁵ See in: *Supra* note 22, *The State of Older People in Africa 2007*, at 31 - 28.

²⁶ See Monica Ferreira, *Elder abuse in Africa: What policy and legal provisions are there to address the violence?* (2005) 16(2) JOURNAL OF ELDER ABUSE AND NEGLECT, 17, 17-32.

in cities, and in South Africa, 32.8% live in urban environments. The accelerated urbanization process also has negative side effects. For instance, most of the cities in South Africa lack basic subsistence infrastructures; only 20% of residents have access to electricity, approximately 53% have access to a telephone landline, and only 40% have access to clean water.²⁷ In addition, because of the rapid urban population growth, these countries are coping with increasing overcrowding, leading to high morbidity, air pollution, noise, and so on.²⁸

These urbanization processes had a direct impact on the elders; being accustomed to a rural lifestyle and mainly agricultural occupations over many years, most of these older persons did not succeed in adjusting to an urban lifestyle.²⁹ They had no access to the new types of work in industrial plants, quarries, and infrastructures. In contrast, the young people who desired a better lifestyle and good quality education left the rural villages for the cities. This phenomenon left behind a “residue” of elders, resulting in the crumbling of the family unit.³⁰

Once again, it is important to emphasise the complexity of these cultural changes, which occur on different levels and at different rates in different countries and groups on the African continent. Thus, for example, a relatively new research, which studied the representation pattern of elders in the capital of Senegal,³¹ found a complex picture of reality, in which most representations of elders were positive (63.7% of participants reported positive representations of elders). Hence, in a

²⁷ See online: African Development Bank Group, <http://www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/urbanization-in-africa-10143/>

²⁸ *Ibid.*

²⁹ See: Helpage, GlobalAgewatch Index 2013- Insight Report, online: www.helpage.org/global-agewatch/reports/global-agewatch-index-2013-insight-report-summary-and-methodology

³⁰ See: Enguerran Macia, Priscilla Duboz, Joann M. Montepare & Lamine Gueye, Social representations of older adults [magget] in Dakar, (2015) 35(2) *AGEING AND SOCIETY*, 405, 405-427.

³¹ See Enguerran Macia, Priscilla Duboz, Joann M. Montepare, and Lamine Gueye. (2015). *Social representation of older adults [maggel] in Dakar. AGEING AND SOCIETY*, 35(2), 405-427.

dynamic reality, in which the status of elders not only changes over time, it is also shaped in different ways in different countries in Africa.³²

1.2.2 The AIDS epidemic and its implications for elders in Africa: Africa's newest mothers

Alongside the dramatic shift in the cultural status of elders in the traditional African society, Africa experienced another unique phenomenon, which had an impact on older persons: the outbreak of AIDS and its social implications. AIDS has had a damaging demographic impact on Africa and its elders. As of the beginning of the 21st century, approximately 23 million AIDS carriers lived south of the Sahara in Africa. Of these, approximately 6 million lived in South Africa.³³ In the last decade, approximately 20 million deaths have been attributed to circumstances in connection with AIDS. The dimensions of the phenomenon have had an extensive impact on the shaping of African society today.³⁴

The AIDS epidemic had an immediate impact on the sexually active age group, who were exposed to infection with the virus.³⁵ The epidemic had dramatic implications in certain regions of Africa regarding the impoverishment and even disappearance of the middle generation—the parents of working age. Entire regions

³² For more examples of studies regarding the complex and diverse situation of older persons in Africa see: Eric Bologo, *Transferts fonciers intergénérationnels et intrafamiliaux dans l'Ouest du Burkina-Faso: modalités et mutations [Intergenerational and intrafamilial land transfers in the West of Burkina-Faso: forms and mutations]*, In LES RELATIONS INTERGÉNÉRATIONNELLES EN AFRIQUE. APPROCHE PLURIELLE [INTERGENERATIONAL RELATIONSHIPS IN AFRICA. A GLOBAL APPROACH] 213, 213 - 230 (Philippe Antoine ed., 2007). See also: Catherine Campbell, *Intergenerational conflicts in township families: transforming notions of respect and changing power relations*, (1994) 3 SOUTHERN AFRICAN JOURNAL OF GERONTOLOGY, v37, 37-42.

³³ Sheung-Tak Cheng, and Benjamin Siankam. (2009). The impact of the HIV/AIDS pandemic and socioeconomic development on the living arrangements of older persons in Sub-Saharan Africa: A country-level analysis. *Am. J. Community Psychol.* 44, 136-147.

³⁴ For an analysis of the impact of AIDS on older persons in Africa see :WHO – World Health Organization (2002). *Impact of AIDS on Older People in Africa: Zimbabwe Case Study*. Geneva: WHO.

³⁵ In this article we will not discuss the demographic impact of children born with AIDS or the medical options available today for AIDS patients in Africa, as it is beyond the scope of this article.

were left with young children, who had been orphaned due to AIDS, and were living with their grandparents. At an age at which people are usually in need of help and support from their families, many African elders were left behind to raise the young generation (the grandchildren) in outlying residential areas. This explains why the elders were nicknamed “Africa’s newest mothers.”³⁶ For example, in Uganda, Malawi, and Zambia, one in every five children lives with his/her grandparents.³⁷ In Namibia, the rate is even higher, at approximately 61%.³⁸ According to some studies, the number of children who have lost one or both parents due to AIDS stands at approximately 15 million.³⁹

Therefore, AIDS in Africa led to a unique phenomenon in which the elders stepped into their children’s shoes as breadwinners and those responsible for childrearing. The elders were forced to continue working to sustain and bring up the younger generation who remained with them. Some of them could no longer rely on the middle generation that had disappeared or on the greatly diminished extended family. These elders cannot allow themselves to reduce the amount and pace of their work because they will have no source of assistance in old age and will be unable to work.⁴⁰ The bottom line is that the elders have been left behind: They are sometimes left alone with no support system and additional dependents, increased expenses for raising the grandchildren and funding their medical expenses, despite their gradually diminishing capability to work due to age.⁴¹

³⁶ See: Nhongo, *supra* note 22, at 5.

³⁷ *Ibid.*

³⁸ See: NY: UNITED NATION 2003 UNICEF. Africa's Orphaned Generations, at 24.

³⁹ *Ibid.* See also WHO – World Health Organization. (2002). Impact of AIDS on Older People in Africa: Zimbabwe Case Study. Geneva: WHO.

⁴⁰ See in: The State of Older People in Africa 2007, *supra* note 22, at 28-31; See also: HelpAge. *OLDER PEOPLE IN AFRICA: A FORGOTTEN GENERATION* (2008). Online: <http://www.helpage.org/silo/files/older-people-in-africa-a-forgotten-generation.pdf>.

⁴¹ On the inter connection between mortality rates due to AIDS and loneliness of older persons in Africa see: Tim Kautz, Eran Bendavid, Jay Bhattachary & Grant Miller, AIDS and Declining Support

This phenomenon projected directly onto the elders' economic situation, and to outcome was that older persons and their grandchildren became poorer.⁴² For example, studies show that in 11 countries on the African continent, the poverty rate in elder-headed households is higher than the average poverty rate in each country. Other studies show that, because of the unstable economic situation, some children are abandoned by their grandparents who are unable to provide them with adequate care.⁴³ Thus, poverty is a central issue and will be addressed separately later on.

The AIDS epidemic in Africa had an impact on an additional subpopulation of elders: older persons who are AIDS carriers. Many elders in Africa today are either ill with the disease or carriers, and are isolated and ostracized by society. Despite innovative life-lengthening treatments, the social stigma attached to AIDS carriers is still valid⁴⁴.

1.2.3 Gender and older women in Africa: Old and lonely

Within the socially weakened group of elders in Africa, the women constitute an even weaker subgroup.⁴⁵ Women live longer than men. In some African countries, 75% of the women above age 65 are widows.⁴⁶ They are generally poorer than older men, have a lower level of education, and do not usually have their own property or

for Dependent Elderly People in Africa: Retrospective Analysis Using Demographic and Health Surveys. *BMJ*, 340, C 2841(2010). For an overview of the health and social implications of the caring duties of African grandparents who lost their adult children to AIDS, see: Fletcher Njororai & W.W.S. Njororai "Older adults caregivers to people with HIV/AIDS in Sub-Saharan Africa: A review of literature and policy implications for change." *INTERNATIONAL JOURNAL OF HEALTH PROMOTION AND EDUCATION* 1-19 (2012)

⁴²See: James H. Schultz, *The Economics of Aging*, in *THE SAGE HANDBOOK OF SOCIAL GERONTOLOGY* 33, 35 - 44 (Dale Dannefer & Chris Phillipson ed., 2010); See also: RICHARD DISNEY, *CAN WE AFFORD TO GROW OLDER?* 307 - 309 (1996)

⁴³See: Eucebious Lekalakala-Mokgele, *A literature review of the impact of HIV and AIDS on the role of the elderly in the sub-Saharan African community* (2011) 16(1) *HEALTH SA GESONDHEID* 1.

⁴⁴ See: WHO Report, *supra* note 34.

⁴⁵ See: *The State of Older People in Africa 2007*, *supra* note 22, at 31. See also: HelpAge: Protecting 2008, at 5.

⁴⁶ See: Eyassu Habte-Gabr, Nancee S. Blum & Ian M. Smith. *The elderly in Africa*, (1987) 6(2) *JOURNAL OF APPLIED GERONTOLOGY* 163-182.

possessions.⁴⁷ This is usually because women in Africa spend most of their lives at home caring for the family or in informal work that does not earn them a direct financial income. Hence, most of them lack professional training and the ability to earn a salary. It is not surprising, therefore, that most elder women have neither pension nor stipends and no possessions or financial resources of their own on which to live in old age.

Moreover, the spread of AIDS in Africa has worsened the economic situation of women on the continent. This can happen when the cost of treating the sick offspring (with AIDS) falls on the grandmother and can push the older person below the poverty line.⁴⁸ In some extreme cases, women are forced into prostitution because their husbands have died or because they are no longer able to function or to work. Women are also harmed more by the phenomenon of the younger population's migration to urban centers. They stay behind while lacking economic capabilities and without protection, but with the responsibility of caring for the young generation.⁴⁹ For this reason, a strong trend to address the issue of the older women can be observed in the global arena, as part of the fight for women's rights in general.⁵⁰

Looking into the future, the challenge regarding older African women will only increase. The forecasts show that in 2050, women will be the majority in all age

⁴⁷ See: Victoria Hosegood & Ian M. Timaeus. HIV/AIDS AND OLDER PEOPLE IN SOUTH AFRICA. In Barney Cohen and Jane Mnken (Eds.) *Aging in Sub-Saharan Africa: Recommendation for Furthering Research*. Washington DC: National Academies Press (2006).

⁴⁸ See Habte-Gabr, Blum & Smith, *supra* note 46, at 173.

⁴⁹ There is rich literature in this field. See for example: General recommendation No. 27 on older women and protection of their human rights, CEDAW/C/2010/47/GC.1 (19.10.2010). In the preamble, and in Article 5, the following was stated: "The gendered nature of ageing reveals that women tend to live longer than men, and that more older women than men live alone. While there are 83 men for every 100 women over the age of 60, there are only 59 men for every 100 women over the age of 80. Further statistics from the United Nations Department of Economic and Social Affairs indicate that 80 per cent of men over 60 are married compared with only 48 per cent of older women".

See also: UN, Department of Economic and Social Affairs: *Current Status of the Social Situation, Well-Being, Participation in Development and Rights of Older Persons Worldwide* (2011); and see also: VIRPI TIMONEN, *AGEING SOCIETIES: A COMPARATIVE INTRODUCTION* 26 (2008).

⁵⁰ See: *The State of Older People in Africa 2007*, *supra* note 22 at 31.

groups over 60.⁵¹ The latent reality behind this fact is complex. Women live longer and therefore, at advanced ages, usually live alone, generally as widows. The combination of loneliness and sometimes their unique appearance (a stooping gait, sagging skin, shaky hands, and yellow eyes)⁵² contributes to the population's negative image of these older women, who come to be perceived in some places in Africa as "witches."⁵³ The subsequent witch-hunting in some cases ends in murder.⁵⁴ For example, in Tanzania and Mozambique, discriminatory and harmful practices against older women have developed. In these countries, when older women are labeled as "witches", they are unable to inherit the family's property and are even driven from their homes in the rural community to live in the city⁵⁵. Although precise data are lacking, it is claimed that the number of older women in Africa, who were murdered as a result of witch-hunting in the last three decades, reaches into the tens of thousands.⁵⁶

It is quite clear then that older women in Africa require assistance in almost every respect, starting from physical care and protection to aid in making a living. Of course, the women are also in need of "routine" old age care, such as medical treatment and the security of stipends and pensions.

⁵¹ See: Habte-Gabr, Blum & Smith, *supra* note 46 at 164.

⁵² This description is in no ways representative or accurate. It is mostly a stigmatic and stereotypical construction, which allows the development of negative narrative of the older witch.

⁵³ See: WHO, Abuse of the Elderly Chapter 5,

http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap5.pdf

⁵⁴ See: Silvia Federici, "Women, witch-hunting and enclosures in Africa today" 3 SOZIAL GESCHICHTE ONLINE S. 10-27. Online (last accessed: October 10, 2016): https://duepublico.uni-duisburg-essen.de/servlets/DerivateServlet/Derivate-24612/03_Federici_Women.pdf

⁵⁵ See: WHO, Abuse of the Elderly Chapter 5,

http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap5.pdf

⁵⁶ See: Federici, *supra* note 54 at 13.

1.2.4 Poverty and age in the African context: The absence of social security and its implications

All the factors described above, together with others that will be mentioned later, lead to the generalization that older persons on the African continent suffer from poverty. On the African continent in general, approximately 60% of all elders (over 60) are under the poverty line.⁵⁷ This combines with other data, which shows that in many places in Africa, the elders are forced to continue to work and are unable to retire until they become disabled and are no longer capable of working.⁵⁸ Poverty, on the one hand, and the need to continue working in old age, on the other, are interconnected, and are also linked to the absence of social security systems and old age pensions, which is a central issue of poverty among elders in Africa.

Indeed, the poverty phenomenon among elders in Africa is derived from a large variety of reasons, some of which are described above (such as the implications of the AIDS epidemic and caregiving responsibilities falling on the grandparents). Some, however, are derived from the absence of universal old age pension and social security plans built into the work system in most African countries. Even in countries which do have pension schemes, the majority of people work in the informal sector and are therefore not covered by these schemes.⁵⁹ This lack often stems from the countries' poor economic status, causing either inability or unwillingness to allocate resources for this purpose.

Nevertheless, a slight change in this trend can be observed. Countries such as Botswana, Mauritius, and South Africa have begun to establish a universal pension

⁵⁷ See: Nhongo 2004, *supra* note 22, at 7.

⁵⁸ See: The State of Older People in Africa 2007, *supra* note 22, at 32.

⁵⁹ Stewart, F. and J. Yermo (2009), "Pensions in Africa", OECD Working Papers on Insurance and Private Pensions, No. 30, OECD publishing.

model for their citizens. According to research, only 16.9% of elders in the region south of the Sahara are entitled to an old age pension as opposed to 36.9% in North Africa. This pension generally serves as a minimal “safety cushion” for those elders. Over 50% of elders report that this is their only income.⁶⁰ In addition, in light of the missing middle generation, as described above, the elders are forced to continue to care for the young generations who are dependent on them.⁶¹

Poverty among the elders in Africa naturally has a direct impact on their health and on all their life conditions. Various reports describe how, in the different African countries, elders live in distressed conditions with no access to medical and health services or to an environment with adequate medical services as well as specialized geriatrics and dementia services. Poverty in old age affects the elders’ nutrition, quality of food and water, and their ability to live a lifestyle that will delay age-related illnesses, disability, and early death⁶².

It is clear then, that older persons in Africa need protection for their basic and fundamental human rights.

Part II: The African Charter on Human and People’s Rights

2.1 The international charter for human rights in Africa in the context of elders’ rights: General information

The African Charter on Human and People’s Rights (hereinafter “the Charter”) was passed unanimously in 1981 at the Assembly of the Heads of State in Nairobi,

⁶⁰ See: International Labor Organization. SOCIAL PROTECTION FOR OLDER PERSONS: KEY POLICY TRENDS AND STATISTICS (2014).

⁶¹ See: The State of Older People in Africa 2007, *supra* note 22, at 33.

⁶² See e.g.: The State of Older People in Africa , 2007, *supra* note 22.

Kenya⁶³ and became effective in 1986 following its ratification by all members of the AU. The Charter includes many fundamental human rights, which are relevant and applicable to elders, such as the right to health, education, and employment. Specific reference to elders' rights can be found in only two specific articles in the Charter. The first is in section 18(4), (which is a subsection of a part dealing with the importance of the family unit), and dictates as follows:

“The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”⁶⁴

The second, detailed in section 29(1) of the Charter (in the section dealing with the individuals' obligations rather than with their rights) dictates that:

“The individual shall also have the duty:

To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.”⁶⁵

These two sections have undergone several normative (i.e., not empirical) analyses in the academic literature, which attempted to interpret them in-depth and to describe their relationship to elders' rights within the framework of the AU in general.⁶⁶ Since this article focuses on the activity of both these organizations within the framework of the Charter, the African Commission on Human and People's

⁶³ See: Chidi Anselm Odinkalu & Camilla Christensen, *The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures*, (1998) 20 HUM. RTS. Q. 235, 235.

⁶⁴ See ACHPR Article 18(4).

⁶⁵ See ACHPR Article.29(1) .

⁶⁶ In general, the exiting literature regarding these two sections of the African Charter are short and are brought within a broader analysis of Charter in general. See for example the following writings for examples: Yeung Kam John Yeung Sik Yuen, *The rights of older persons and persons with disabilities in Africa*, In *THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN RIGHTS AND PEOPLES' RIGHTS* 213, 213-233 (M. Ssenyonjo ed., 2012). See also: Morris Kiwinda Mbondenyei, *INTERNATIONAL HUMAN RIGHTS AND THEIR ENFORCEMENT IN AFRICA*. (2011).

Rights (hereinafter “the Commission”) and the African Court on Human and People’s Rights (hereinafter “the Court), we will describe the legal system of these two organizations’ activities in broader detail.

2.2 The African Commission on Human and People’s Rights and its activity patterns: General information

The creation of the African Commission was an inseparable part of the authorization of the African Charter.⁶⁷ The Charter stated that a human rights commission would be established as part of the procedure to ensure the implementation of the rights prescribed in the Charter.⁶⁸ The Commission officially came into effect on November 2nd 1987 in Addis Ababa.⁶⁹ Section 30 of the Charter is the legal norm guiding the Commission’s establishment and mode of activity:

“An African Commission on Human and Peoples’ Rights, hereinafter called “the Commission,” shall be established within the Organization of African Unity to promote human and people’s rights and ensure their protection in Africa.⁷⁰”

Today, the human rights commission operates in Banjul, Gambia. Its location on the western side of the continent is not coincidental, and was intended to demonstrate its independence and disassociation from the administrative center of the AU in Addis Ababa.⁷¹ Section 45 of the Charter states that the aims of the

⁶⁷ For a short history of the development of the commission see: online: African Commission on Human and Peoples’ Rights, History, (14 February 2015) <http://www.achpr.org/about/history>.

⁶⁸ See: ACHPR Article 30.

⁶⁹ See: Frans Viljoen, *A Human Rights Court for African, and Africans*, (2004) 30 BROOKLYN J. INT’L L. 1, 7.

⁷⁰ See ACHPR Article 30. See for an analysis: Chidi Anselm Odinkalu, *The Individual Complaint Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment*, 8 TRANSNAT’L L. & CONTEMP. PROBS 359, 365 (1998).

⁷¹ SEE: RACHEL MURRAY, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS AND INTERNATIONAL LAW* 11 (2000); SEE ALSO: FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* 312 - 314 (2007). As of February 2015, there are still structural and organizational challenges which makes it difficult for the Commission to operate effectively. See: Combined 32nd and 33rd Activity Report of the African Commission on Human and Peoples’ Rights, EX.CL/782(XXII) Rev.2, 21 – 25 January 2013 (Addis Ababa, ETHIOPIA) at sections 6 – 60 .

Commission are to *promote, protect, and interpret* the rights prescribed in the Charter, and then to perform all tasks imposed on the Commission by the AU.⁷²

Some of the Commission's activities are detailed below. The aim is to present the different ways in which the Commission operates, which also serve the purpose of promoting elders' rights. Human rights are promoted through the following central patterns:

(1) State reporting: The backbone and one of the central tools that serves the Commission in promoting human rights is the reports that each country is obliged to submit according to Section 62 of the Charter.⁷³ Each country has to report the state of human rights within its borders once every two years, including the legislative and other measures that they have taken to implement the Charter.⁷⁴ The state of the reporting in practice shows that the vast majority of countries do not meet their reporting requirements.⁷⁵

(2) Special rapporteurs: Although the state reporting depends, to a large extent, on the willingness of the countries to cooperate, the special rapporteurs enable the

⁷² See ACHPR Articles 45; See also: Rules of Procedure of the African Commission on Human and Peoples' Rights (Amended), adopted 6 October 1995, ACHPR/RP/XIX; (1996) 8 AJICL 978-1003) 73-82;

⁷³ See ACHPR Article 62; See Rules of Commission *Ibid*, at 73-82; See also: El-Shekin Ibrahim Badawi, *The African Commission on Human and Peoples' Rights: Prospects and Problems*, 7 NETH. Q. HUM. RTS. 272, 281; (1989) ; El-Shekin describes the reporting procedures as follows: "I believe that the reporting procedure is the backbone of the mission of the Commission." See also: Malcolm D. Evans , Tokunbo Ige & Rachel Muurray, *The Reporting Mechanism of the African Charter on Human and Peoples' Rights*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986 – 2000 36, 36 - 39 (Malcolm D. Evans & Rachel Murray ed., 2002) 7.

⁷⁴ See e.g.: International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (Entered into force Mar. 23, 1976) (ICCPR) Article 40; See also: International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, (Entered into force Jan. 3, 1976)) ICESCR Article 16.

⁷⁵ See: Combined 32nd and 33rd Activity Report, *supra* note 66, in sections 16-17; See also in MURRAY 2000, *SUPRA* NOTE 65, AT 16; See also: Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999 – 2000, AHG/222 (XXXVI), (2000) at 26-39. As described in the activity report of the commission, the commission is experiencing unwillingness to cooperate from some African countries with regards their duty to submit reports.

Commission to initiate and lead the processes of the report.⁷⁶ To date, five special rapporteurs are operating in the Commission.⁷⁷

(3) Working groups of the Commission: In addition to the special rapporteurs and the state reporting, the working groups are another central and important means of promoting human rights.⁷⁸ Their composition is varied, including, among others, experts, members of NGOs, authorities who wish to advance and contribute to the subject being dealt with by the Commission. Seven working groups currently exist in the Commission.⁷⁹

(4) Visits to countries: Another means of promoting human rights is through commissioners' visits to countries, adhering to what is written in Section 45(1)(a).⁸⁰ In many states on the African continent, no control system of any kind exists. Most states do not have an institutionalized, governmental system of control and supervision. The African Commission on Human and People's Rights has created a special supervision process. The visits to the states tend not to be of an investigative, confrontational nature, but are intended to create a means of cooperation and dialogue for the promotion of human rights.⁸¹ However, the fact that there are only 11

⁷⁶ See: VILJOEN, *supra* note 69 at 392.

⁷⁷ See online: African Commission on Human and Peoples' Rights, Special Mechanisms, (14 February 2015) <http://www.achpr.org/mechanisms/>

⁷⁸ SEE VILJOEN, *Supra* note 69 at 454.

⁷⁹ See *supra* note 71. The existing working groups are: Working Group on Indigenous Populations/Communities in Africa; Working Group on Economics, Social and Cultural Rights; Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killing in Africa; Working Group on Specific Issues Related to the Work of the African Commission; Working Group on Extractive Industries, Environment and Human Rights Violations; Working Group on Communication; And finally: Working Group on Rights of Older Persons and Peoples With Disabilities, which is discussed late on in this article.

⁸⁰ See: ACHPR Article 18(1): "To collect documents, undertake studies and researches on African problems in the collect documents, undertake studies and researches on African problems ...

⁸¹ See VILJOEN *supra* note 69 at 401.

commissioners and 54 member states in the AU means that the visits are quite a rare occurrence.⁸²

(5) Resolutions: As part of the human rights promotion in Africa, the Commission makes decisions and publicizes them. If, in the early days of the Commission, the decisions were considered as merely declarative, today, they have an impact mainly in creating awareness to the topics of their resolutions.⁸³

(6) Working in collaboration with NGOs: The importance of NGOs in the promotion of human rights, in general, and in Africa, in particular,⁸⁴ cannot be overstated. These organizations deal, fundamentally, and in the nature of things, with follow-up, documentation, and reporting the violation of human rights.⁸⁵ Their activities and development over the years earned them a status which makes them an essential factor in creating human rights norms. NGOs were partners in the formulation of the Charter.⁸⁶

(7) Dealing with communications: Besides promoting human rights, it is also the job of the Commission to protect human rights; the second task that appears in Section 45(2) of the Charter.⁸⁷ The Commission provides protection through the receipt of communications. The authority to submit communications appears in

⁸² See for example the summary of the visit to Cameroon in 2012: African Commission on Human and Peoples' Rights, Cameroon: Promotion Mission, 2012, www.achpr.org/states/cameroon/missions/cameroon-promo-2012.

⁸³ See VILJOEN *supra* note 69 at 401.

⁸⁴ See: Kwadwo Appiagyei-Atua, *Human Rights NGOs and their Role in the Promotion and Protection of Rights in Africa*, (2002) 9 INT'L J. ON MINORITY & GROUP RTS. 265, 266 – 268. See also: Wiseberg Laurie s., *Protecting Human Rights Activists and NGOs: What More Can Be Done?*, (1991) 13 HUM. RTS. Q. 525, 529. The author defined NGOs as follows: "A human rights nongovernmental organization (NGO) is a private association which devotes significant resources to the promotion and protection of human rights, which is independent of both governmental and political groups that seek direct political power, and which does not itself seek such power...".

⁸⁵ See Kwadwo, *supra* note 78, at 267.

⁸⁶ See: Ahmed Motala, *Non-Governmental Organizations in the African System*, in *The African Charter on Human and Peoples' Rights: The System in Practice, 1986 – 2000* 246, 246 (Malcolm D. Evans & Rachel Murray ed., 2002)

⁸⁷ See ACHPR in Article 2: "Ensure the protection of human and peoples' rights under conditions laid down by the present Charter."

Sections 54–59 of the Charter.⁸⁸ Communications to the Commission between countries is described in Sections 47–54,⁸⁹ and allow countries to file a complaint against another country in the case of violation of the Charter.⁹⁰ Nongovernmental communications are another type of communication submitted to the Commission.⁹¹ These involve communications by NGOs (see above) and by individuals, who were harmed by a violation of the Charter or who were witness to such violation.

The Charter does not state explicitly, and in clear language, the possibility of individual communications. The norm is learned, in practice, in a residual manner, from Section 55 of the Charter.⁹² Individuals' communications were accepted under this section but also under Section 58 of the Charter,⁹³ involving cases where the Commission is of the opinion that massive violation of human rights has occurred. Then, once the Commission has brought it to the attention of the Assemblies of the Heads of State, they can request that the Commission investigate the issue. In practical terms, the Commission accepts communications from individuals.⁹⁴ Communications from individuals and organizations constitute the absolute majority of communications.⁹⁵ The Commission receives the communications, asks the relevant countries to deal with the issue, and makes decisions and recommendations.⁹⁶

⁸⁸ See ACHPR in Article 47-59; See also: Rules of Commission, *supra* note 66 in section 83-113; See also: MURRAY 2000, *supra* note 71 at 17-19;

⁸⁹ See ACHPR, Articles 47-59.

⁹⁰ SEE MURRAY 2000, *SUPRA* NOTE 71, AT 17-19.

⁹¹ See Odinkalu & Christensen, *supra* note 63, at 244-249.

⁹² See ACHPR, Article 55; See also: Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and Peoples' Rights*, (1988) 31 HOWARD L.J. 643, 648.

⁹³ See ACHPR Article 58(1): "When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases".

⁹⁴ See: Guidelines for the Submission of Communications, *supra* at 3-7.

⁹⁵ See Combined 32nd and 33rd Activity Report, *supra* note 65 at 5-9; See also: Murray 2000, *supra* note 71 at 18.

⁹⁶ See Combined 32nd and 33rd Activity Report, *Ibid*.

In other words, the Commission routinely follows up communications by individuals and organizations and actively deals with them.⁹⁷

(8) Interpretation: Finally, Section 45(3) of the Charter gives the Commission the authority to interpret the Charter and to make a recommendation.⁹⁸ Sections 60 and 61 of the Charter obligate the Commission to consider additional legal norms when interpreting the Charter.⁹⁹ It must examine international and African norms, with special emphasis on the examination of the customary law and African tradition. In this way, the Charter attempted to ensure that the Commission attributes importance to the culture and heritage of African society.¹⁰⁰

The Commission's recommendations are not binding.¹⁰¹ However, the Commission issues and continues to publicize a recommendation in which it interprets the rights prescribed in the Charter. For example, the Commission issues clarifications and recommendations for how countries should act on the obligation to allow a fair trial as well as freedom of organization.¹⁰² These guidelines, in some cases, were the adoption of norms as expressed in UN charters or recommendations.

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⁹⁷ As mentioned, there are different opinions regarding the legal authority of the commission to deal with individual complaints.

⁹⁸ See ACHPR Article 54(3): "Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU". See also Murray 2000, *supra* note 65, at 25-26.

⁹⁹ See: ACHPR, Articles 60-61.

¹⁰⁰ See: MURRAY 2000, *supra* note 71, at 25.

¹⁰¹ See: VILJOEN *supra* note 69 at 454.

¹⁰² See: Fifth Annual Activity Report of the African Commission 1991 – 1992, in Appendix IV " : *Recognizing that the right to a fair trial is essential for the protection of fundamental human rights and freedoms...*" ; See also in Appendix V " :The regulation of the exercise of the right to freedom of association should be consistent with states' obligations under the African Charter on Human and Peoples' Rights".

¹⁰³ This was for example the case regarding the prevention of discrimination of women: See: MURRAY 2000, *supra* note 71 at 25.

2.3 The African Court on Human and People's Rights and its activity patterns: General information

Fifty-four AU member states are signatories to the African Court on Human and People's Rights. As of February 2015, only 26 states had signed and ratified the Charter protocol on the establishment of the Court.¹⁰⁴ Of these 26 states, only seven ratified the section in the protocol that allows the direct submission of communications by individuals and NGOs to the Court and not via the Commission.¹⁰⁵ This is an indication of the Court's problematic status and its role in the regional system for the protection of human rights. Nevertheless, it seems that when examining the status report of human rights in Africa (and in this case, the legal status of the elders) attention must be paid specifically to the development process of this legal institution. The development process of the Court can actually indicate a gradual improvement and reinforcement of human rights.

It should be kept in mind that historically, the African Charter did not include the establishment of a Court as part of its means of enforcement, as opposed to the European Charter, for example, which included the establishment of a designated Court as part of its original design.¹⁰⁶ There were those who perceived the lack of

¹⁰⁴ See :Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, OUA/LEG/AFCHPR/PORT(III), Adopted by the Assembly of Head of State and Government, 34th Session, Burkina Faso, 8-10 June 1998; See also :Julia Harrington, *The African Court on Human and Peoples' Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986 – 2000* 305, 305 (Malcolm D. Evans & Rachel Murray ed., 2002).

¹⁰⁵ See ACHPR Article 5(3). For possible reasons for the failure to ratify the protocol see: Rebecca Wright, *Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights*, (2006) 24 *BERKELEY J. INT'L L.* 463, 477 – 482.

¹⁰⁶ See: The Convention for the Protection of Human Rights and Fundamental Freedoms (As amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010) In Article 19: " **Establishment of the Court:** To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis".

inclusion of a Court as a reflection of the Charter's special character.¹⁰⁷ Those scholars who worded the Charter were of the opinion that the adversarial legal method was inappropriate to the customary law in Africa.¹⁰⁸

Only after many committees and various alternative drafts, the Protocol on the Establishment of the Court on human rights in Africa was accepted by the Committee of Ministers, and later by the Assembly of the African Heads of State on June 9th 1998 in Burkina Faso.¹⁰⁹ The Protocol became effective on January 25th 2004 following its ratification by 15 states.¹¹⁰ In January 2006, the first judges were appointed by the Heads of State.¹¹¹ The judges were sworn in before the same Assembly in July 2006. The Court established the rules according to which it operates and they came into effect on January 1st 2010.¹¹² In November 2006, the Court began to operate officially in Addis Ababa. In August 2007, the Court moved to its permanent location in Arusha, Tanzania.¹¹³

Part III: The research—the rights of elders in AU institutions

In this part of the article, we will present the findings of our research on the two legal institutions that are supposed to enforce and protect the rights of older persons within the framework of the AU: the Court and the Commission. We will present the research methodology followed by the findings.

¹⁰⁷ See :U. O. Umozurik, *The African Charter on Human and Peoples' Rights*, (1983) 77 AM. J. INT'L L. 902, 909 - 910.

¹⁰⁸ See :Harrington, *supra* note 104, at 306; See also :Umozurik, *supra* not 107, at 909.

¹⁰⁹ See :Protocol on the Establishment of the Court, *supra* note 98; See also: Viljoen 2004, *supra* note 69 at 8.

¹¹⁰ See: Protocol on the Establishment of the Court, *supra* note 98.

¹¹¹ See: Wright, *supra* note 105 at 476.

¹¹² See: African Court on Human and Peoples' Rights Rules of Court, <www. African court- Interim Rules of Court>, section 76.

¹¹³ See: Protocol on the Establishment of the Court, *supra* note 98.

3.1. Methodology

In our research, we attempted to review expansive subjects in the field of old age on the African continent. In this study, we attempted to describe a current legal situation report of elders in the regional legal arena in Africa, as reflected in the decisions and activities of the Commission and the Court.

We attempted to fulfill the aims of the research through seeking, processing, and analyzing material from varied databases detailed below: A: *Online legal databases* – we focused on searching for court rulings in African legal databases translated into English, such as the Southern African Legal Information Institute (SALII), the African Court of Justice¹¹⁴ website, and the African Commission on Human and Peoples’ Rights¹¹⁵ website. B: *Relevant research literature* – extensive search of articles, journals, literature, and UN reports relevant to the field of elder rights on the continent. C: *Interviews with elder-law human rights researchers* – we contacted the University of the Free State, the University of Pretoria, the University of Johannesburg, and the University of Stellenbosch, among others. D: *Application to NGOs working for the promotion of elder rights* – we compiled a list of all the significant NGOs working to overcome the problem of aging in Africa. This list included approximately 45 designated organizations operating in Africa. Finally, in January 2014, we visited the African Court, during which we interviewed Court officials on issues concerning the Court’s general activity as well as concrete activity on older persons’ rights¹¹⁶.

¹¹⁴ See: African Commission on Human and Peoples’ Rights, (February 14, 2015) <http://www.achpr.org>.

¹¹⁵ See *supra* note 98.

¹¹⁶ The authors would like to specifically thank Mr. Fidelis Mutisya and Mrs. Jester Helena Charewa for their friendly cooperation and willingness to be interviewed and share their knowledge and insights.

3.2 Findings regarding the African Court on Human and People's Rights

The Court made its first ruling on August 11th 2008. As of December 31st 2014, 27 claims had been filed with the Court. The Court had passed a ruling on 22 claims, and five were pending.¹¹⁷ A study, search, and analysis of all these legal procedures revealed that **not one of these claims dealt with ageism in general or with elders' rights in particular.**

For a deeper understanding of these findings, a meeting was held with official members of the Court during a special visit to Arusha. From the interviews with the Court officials, it emerged that notwithstanding the awareness of the importance of the subject, there is still an inherent limitation of the Court at this stage of its historical development: the African Court on Human and People's Rights does not have equal power to that of the European Court on Human Rights and the Inter-American Court of Human Rights within the OAS.¹¹⁸ Not only does it have a much shorter organizational history, but its status and potency are still very limited.

Despite the awareness that a system for the protection of human rights that is capable of fulfilling its mission requires an authorized and accepted court, it is clear that the Court will neither meet expectations nor fulfill its role if it will not merit the full support of all the African states. (As mentioned earlier, only half of the African countries have ratified the Protocol on the Establishment of the Court¹¹⁹). As of today, at least, the Court is still at the stage of "building" its role and status, and therefore the scope of applications to the Court is still minimal. Naturally, it has not yet created for itself the status and power that parallel courts (in Europe or the United

¹¹⁷ See: *supra* note 98.

¹¹⁸ See: Makau W. Mutua. The African Human Rights Court: A Two Legged Stool? (1999) *HUMAN RIGHTS QUARTERLY*, 21, pp. 342-363.

¹¹⁹ *Ibid.*

States) have succeeded in creating. The intention and the vision are, naturally, to create, gradually and intelligently, a status that will express the importance of the Court as a mechanism for protecting and maintaining human rights in general, and elder rights in particular. It seems, however, that, at this point in the history of the development of older persons' rights in Africa, the Court has simply not reached the stage at which it has achieved significant status for promoting elders' rights.

3.3 Findings regarding the African Commissions

3.3.1 Findings regarding the “Communications”

Since the establishment of the Commission (1987) until the end of 2012, 426 communications were submitted to the Commission.¹²⁰ The Commission concluded 210 out of those communications, that is approximately 49%. In October 2012, 52 communications (12%) were pending with the Commission.¹²¹ Out of the 210 that were concluded, 82 (39%) were declared as inadmissible and another 13 (6%) were struck out of the list because of technicalities or other reasons¹²². The Commission took 22 provisional measures within the framework of communications that were dealt with.¹²³ Two communications (0.5%) were transferred to the Court. **Not one communication was raised specifically in the field of elders' rights.**

¹²⁰ See: Combined 32nd and 33rd Activity Report, *supra* note 65 at 19.

¹²¹ *Ibid.* This represents the backlog problem and the delay that comes with the growing amount of complaints filed to the commission.

¹²² For broader overview regarding admissibility issues within international human rights commissions See: VILJOEN, *supra* note 69, at 331-339.

¹²³ See: VILJOEN, *supra* note 69 at 326-329. In almost all cases when the commission did order a decision, the relevant countries ignored it.

3.3.2 The findings regarding reports that were submitted by the states

With everything to do with reports submitted by the states, in accordance with the methodology, all the reports on the Commission’s website were analyzed by searching for keywords related to elders’ rights. This time, issues relating to elders’ rights did arise. From analysis of all the reports, three patterns of relating to elder rights emerged:

(1) Disregard. In the first pattern, the states did not refer to rights of elders at all in their reports and did not mention the subject, either directly or indirectly.

(2) In the second pattern, the rights of elders were referred to from the point of view of the society’s and family’s obligation to care for them. Even though the rights of elders are not directly addressed as independent and separate “rights,” incidental mention of elders’ rights is made when referring to the household’s obligations and to a culture that generally respects elders, or to other issues, such as rights of the family or of the children.

(3) Direct reference to rights of elders as such. In this pattern, in the report, the state relates directly and specifically to different aspects of rights of elders as a unique and identified group. First, we will present the overall picture of the division into these three patterns:

Comparison of how the different states on the African continent related to elders’ rights according to the reports submitted to the Commission

	Country	<u>Date of report</u>	<u>Direct relation</u>	<u>Indirect relation</u>	No relation at all
1	Uganda	25.09.13			No relation
2	Algeria	01.08.06			No relation
3	Angola	24.09.11			No relation
4	Ethiopia	16.05.14	Relating to the special characteristics of elders’ rights and		

			ways of realizing them.		
5	Botswana	01.01.09			No relation
6	Burundi	01.09.10		Relating to dealing with elders' problems as part of the protection of elders and people with disability.	
7	Burkina Faso	14.10.10	Relating to elders as having an important social role in the population. Focusing on eradicating the murder of older women who are perceived as "witches."		
8	Benin	24.09.11			No relation
9	Gabon	25.02.13		Relating to elders as part of strengthening the preservation of weakened populations.	
10	Djibouti	03.05.14		Relating to elders while referring to the culture/custom of the family's obligation to care for them.	
11	South Africa	14.05.05	Detailed list of specific governmental actions to preserve, protect, and promote elders' rights.		
12	The Democratic Republic of the Congo	01.06.07			No relation
13	Zimbabwe	20.10.06	Relating to the need for special treatment of elders' problems.		
14	Zambia	01.01.05			No relation
15	Ivory Coast	04.07.12			No relation
16	Tanzania	01.04.07	Detailed list of specific governmental actions to preserve, protect, and promote elders' rights.		
17	Libya	01.01.11		Relating to the care of elders as part of weakened groups in the population.	
18	Liberia	06.11.12			No relation
19	Lesotho	01.08.00			No relation
20	Mauritius	01.01.08	Detailed list of specific governmental actions to preserve, protect, and promote elders' rights.		
21	Mozambique	13.02.13	Relating to the special characteristics of elders' rights and ways of realizing them.		
22	Malawi	19.07.13		Relating to elders while referring to the culture/custom of the family's obligation to care for them.	

23	Egypt	01.01.04	Detailed list of specific governmental actions to preserve, protect, and promote elders' rights.		
24	Niger	15.08.14	Relating to the special characteristics of elders' rights and ways of realizing them.		
25	Nigeria	12.09.13		Relating to the care of elders as part of weakened groups in the population	
26	Namibia	01.08.10			No relation
27	Sudan	01.12.11			No relation
28	Sierra Leone	27.06.13		Relating to elders while referring to the culture/custom of the family's obligation to care for them.	
29	Senegal	25.04.13			No relation
30	Congo	01.01.08			No specific relation
31	Cameroon	11.04.13	Detailed list of specific governmental actions to preserve, protect, and promote elders' rights.		
32	Kenya	01.06.06			No relation
33	Ruanda	01.07.09			No relation
34	Republic of Central Africa	01.01.06			No relation
35	Tunisia	01.06.06	Relating to the special characteristics of elders' rights and ways of realizing them.		

*Source: www.achpr.org

To illustrate the different patterns of relating to the issue among the different countries, we will present several examples. Regarding direct relation to issues concerning elders' rights, we can present the Ethiopian government's report from 2014:

“The government has set up several institutions to respect, protect, promote and fulfill, as far as conditions allow, the right of elderly citizens. The GTP lays down that program for older members of society should respect their dignity, freedom and independence and their established relationships and association with society. The thrust of such programs should be towards providing care and support from immediate social formations and neighborhood communities

rather than via formalized institutions. Creating and developing societal and communal awareness activities should be reinforced along these lines. The Government has been supported and encouraged the many charities and associations established to aid and care for the old...”¹²⁴

Another example of a direct, designated referral to the issue can be found in the report by the government of Cameroon in 2013:

“The promotion and protection older person is a major concern for the public authorities. They are considered as full members of society and their contribution remains important for national development. These actions for the benefit of older persons are part of the fight against exclusion and for the promotion of national solidarity...”¹²⁵

Contrary to the states that reported directly and separately about elders’ rights, the states which submitted indirect reports about elders’ rights demonstrated a characteristic “anchoring” of their coping with the issue of elders’ rights as part of an overall cultural and social responsibility and the family’s obligation or an accepted custom that includes “concern” for elders. Such an example can be found in the report by the Djibouti government in 2014:

“Protection of older persons is ensured, in accordance with national tradition, by the children or descendants within the family. It is therefore their responsibility to provide for the elderly in compliance with the provisions of the Family Code...”¹²⁶

A similar example can be found also in a report by the government of Sierra Leone:

“In line with the duties towards family, as a matter of practice in Sierra Leone, children look after their aged parent/ relatives...”¹²⁷

¹²⁴ See : African Commission on Human and Peoples’ Rights, *supra* note 114 at 99. See in specific the Ethiopian 5th and 6th report for the year 2009-2013.

¹²⁵ The Ethiopian report, *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

3.3.3. *The findings regarding Working Groups*

With regard to the activity of the Commission in the context of establishing working groups, until about a decade ago, no special activity existed in this context in the field of older persons' rights. The situation has changed since 2002, when the Assembly of Heads of State in Africa defined a framework and plan of action, all as part of the Madrid International Plan of Action on Aging (MIPAA – Madrid International Plan of Action on Aging)¹²⁸ on the African continent, and with the purpose of promoting the rights of people with disability and of older persons. The AU saw fit to deal with this field as a continuation of its presence in the African Charter for Human Rights.¹²⁹ As a continuation of the definition of the framework and Plan of Action on Aging, in 2007, a focal point was established for this issue. The focal point was established within the framework of Decision 118 of the 42nd Ordinary Session of the African Commission on Human and Peoples' Rights.¹³⁰ At the time of establishing the focal point, it was clear that one of the working group's central targets was laying the infrastructure for creating a protocol for the Charter.¹³¹

¹²⁸ The Madrid International Plan of Action on Aging (MIPAA) of 2002 was the outcome of the 2nd World Conference on Ageing held in Madrid. This world conference was aimed at updating the Vienna International Plan of Action on Aging (VIPAA) held 20 years earlier. MIPAA was supported by all the 159 UN member states which participated in the conference. MIPAA itself is quite extensive with very broad non-binding policy recommendations. For the plan itself see online: Second World Assembly on Ageing, Madrid Spain 8-12 April 2002, <http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf>; For the specific African Union policy framework and plan of action, see online: http://undesadspd.org/LinkClick.aspx?fileticket=Bd_YFGLRS5s%3d&tabid=330

¹²⁹ See :Yeung Kam John Yeung Sik Yuen, *The Rights of Older Persons and Persons With Disabilities in Africa*, in THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 213 (Manisuli Ssenyonjo ed., 2011).

¹³⁰ See: ACHPR/Res.118 XXXII) 07 at the 42nd Ordinary Session held in Brazzaville, Republic of Congo from 15-28 November 2007 ;See African Commission on Human and Peoples' Rights, Working Group on Rights of Older Persons and People with Disabilities :www.achpr.org/mechanisms/older-disabled. See also: Report of the Chairperson of the Working Group on the Rights of Older Persons and People with Disabilities in Africa. Presented during the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights. Yamoussoukro, Cote d'Ivoire, 9 -22 October 2012, 2; See also: Agenda of the 42nd Ordinary Session of the African Commission on Human and Peoples' Rights, (From 15th to 28th November. 2007, Brazzaville, Republic of Congo) in Article 10c.

¹³¹ See :Yeung Sik Yuen, *supra* note 129, at 228.

In May 2009, during the 45th Ordinary Session of the Commission, it adopted Decision 143.¹³² The decision turned the focal point to one of the Commission's working groups (see above); the working group for the rights of older persons.¹³³ This was the wording of the mandate given to the older people working group:

1. "Hold comprehensive brainstorming sessions to articulate the rights of older persons and people with disabilities.
2. Draft a Concept Paper for consideration by the African Commission that will serve as a basis for the adoption of the Draft Protocol on Ageing and People with Disabilities.
3. Facilitate and expedite comparative research on the various aspects of human rights of older persons and people with disabilities on the continent, including their socio-economic rights.
4. Collect data on older persons and people with disabilities to ensure proper mainstreaming of their rights in the policies and development programmes of Member States.
5. Identify good practices to be replicated in Member States.
6. Submit a detailed Report to the African Commission at each Ordinary Session."¹³⁴

Broadening the group's mandate and establishing its aims was the foundation for starting the creation of the protocol for older persons' rights in Africa.¹³⁵ During 2010 and 2011, the working group dealt, among other things, with the final wording of the protocol for the Charter on the rights of older persons. The group also formulated the methodology for continued authorization of the protocol.¹³⁶ The focal point and, subsequently, the working groups, produced a draft protocol on elders, which was presented during 2010. Africa's Commissioner for Human Rights called an

¹³² See :Report of 52nd Ordinary Session, *supra* note 130 at 2.

¹³³ See :Older People Working Group, *supra* note 130; See also: Agenda of the 45th Ordinary Session of the African Commission on Human and Peoples' Rights (13th – 27th May 2009, Banjul, The Gambia) EX.CL/529(XV);

¹³⁴ See :Older People Working Group, *supra* note 130; See also: Agenda of the 45th Ordinary Session of the African Commission on Human and Peoples' Rights (13th – 27th May 2009, Banjul, The Gambia) EX.CL/529(XV) ;

¹³⁵ See: Yeung Sik Yuen, *supra* note 129, at 229.

¹³⁶ See: Report of 52nd Ordinary Session, *supra* note 130 at 2.

Assembly in November 2011, which summarized the activity on the rights of older persons.¹³⁷

The final version was transferred for the commissioners' attention and perusal at the Assembly of the Commission in May 2014.¹³⁸ After approval by the Commission, the protocol was transferred for approval by the Assembly of Heads of State. At the time of writing, the Protocol was still pending discussion by the Assembly of the Heads of State, and it has been informally stated that there is an intention to try and formally approve the new protocol at the beginning of 2016. This is still to be seen.

Discussion and Summary

In our research and in this article, we do not profess to analyze or examine the overall success or effectiveness of the AU human rights system as a whole.¹³⁹ The study focused on a single, specific and quite narrow issue: the human rights of older persons from the perspective of the African Court and the Commission on Human and People's Rights. In conclusion, it can be said that a complex overall picture is reflected in the analysis of the study findings described above. In several respects, the African continent is characterized by a high level of significant development regarding awareness, action, and coping with the promotion of elder rights in that region. In many other respects, however, the African continent has not yet succeeded

¹³⁷ See: African Commission on Human and Peoples' Rights, *supra* note 109. See also: The African Commission on Human and Peoples' Rights meeting at its 50th Ordinary Session held in Banjul, The Gambia from 24th October to 5th November 2011

¹³⁸ See: African Commission on Human and Peoples' Rights, *supra* note 114.

¹³⁹ There have been numerous articles and writing which try to analyze and evaluate the success and failure of the AU human rights system. See for example: Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and People's Rights*, (1998) 31 HOWARD LJ 643, 661; See also: Moussa Samb, *Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union*, (2009) 15(1) ANNUAL SURVEY OF INTERNATIONAL & COMPARATIVE LAW 61, 73; See also: Magnus Killander, *African human rights law in theory and practice*, In RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW 388, 388 - 413 (Sarah Joseph & Adam McBeth eds., 2010).

in promoting the rights of older persons. At this point, we will draw attention to the central aspects of these contradictory trends. First, we will review the unsuccessful and challenging side and will raise a range of topics where there is room for improvement in all concerning the rights of older persons:

A. The complete absence of claims filed with the Court, which deal with elders' rights

The findings of the present study show that, despite the aforementioned positive aspects, at least, from the point of view of the Court, the elders and their rights are still “invisible” and nonexistent. The presence of “mitigating circumstances” regarding these findings should be noted here, especially considering that the Court is relatively “young” and that the extent of its rulings is still in its infancy. Therefore, it can only be hoped that this reality will change in the coming years and that this finding is more of a reflection of the state of the Court in general and not necessarily of the state of the elders’ rights in specific.

B. The complete absence of communications submitted to the Commission, which deal with older persons’ rights

Unlike the situation with the African Court, there are no mitigating circumstances pertaining to the activity of the Commission. The fact that no specific communications on the rights of older persons have been formally submitted to the Commission indeed indicates the failure to use this regional legal mechanism as a means of promoting elders’ rights in Africa. Based on this study, we are unable to indicate the reasons for this, but it can be assumed that they include a lack of awareness, a lack of means, and objective barriers that generally stand in the way of elders in realizing their legal rights. In addition, one can criticize the extent of activity

by the Commission itself and of human rights organizations in Africa regarding the promotion of knowledge and awareness of the possibility of using this system of submitting communications to the Commission as a tool for promoting the elders' rights.

C. The large number of states that completely disregard elders' rights in their reports or deal with them only indirectly

Besides the lack of use of the Court and Commission system as a means of promoting elders' rights, it is disappointing to discover that many states do not address or relate specifically to older persons' rights in any of their reports. The empirical findings of this study, support previous evaluations that asserted that parties to the African Charter do not sufficiently deal with the rights of older persons in their reports to the commission, despite the provisions in the Charter.¹⁴⁰ Moreover, even among the states that do relate to elders' rights, many of them do so only indirectly. They refer to them in the context of the family's and community's obligation to care for older persons, but not as a human rights system of elders as a unique group that requires specific attention to its rights.

D. Invisibility of the NGOs themselves in the field of older persons' rights within the system of communications and claims submitted to the Commission and to the Court

NGOs constitute one of the most important mechanisms for promoting human rights. Indeed, there are NGOs that operate specifically in the field of aging (such as HelpAge International), which operate in various states on the African continent as

¹⁴⁰ See: JODY KOLLAPAN, *THE RIGHTS OF OLDER PEOPLE – AFRICAN PERSPECTIVES* (2008).

well as local NGOs that operate initiatives for promoting elders' rights.¹⁴¹ Their blessed activity encompasses many areas including developing services, raising awareness, and providing financial assistance in different contexts. Nevertheless, and at least from the findings of this study, it seems that these organizations are still not making use of legal strategies and of legal tools that they are granted within the framework of the African Charter and its institutions, for the promotion of elders' rights.

E. Absence of the use of international "soft law"

Finally, the invisibility of older persons and of human rights organizations in the Court and the Commission, as expressed in this article, also shows the lack of use and relation to "soft law" mechanisms as a tool for social change and the promotion of rights. Indeed, other scholars have already pointed to the fact that the African Charter on Human and People's Rights enables its institutions (such as the Commission on Human Rights), within the framework of its work, to draw principles from documents and "tools" that were adopted by the United Nations.¹⁴² Thus, for example, the Commission is authorized, in its activities through the Charter, to "draw" principles and recognition of human rights as they appear in international "soft law."¹⁴³ Thus, for example, the Commission can draw basic principles from documents such as the MIPAA or the UN Principles for Older Persons, and so on.¹⁴⁴ The lack of utilization of international "soft law" specifically regarding older persons' rights within the

¹⁴¹ For example see: The Older Citizens Monitoring Project. This project, which started in Kenya, and then was adopted in Ethiopia and Mozambique between 2002-2006. The project supported local groups of elders which developed local indicators regarding creation and implementation of new policies regarding older persons. See more on NGOs projects in Africa: Monica Ferreira, *Ageing policies in Africa*, In REGIONAL DIMENSIONS OF THE AGEING SITUATION 63, (2008) 63 – 82. NY: UNDESA.

¹⁴² JODY KOLLAPAN, *supra* note 140..

¹⁴³ See: ACHPR, Article 60.

¹⁴⁴ For the importance and significance of "soft law" within the promotion of international human rights of older persons see: Doron & Spanier, *supra* note 6, at 7-16. .

framework of the African Court and of the activities of the Commission is a lacuna that can be filled relatively easily because it does not require any change in the existing normative mantle in the AU. All that is needed is awareness and actual utilization.

Alongside the challenges and weaknesses described above, the findings showed a different picture as well: The findings of this study also pointed to the tremendous amount of positive activity on the issue of older persons in Africa:

A. Creating a unique protocol for the promotion of elders' rights

There is no doubt that the AU has been involved with very significant work on the issues of elders' rights. The activity began with the creation and adoption of an African Plan of Action in the field of aging as part of the implementation of the MIPAA (Madrid International Plan of Action on Aging). It continued with the decision to establish a working group for promoting the rights of older persons and people with disability and led to the creation of a unique working group to deal with elders' rights and to the shaping of a draft of a specific charter/protocol. This was not only performed relatively rapidly, but also at a time when other regions in the world (such as Europe and Asia) had no such similar activity. Furthermore, on the global level, basic controversies still exist regarding justification of establishing a unique human rights instrument for older persons.¹⁴⁵ It can be hoped that, in the end, the new and novel protocol will be approved by the AU and will succeed in its fight for ratification by the various African countries. After this study has been finalized and accepted for publication, the Assembly of the African Union in its Twenty-Sixth Ordinary Session, held in Addis Ababa Ethiopia, on January 30-31 2016, decided to

¹⁴⁵ Such a disagreements came to light during the discussions of the OEWG - Open Ended Working Group on the Rights of Older Persons at the UN level.

adopt a new and unique additional "Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons".¹⁴⁶ This is indeed a fascinating and promising new legal development, which time (and future research) will tell how it will change the actual lives of older persons in Africa.

B. Certain countries' direct relation to the issue of older persons' rights in their state reports

In several state reports, it is possible to identify an increasing awareness of the need to develop social policy, in general, and a policy of rights, in particular, concerning older persons resident in those states.¹⁴⁷ In different states in Africa, there appears to be a gradual "permeation" and internalization of the demographic and cultural changes regarding the aging of these countries and the need not to remain passive or apathetic toward these developments.¹⁴⁸ The initiatives of African countries and their cumulative experience in policy development might be a positive catalyst, which, through adjacent or other states on the continent, might learn from these experiences and implement them while adapting them to the unique local features of their countries.

¹⁴⁶ See the African Union's DECISION ON THE SPECIALIZED TECHNICAL COMMITTEES, ASSEMBLY/AU/DEC.589(XXVI). Decided within the framework of the 26th Ordinary Session of the AU General Assembly: Addis Ababa, Ethiopia, January 31, 2016.

¹⁴⁷ One good example is South Africa, which enacted a specific statute with regards to older persons: The Older Persons Act. In this Act, the unique position of older persons was recognized, and specific rights were granted. For more details see: Antoinette Lombard & Elma Kruger, *Older persons: the case of South Africa*, 34 (2009) *AGEING INTERNATIONAL*, 119, 119-135. The South-African experience has received attention in other African countries which have tried to learn from this legal experience and precedent. See for example: Med Sengooba, TOO OLD TO TREAT? IS HEALTH CARE OF RIGHT TO OLDER PERSONS IN UGANDA? (2010). Available online at: http://works.bepress.com/med_sengooba/1

¹⁴⁸ See for example the Nigerian's government initiative to develop a novel plan of action in the field of aging, and the difficulties it had in trying to implement it. See: Abimbola Asagba, *Research and the formulation and implementation of ageing policy in Africa: The case of Nigeria*, 15(2) (2005) *GENERATIONS REVIEW*, 39, 39-41.

C. Specific relation to the rights of older persons in the framework of the African Charter

In contrast to other regional Human Rights Conventions (such as the European Convention on Human Rights), which do not necessarily include any specific relation to the rights of older persons, the African Charter does include such reference. As we have seen, it refers to them in specific and limited contexts, but still provides a legal “anchor” to utilize the African Charter as a legal and binding means of promoting older persons’ rights in Africa. In this sense, the state of older persons in Africa is better than in other regions in the world in which no international charter exists (e.g. Asia), or which have regional charters that make no specific mention of older persons or very limited (e.g. Europe).

Conclusion

The outcome of this study appears to be that an understanding exists in the AU, at least based on the existing activity, to create a unique protocol for human rights of older persons, that the human rights of elders on the African continent should specifically be addressed. This understanding culminated in the recent AU's decision to adopt a new Protocol on the Rights of Older Persons. It is an important achievement in itself to have understood the inadequacy of the current framework in the human rights mantle of the AU, as an effective tool for promoting and maintaining the human rights of older persons in Africa, whether in the Charter itself or in the varied activity of the Commission. The challenge now facing the leaders of the AU and of the different states as well as human rights organizations throughout Africa is to be the vanguard for realizing and implementing this innovative new human rights Protocol. The African continent currently has a historical opportunity to become a

world leader in this field alongside the OAS (Organization of American States) and the Latin American countries. Symbolically, it will be highly appropriate for the continent that takes pride in its cultural uniqueness regarding family relationships and the community to be the leader in promoting the rights of older persons as a group. This conclusion is not intended to disregard the general problems and difficulties in the human rights system on the African continent, neither is it intended to ignore the limitations regarding its ability to be an effective tool for changes in human rights. Nevertheless, in the specific context of human rights, the findings of this study seem to indicate room for practical and concrete advancement and improvement.