

PULP COMMENTARIES ON AFRICAN HUMAN RIGHTS LAW



The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A COMMENTARY

Edited by
Annika Rudman
Celestine Nyamu Musembi
Trésor Muhindo Makunya

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Since its adoption on 11 July 2003, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) has become a landmark on the African human rights landscape. It has steadily gained prominence as a trail-blazing instrument, responsive to the diverse realities of women on the African continent. This comprehensive Commentary on the Maputo Protocol, the first of its kind, provides systematic analysis of each article of the Protocol, delving into the drafting history, and elaborating on relevant key concepts and normative standards. This Commentary aims to be a 'one-stop-shop' for anyone interested in the Maputo Protocol, such as researchers, teachers, students, practitioners, policymakers and activists.

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The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary

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Preface

Frans Viljoen

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary is a first. It is the first comprehensive article-by-article examination of the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). It is also the first time that an African-based publisher, Pretoria University Law Press (PULP), has brought together mainly African-based and African-educated authors to collaborate in preparing a commentary of this nature on an African human rights treaty.

PULP is an open-access publisher established within and managed by the Centre for Human Rights (CHR), Faculty of Law, University of Pretoria. It aims to cultivate African scholarship, particularly on human rights. The opportunity that this *Commentary* provides – to disseminate knowledge and foster an understanding of African human rights standards and practice – is fully aligned with PULP and the CHR's ambition of advancing African scholarship that matters. *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* is the first in a series of PULP commentaries on African human rights law, under the series title *PULP Commentaries on African human rights law* with myself as the series editor.

This *Commentary* is part of a proud tradition. It locates, on African soil, an evolving publishing practice by some of the world's leading publishers. The tradition of human rights treaty commentaries emerged as the outputs of the United Nations (UN) human rights system started to become more and more visible and significant. A prominent initial example is Manfred Nowak's commentary on the International Covenant on Civil and Political Rights (ICCPR), initially in German (published by NP Verlag in 1989) and subsequently in English (*UN Covenant on Civil and Political Rights. CCPR commentary*, published by NP Verlag in 1993). Between 2005 and 2012, Brill published a series of self-standing monographs, each dealing with a provision of the UN Convention on the Rights of the Child (*A commentary on the United Nations Convention on the Rights of the Child*). Other early examples are *The United Nations Convention against Torture: a commentary*, by Manfred Nowak, Elizabeth McArthur and Kerstin Buchinger (Oxford University Press, 2008) and *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary*, by Marsha A Freeman, Christine Chinkin and Beate Rudolf (Oxford University Press, 2012). In the last decade, this practice really picked up, with the publication of a number of commentaries on UN and regional human rights treaties as part of the *Oxford Commentaries on International Law*. These titles include: William Schabas *European Convention on Human Rights: a commentary* (2015); Patrick Thornberry *The International Convention on the Elimination of All Forms of Racial Discrimination: a commentary* (2016); Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: a commentary* (2018); Rachel Murray *African Charter on Human and Peoples' Rights: a commentary* (2019); and Ludovic Hennebel and H el ene Tigroudja *The American Convention on Human Rights: a commentary* (2022), all published by Oxford University Press. Other publishers have also, in recent times, become more involved in this domain; see, for example, Paul M Taylor *A commentary on the International Covenant on Civil and Political Rights: the UN Human Rights Committee's monitoring of ICCPR rights* (Cambridge University Press, 2020).

Since its adoption on 11 July 2003, the Maputo Protocol has become an unmistakable landmark on the African human rights landscape. It has received much scholarly attention, as reflected in the number of academic articles dealing with its various aspects. Unfortunately, the academic interest has

not, with the exception of a few decisions by the African Court on Human and Peoples' Rights and the Economic Community of West African States Community Court of Justice, culminated in the development of significant case law. There has, in particular, been a dearth of cases before the African Commission on Human and Peoples' Rights (African Commission) for reasons that are explored in the pages of this publication. The *Commentary* aims not only to provide a comprehensive legal analysis that consolidates and deepens existing jurisprudence and scholarly writing, but also endeavours to stimulate greater interest and further open up possibilities for the Protocol's practical application. This *Commentary* aims to be a 'first-stop-shop' for anyone interested in the Maputo Protocol – researchers, teachers, students, practitioners, policymakers and activists.

The *Commentary* is also a celebration. Its publication has been timed to coincide with the 20th anniversary of the Maputo Protocol's adoption on 11 July 2003. The *Commentary* charts the extensive influence of the Maputo Protocol over these twenty years. A variety of factors may explain the extent of this influence. First, the Maputo Protocol was the first normative expansion (in the form of a 'protocol') to the African Charter, and its adoption came at a time when the African Commission had already established itself as a credible supra-national human rights supervisory mechanism. Different from the African Charter on the Rights and Welfare of the Child, which established its own supervisory arm and struggled to gain prominence, the Maputo Protocol was superimposed on a firmly established basis, allowing it to benefit from the Commission's already-existing radiating effect. Second, the Maputo Protocol is of a general and comprehensive scope, covering numerous aspects of women's rights. In this respect, it differs from the women-specific treaties in the Inter-American and European human rights systems (the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Convention of Belém do Pará, and the Council of Europe Convention on preventing and combating violence against women and domestic violence, known as the Istanbul Convention), which are more narrowly focused on violence against women. Third, the inclusive and protracted drafting process, involving numerous actors, drew attention to the Maputo Protocol and elevated its level of inclusiveness. These elements of the drafting process translated into a subsequent sense of continental ownership. Fourth, the specificity of provisions (such as those dealing with 'female genital mutilation', HIV and abortion), which were included in response to African realities and challenges, set the Maputo Protocol apart from the corresponding UN treaty, the Convention on the Elimination of All Forms of Discrimination against Women. The level of specificity of these provisions has also facilitated domestication. Fifth, the relatively short time it took the Maputo Protocol to enter into force, and the subsequent pace of ratification, allowed state practice to evolve without too much delay. Sixth, within the African Commission, the Protocol was nurtured by a dedicated special procedure, the Special Rapporteur on the Rights of Women in Africa, which was established in 1999. Finally, the Maputo Protocol was also given further prominence when it became the basis for the first-ever 'General Comment' adopted by the African Commission.

Unlike most of the works cited earlier, which are written by one or a few authors, this *Commentary* consists of a collection of edited chapters by 28 authors. This project has deliberately been undertaken in a spirit of collaboration, bringing together expert commentators with diverse backgrounds from across different parts of the continent and beyond.

Sincere thanks and appreciation must go to the three co-editors – Annika Rudman, professor in the Department of Public Law at the Faculty of Law, University of Stellenbosch; Trésor Muhindo Makunya, a postdoctoral fellow with the CHR and the CHR's publications coordinator; and Celestine Nyamu Musembi, senior lecturer at the University of Nairobi School of Law – the 28 contributors and five reviewers. The very competent, resilient, and dedicated team of co-editors with determined professionalism undertook the immense task of coordinating authors and co-authors and the writing, reviewing and editing of 30 chapters. A special word of thanks also goes to Chantelle Hough Louw, who acted as the technical editor for this publication.

Warm words of thanks further go to Professor Sylvia Tamale, Professor Rachel Murray, Lawrence Mute, Meskerem Geset Techane and Karen Stefiszyn, who acted as reviewers. Their participation ensured quality control and added another layer of legitimacy to this publication.

The PULP team, in particular Lizette Hermann, deserve not only our gratitude but also our admiration for the efficiency and speed with which the manuscript was made print-ready. The financial support for this writing project by the Royal Norwegian Government through its Ministry of Foreign Affairs/Embassy in Pretoria is acknowledged and appreciated.

Frans Viljoen
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May 2023

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Table of abbreviations and acronyms

APRM	African Peer Review Mechanism
ACDHRS	African Centre for Democracy and Human Rights Studies
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AG	Attorney-General
APDF	Association Pour Le Progrès et la Défense des droits des Femmes
APRM	African Peer Review Mechanism
AU	African Union
AUC	African Union Commission
AUDA-NEPAD	African Union Development Agency-NEPAD
AUOLC	African Union Office of the Legal Counsel
CADE	Convention against Discrimination in Education
CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	United Nations Convention on the Elimination of all Forms of Discrimination against Women
CERD	United Nations Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Centre for Human Rights
CRC	United Nations Convention on the Rights of the Child
CRMW	United Nations Convention on Protection of the Rights of All Migrant Workers and Members of their Families
CSO	civil society organisations
DEVAW	United Nations Declaration on the Elimination of Violence Against Women
DRC	Democratic Republic of Congo
EACJ	East African Court of Justice
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
FEMNET	African Women's Development and Communication Network
FGCS	female genital cosmetic surgeries
FGM	female genital mutilation
FIACAT	La Fédération Internationale des ACAT
GAIN	Global Alliance for Improved Nutrition
GBV	gender-based violence
GBVF-NSP	Gender-based Violence and Femicide National Strategic Plan
GDP	gross domestic product
HP	harmful practices
HRC	United Nations Human Rights Committee
IAC	Harmful Traditional Practices Affecting the Health of Women and Children
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice

ICL	international criminal law
ICPD	International Conference on Population and Development
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPS	internally displaced persons
IHL	international humanitarian law
IHRDA	Institute for Human Rights and Development in Africa
ILO	International Labour Organization
IRL	international refugee law
ISER	Initiative for Socio-economic Rights
LGBTIQ+	lesbian, gay, bisexual, transgender, intersex, queer/questioning, asexual
MOU	memorandum of understanding
MPSI	Maputo Protocol Scorecard and Index
NEPAD	New Partnership for Africa's Development
NGO	non-governmental organisations
NHRI	national human rights institutions
NSNP	national school nutrition plan
OAU	Organisation of African Unity
ODPP	Office of the Director of Public Prosecution
OHCHR	Office of the United Nations High Commissioner for Human Rights
PULP	Pretoria University Law Press
SADC	Southern African Development Community
SCA	Supreme Court of Appeal
SDG	sustainable development goals
SDGEA	Solemn Declaration on Gender Equality in Africa
SERAC	Social and Economic Rights Action Centre
SGBV	sexual and gender-based violence
SRHR	Sexual and reproductive health and rights
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	The United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNSC	United Nations Security Council
VAW	violence against women
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WiLDAF	Women in Law and Development in Africa

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African Charter on Human and Peoples' Rights
African Charter on the Rights and Welfare of the Child
African Youth Charter
Agreement Amending the Southern African Development Community Protocol on Gender and Development
American Convention on Human Rights
Constitutive Act of the African Union
Convention against Discrimination in Education
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Convention for the Protection and Assistance of Internally Displaced Persons in Africa
Convention on Protection of the Rights of All Migrant Workers and Members of Their Families
Convention on the Elimination of all Forms of Discrimination against Women
Convention on the Elimination of All Forms of Racial Discrimination
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 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa
 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security
 Revised Treaty of the Economic Community of West Africa
 Rome Statute of the International Criminal Court
 Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty
 Solemn Declaration on Gender Equality in Africa
 Southern African Development Community Declaration on Gender and Development
 Supplementary Act Relating to Equality of Rights Between Women and Men for Sustainable Development in the ECOWAS Region
 The Economic Community of West African States, Revised Treaty of the Economic Community of West African States
 Treaty Establishing the African Economic Community
 United Nations Convention Against Torture
 United Nations Convention against Transnational Organized Crime
 United Nations Convention on Protection of the Rights of All Migrant Workers and Members of Their Families
 Universal Declaration of Human Rights
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Introduction

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1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the only regional human rights treaty focusing broadly on women's rights, is a landmark instrument.¹ As suggested by Banda, it is a 'strong indicator of the normative acceptance of the idea that human rights are women's rights'.² Alongside the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), it is a ground-breaking treaty in the struggle for women's equal rights. Importantly, the Maputo Protocol promotes substantive equality and aims to transform the lives of African women towards the holistic protection of their human rights. It applies to all forms of discrimination against African women; hence it is not restricted to the specific fields of protection spelt out within it. The Maputo Protocol further speaks to intersecting identities and vulnerabilities, focusing on, for example, widowhood, elderly women, women with disabilities, and women living in poverty.³

Like the African Charter on Human and Peoples' Rights (African Charter) the Maputo Protocol combines civil, political, socio-economic, cultural, and collective rights. It takes its point of departure from the reality that,

1 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), Declaration on the Elimination of Violence Against Women in the ASEAN Region and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) focus exclusively on eliminating violence against women.

2 F Banda 'Blazing a trail: the African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 84.

3 See Maputo Protocol arts 20, 22, 23 & 24.

despite the ratification of the African Charter and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.⁴

The first article of the Maputo Protocol contains a number of powerful definitions guiding the application of the subsequent provisions.⁵ 'Women' are defined by their gender and not their biological sex, while discrimination against women is broadly defined in terms of its substantive impact on women's equal enjoyment of their human rights and fundamental freedoms in all spheres of life.⁶ Linked to this definition is a comprehensive list of state obligations targeting not only the legislative arm of the state but also requiring each state party to prevent discrimination and impose sanctions on non-state actors, including family and community members as well as corporate actors for discriminatory acts.⁷

As detailed throughout this Commentary, in a bid to recognise the complex, oppressive cultural and religious contexts within which many African women live, the Maputo Protocol moreover offers a definition of 'harmful practices'.⁸ The Maputo Protocol is the first treaty to do so, providing African women with protection against any 'behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'. It employs state obligations to address the oppressive patriarchal *status quo* by requiring the state to socialise and re-socialise every individual and every community to uphold the inherent dignity of all women.

This collection is the first comprehensive commentary on the provisions of the Maputo Protocol. The Commentary analyses the Maputo Protocol's provisions alongside the jurisprudence and interpretive comments that have emerged from its monitoring bodies: the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (African Court), the African Committee on the Rights and Welfare of the Child (African Children's Committee), the Special Rapporteur on Rights of Women in Africa (Special Rapporteur on Women in Africa); sub-regional courts such as the Economic Community of West African States Community Court of Justice (ECOWAS Court); and domestic courts. The Commentary also draws from the important work done by the member states through their initial and periodic reporting under articles 26(1) of the Maputo Protocol and 62 of the African Charter. Where relevant, reference is also made to the essential work of other international and regional treaty bodies and courts to provide interpretive rigour. Since the jurisprudence of the African Commission and African Court on the Maputo Protocol is still in its early stages, contributing authors were also encouraged to supplement the regional sources with examples from domestic jurisdictions where domestic courts have interpreted and applied the Maputo Protocol. Moreover, this Commentary aims to engage the most important scholarship on the Maputo Protocol to provide the reader with a comprehensive list of source materials.

In terms of its structure, this Commentary contains detailed analyses of the Preamble, as contained in the following chapter, and of each article of the Maputo Protocol. It includes separate chapters on the interpretive mandates linked to the African Commission and the African Court, articles 27 and 32 and the final provisions, found in articles 28-31. The sources relied on in every chapter are primarily the text of the article in question, the preparatory work, general recommendations, state reports, concluding observations and case law through which regional, sub-regional and domestic courts and quasi-legal bodies have interpreted and applied the Maputo Protocol. The general drafting process is

4 Preamble to the Maputo Protocol. For further discussion see A Rudman 'Preamble' in this volume.

5 See M Kamunyu 'Article 1' in this volume.

6 Maputo Protocol art 1(f).

7 Maputo Protocol arts 2 & 5.

8 See M Kamunyu 'Article 1' and S Nabaneh 'Article 5' in this volume for further discussion.

described in this chapter. Each chapter then contains a detailed description of the drafting history of the article in question. This dimension was considered important to include in the Commentary as no other comprehensive comment on the preparatory work exists.⁹

While each chapter is self-contained and can be read as a stand-alone piece, this Commentary was also conceived of as an inherent whole. Thus, every attempt was made to harmonise the structure of the chapters, bearing in mind the diversity of contexts that surrounds each article. The Commentary moreover introduces a number of concepts, ideas and issues that are relevant throughout the Maputo Protocol, and where they are addressed in more detail elsewhere in the Commentary it directs the reader to the appropriate chapters through cross references.

As far as limitation goes, this Commentary does not claim to offer a detailed analysis of the status or position of women under regional or international law or developments in the international protection of women's human rights outside the framework of the Protocol. Instead, the aim is to provide a comprehensive guide to the extraordinary legal instrument that the Maputo Protocol has proven to be, so that others may use it and build onto it in the struggle for the respect, promotion, protection, and fulfilment of *all* rights of *every* woman in Africa.

This introduction to the Commentary dwells on the history, adoption, and structure of the Maputo Protocol; alongside some of the principles of general international law which affect the interpretation and implementation of the Maputo Protocol. Therefore, this chapter is divided into six sections. Section 2 presents the history of the Maputo Protocol and the surrounding events and historical context that inspired this ground-breaking treaty. Section 3 provides some insight into the close relationship between the Maputo Protocol and the African Charter. Section 4 gives a brief insight into the status of the Protocol in domestic legal systems, while section 5 sets out the structure of the Protocol. Section 6 provides some brief thoughts on the chapters and discussions to follow.

2 The history of the Maputo Protocol

2.1 Overview

Article 32 of the Vienna Convention on the Law of Treaties (VCLT) establishes that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' to establish its meaning.¹⁰ One of the chief sources in treaty interpretation, the Preamble, is discussed in the next chapter. This section details the preparatory work of the Maputo Protocol, making visible the context within which the Maputo Protocol should be understood.

Drafting any international treaty, where many stakeholders are naturally involved, is a lengthy and complex process. The conception of the Maputo Protocol is no exception. As succinctly concluded by Nsibirwa, '[t]he history of the Draft [Maputo] Protocol is quite a long one'.¹¹ As discussed throughout this chapter, and indeed throughout this Commentary, the Maputo Protocol was not conceived of and drafted in a vacuum. Its adoption must be viewed against a much broader contemporary international,

9 Some aspects of the drafting history are discussed in Banda (n 2), MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63; F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice*; and R Murray 'A feminist perspective on reform of the African human rights system' (2001) 1 *African Human Rights Law Journal*.

10 Art 32 follows on art 31 which sets out the general, primary, rules of treaty interpretation.

11 Nsibirwa (n 9) 41.

regional, and sub-regional political, legal, and social background.¹² As is evident from the drafting history, many different stakeholders made their mark on the Protocol. Moreover, the institutional framework into which it fits changed while the Protocol was developed. For instance, the position of the Special Rapporteur on Women in Africa was created, and the promotion of gender equality was explicitly declared as a founding principle of the African Union (AU) and given visibility in the Constitutive Act of the African Union (AU Constitutive Act).¹³

The drafting of the Maputo Protocol began, as is further detailed below, in 1995. The Maputo Protocol was adopted eight years later, on 11 July 2003, by the AU Assembly of Heads of State and Government (AU Assembly) in Maputo, Mozambique. Hence, the short title ‘Maputo Protocol’ is used throughout this Commentary.¹⁴ In terms of the AU member states’ interaction with the newly adopted Maputo Protocol, no instruments of ratification were received by the African Union Commission (AU Commission) in the first nine months after the Protocol was adopted. Comoros became the first state to deposit its instrument of ratification on 16 April 2004, followed by Libya,¹⁵ Rwanda,¹⁶ Namibia,¹⁷ and Lesotho¹⁸ in 2004. In July 2004, the AU Assembly adopted the Solemn Declaration on Gender Equality in Africa,¹⁹ where member states committed themselves to sign and ratify the Maputo Protocol by the end of 2004. In 2005, South Africa,²⁰ Senegal,²¹ Mali,²² Djibouti,²³ Nigeria,²⁴ Malawi,²⁵ Cape Verde,²⁶ The Gambia,²⁷ and Benin followed suit.²⁸ Togo deposited its instrument of ratification on 26 October 2005, becoming the fifteenth state to do so.²⁹ Thirty days later, on 25 November 2005, the Protocol entered into force in accordance with its final provisions.³⁰ Thus, a little more than ten years after the drafting began and two years and four months after it was adopted, the Protocol became operative in the first 15 state parties. While it took only a little more than three years for the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) to enter into force, it took more than five years after its adoption for the African Charter to enter into force; and more than nine years from the adoption of the African Charter on the Rights and Welfare of the Child (African Children’s Charter) before it entered into force.

12 Viljoen (n 9) 12.

13 Art 4(l).

14 Other short titles commonly used are ‘Women’s Protocol’ or ‘African Women’s Protocol’.

15 30 June 2004.

16 1 July 2004.

17 26 August 2004.

18 5 November 2004.

19 Assembly/AU/Decl.12 (III) Rev.1 (SDGEA) para 9.

20 14 January 2005.

21 30 January 2005.

22 3 February 2005.

23 4 February 2005.

24 18 February 2005.

25 29 June 2005.

26 22 July 2005.

27 6 September 2005.

28 13 October 2005.

29 According to art 29(1) ‘[t]his Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification’.

30 See B Traoré ‘Articles 28-31’ in this volume, for further discussion. For current status of ratifications see African Union, ‘Reservations and declarations entered by member states on the protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’, March 2022, communication from the African Union Commission. On file with the author.

2.2 International context

In terms of international law, the Maputo Protocol was drafted in a context where an international treaty on women's rights, CEDAW, had already been established, along with its monitoring body, the UN Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee).³¹ The UN General Assembly adopted CEDAW in 1979. Described as an international bill of rights for women,³² it entered into force in September 1981. By the end of 1995, at the initial phase of the drafting process of the Maputo Protocol, 43 members of the then Organisation of African Unity (OAU) had ratified CEDAW.³³ By the time the Maputo Protocol was adopted in 2003, all AU and UN member states except Somalia and Sudan had ratified CEDAW.³⁴ In 2015, four years after gaining independence, South Sudan ratified CEDAW. However, Somalia and Sudan have neither signed nor ratified CEDAW. As these states have also not yet ratified the Maputo Protocol, women in these states have effectively been left outside the reach of the provisions of both CEDAW and the Maputo Protocol.³⁵

In the lead-up to the drafting process of the Maputo Protocol, five influential human rights-related conferences were hosted by the UN: the UN Conference on Environment and Development,³⁶ the Second World Conference on Human Rights,³⁷ the UN Conference on Population and Development,³⁸ the World Summit for Social Development,³⁹ and the Fourth World Conference on Women.⁴⁰ The latter resulted in the Beijing Declaration and Platform for Action (Beijing Platform).⁴¹ The Beijing Platform covers 12 critical areas of concern to women's rights which were all relevant to the development of the Maputo Protocol.⁴²

In addition, on the regional plane, the Fifth African Regional Conference on Women⁴³ was held in Dakar in November 1994 in preparation for the Fourth World Conference on Women. The conference adopted the Dakar Platform for Action (Dakar Platform),⁴⁴ a synthesis of regional perspectives and

31 Established under art 17 of CEDAW. By the time the Maputo Protocol entered into force the Optional Protocol to CEDAW had also entered into force establishing the complaint and inquiry mechanisms under CEDAW.

32 The United Nations and The Advancement of Women, 1945-1995, UN Blue Books Series, Vol. VI (Revised edition 1996) 5.

33 Angola, Benin, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Togo, Tunisia, Uganda, Tanzania, Zambia, and Zimbabwe.

34 Excluding the Sahrawi Arab Democratic Republic.

35 Somalia and Sudan have both signed the Maputo Protocol. See B Traoré 'Articles 28-31' sec 2.2.3 in this volume on the discussion of art 18 of the VCLT on the obligation not to defeat the object and purpose of a treaty prior to its entry into force.

36 Rio de Janeiro, Brazil, 3-14 June 1992, Agenda 21.

37 Vienna, Austria 14-25 June 1993.

38 Cairo, Egypt, 5-13 September 1994.

39 Copenhagen, Denmark 6-12 March 1995.

40 Beijing, China 4-15 September 1995. Preceded by the World Conferences on Women in Mexico City in 1975, Copenhagen in 1980, Nairobi in 1985.

41 United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995. Endorsed by UNGA Resolution 50/203, 22 December 1995.

42 These are (1) women and poverty; (2) education and training of women; (3) women and health; (4) violence against women; (5) women and armed conflict; (6) women and the economy; (7) women in power and decision-making; (8) institutional mechanisms; (9) human rights of women; (10) women and media; (11) women and the environment; and (12) the girl child.

43 Dakar, Senegal, 16-23 November 1994.

44 African Platform for Action: African common position for the advancement of women E/ECA/CM/21/RES/802(XXX) Adopted at the 296th meeting, 3 May 1995 Economic Commission for Africa.

priorities as well as a framework for action for formulating policies and implementing concrete and sustainable programs for advancing African women. The Dakar Platform was developed in consonance with the Nairobi Forward-looking Strategies,⁴⁵ the Abuja Declaration⁴⁶ and the Kampala Action Plan.⁴⁷

The drafting process moreover relied on some influential sub-regional instruments on women's rights, such as the Southern African Development Community (SADC) Declaration on Gender and Development and its addendum on violence against women.⁴⁸

These gatherings, their related outcomes, and already existing instruments on women's rights all brought women's issues to the forefront. This is not to say that states and other stakeholders sufficiently acknowledged women's narratives and struggles, but the voices of women's rights organisations, especially organisations from the African continent, had started to grow stronger.⁴⁹ Common themes of these narratives presented by non-governmental organisations (NGOs) were the failure of the existing legal framework to provide protection of women's rights, the negative impact of cultural and religious practices on women's rights, and women's lack of access to resources for development. Thus, women's issues were on the agenda when the Second World Conference on Human Rights took place in Vienna, Austria in 1993. The conference culminated in the adoption of the 1993 Vienna Declaration and Programme of Action (Vienna Declaration), a plan of action to strengthen the protection of human rights across the globe.

Importantly, the Vienna Declaration recognised that women's human rights are 'an inalienable, integral and indivisible part of universal human rights'.⁵⁰ It also confirmed that women are entitled to full and equal participation in 'political, civil, economic, social and cultural life, at the national, regional and international levels'.⁵¹

As a point of departure for further work on guaranteeing women's rights globally, the Vienna Declaration concluded that 'the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community'.⁵² The Vienna Declaration also recognised, in line with General Recommendation 19 of the CEDAW Committee, issued in 1992, that '[g]ender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated'.⁵³ Later that same year, the UN General Assembly adopted the UN Declaration on the Elimination of Violence Against Women. In addition to concluding the Vienna Declaration, the Vienna Conference also took the novel step to support the creation of a new international mechanism, a Special Rapporteur on Violence against Women, subsequently appointed in 1994.⁵⁴

45 Report of the world conference to review and appraise the achievements of the united nations decade for women: equality, development and peace, Nairobi, Kenya, 15-26 July 1985. United Nations, New York, 1986.

46 Regional Conference on the Integration of Women in Development and on the Implementation of the Arusha Strategies for the Advancement of Women in Africa, Abuja, Federal Capital Territory, Nigeria, 1989.

47 The Regional Conference on Women and Peace which took place in Kampala, Uganda 22-25 November 1993.

48 Banda (n 2) 74.

49 Viljoen (n 9) 12.

50 Vienna Declaration para 18.

51 As above.

52 As above.

53 Vienna Declaration para 18; see also UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, A/47/38 (General Recommendation 19).

54 Commission on Human Right Resolution 1994/45 Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women.

2.3 The early drafting stage 1995-1999

At the beginning of March 1995, the African Commission, working together with Women in Law and Development in Africa (WiLDAF), the International Commission of Jurists, and the African Centre for Democracy and Human Rights Studies (ACDHRS) hosted the seminar on the African Woman and the African Charter on Human and Peoples' Rights, in Lomé, Togo.⁵⁵ This is regarded as the official starting point of the drafting of the Maputo Protocol.⁵⁶ Two main recommendations came out of the discussions at this seminar: the creation of a protocol that would elaborate on women's rights, which would be part and parcel of the African Charter,⁵⁷ and the creation, by the African Commission, of the position of a Special Rapporteur on African Women's Rights.⁵⁸

At its 17th ordinary session, the African Commission endorsed the recommendation of the seminar to prepare a draft protocol on the rights of women.⁵⁹ The African Commission also established a mechanism to consider the position of African women under the existing regional human rights framework.⁶⁰ A working group consisting of Commissioners Dankwa, Duarte-Martins, the first female Commissioner at the Commission, and Ondziel-Gnelenga was set up to initiate the work on a draft protocol.⁶¹ In July 1995, the OAU Assembly officially endorsed the development of a draft protocol on the rights of women.⁶²

The Working Group's first meeting took place in Nouakchott in, Mauritania, in April 1997.⁶³ The International Commission of Jurists, in collaboration with the African Commission, hosted an expert meeting on the preparation of a draft protocol to the African Charter concerning the rights of women. This meeting resulted in the first draft of the Protocol, the Nouakchott Draft.⁶⁴ Once the first draft was prepared, feedback was generated from all over Africa and the diaspora following an email discussion of the draft initiated by the African Women's Development and Communication Network (FEMNET).⁶⁵ At its 22nd ordinary session in November 1997, the African Commission extended the Working Group

55 The seminar took place on 8 and 9 March 1995. Interoffice Memorandum, 17 May 2001, subject: draft additional protocol on the rights of women, Annex: Road Map of activities relating to the draft protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para 3. On file with the author.

56 Banda (n 2) 72.

57 See further discussion on the relationship between the African Charter and the Maputo Protocol under 3 below.

58 F Mohamed 'Mobilizing for women's rights' (2005) sister Namibia 12. On file with the author.

59 17th ordinary session of the African Commission was held in Lomé, Togo 13-22 March 1995. The decisions of the 17th ordinary session are available in the 8th Annual Activity Report of the African Commission 1994-1995. See also Interoffice Memorandum (n 55) para 4.

60 Banda (n 2) 73.

61 10th Annual Activity Report of the African Commission on Human and Peoples' Rights 1996/97 para 20. See also Interoffice Memorandum, 17 May 2001 (n 55) para 4.

62 31st ordinary session Resolution AHG/Res 240 (XXXI). As explained by Commissioner Ondziel-Gnelenga, the elaboration of a draft protocol on the rights of women was one of the recommendations made in the Commission's 8th Annual Activity Report 1994-1995. This report was presented to the OAU Assembly, meeting in its 31st ordinary session in Addis Ababa, Ethiopia, from 26-28 June 1995. The OAU Assembly authorised the publication of the 8th Activity Report as well as the conclusions and recommendations relating to the information contained in this report. The 8th Activity Report of the African Commission refers to the Seminar on the African Woman and the African Charter on Human and Peoples' Rights, Lomé, Togo, 8-9 March 1995 and to the Report on the Seminar on the African Woman and the African Charter on Human and Peoples' Rights (Seminar report). However, the Seminar Report is not part of the activity report and thus it is difficult to trace the specific decision to endorse the development of a protocol on African women's rights. See also Interoffice Memorandum (n 55) para 5.

63 10th Annual Activity Report of the African Commission on Human and Peoples' Rights 1996/97 para 17(c), Annex III: Agenda African Commission on Human and Peoples' Rights 21st ordinary session 15-24 April 1997, Nouakchott, Mauritania, para 7(i) Elaboration of the Draft Additional Protocol on African Women's Rights; Doc.OS/7(XXI) Add.8.

64 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

65 Mohamed (n 58) 12.

initially composed of the three Commissioners to include the International Commission of Jurists and the ACDHRS.⁶⁶ In view of its vast expertise in the field of women's issues and taking into consideration its observer status with the Commission, WiLDAF also joined the Working Group.⁶⁷

The second meeting of the Working Group took place in Banjul, The Gambia in January 1998.⁶⁸ The Working Group submitted an interim report to the African Commission during its 23rd ordinary session in April 1998.⁶⁹ In June 1998, the OAU Assembly, at its 34th ordinary session, requested the African Commission to finalise the Protocol to the African Charter relating to Women's Rights as early as possible.⁷⁰

To support the work of the Working Group's and to further focus its mandate on women's rights, the African Commission created the position of a Special Rapporteur on Women in Africa in May 1999. The Special Rapporteur on Women in Africa led the Working Group on the further preparation of the draft protocol. Commissioner Ondziel-Gnelenga held this position.⁷¹ The mandate of the Special Rapporteur on Women included preparing a situation analysis on the rights of women in Africa and suggesting appropriate remedies to protect women's rights.⁷²

The third meeting of the Working Group was held in June 1999.⁷³ A wider range of stakeholders were consulted, and their contributions were reflected in the draft protocol.⁷⁴ As an example, the International Labour Organization (ILO) provided substantial commentary on the draft, particularly on the labour-related rights.⁷⁵ The Working Group held a fourth meeting in October 1999.⁷⁶ It submitted its final report to the African Commission at its 26th ordinary session held in Kigali, Rwanda in November 1999. The draft emanating from this session is commonly referred to as the Kigali Draft.⁷⁷ At this meeting, the Commission examined and adopted the Kigali Draft and agreed to send it to the OAU General Secretariat for 'appropriate action'.⁷⁸

2.4 The merger

At the time the Kigali Draft was presented to the OAU a parallel process was unfolding within the then OAU Women's Unit. The OAU Women's Unit, together with the Inter-African Committee on

66 Interoffice Memorandum (n 55) para 6. See also 11th Annual Activity Report of the African Commission on human and peoples' rights 1997-1998.

67 Interoffice Memorandum (n 55) para 6. See also 11th Annual Activity Report of the African Commission (n 66).

68 26-28 January 1998 Banjul, The Gambia. Interoffice Memorandum (n 55) para 7.

69 Held in Banjul, The Gambia, 20-29 April 1998. Interoffice Memorandum (n 55) para 7. See also Report of the first meeting of the Working Group on the Additional Protocol to the African Charter on Women's Rights DOC/OS/34c (XXIII); see Murray R. *The African Commission on Human and Peoples' Rights and international law* (2000) 24.

70 Held in Ouagadougou, Burkina Faso, 8-10 June 1998. AHG/Dec.126(XXXIV). See also Interoffice Memorandum (n 55) para 8.

71 25th ordinary session held in Bujumbura, Burundi, from 26 April to 5 May 1999, the African Commission adopted resolution ACHPR/res.38 (XXV) 99 on the appointment of a Special Rapporteur on Women in Africa. The Resolution appointed the first Special Rapporteur in May 1999 retroactively as from October 1998.

72 Murray (n 69) 24.

73 14-15 June 1999 in Dakar, Senegal. Interoffice Memorandum (n 55) para 9.

74 Interoffice Memorandum (n 55) para 9. This draft is referred to by some authors as the Dakar Draft Protocol see Murray (n 69) 24 footnote 131.

75 Interoffice Memorandum ES/WU/COL/JOI/26.99, 5 August 1999. On file with the author.

76 Kigali, Rwanda 30-31 October 1999.

77 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda. See also Nsibirwa (n 9) 41-42.

78 Final Communique of the 26th ordinary session of the African Commission on Human and Peoples' Rights Kigali, Rwanda 1-15 November 1999 para 16.

Harmful Traditional Practices Affecting the Health of Women and Children (IAC), were working on a Draft OAU Convention on Harmful Practises.⁷⁹ Some of the rights set out in the Draft OAU Convention on Harmful Practises overlapped with the protections in the Kigali Draft. In order to avoid duplication, the OAU General Secretariat suggested that the African Commission and the OAU Women's Unit work together on the draft protocol. During this process, the OAU Women's Unit and the Legal Division of the OAU initially made a couple of suggestions to improve the Kigali Draft.⁸⁰ In a letter to the Chairman of the African Commission in March 2000, the Legal Counsel for the OAU (OAU Legal Counsel) suggested that a meeting of governmental experts be convened in anticipation of the 26th OAU Summit to be held in Lomé, Togo, in July 2000 and importantly, that for strategic and substantive reasons, the Draft OAU Convention on Harmful Practises be integrated into the Kigali Draft.⁸¹

The merger of these two treaties was not without friction, especially considering the fact the Draft OAU Convention on Harmful Practises would no longer stand independently from the Kigali Draft.⁸² However, after what was referred to as 'fruitful and persuasive discussions' between the OAU and the IAC, the IAC agreed to the merger.⁸³ The President of the IAC nonetheless had some specific requests for the OAU: to recognise the Addis Ababa Declaration on Violence Against Women in the Preamble to the draft protocol; to place all substantive articles of the Draft OAU Convention on Harmful Practises as a separate chapter of the draft protocol under the title 'Harmful Practices'; and to recognise the input of the IAC through a footnote to this chapter.⁸⁴

During the 26th OAU Summit, there were further consultations between the OAU Legal Counsel, the Chief of the OAU Women's Rights Unit, the Secretary of the African Commission and the Special Rapporteur on Women on the Kigali Draft and the suggested merger.⁸⁵ During these consultations, it was agreed that further consultations should be held, enlarged to include a representative of the IAC. The objective of the consultations was to discuss how to actually integrate the Draft OAU Convention on Harmful Practises into a new draft protocol with a view to producing one integrated text to be submitted to a meeting of experts and ministers for their consideration.⁸⁶

A meeting of the OAU Political Department, the OAU Legal Counsel, the Secretariat of the African Commission, the Special Rapporteur on Women in Africa, and representatives of the IAC took place in Addis Ababa in July 2000. The group completed the integration of the Draft OAU Convention on Harmful Practises into the Kigali Draft and prepared one complete draft document to be submitted to the meeting of government experts for consideration.⁸⁷ In September 2000, the integrated document was finalised and termed the Final Draft.⁸⁸ The Final Draft contained 27 articles compared to the 23

79 Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

80 Nsibirwa (n 9) 42.

81 T Maluwa (Legal Counsel for the OAU) Letter to the Chairman of the African Commission CAB/LEG/72.20/27/Vol.I 7 March 2000.

82 OAU Legal Counsel Inter Office Memorandum to the Secretary of the African Commission subject: OAU Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls, I CAB/LEG/117.141/62/Vol.I 17 May 2000 see also response from Berhane Ras-work President of the IAC REF: IACOAU/197.00 9 May 2000. On file with the author.

83 Berhane Ras-work President of the IAC (n 82).

84 As above.

85 OAU Legal Counsel CAB/LEG.66.6/13/Vol.I. On file with the author.

86 OAU Legal Counsel (n 85).

87 Interoffice Memorandum (n 55) paras 14 & 15.

88 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to

articles of the Kigali Draft and 13 articles of the Draft OAU Convention on Harmful Practises. None of the requests from the IAC were incorporated into the Final Draft, where harmful practices are referred to in the Preamble and in articles 1, 2 and 5 instead of in a separate chapter.

2.5 The Final Draft and the road towards consensus

To get the Final Draft ready for adoption by the OAU Assembly, a road map was created and distributed to various stakeholders to chart the way forward. The roadmap set out four milestones: a meeting of experts on the draft protocol to take place in February 2001; a second meeting of experts followed by a meeting of the relevant ministers at the end of May 2001; consideration of the draft by the OAU Council of Ministers and finally, adoption of the draft protocol by the OAU Assembly at its meeting in Lusaka, Zambia in July 2001.⁸⁹

The actual schedule deviated from these timeframes as interest waned after the finalisation of the Final Draft. In the meantime, the process of constituting a new continental organisation, the AU, was well underway. The first Pan-African Women Conference was held in Tripoli, Libya, in April 2001 to discuss the role of women vis-à-vis the AU. The conference aimed to call attention to the need to engender the unification process. From the mission report of the conference, it is clear that engagement with women's organisations was high on the agenda. The main outcome of the conference was the acknowledgement that there was a need for more inclusive outreach exercises as well as consultations on how best to ensure the effective inclusion and participation of women in the unification process, as well as in the institutions and structures of the AU.⁹⁰ This included participation in the process towards the adoption of the Maputo Protocol.

After the Pan-African Women Conference, the African Commission held its 29th ordinary session at the same location. At this meeting, the Special Rapporteur on Women in Africa expressed concern about the lack of progress on the Final Draft.⁹¹ It was decided that the OAU Women, Gender and Development Division (OAU Gender Division) should try to rekindle the momentum on the draft protocol towards adoption. In this regard, it was decided that the OAU Gender Division would act as a focal point regarding activities relating to the Final Draft, working together with the OAU Political Department, other relevant OAU Divisions and other stakeholders towards the finalisation of the protocol.⁹²

2.5.1 *First meeting of government experts*

The first meeting of government experts finally took place 12-16 November 2001.⁹³ The meeting consisted of representatives of 44 OAU member states.⁹⁴ It produced a report, the Report of the

the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63. This version with the reference CAB/LEG/66.6 dated 13 September 2000 was named the 'Final Version' by the OAU Legal Counsel and all further commentary would be based on this document as is evident in the references to this document going forward. See Interoffice Memorandum, 30 October 2000, subject: draft protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa CAB/LEG/66.6/22/Vol.I. On file with the author.

89 Interoffice Memorandum (n 55) para 17. Note that the letter to which the roadmap is attached indicates that the meetings of experts were to take place in September and November 2001 respectively.

90 Interoffice Memorandum, 9 May 2001, file no CAD/WGD26/19.01 AU Office of the Legal Counsel para 11. On file with the author.

91 Interoffice Memorandum, AU Office of the Legal Counsel (n 90) para 14.

92 Interoffice Memorandum, AU Office of the Legal Counsel (n 90) para 16.

93 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

94 Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, The Congo, Côte d'Ivoire, The Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Ghana, Guinea,

Meeting of Experts,⁹⁵ commenting on all substantive provisions of the Final Draft and suggesting revisions, exclusions, new paragraphs, and provisions.⁹⁶ On 22 November 2001, a revised version of the Final Draft was issued, including the revisions and amendments set out in the Report of the Meeting of Experts.⁹⁷ At the meeting, three articles were flagged as ‘contentious’ on which the meeting could not obtain consensus. These were: articles 6 (Marriages), 22 (Monitoring) and 26 (Amendment and Revision). As is further detailed with regard to the respective articles in the chapters that follow, some issues, such as the status of polygamous marriages and the equal right of property of both spouses, yielded a lot of resistance and objections from some state parties and led to reservations.⁹⁸ Following the first meeting of experts, the OAU Legal Counsel also provided feedback on the Revised Final Draft suggesting both editorial and substantive revisions.⁹⁹

2.5.2 *NGO Forum*

Following a period of little engagement with the drafting process, NGOs across the continent gathered momentum once more in 2002 and applied pressure to move the process forward. More groups joined the process, raising concerns about ‘weak’ provisions contained in the draft protocol. Equality Now came on board, and after consultation with WiLDAF, ACDHRS and FEMNET, decided to convene a consultative meeting bringing together women’s rights organisations from across the continent to review the draft and advocate for its improvement.¹⁰⁰ The meeting was held on 4 and 5 January 2003 in Addis Ababa. The meeting produced a report, *Comments by the NGO Forum*,¹⁰¹ which highlighted the provisions that were considered to be below international standards in the Revised Final Draft and recommended alternative language to strengthen them.¹⁰² Some NGOs also engaged in a dialogue with the AU Commission, emphasising how embarrassing it would be if the draft protocol was adopted as it was.¹⁰³

In a letter to the Interim Commissioner for Peace, Security and Political Affairs of the AU, dated 13 January 2003, in anticipation of the second meeting of government experts, the Africa Office Director of Equality Now, expressed the collective concerns of the NGO Forum:

While appreciating the fact that the African Union has set higher standards in previous legal instruments such as the African Charter itself and the Charter on the Welfare and the Rights of the Child than other regional or international organizations, we are concerned that the draft Protocol on the Rights of Women in Africa does not clearly and consistently reflect the noble objectives of the organization and its member states ... if

Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, South Africa, The Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. See Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001, (Report of the Meeting of Experts) para II.2.

95 Report of the Meeting of Experts (n 94).

96 Report of the Meeting of Experts (n 94).

97 (Revised Final Draft), CAB/LEG/66.6/Rev.1.

98 Banda (n 2) 76 & 77; Viljoen (n 9) 42.

99 Comments by the OAU Legal Counsel (2002): CAB/LEG/66.6/Rev.1.

100 Mohamed (n 58) 12.

101 Draft protocol to the African Charter on Human and peoples’ Rights on the Rights of Women in Africa, as adopted by the Meeting of Government Experts in Addis Ababa 16 November 2001, CAB/LEG/66.6/Rev.1.

102 The following NGOs participated in this meeting: African Centre for Democracy and Human Rights Studies, Akina Mama Wa Afrika, Equality Now, Ethiopian Women Lawyers Association, Femmes Africa Solidarite, FEMNET – African Women’s Development And Communication Network, Malian Women Lawyers Association, Senegalese Women Lawyers Association WiLDAF-Women in Law and Development in Africa, WRAPA – Women’s Rights Advancement and Protection Alternative.

103 Mohamed (n 58) 12.

the draft Protocol is passed as it stands now, the African Union would for the first time set lower standards than those already existing regionally and internationally ... [moreover] the repeated postponements of the meetings do not reflect well on the African Union.¹⁰⁴

2.5.3 *Second meeting of government experts and meeting of ministers*

Following the substantial feedback from the NGO Forum and their push for immediate engagement with the draft protocol, a second meeting of government experts was convened 24-26 March 2003. Forty-two¹⁰⁵ AU member states participated in this meeting alongside a number of observer delegations.¹⁰⁶ The meeting considered the articles that had been highlighted at the 2001 meeting of government experts and identified articles 4(2)(m), 6(d), 8, 9, 10, 11, 12, 13, 17, 19, 20, 21 and 23 as needing further attention. A number of amendments were made, and a revised text referred to as the 'New Draft Protocol' was adopted.¹⁰⁷ This draft was subsequently discussed by the Ministerial Meeting on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the rights of women in Africa, held back-to-back with the meeting of government experts.¹⁰⁸ Ambassador and Interim Commissioner Mahamat Habib Doutoum formally opened the ministerial meeting. In his opening address, he made the following remarks that succinctly describe the struggle for women's emancipation and equality. He observed that,

to a certain degree, values of civilizations, be they religious or cultural, tend to rigidly assign specific roles and tasks to men and women, which often limit the participation of women in political life or even keep them away altogether... [t]he Protocol will change behaviour and cultural attitudes inherited from ancestors, and will constitute a stride in reshaping the thinking about the role and dignity of women in modern African societies... once it [is] adopted, the Protocol [will] become one of the international instruments and [will] play a role in enhancing the human rights of women and hence their contribution to development.¹⁰⁹

The ministerial meeting considered the text, article by article, but only substantive issues were discussed.¹¹⁰ It adopted the various articles through consensus to remove the reservations previously entered by some delegations.¹¹¹ Where consensus was not reached, the text submitted by the meeting of government experts was endorsed, and delegations were then free to enter reservations on the said text.¹¹² At the end of its work, the ministerial meeting adopted the final draft version of the Maputo

104 Equality Now Regional Office, Letter to the Interim Commissioner for Peace, Security and Political Affairs African Union, Ambassador Djinnit Said, date 13 January 2003. On file with the author.

105 Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Congo, Côte d'Ivoire, Democratic Republic of Congo, Chad, Ethiopia, Eritrea, Egypt, Guinea Equatorial, Gabon, Guinea Conakry, Gambia, Ghana, Kenya, Lesotho, Libya, Malawi, Mali, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Saharawi Arab Democratic Republic, South Africa, Senegal, Sudan, Swaziland, Sierra Leone, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe.

106 ECA, UNDP, UNICEF, FAO, UNHCR, ILO, UNEP, AWCPD, CIDA CANADA, GPI, WLEA, FIDA, FAS, ICRC, IAC, NCTPE, OHCHR, UNIFEM, CGE, WILDAF, EQUALITY NOW, AJM, AJS, EWLA, ACDHRS, FEMNET, WRAPA, WILSA, FRANCOPHONIE, and AMWA.

107 Summary of the proceedings of the Ministerial Meeting on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the rights of Women in Africa, MIN/PROT.WOMEN/RTS/Rpt, Addis Ababa, Ethiopia, March 2003 (Summary of the proceedings of the 2nd Meeting of Experts).

108 The same state parties and observer organisations participated in this meeting.

109 Summary of the proceedings of the 2nd Meeting of Experts (n 107) para III Opening Ceremony 5.

110 Summary of the proceedings of the 2nd Meeting of Experts (n 107) para VII Proceedings 11(a). It was decided that editorial corrections should be handed over to the AU Commission, which was requested to ensure the harmonisation in all working languages.

111 Summary of the proceedings of the 2nd Meeting of Experts (n 107) para VII Proceedings 11(b). See also Banda (n 2) 76 & 77; Viljoen (n 9) 42.

112 Summary of the proceedings of the 2nd Meeting of Experts (n 107) para VII Proceedings 11(c).

Protocol, also known as the Addis Ababa Draft,¹¹³ containing the 32 articles that are reflected in the Maputo Protocol. Some delegations registered reservations at this stage.¹¹⁴ As reflected above, the Maputo Protocol was adopted on 11 July 2003 by the AU Assembly in Maputo, Mozambique and officially entered into force on 25 November 2005.¹¹⁵

3 Relationship with the African Charter

3.1 Overview

Throughout this Commentary the authors detail the different international instruments that are relevant to understanding and contextualising the comprehensive issues addressed in the Maputo Protocol. As is evident in these discussions, one instrument, the African Charter, stands out. It is the originating treaty to which the Protocol is attached. Therefore, it has a special relationship with the Maputo Protocol, both as an antagonist, as some have argued, and as a point of departure for African women's rights, as was evident at the Lomé seminar 1995. As mentioned in the drafting history, the creation of the Maputo Protocol would come to elaborate on women's rights, which would form part and parcel of the African Charter.¹¹⁶ It is this complex relationship that this section sets out to elaborate. This discussion is then supplemented by analyses of specific linkages between the Maputo Protocol and the African Charter in relation to the specific articles of the Protocol discussed in the Commentary's subsequent chapters.¹¹⁷

3.2 A 'Protocol'

Article 2(1)(a) of the VCLT defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Consequently, 'whatever its particular designation' signifies that the specific designation employed does not determine whether an instrument is a treaty or not. Irrespective of the designation, an international agreement falling under the VCLT's definition is considered to be a treaty. The term 'treaty' is a generic name, and many different terms are used to indicate the same. The term 'treaty' includes, among others, the terms: convention, agreement, pact, *protocol*, charter, statute and covenant. As long as an instrument falls under the above definition, it refers to an international treaty that is binding under international law.

113 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft). The original document adopted in English and in French was translated into Arabic and Portuguese. See Interoffice Memorandum, subject: Maputo Documents: Draft Protocol Relating to the Rights of Women in Africa, POL/DIR/63(1)14.03. On file with the author.

114 The following reservations were registered: South Africa art 4(j); Botswana art 4(j) on the notion of nursing women; Tunisia and Sudan art 6(b); Kenya, Namibia and South Africa art 6(d); South Africa and Zambia art 6(h); Egypt, Libya and Sudan art 7(a); Egypt art 7(d); Libya art 11(3); Sudan art 14(1)(a); Burundi, Senegal and Sudan art 14(1)(b); Sudan art 14(1)(c); Libya, Rwanda and Senegal art 14(2)(c); Egypt and Sudan art 20(b); and Egypt art 21. Annex to Draft Protocol (n 113) Table of reservations to the Draft Protocol to the African Charter on Human and Peoples' Rights Related to the Rights of Women in Africa. Not all of the reservations registered at this stage of the drafting process were duly deposited with the AU Commission. See B Traoré 'Articles 28-31' sec 5.4 in this volume, for further discussions on reservations.

115 Decision on the draft protocol to the African Charter on Human and Peoples' rights relating to the Rights of Women Assembly/AU/Dec.19(II), Assembly of the African Union Second ordinary session 10-12 July 2003 Maputo, Mozambique.

116 Mohamed (n 58) 12.

117 The first protocol to the African Charter, is the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights which was adopted on 10 June 1998 and entered into force on 25 January 2004 i.e. after the Maputo Protocol. Since, the adoption of the Maputo Protocol, the Assembly of Heads of State and Governments of the AU has adopted three other normative protocols to the African Charter, see sec 3.2 for further reference.

The Maputo Protocol was created as a ‘supplementary treaty’ but arguably goes much further than merely supplementing or modifying specific rights in the African Charter. Rather, it creates a large number of additional rights and obligations. The mechanism of enlarging already existing human rights treaties by adding protocols is commonly used in, for example, the European regional human rights system, where the European Convention on Human Rights, the originating treaty, has thus far been supplemented by ten additional protocols adding both substance and procedure albeit on a smaller scale in each of the additional protocols.

The Preamble to the Protocol, as is further discussed in the next chapter, opens up with a reference to article 66 of the African Charter, establishing a mutual relationship between these two treaties. Article 66 stipulates that ‘[s]pecial protocols or agreements may, if necessary, supplement the provisions of the present Charter’. The same provision has been used to create the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Court Protocol), the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons (Protocol on the Rights of Older Persons), the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Citizens to Social Protection and Social Security (Protocol on Social Security). The essential feature in the use of ‘protocol’ is to signify the protocol’s relationship with the preceding, originating, treaty, both in substance and in procedure. Arguably, by associating the Maputo Protocol with the African Charter, the Maputo Protocol is firmly placed within the monitoring framework created by the African Charter. The association also brings interpretations of the substantive provisions of the African Charter to bear on the Protocol. Thus, as a point of departure, the Maputo Protocol supplements the African Charter in terms of its interpretation, monitoring and substantive provisions.

To supplement something is to add to it to complete or enhance it.¹¹⁸ In the case of protocols to the African Charter, they enhance either its normative or institutional protection. This approach is particularly evident in the role of the African Commission vis-à-vis the Maputo Protocol, which is further elaborated on in Chapter 29, detailing the African Commission’s interpretive mandate under the Protocol. It is also evident in the drafting history of the protocol where most draft articles in the Nouakchott and Kigali Drafts directly referenced the relevant articles in the African Charter, taking the African Charter as a point of departure. The Maputo Protocol thus builds onto the African Charter; it does not replace or supersede its provisions.¹¹⁹

3.3 The format of protection: a new treaty or the deployment of already existing provisions?

At the outset of the drafting process that unfolded in 1995, the main question asked was not related to the format of the legal instrument, that is, the creation of a ‘convention’ or a ‘protocol’, but rather, whether the protection of African women’s rights could be achieved based on an already existing generic human rights instrument: the African Charter. At the seminar in Lomé, two different standpoints on the format of the protection of women’s rights were essentially represented. The first one argued for an addition to the African Charter in the form of a separate treaty (the nature of the relationship between this new treaty and the African Charter was not elaborated upon). The second standpoint argued that the already existing provisions of the African Charter were adequate to protect women’s rights, on the understanding that under the African Charter, ‘everyone’, not ‘every man’ is a rights-bearer.¹²⁰ The outcome, the Maputo Protocol, speaks, to some extent, to both these ideas. On the one hand, it is a

118 Oxford dictionary of English, online version (2015).

119 For further discussion on the inclusion of more favourable provisions see B Traoré ‘Articles 28-31’ secs 5.2 & 5.3 in this volume.

120 Viljoen (n 9) 18. See the Preamble to the African Charter.

separate treaty from the African Charter, with important additional substantive provisions. On the other hand, it builds onto the provisions of the African Charter and supplements existing substance, employing existing monitoring mechanisms.

Tracing the drafting history back to the Lomé seminar, it is evident that the idea from the very beginning was to ‘fill in gaps’ in the African Charter and create an instrument that would become ‘part and parcel’ of the Charter.¹²¹ This stands in stark contrast to the way the African Children’s Charter was conceived of, formulated as a separate charter with a separate monitoring body, the African Children’s Committee and the way the Kampala Convention, as a separate treaty, not a protocol, appoints the African Commission and its Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants as its main monitoring bodies.¹²²

At the time the Maputo Protocol was drafted, discussions and disagreements about the pros and cons of mainstreaming women’s rights in general human rights instruments on the one hand, or protecting them through specific women’s rights instruments on the other, were in full bloom at the international and regional levels.¹²³ One of the main points of contestation in this regard was the conceptualisation of women’s rights within the African Charter and whether this conceptualisation was conducive to the protection of the rights of African women. This discussion is further highlighted in the following section.

3.4 ‘Women’ in the African Charter

The term ‘women’ is used only once in the African Charter, in article 18(3). This provision collectively addresses the rights of women, children, the elderly, and persons with disabilities. One of the main arguments for creating a separate treaty on women’s rights was the focus on the family in article 18(3) and the lack of protection of women’s rights outside the family context. The reference to women exclusively in relation to the ‘family’ was seen by some as entrenching a view of women as valuable only insofar as their reproductive and caregiving roles are concerned.¹²⁴ Restricting the protection of women’s rights to the context of the family, which article 18(2) of the African Charter refers to as ‘the custodian of morals and traditional values recognized by the community’, arguably conflicts with the very achievement of women’s equality since family is often the very sphere in which gender-based discrimination thrives.¹²⁵ The critique further related to the lack of reference to specific harms suffered by women such as female genital mutilation, forced marriages and inequality in inheritance rights of widows and female heirs.

Those who argued against a specific regional instrument on women’s rights suggested that the issue facing African women was not the lack of legal protection but rather the underutilisation of the existing provisions of the African Charter by women or their representatives.¹²⁶ The idea presented was that the guarantees of equality could be ‘unlocked by campaigning for the adoption of resolutions

121 Mohamed (n 58) 12.

122 Art XX(3).

123 Murray (n 9) 205-206.

124 NW Orago & M Nassali ‘The African human rights system: challenges and potential in addressing violence against women in Africa’ in R Manjoo & J Jones (eds) *The legal protection of women from violence: normative gaps in international law* (2018) 113.

125 K Stefszyn & A Prezanti ‘The impact of the protocol on the rights of women in Africa on violence against women in six selected southern African countries: an advocacy tool’ (2009) 2. See also M Addadzi-Koom, ‘Of the women’s rights jurisprudence of the ECOWAS Court: the role of the Maputo Protocol and the due diligence standard’ (2020) 28 *Feminist Legal Studies* 155, 158; and Viljoen (n 9) 19.

126 Viljoen (n 9) 18.

(‘General Comments’) on rights of relevance to women’.¹²⁷ However, this argument was weakened by the weight of history: although the Commission had taken an increased interest in women’s rights in the early 1990s and had interpreted the African Charter progressively and expansively in a number of decisions on communications (not specifically related to women’s rights), it had not published any general comment by 1995. In addition, between 1986 and 1995, it had not dealt with any complaints about women’s rights.¹²⁸ Moreover, the first time that women’s rights were raised within the protective mandate of the African Commission was in relation to its visit to Mauritania in 1996.¹²⁹

4 The status of the Maputo Protocol in the domestic legal systems of member states

To ensure the enforceability of the provisions in the Maputo Protocol at the domestic level, all member states, upon ratification, undertake to incorporate the Protocol within their domestic legal system or to otherwise give it appropriate legal effect within their domestic legal orders.¹³⁰ In this regard, as with most international instruments, the Maputo Protocol does not prescribe direct incorporation of its provisions as a whole into domestic law, but leaves the operative decision to state parties in consideration of their constitutional systems. Therefore, the status of the Maputo Protocol in each domestic legal system, and hence the ability of domestic courts to directly apply it without incorporating or enabling legislation, depends upon the constitutional framework of each state party. This, in turn, relates to whether the state in question applies a monist or dualist approach to incorporating international law into its domestic system. As a point of departure, it is important to note that although clearly specified within a constitution, domestic courts do not always adhere strictly to the mainly theoretical distinction between a monist and a dualist approach.¹³¹ Case law in which domestic courts have applied the Maputo Protocol are discussed throughout this Commentary to further highlight how states and domestic courts have approached the incorporation of the Protocol into domestic law.

In a monist system, international and regional legal obligations are part and parcel of domestic law, and litigants can invoke international and regional obligations.¹³² African states with a German, French, Belgian or Portuguese colonial history generally adhere to the doctrine of monism. States such as Namibia,¹³³ Senegal,¹³⁴ the Democratic Republic of the Congo¹³⁵ and Mozambique¹³⁶ adhere to a monist system.¹³⁷ As explained by Killander, with regard to monist states, any self-executing

127 Viljoen (n 9) 18.

128 Banda (n 2) 73.

129 Murray (n 9) 209 referring to the Report of the Mission to Mauritania of the African Commission on Human and Peoples’ Rights Nouakchott 19-27 June 1996, available in the 10th Annual Activity Report by the African Commission on Human and Peoples’ Rights Annex IX.

130 See for comparison UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28 (CEDAW Committee General Recommendation 28) para 31.

131 See eg *Ex-Parte Attorney General: In re Corporal Punishment by Organs of State*, 1991 (3) SA 76 (NmSc) which stands in stark contrast to *Government of the Republic of Namibia & Others v Mwilima & Others* [2002] NASC 8 (7 June 2002); and *Mitu-Bell Welfare Society v Kenya Airports Authority*, SC Petition 3 of 2018 paras 123-132.

132 J Dugard *International law: a South African perspective* (2011) 42.

133 Art 144 of the Constitution of Namibia (1990).

134 Art 98 of the Constitution of Senegal (2001)

135 Art 215 of the Constitution of the Democratic Republic of the Congo (2015).

136 Art 18 of the Constitution of Mozambique (2018).

137 See also Constitution of Burkina Faso (1991) art 151; Constitution of Cameroon (1992) art 45; Constitution of Mali (1992) art 116; Constitution of the Republic of Benin (1990) art 147; Constitution of the Central African Republic (2016) art 94. These provisions are all modelled on art 55 of the French Constitution of 1958. In general, they provide that treaties or agreements duly ratified or approved shall, upon their publication, have authority superior to that of domestic legislation, subject, for each government or treaty, to application by the other party.

norm would, in theory, be directly applicable.¹³⁸ In this context, a self-executing norm is a norm that provides enough detail to establish an explicit right and/or obligation.¹³⁹ However, the reality is that even in strictly monist states, domestic legislation often takes precedence.¹⁴⁰ As an example, in Kenya, a monist approach can be detected in section 2(5) of the 2010 Kenyan Constitution, indicating that '[t]he general rules of international law shall form part of the law of Kenya'. However, this is tempered by section 21(3) stipulating that '[t]he State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms'.

In a dualist system, often found in states with a British colonial history, states' international and regional legal obligations are not directly enforceable in domestic courts without enabling legislation.¹⁴¹ States such as Zimbabwe,¹⁴² Nigeria,¹⁴³ South Africa,¹⁴⁴ and Malawi¹⁴⁵ approach the incorporation of treaty law from a dualist perspective. Moreover, the trend of merging international and constitutional law resulting from international legal reception, especially with regard to human rights norms, has aptly been described by Bryde as the 'constitutionalisation of international law and internationalisation of national constitutional laws'.¹⁴⁶ However, although the prohibition of discrimination on the basis of sex is largely constitutionalised, as discussed throughout this Commentary, little of the detailed, substantive, and transformative protection of women's rights that is found in the Maputo Protocol is generally found in the constitutional domain. Therefore, direct reception or domestication through legislation is essential. As set out in SDGEA in 2004, a new era of domesticating and implementing the Protocol by all states parties must be ushered in.¹⁴⁷

The African Commission has repeatedly urged state parties, regardless of their constitutional systems, to domesticate all substantive provisions of the Protocol.¹⁴⁸ In its Concluding Observations on Uganda, the Commission, for example, recommended that Uganda take 'measures to pass a specific law domesticating the Maputo Protocol'.¹⁴⁹ Similarly, the Commission expressed concern that South Africa lacked a law domesticating the Maputo Protocol.¹⁵⁰ In the case of The Gambia, the Commission commended the '[d]omestication of the Maputo Protocol and CEDAW through the enactment of the Women's Act, the Domestic Violence Act and the Sexual Offences Act'.¹⁵¹ Importantly, whether or

138 Killander M 'How international human rights law influences domestic law in Africa' (2013) 17 *Law Democracy and Development* 379.

139 Killander (n 138) 379.

140 Killander (n 138) 379.

141 Dugard (n 132) 42.

142 Sec 34 of the Constitution of Zimbabwe (2013).

143 Sec 12(1) of the Constitution of Nigeria (1999).

144 Sec 231(4) of the Constitution of South Africa (1996).

145 Sec 211(1) of the Constitution of Malawi (1994).

146 BO Bryde 'International democratic constitutionalism' in R St.John Macdonald & D Johnston (eds) *Towards world constitutionalism: issues in the legal ordering of the world community* (2005) 121.

147 Para 9.

148 See eg African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) and art 14(2)(a) & (c) of the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 54th ordinary session of the African Commission held in Banjul, The Gambia from 22 October to 5 November 2013.

149 Concluding Observations of the African Commission on Human and Peoples' Rights on the 4th Periodic Report of the Republic of Uganda, African Commission on Human and Peoples' Rights, adopted at its 49th ordinary session 28 April to 12 May 2011, Banjul The Gambia, para 15(vi).

150 Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa, African Commission on Human and Peoples' Rights, adopted at its 20th extraordinary session 9-18 June 2016, Banjul, The Gambia, para 33(iii).

151 Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of The Gambia on the Implementation of the African Charter on Human and Peoples' Rights (1994-2018) and the Initial Report on the

not the Protocol is incorporated into domestic law, member states must ensure the rights within their domestic legal system and provide for their effective enforcement through sanctions and remedies as provided for under each article and reinforced by article 25. Moreover, even if a domestic legal system is dualist, the Maputo Protocol can still impose obligations on states that have ratified it but have not yet domesticated it through enabling legislation.

In some member states, constitutional provisions provide for courts to consider international and regional law, such as the Maputo Protocol, in reaching their decisions. For example, section 11(2)(c) of the Constitution of Malawi states that, in interpreting the provisions of the Constitution, courts shall, 'where applicable, have regard to current norms of public international law'.¹⁵² Correspondingly, in South Africa, section 39(1)(b) of the Constitution provides that, '[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law'.¹⁵³

5 The structure of the Maputo Protocol

The Maputo Protocol consists of a Preamble and 32 articles. Different from the African Charter and CEDAW it is not divided into parts. In terms of the structure of the Maputo Protocol, article 1 deals with the definition of key, reoccurring terms in the Protocol; article 2 refers to the general obligations of state parties; and article 5 refers to harmful practices. These provisions form an overarching interpretive framework for the application of the subject-specific obligations throughout the Protocol. Article 3 has a dual character: it fits within the interpretive framework as it contains a broad principle referring to the dignity inherent in all human beings, but it also sets out specific state obligations, such as the prohibition of the exploitation of women, making it a free-standing right. Arguably, in comparing the structure and order of the articles in the Maputo Protocol with those of CEDAW, the first five articles in the Protocol could be viewed as part of the overarching interpretive framework. This is similar to Part I of CEDAW, whose articles 3 and 4 also function as free-standing rights. In this regard, it can be concluded that the interpretive framework is more detailed in the Maputo Protocol, adding both the principle of dignity and a general prohibition of violence against women to the interpretive scope.

Articles 6, 7, 8, 20, 21, 22 and 23 refer to the legal status of women, including within family relations. As briefly mentioned in the introduction, many of these rights also refer to an intersectional approach to equality, identifying specific intersecting identities such as widowhood or old age. Articles 12–17 and 24 predominantly refer to economic, social, and cultural rights, while articles 18 and 19 traditionally would fall under the umbrella of 'group' rights but are phased as individual rights in the Maputo Protocol. Article 9 is the only civil and political right. Articles 10 and 11, unique to the Maputo Protocol, protect women in times of conflict. Articles 25, 26, 27 and 32 deal with implementation and monitoring. The final clauses, articles 28–31, refer to the miscellaneous provisions of the Protocol, such as ratification and amendment and contains a 'most favourable treatment' clause.

Some issues are alluded to in more than one article of the Protocol. 'Dignity', for example, is referred to in the Preamble, articles 1, 3, 22, 23 and 24, which confirms its status as a substantive right, but also its interpretive value. 'Pregnant / pregnancy' is referred to in articles 4, 14 and 24, while 'refugee' is referred to in articles 4, 10 and 11. The structure of the Protocol, the protection of different, overlapping identities and the apparent repetition of issues all signify the lived realities of women,

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) (2005-2014) para 28(i).

152 Constitution of the Republic of Malawi (1994).

153 Constitution of the Republic of South Africa (1996). In this regard it is essential to acknowledge, as has the South African Constitutional Court that binding treaties must always be applied to uphold international legal obligations; while a much broader set of international instruments can be used as interpretive tools see eg *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

which cannot easily be structured or compartmentalised into neat exclusive categories. Thus, we are left with a text that might not appear so well structured but reflects the subjects it is set to protect: African women in all their diverse expressions.

6 Conclusion

When the Saharawi Arab Democratic Republic deposited its instrument of ratification of the Maputo Protocol on 29 April 2022, it brought the number of states parties to 43.¹⁵⁴ Although not covering the whole continent yet, the Protocol has a large footprint.

Every right in the Protocol is instrumental in achieving the core value of the Maputo Protocol, namely substantive equality, which has the power to transform the lives of all African women.

The subsequent chapters provide an in-depth discussion, article by article, of the concepts, obligations, and implementation of each right to expose the legal and practical status of women's rights on the continent. Read together, these contributions present a complex picture of both accomplishments and setbacks, underlining the dire need for swift action by state parties.

Before the article-by-article exposition, Chapter 2 introduces the interpretive framework of the Preamble to the Maputo Protocol providing the context within which the Protocol should be understood and applied.

154 African Union 'Saharawi Arab Democratic Republic becomes the 43rd African Union Member State to ratify the Protocol on Women's Rights' <https://au.int/en/pressreleases/20220504/saharawi-arab-democratic-republic-becomes-43rd-african-union-member-state> (accessed 22 June 2023). The twelve AU member states that have not yet ratified the Maputo Protocol are: Botswana, Burundi (signed the Protocol on 3 December 2003), Central Africa Republic (signed the Protocol on 17 June 2008), Chad (signed the Protocol on 6 December 2004), Egypt, Eritrea (signed the Protocol on 25 April 2012), Madagascar (signed the Protocol on 28 February 2004), Morocco, Niger (signed the Protocol on 6 July 2004), Somalia (signed the Protocol on 23 June 2006), South Sudan (signed the Protocol on 24 January 2013) and Sudan (signed the Protocol on 30 June 2008). While 9 of these states have signed the Maputo Protocol, Botswana, Egypt, and Morocco have neither signed nor ratified it. See African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 22 June 2023).

Preamble

Annika Rudman

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1 Introduction

In generic terms, a Preamble is a preliminary statement that generally explains the purpose of what is to follow. It is often a place where reference is made to a contemporary context, both legal and historical. In the making of international human rights law, a Preamble often serves more than one objective: to state the reason why a treaty was adopted; to outline a common standard of achievement amongst states; to formulate the substantive values underlying the instrument; to firmly ground it in already existing international instruments; and to, importantly, highlight the (human) wrongs of the past which the treaty aims to address. Thus, the Preamble anchors the treaty provisions in a specific legal context and frame of mind.

The practical purpose of Preambles in international-treaty law is two-fold: to support the interpretation of treaty provisions and to provide insight into the object and purpose of the treaty.¹ Together with the preparatory work of the Maputo Protocol, as analysed throughout this Commentary, a Preamble may assist in establishing the drafters' intentions, which in turn may assist in interpretive exercises. This chapter focuses on the Preamble to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in order to present an important aspect of the interpretive framework of the Protocol.

The Preamble to the Maputo Protocol, consisting of 14 paragraphs, serves all the different purposes outlined above: It links the Protocol's creation with the fact that the African Charter on Human and Peoples' Rights (African Charter) and other international human rights instruments, such as the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), were not enough to eliminate discrimination against African women; it confirms that practices that hinder or endanger the normal growth and affect the physical and psychological development of women must be eliminated; it defines 'African values' from a perspective of equality and dignity; and it makes reference to international, regional and sub-regional hard and soft law on women's rights to contextualise its provisions.

Anchoring a progressive human rights treaty such as the Maputo Protocol to pre-existing treaties could, at first glance, restrict some of its provisions. In all fairness, the view on gender equality has changed over time and continues to develop. From the perspective of the Preamble to CEDAW, Chinkin and Rudolf note that at the time CEDAW was adopted, the concept of gender had not 'yet appeared on the international agenda' and thus, looking back at its Preamble, the language seems somewhat outdated.² However, a Preamble is seldom just a reflection of a contemporary *status quo*. As an example, the Preamble to CEDAW contains progressive and forward-looking references such as the reference to the 'maximum participation of women' and the need for a 'change in the traditional role of men as well as the role of women in society'. In this regard, Chinkin and Rudolf posit that the CEDAW Committee has utilised this progressive language to make CEDAW a 'dynamic instrument'.³ Part of the analysis in this chapter is to trace the same dynamism, if any, in the Preamble to the Maputo Protocol to align it with its many progressive rights.

Moreover, if the Preamble to the Maputo Protocol is compared to the Preambles to the African Charter and CEDAW, because of their historical and normative ties, the absence of some contexts and concepts that are captured in these related instruments have become evident. Both the African Charter and CEDAW refer to the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, and foreign occupation, while no such references are made in the Preamble to the Maputo Protocol. Moreover, the Preamble to the Maputo Protocol lacks reference to 'poverty', which is provided in the Preamble to CEDAW.⁴ The close link between the Maputo Protocol and the African Charter can arguably explain the lack of reference to some of the above mentioned concepts. However, the most striking feature that sets the Preamble to the Maputo Protocol apart from the Preamble to CEDAW is that the latter recognises the disadvantaged position of women, and that perceptions of women and men must change for women's equality to be achieved.

1 M Hulme 'Preambles in treaty law' (2016) 164 *University of Pennsylvania Law Review* 1297.

2 C Chinkin & B Rudolf 'Preamble' in M Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* 37.

3 C Chinkin & B Rudolf 'Preamble' in Freeman, Chinkin & Rudolf (n 2) 37, with reference to UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para 2.

4 It should however be noted that the protection of poor women is ensured in art 24 of the Maputo Protocol.

This is neither featured in the Preamble to the Maputo Protocol nor the Preamble to the African Charter.

This chapter is divided into five sections to address the complex nature and content of the Preamble to the Maputo Protocol. Section 2 presents the generic role of Preambles and further contextualises the position of Preambles in human rights treaties. Section 3 engages with the drafting process of the Preamble to the Maputo Protocol. Section 4 presents the key concepts of each paragraph of the Preamble. The final section presents a few thoughts on the object and purpose of the Maputo Protocol as gleaned from its Preamble.

2 The role of a Preamble

A Preamble can be defined as '[a] clause at the beginning of a ... statute explanatory of the reasons for its enactment and the objects sought to be accomplished'.⁵ A Preamble is not an operational part of a treaty; it does not create binding legal obligations. However, as pointed out by Fitzmaurice, a Preamble 'does have legal force and effect from the *interpretative* standpoint'.⁶ He suggests two primary functions of the Preamble: First, to 'elucidate the meaning of clauses the purpose of which might otherwise be doubtful'; second, to indicate the juridical climate in which the operative clauses of the treaty should be read, 'whether for instance liberally or restrictively, broadly or strictly'.⁷ As further explained by Papadopoulos, 'while the question of the legal value or status of Preambles has not (yet) been resolved, it is generally accepted that Preambles contain ceremonial and politically fuelled ideals that do not give rise to enforceable rights or obligations under international law'.⁸

As is stipulated under article 31(2) of the Vienna Convention of the Law of Treaties (VCLT) in relation to the general rules of interpretation, '[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *Preamble* and annexes: any agreement relating to the treaty and any instrument which was made by one or more parties in connection with the conclusion of the treaty'.⁹ In Chapter 1, reference was made to related agreements, such as the African Charter. However, for the purposes of this discussion, it is essential to note that the VCLT clearly stipulates that the Preamble to a treaty is part of the *text* of the treaty. Thus, the VCLT recognises the inseparable link between the body of a treaty and its Preamble.¹⁰ In this regard, the Preamble should be aligned with the operative part of the text, but only in terms of the context of the treaty.¹¹ As further explained by Hulme, the VCLT creates an opportunity for Preambles to enter into the interpretive process at the text-and-context stage, as described above, but also, and perhaps more importantly, with regard to human rights treaties, at the object-and-purpose stage.¹²

Despite the status of 'text' under the VCLT, Preambles are more frequently used as interpretive resources in the determination of the treaty's object and purpose.¹³ The object-and-purpose test has mainly been provoked by certain vague and all-encompassing reservations to human rights treaties

5 BA Garner *Black's Law Dictionary* (2019).

6 GG Fitzmaurice 'Law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1951) 28 *British Yearbook of International Law* 25.

7 Fitzmaurice (n 6) 25.

8 NA Papadopoulos 'Revisiting the Preamble of the European Social Charter: paper tiger or blessing in disguise?' (2022) 22 *Human Rights Law Review* 1-2.

9 My emphasis.

10 Papadopoulos (n 8) 2.

11 Papadopoulos (n 8) 2.

12 Hulme (n 1) 1297.

13 See eg *Femi Falana v African Union*, Application 001/2011 (jurisdiction) (2012) 1 AfCLR 118 paras 12 & 13.3; and *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (2014) 1 AfCLR 725 paras 77-92.

such as CEDAW.¹⁴ Article 19(c) of the VCLT introduces this test, stipulating that a state may formulate a reservation that is not ‘incompatible with the object and purpose of the treaty’. Although the VCLT does not refer to the Preamble of the treaty *per se*, it is an important source in determining the object and purpose of a treaty. As established by Papadopoulos, ‘the importance of Preambles lies in their role as an important framework in which to interpret the treaty, as well as the obligations it entails, or to infer its “object and purpose”’.¹⁵ In this regard it is important that there are no inconsistencies between the Preamble of the treaty and the treaty text so that the former can be effectively used on the one hand to establish the objective and purpose of the treaty and on the other to fill gaps in the text.

In the context of human rights treaties, it is further relevant to note that contrary to conventional treaties operating on the principle of ‘reciprocity’, human rights treaties, such as the Maputo Protocol, introduce an ‘objective’ system where the interests of the state parties in balancing respective rights and duties often requires an inquiry into their intentions.¹⁶ This makes essential the object-and-purpose enquiry which is centred around the Preamble. In this regard, it is vital to note that the Preamble to the Maputo Protocol makes key statements on equality with reference to both a ‘solemn commitment to eliminate all forms of discrimination and harmful practices against women’ and a *de facto* recognition that ‘women in Africa still continue to be victims of discrimination and harmful practices’. These are strong commitments by state parties to guarantee all the rights within the Protocol and fully realise women’s human rights.

3 Drafting history

3.1 References to the African Charter

As mentioned in the introduction, the Preamble to the Maputo Protocol consists of 14 paragraphs of varying nature. The Nouakchott Draft¹⁷ and the Kigali Draft¹⁸ contained nine paragraphs each; four of these referred directly to provisions in the African Charter: Article 2, in paragraph 1, article 18 in paragraph 2, articles 60 and 61 in paragraph 6 and article 66 in paragraph 9.¹⁹ These references frame the close relationship between the Protocol and the Charter. Due to the fact that the references to articles 2 and 18 are more or less verbatim quotes of the text of these provisions in the African Charter, there were no changes made to these paragraphs from the initial draft to the Addis Ababa Draft.²⁰

With regard to the reference to articles 60 and 61 of the African Charter, the wording changed slightly between the Nouakchott Draft and the Kigali Draft. The Nouakchott Draft referred to the idea that articles 60 and 61 ‘*accept* regional and international instruments *as well as* African practices consistent with international norms on human and peoples’ rights as being important *references* for the application and interpretation of the Charter’ while the Kigali Draft refers to the idea that these articles ‘*recognise* regional and international human rights instruments *and* African practices consistent with international norms on human and peoples’ rights as being important *reference points* for the application

14 See eg Algeria’s reservations to CEDAW.

15 Papadopoulos (n 8) 2.

16 Chinkin & B Rudolf ‘Preamble’ in Freeman, Chinkin & Rudolf (n 2) 38.

17 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples’ Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997.

18 Draft Protocol to the African Charter on Women’s Rights, 26th ordinary session of the African Commission on Human and Peoples’ Rights 1-15 November 1999 Kigali, Rwanda.

19 Expert Meeting (n 17).

20 Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

and interpretation of the Charter'.²¹ Arguably the references to 'recognise' and 'reference points' are more accurate in the context of the relevant treaty provisions.

The reference to article 66 of the African Charter appeared as the last provision in the Nouakchott Draft but was moved from the Kigali Draft onwards to serve as the first paragraph. This makes sense considering the fact that the Maputo Protocol was created under this article forming a close relationship between the Protocol and the Charter, as discussed in Chapter 1.²² Moreover, the Final Draft²³ added a specific reference to Resolution 240 of the Assembly of Heads of State and Government (OAU Assembly), endorsing the Commission's work in drafting a protocol on African women's rights.²⁴

The Final Draft presented the references to the African Charter more logically from articles 66, 2, 18, 60 and 61. During the meeting of the NGO Forum, suggestions were made to add a paragraph between the paragraphs referring to articles 18 and 60/61. This paragraph recognised the benefit of elaborating and supplementing all rights in the African Charter as they pertain to women, pursuant to article 66 of the African Charter, in order to secure these rights in reality.²⁵ The arguments provided in support of this provision was that this addition was supported by a similar approach in article 2(a) of CEDAW, which commits states parties to undertake to end discrimination against women through appropriate means that ensure 'practical realization of this principle'. A reference to article 1 of the African Charter was also provided, which similarly requires that state parties recognise the rights in the Charter and 'undertake to adopt legislative or other measures to give effect to them'.²⁶ As 'effective'²⁷ protection of women's rights are reiterated in different forms throughout the Maputo Protocol, this paragraph was ultimately discarded and did not appear in the Addis Ababa Draft. Thus, the structure and content of the Final Draft were kept and feature in paragraphs 1 to 4 in the Preamble to the Maputo Protocol.

3.2 Reference to international, regional and sub-regional instruments

The Nouakchott Draft contained one provision referring to other human rights instruments, notably not referencing CEDAW. This provision, in paragraph 3, referenced the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) and contained a direct reference to the Vienna Declaration and Programme of Action (Vienna Declaration), which frames women's rights as an 'inalienable, integral and indivisible part of universal human rights'. In the Kigali Draft, with the moving of the paragraph relating to article 66 of the African Charter to the beginning of the Preamble, as referred to above, the reference to international instruments became the fourth paragraph. The Kigali Draft added a specific reference to CEDAW and a general reference to 'all other international conventions and covenants relating to the rights of women'. The Final Draft

21 My emphasis.

22 See A Rudman 'Introduction' sec 2.3 in this volume.

23 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63. This version with the reference CAB/LEG/66.6 dated 13 September 2000 was named the 'Final Version' by the OAU Legal Counsel and all further commentary would be based on this document as is evident in the references to this document going forward. See Interoffice Memorandum, 30 October 2000, subject: draft protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa CAB/LEG/66.6/22/Vol.I. On file with the author.

24 31st ordinary session Resolution AHG/Res 240 (XXXI) (Resolution 240). See further discussion in A Rudman 'Introduction' sec 2.3 in this volume.

25 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003, Preamble.

26 Comments by the NGO Forum (n 25) Preamble.

27 See eg art 2(1)(d) where state parties are obligated to 'take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist'.

provided a full reference to CEDAW and clarified that women's rights as they are protected in these instruments are inalienable, integral and indivisible human rights. Going forward, this paragraph was only revised once where, at the first meeting of experts, a reference to the African Charter on the Rights and Welfare of the Child (African Children's Charter) was inserted.²⁸

The Final Draft also presented a new paragraph, paragraph 8, which referred to 'resolutions, recommendations, decisions and other conventions aimed at eliminating all forms of discrimination and at promoting equality between men and women'. This paragraph was taken almost verbatim from the Draft OAU Convention on Harmful Practices as a direct result of the merger between the Kigali Draft and the Draft Convention on Harmful Practices.²⁹ This paragraph was revised by the first meeting of ministers to delete 'and other' before 'conventions' and to add 'other regional and sub-regional instruments'.³⁰ No further revisions were made; thus, with these final additions, this is how the paragraph appears as paragraph 11 in the Preamble to the Maputo Protocol. The addition of references to a larger pool of international hard-law and soft-law instruments together with reference to regional and sub-regional instruments were essential as it, for example, drew on the Southern African Development Community (SADC) Declaration on gender and development with its addendum, the Grand Bay Declaration on Violence Against Women and Children.

3.3 Aspects of international relations conducive to realising the purposes of the Protocol

Paragraphs 6 to 9 of the Preamble to the Maputo Protocol relate to international relations and commitments that states viewed as key to realising the purpose of the Protocol: to ensure that the rights of women are promoted, realised, and protected. In this regard, the Nouakchott Draft contained references to the:

- UN Conference on Environment and Development;³¹
- Second World Conference on Human Rights;³²
- UN Conference on Population and Development;³³
- World Summit for Social Development³⁴ in paragraph 4;
- Fifth African Regional Conference on Women³⁵ in paragraph 5, adopting the Africa Platform for Action and the Dakar Declaration (Dakar Platform);³⁶ and

28 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 22(a).

29 Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

30 Report of the Meeting of Experts (n 28) para 26.

31 Rio de Janeiro, Brazil, 3-14 June 1992.

32 Vienna, Austria, 14-25 June 1993.

33 Cairo, Egypt, 5-13 September 1994.

34 Copenhagen, Denmark, 6-12 March 1995.

35 Dakar, Senegal, 16-23 November 1994.

36 African Platform for Action and the Dakar Declaration, adopted by the 5th Regional Conference on Women, held at Dakar, 6-23 November 1993, preparations for the 4th world conference on women: action for equality, development and peace, reports from regional conferences and other international conferences, Commission on the Status of Women E/CN.6/1995/5/Add.2 29 December 1994.

- Fourth World Conference on Women,³⁷ which resulted in the Beijing Declaration and Platform for Action (Beijing Platform).³⁸

In terms of the two latter conferences, only the outcomes were listed, that is, the ‘plans of action adopted in Dakar ... and in Beijing’. These two paragraphs remained the same in the Kigali Draft, then listed as paragraphs 5 and 6, respectively.³⁹

The reference to the Dakar and Beijing Platforms in the Nouakchott and Kigali Drafts indicated that states should ‘take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women’. In the Final Draft, these provisions were located in paragraphs 6 and 7, respectively. Paragraph 6 was left unrevised, while paragraph 7 was revised to read, ‘the Plans of Action adopted in Dakar and in Beijing call on all Member States of the United Nations, which have made a *solemn commitment* to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women’.⁴⁰ At the first meeting of ministers, paragraph 6 was adopted without amendments, while paragraph 7 was revised to include the full titles and dates of the documents adopted in Dakar and Beijing.⁴¹ During its engagement with the Preamble, the NGO Forum suggested that the reference to discrimination should be amended to ‘eliminate all forms of discrimination *including* gender-based violence against women, *which has been internationally recognised as a form of sex discrimination*’.⁴² This suggestion was not adopted by the following meetings of experts and ministers, and the draft remained the same through to the Addis Ababa Draft. This is arguably so because a definition of violence against women was incorporated in articles 1 and 4, which protects women against violence in its different forms, provisions that CEDAW lacks. No further revisions were made to these paragraphs. Thus, the paragraph that references the four world conferences appears as paragraph 6, while the paragraph that references the Platforms adopted in Dakar and Beijing appears as paragraph 9 in the Preamble to the Maputo Protocol. This is so because two new paragraphs were added in between these paragraphs.

Paragraphs 7 and 8 refer, in turn, to three important international and regional developments that took place in 2000 and 2001. Paragraph 7, as it appears for the first time in the Addis Ababa Draft, refers to United Nations Security Council Resolution 1325,⁴³ which was adopted on 30 October 2000.

Paragraph 8, which also appears for the first time in the Addis Ababa Draft, refers to the principle of promoting gender equality with reference to the Constitutive Act of the African Union (AU Constitutive Act) concluded in July 2000 and the New Partnership for Africa’s Development (NEPAD)

37 Beijing, China 4-15 September 1995. Preceded by the World Conferences on Women in Mexico City in 1975, Copenhagen in 1980, Nairobi in 1985.

38 United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995. Endorsed by UNGA Resolution 50/203, 22 December 1995.

39 At the time the Kigali draft was adopted by the African Commission in November 1999, the OUA Assembly had officially endorsed the Addis Ababa Declaration on the Dakar African Platform for Action on Women OAU Assembly of Heads of State and Government 31st ordinary session Resolution AHG/Dec.2 (XXXI).

40 Final Draft (n 23) Preamble para 7. My emphasis.

41 Report of the Meeting of Experts (n 28) para 25.

42 Comments by the NGO Forum (n 25) Preamble. Emphasis added to show the revisions suggested. This amendment was based on references to: UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, A/47/38 (General Recommendation 19); the Beijing Platform; the Joint Declaration adopted by the Special Rapporteurs on Women’s Rights (including the Special Rapporteur of the African Commission on Human and Peoples’ Rights) and the American Convention of Belém do Pará (Convention of Belém do Pará).

43 United Nations Security Council Resolution 1325 on Women, Peace and Security, S/RES/1325 (2000) adopted by the Security Council at its 4213th meeting, on 31 October 2000 (UN Security Council Resolution 1325).

as adopted in July 2001. The former draws on article 4(l) of the AU Constitutive Act, stipulating that the AU must function in accordance with the principle of promoting gender equality. By introducing the latter, the Preamble draws specific attention to the full participation of African women as equal partners in Africa's development. This paragraph, similar to paragraph 11, furthermore refers to relevant declarations, resolutions, and decisions, with specific reference to the position of women in development.

The reference to women's position in development moreover draws on comments made by the NGO Forum where a separate paragraph was suggested that would read, 'committed to the full participation of African women as equal partners in Africa's development'. This suggestion, in turn, referred to a number of important international instruments, such as the United Nations Declaration on the Right to Development,⁴⁴ the Beijing Platform,⁴⁵ and the Copenhagen Declaration on Social Development.⁴⁶ This suggestion was incorporated in the Addis Ababa Draft, which refers to the 'commitment of the African States to ensure the full participation of African women as equal partners in Africa's development'.

3.4 The continuation of discrimination against women in Africa

Similar to paragraph 6 of the Preamble to CEDAW, paragraph 12 of the Preamble to the Maputo Protocol recognises that notwithstanding the ratification of the African Charter and other international instruments, women in Africa continually suffer from discrimination. This paragraph existed from the very outset of the drafting, in the Nouakchott Draft, and attracted very few revisions. The Final Draft added a reference to harmful practices as a result of the merger between the Kigali Draft and the Draft Convention on Harmful Practices. In its Preamble, the Draft OAU Convention on Harmful Practices referred to the fact that 'in spite of these various instruments, the health and basic human rights of women and girls, such as the right to life, health and bodily integrity, continue to be impinged upon by harmful practices, which include widowhood rites, nutritional taboos, female genital mutilation (FGM), forced and/or early childhood marriage'.⁴⁷ This paragraph was subsumed under the reference to 'harmful practices'. Paragraph 9 of the Preamble, as it was in the Final Draft, was adopted without amendment by the first ministerial meeting. The NGO Forum suggested that the reference to discrimination should be amended to include a reference to 'discrimination including violence and other harmful practices'.⁴⁸ This amendment was based on references to CEDAW General Recommendation 19,⁴⁹ the Beijing Platform,⁵⁰ the Joint Declaration adopted by the Special Rapporteurs on Women's Rights (including the Special Rapporteur of the African Commission on Human and Peoples' Rights)⁵¹ and the American

44 UN General Assembly, Declaration on the Right to Development: resolution, adopted by the General Assembly, 4 December 1986, A/RES/41/128 art 1.

45 The Beijing Platform (n 38) provides that women's 'full participation on the basis of equality' is 'fundamental for the achievement of equality, development and peace' para 13; and that 'eradication of poverty based on sustained economic growth, social development, environmental protection and social justice' requires 'the full and equal participation of women and men as agents and beneficiaries of people-centred sustainable development' para 16.

46 World Summit for Social Development, Copenhagen Declaration on Social Development Annex I A/CONF.166/9. The Copenhagen Declaration acknowledges that 'social and economic development cannot be secured in a sustainable way without the full participation of women and that equality and equity between women and men is a priority for the international community and as such must be at the centre of economic and social development' para 7.

47 Draft OAU Convention on Harmful Practices (n 30) Preamble para 7.

48 Comments by the NGO Forum (n 25) Preamble.

49 General Recommendation 19 (n 42) para 1.

50 Beijing Platform for Action (n 38) para 118.

51 The UN Special Rapporteur on violence against women, its causes and consequences, and the Special Rapporteurs on women's rights of the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights met for the first time on 28 February-1 March 2002. Joint Declaration of the Special Rapporteurs on Women's Rights 8 March 2002, <http://www.cidh.org/women/declaration.women.htm> (accessed 2 May 2023).

Convention of Belém do Pará. This suggestion was not adopted by the following meetings of experts and ministers, and the draft remained the same through to the Addis Ababa Draft.

3.5 Women's contributions and position

As was briefly mentioned in the introduction to this chapter, there is a lack of reference to the negative gender stereotypes that influence women's position in society in the Preamble to the Maputo Protocol and the need for change in the traditional gender roles of women and men to achieve substantive equality. Critical to recognising negative gender stereotypes and changing traditional gender roles is the focus on, and recognition of, women's contributions in society, culturally, politically, within the family, and to development broadly. Paragraph 13 of the Preamble to CEDAW recognises the 'great contribution of women to the welfare of the family and to the development of society', 'the social significance of maternity and the role of both parents in the family and in the upbringing of children', and 'that the upbringing of children requires a sharing of responsibility between men and women and society as a whole'. Paragraph 14 further acknowledges the need for a 'change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'. While much of the focus of these provisions is on the family, they showcase states' commitment to the transformation of gender roles and stereotypes.

The Nouakchott Draft briefly references women's contributions in paragraph 8, noting that 'many people in Africa continue to perceive human and peoples' rights as being the exclusive preserve of men even though women play a fundamental role in peace and development in Africa'. As women play a fundamental role in all areas of life, the same paragraph, slightly revised, appeared as paragraph 9 in the Kigali Draft, indicating that 'many people in Africa continue to perceive human and peoples' rights as being the exclusive preserve of men despite the fact that women play a fundamental role in all spheres'. This paragraph did not feature in the Final Draft.

Therefore, the NGO Forum's commentary unsurprisingly provided several suggestions to strengthen the recognition of women's contribution, participation, and position in the Preamble. It suggested a new clause that would read, 'repudiating the inequality of the sexes wherever it exists, rejecting all notions and institutions of superiority and inferiority on the basis of sex, and affirming the equal humanity of men and women'.⁵² Such a clause, the NGO Forum suggested,⁵³ would mirror the language of the Preamble to the Universal Declaration, the African Charter,⁵⁴ CEDAW⁵⁵ and the Convention of Belém do Pará.⁵⁶ It further suggested a new paragraph that would recall that, 'discrimination against women is an obstacle to the participation of women in the political, social, economic and cultural life of their countries and constitutes an obstacle to development in the continent'.⁵⁷ The NGO Forum made the point that the Preamble to CEDAW recognises that 'discrimination against women ... is an obstacle to the participation of women ... in the political, social, economic and cultural life of their countries' and that the 'full and complete development of a country ... requires participation of women on equal terms with men in all fields'.⁵⁸ The NGO Forum furthermore pointed out to the drafters that all major international human rights conventions 'virtually universally' include preambular statements of substantive values that the instruments are set to further. It reiterated that a '[f]ailure to include any such statement would be a significant departure from the standard practice of other international

52 Comments by the NGO Forum (n 25) Preamble.

53 Comments by the NGO Forum (n 25) Preamble.

54 Preamble and art 2.

55 Preamble and arts 2 & 5(a).

56 Preamble and art 6.

57 Comments by the NGO Forum (n 25) Preamble.

58 CEDAW Preamble paras 7 & 12.

instruments'.⁵⁹ Notwithstanding these comments, none of these suggestions were included in the Addis Ababa Draft.

3.6 Harmful practices

As discussed in Chapter 1, and as referred to above, the text of the Maputo Protocol, including the Preamble, was affected by the merger between the Kigali Draft and the Draft OAU Convention on Harmful Practices. Thus, the Preamble includes two references to harmful practices: a direct reference in paragraph 12, in referring to the continual discrimination against African women and in a separate statement in paragraph 13. The Final Draft included a new clause which stated, 'that any practice that hinders or endangers the normal growth and affects the physical, emotional and psychological development of women and girls should be condemned and eliminated'. This stems from article 2 of the Draft OAU Convention on Harmful Practices, which stipulated that 'States Parties to this Convention condemn all practices which hinder or endanger the normal growth, and affect the physical, emotional and psychological development of women and girls'. The first meeting of ministers removed the reference to 'emotional' but left the rest of the statement intact.⁶⁰ This statement remained unchanged throughout the rest of the drafting process.⁶¹ It is interesting to note that the language in this paragraph was not aligned with the definition of harmful practices in article 1(g), defining 'harmful practices' to mean 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.

3.7 African values

The Final Draft effectively contained 11 paragraphs, while the Addis Ababa Draft contained 14 paragraphs. As discussed above, references to the AU Constitutive Act and NEPAD were added alongside a paragraph with reference to UN Security Council Resolution 1325. These additions recognised contemporary instruments of importance that were developed or adopted after the Final Draft was presented. Thus, the history and significance of these additions, even though not specifically mentioned in the drafting document, can be traced. However, one paragraph in the Preamble that cannot be traced is the reference to the recognition of the 'crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy'. As mentioned above, there is little reference in the Preamble to women's contributions and none to the important commitment to dismantle gendered stereotypes and traditional roles that do not support equality between women and men. However, a much-contested reference to 'African values' appears for the first time in the Addis Ababa Draft as paragraph 10. It is safe to assume that had this statement occurred in the Final Draft, it would have attracted much attention from the NGO Forum.

3.8 To ensure that the rights of women are protected

As also mentioned above, the Nouakchott and Kigali Drafts contained nine paragraphs each. The Final Draft added two paragraphs, one on harmful practices as referred to above, and one, final paragraph that affirmed the purpose of the Maputo Protocol to 'ensure that the rights of women are protected in order to enable them to enjoy fully all their human rights'. In the Addis Ababa Draft, the words 'promoted, realised and' was added before 'protected' to further elaborate on the state obligations in the Protocol. This paragraph, which is further addressed in the following section, constitutes an

59 Comments by the NGO Forum (n 25) Preamble.

60 Report of the Meeting of Experts (n 28) para 28.

61 The NGO Forum suggested the omission of 'and girls' in this paragraph but this suggestion was not incorporated. Comments by the NGO Forum (n 25) Preamble.

essential part of the objective and purpose of the Maputo Protocol, to ‘ensure’ the elimination of all forms of discrimination and harmful practices against women in Africa.

In conclusion, compared to the effort that went into drafting the different provisions of the Maputo Protocol, the drafting history reveals much less input into the Preamble. The Preamble to the Maputo Protocol follows the format of the African Charter and CEDAW to some extent, but, as indicated above, it also differs in some essential ways. While anchoring the Maputo Protocol in the legislative framework existing at the time, the Preamble to the Maputo Protocol lacks the essential statements about women’s roles and positions housed within the Preamble to CEDAW. Instead, it references African values, with reference to principles of equality, peace, freedom, dignity, justice, solidarity, and democracy. This arguably raises important questions as to the meaning of African values and, as is further discussed in Chapter 19, how to define a positive cultural context.⁶²

4 Content and concepts of the preambular paragraphs

The states parties to this Protocol,

4.1 Paragraph 1⁶³

CONSIDERING that article 66 of the African Charter on Human and Peoples’ Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the Assembly of Heads of State and Government of the Organization of African Unity meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples’ Rights to elaborate a Protocol on the Rights of Women in Africa.

The first paragraph refers to the creation of the Maputo Protocol as a protocol to the African Charter under article 66 of the African Charter. The consequences of the close relationship between the African Charter and the Maputo Protocol were discussed in detail in Chapter 1.⁶⁴ Thus, it suffices to conclude that placing this reference first in the Preamble frames and contextualises the Maputo Protocol as supplementing the procedures and rights in the African Charter.

Similar to the Preamble to the African Charter, paragraph 1 of the Preamble to the Maputo Protocol’s presents the OAU Assembly’s decision to create the Protocol stipulating the details of this decision.⁶⁵ However, the decision setting out the mandate to draft the African Charter explicitly calls on the Secretary-General of the OAU to ‘[o]rganise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an “African Charter on Human and Peoples’ Rights” providing *inter alia* for the establishment of bodies to promote and protect human and peoples’ rights’.⁶⁶ In contrast, Resolution 240 approved the Eighth Activity Report of the African Commission, which in turn refers to the seminar on the African Woman and the African Charter on

62 See A Johnson ‘Article 17’ in this volume.

63 The numbering of the paragraphs has been added for ease of reference and does not appear in the original text of the Maputo protocol. The same is true for the numbering of the paragraphs of the African Charter and CEDAW.

64 See A Rudman ‘Introduction’ sec 3 in this volume.

65 Paragraph 2 of the Preamble to the African Charter recalls ‘Decision 115 (XVI) of the Assembly of Heads of State and Government at its 16th ordinary session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a “preliminary draft on an African Charter on Human and Peoples’ Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples’ rights”’.

66 AGH/Dec115(XVI)Rev 1 1979 in C Heyns *Human rights law in Africa 1999* (2002) 127-128.

Human and Peoples' Rights.⁶⁷ Compared to the direct statement in the decision of the OAU Assembly to endorse the drafting of the African Charter, the actual decision to instruct the African Commission to start the process of drafting a protocol on African women's rights is less obvious.⁶⁸

4.2 Paragraph 2

CONSIDERING that article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The second paragraph cites verbatim the non-discrimination clause in article 2 of the African Charter referring to 'race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.

The African Commission has acknowledged that article 2 lays down a principle that is 'essential to the spirit of the African Charter' and that this principle is 'necessary in eradicating discrimination in all its guises' thus fittingly appearing in the Preamble to the Maputo Protocol.⁶⁹ The principle of non-discrimination in article 2, read together with the principles of equality before the law and the equal protection of the law under article 3 of the African Charter, are, according to the African Commission non-derogable and must be respected in 'all circumstances in order for *anyone* to enjoy all the other rights provided for under the African Charter'.⁷⁰

Although the reference to 'sex' in article 2, as in biological male or female sex, is commonly referenced as one of the points of origin of the drafting of the Maputo Protocol, 'sex' is not used to define womanhood in the Protocol where the broader reference to gender is applied. The term 'sex', referring to the different biological and physiological characteristics of males and females, is used twice in the Maputo Protocol, once in the Preamble and once in the definition of discrimination. While 'gender' is referenced seven times, two of which are located within the Preamble.

It is problematic that the terminology in the Preamble, the definition clauses defining 'women' and 'discrimination' and some of the substantive provisions do not correlate. However, as is further discussed below, the statement in the AU Constitutive Act, as referenced in the Preamble, to promote 'gender equality' point to an overarching approach to equality as gender equality, substantiating a diverse and inclusive approach to womanhood.⁷¹

Moreover, the reference to the non-exhaustive list of grounds in the Preamble supports the open-ended intersectional approach of the Protocol, where age and disability, as examples of 'other' grounds are protected. Thus, some of the prohibited grounds in article 2 are directly relevant to some of the more progressive rights in the Protocol. Article 24, for example, referring to 'poverty' and 'female headed households' is arguably linked with the reference to 'social origin' and 'fortune' in article 2 of the African Charter. The open-endedness in reference to 'other status' is also indicative of the statement in the last paragraph of the Preamble with reference to the protection of the right of women, meaning *all* women.

67 Resolution 240 (n 24). The seminar took place on 8 and 9 March 1995. Interoffice Memorandum, 17 May 2001, subject: draft additional protocol on the rights of women, Annex: Road Map of activities relating to the draft protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para 3. On file with the author.

68 See 3.1.

69 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit and Moore*) para 49.

70 *Purohit and Moore* (n 69) para 49. My emphasis.

71 See 4.8.

4.3 Paragraph 3

FURTHER CONSIDERING that article 18 of the African Charter on Human and Peoples' Rights calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions.

The references to article 18 of the African Charter in the third paragraph and not specifically to article 18(3) to which the text quoted in the Preamble refers is intriguing. In comparison, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (Protocol on the Rights of Older Persons) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities) contain specific references in their Preambles to article 18(4) of the African Charter referring to the rights of the aged and the disabled respectively.

Article 18 of the African Charter consists of four sub-articles, each with a different focus. Article 18(1) refers to the centrality of the family, which is appointed as the natural unit and basis of society. The state is thus obligated to protect the family and take care of its physical health and moral needs. In the same vein, article 18(2) expresses that the state has a duty to assist the family, which in turn is the custodian or morals and traditional values recognised by the community. The reference to 'traditional values' in this article and further in the Preamble is discussed below in relation to paragraph 10. The 'family', as is referred to in both as 18(1) and (2), is, as was discussed in Chapter 1, a contested space within which to protect women's rights.⁷² This is so because morals and traditional values created and re-created within the family setting often establish the stereotypes that enable gender-based discrimination and violence.

4.4 Paragraph 4

NOTING that articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter.

The fourth paragraph pays specific attention to articles 60⁷³ and 61⁷⁴ of the African Charter. In the context of the African Charter, article 60 enables the Commission to draw inspiration from international instruments on human and peoples' rights, while article 61 leaves the subject matter and sources of law open for interpretation. Article 61 stipulates that the Commission shall

take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and Peoples' Rights, customs

⁷² See A Rudman 'Introduction' sec 3.4 in this volume.

⁷³ Art 60 states that '[t]he Commission shall *draw inspiration* from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members' My emphasis.

⁷⁴ Art 61 states that '[t]he Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine'.

generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

The two articles are distinguishable from each other; the instruction in article 60 serves to instruct the Commission to draw inspiration from international human rights treaties beyond the Charter, while article 61 serves to indicate that the Commission may consider sources outside the human rights domain that can contribute towards the interpretation of the Charter.⁷⁵ Presented within the context of the Preamble, the references to articles 60 and 61 showcase the broad source material that inspired the drafting of the Maputo Protocol and links with the sources referenced in paragraphs 5, 6 and 11.

4.5 Paragraph 5

RECALLING that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights.

Paragraph 5 gives an indication as to how deeply the provisions of the Maputo Protocol are anchored in international law. It defines the scope in the broadest possible way by referring to 'women's rights' and drawing on the Vienna Declaration's conclusion that women's human rights are an inalienable, integral, and indivisible part of universal human rights.⁷⁶ The references to international instruments are specific, referencing the Universal Declaration, the ICCPR, the ICESCR, CEDAW, the Optional Protocol to CEDAW⁷⁷ and the African Children's Charter, thereby referring both to the global and regional levels. It also extends the scope to 'all other international and regional conventions and covenants relating to the rights of women'. As both 'convention' and 'covenant' refer to an international agreement, one of the terms is redundant. However, the extension of the scope to 'all other' treaties is important because it encompasses, for example, the Convention on the Political Rights of Women, the United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education, the Convention on the Nationality of Married Women, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, ILO Convention No 100 on Equal Remuneration,⁷⁸ ILO Convention No 111 on Discrimination (Employment and Occupation), ILO Convention No 156 on Workers with Family Responsibilities, ILO Convention No 183 on Maternity Protection, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. It further covers all AU agreements relevant to women's rights when the Maputo Protocol was adopted, for example, the African Charter on Democracy, Elections and Governance with its specific references to women and gender⁷⁹ and the African Youth Charter.⁸⁰

75 A Rudman 'The African Charter: just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights' (2021) 21 *African Human Rights Law Journal* 720.

76 Para 5.

77 Setting out the individual complaints mechanism under CEDAW.

78 During the drafting of the Protocol, the ILO suggested that the Preamble specifically mention ILO Convention 100 alternatively include a reference to ILO Conventions relevant to women workers. Interoffice memorandum Subject: Draft Additional Protocol for African Women to the African Human Rights Charter ES/WU/COL/JOI26.99 to which ILO Comments on the Draft additional Protocol for African Women to the African Human Rights Charter ref ILS/GEN/1, EAMAR/3-18 is annexed. On file with the author.

79 See T Mkali and A Rudman 'Article 9' sec 3.3 in this volume.

80 See arts 8, 9, 11, 12, 13, 15, 20, 22 & 23.

In relation to paragraph 5 of the Preamble, it is further of interest to reflect on the symmetry between its broad statement on the international legal context within which the Maputo Protocol should be understood and the extensive material jurisdiction of the African Court over ‘relevant human right treaties ratified by the states concerned’.⁸¹ This synergy is relatable as the Court Protocol was drafted and adopted before the Maputo Protocol. From this perspective, it is further essential to approach this collection of norms, mentioned both in the Preamble to the Maputo Protocol and the Court Protocol, in a manner that advances African women’s rights at the time. In the subject area of African women’s rights, the Maputo Protocol is *lex specialis* (a treaty governing a specific subject matter) and *lex posterior* (a later treaty) and should be preferentially applied in relation to women’s issues where a state is party to, for example, both to CEDAW and the Maputo Protocol. This is so because important aspects of the protection under the Maputo Protocol may be lost if such an approach is not favoured.⁸²

4.6 Paragraph 6

NOTING that women’s rights and women’s essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995.

There are a number of references to women’s role and participation in development in the Preamble and in the substantive rights that follow. Paragraph six focuses on women’s role in development, paragraph 8 refers to the full participation of women in development; article 2(1)(c) obligates states to integrate a gender perspective in their development plans, programmes and activities; article 9(1)(c) refers to women as ‘equal partners with men at all levels of development and implementation of state policies and development’; article 10(3) speaks about reducing states’ military spending in favour of spending on social development; and article 19 ultimately provides the right to sustainable development. Hence, development is at the forefront of the Maputo Protocol.

As a point of origin, the reference to the four world conferences on human rights that took place in the early to mid-1990s creates an important backdrop to the right to development in the Maputo Protocol. The Protocol was conceived against the background of an evolving human rights standard-setting at the UN, focusing at the time on big plans for historical challenges: environmental degradation – and the need for sustainable development; cultural relativity – and the need for a universal understanding of human rights; population growth – and the need for safe access to sexual and reproductive health; and the massive onset of poverty – and the need for people-centred development.

The first of the world conferences mentioned in paragraph 6 is the United Nations Conference on Environment and Development, also known as the ‘Earth Summit’.⁸³ The Earth Summit focused on the impact of human socio-economic activities on the environment. The main achievement of the Earth Summit was the creation of the United Nations Plans of Action on the Environment and Development.⁸⁴ Women’s role and participation feature specifically in section 24 of this plan of action, titled ‘Global action for women towards sustainable and equitable development’.

81 Article 3(1) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Court Protocol).

82 See eg *Association Pour Le Progrès et la Défense des droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* (merits) (2018) 2 AfCLR 380.

83 Held in Rio de Janeiro, Brazil, in June 1992.

84 The aim of the Plans of Action on the Environment and Development ‘Agenda 21’ was to achieve global sustainable development by the year 2000, with the ‘21’ in Agenda 21 referring to the original target of the 21st century. The ‘Earth Summit’ also brought forward the Rio Declaration, the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity and the Declaration on the principles of forest management.

The second world conference mentioned in paragraph 6 is the World Conference on Human Rights, as discussed in Chapter 1.⁸⁵ The main outcome was the Vienna Declaration which underlines the importance of the integration and full participation of women as both agents and beneficiaries in the development process.⁸⁶

The third world conference mentioned in paragraph 6 is the International Conference on Population and Development (ICPD).⁸⁷ The conference adopted the ICPD Programme of Action,⁸⁸ emphasising the integral linkages between population and development. The ICPD Programme of Action emphasised the fundamental role of women's interests in population matters and affirmed the concepts of sexual and reproductive health and reproductive rights.⁸⁹

The final world conference mentioned in paragraph 6 is the World Summit for Social Development, also known as the 'Social Summit'.⁹⁰ In the Copenhagen Declaration⁹¹ that resulted from this conference, states acknowledged that social and economic development could not be secured in a sustainable way without the full participation of women and that equality and equity between women and men is a priority for the international community and as such must be at the centre of economic and social development.⁹²

In conclusion, it is worth noting the problems that may arise in relation to the listing of so many programmatic initiatives whose relevance may be overtaken over time in an instrument which is expected to continue to apply in the long term.

4.7 Paragraph 7

RECALLING ALSO United Nations Security Council's Resolution 1325 (2000) on the role of Women in promoting peace and security.

The UN Security Council adopted its first resolution focusing specifically on women and peace and security in October 2000. UN Security Council Resolution 1325 affirms the important role of women in preventing and resolving conflicts, peace negotiations, peacebuilding, peacekeeping, humanitarian response and in post-conflict reconstruction. It furthermore stresses the importance of women's equal participation and full involvement in all efforts to maintain and promote peace and security as a key objective of the UN. Importantly for the development of the Maputo Protocol, UN Security Council Resolution 1325 urges states to increase the participation of women and incorporate gender perspectives in all peace and security efforts. It also calls on states to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, in situations of armed conflict. The influence of UN Security Council Resolution 1325 is visible in the

85 Held in Vienna, Austria, in June 1993. See further A Rudman 'Introduction' sec 2.2 in this volume.

86 Para 36.

87 Held in Cairo, Egypt, in September 1994.

88 United Nations Population Fund (UNFPA), Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, 1995, A/CONF.171/13/Rev.1 (ICPD Programme of Action). The ICPD Programme of Action built upon the World Population Plan of Action, adopted at the World Population Conference held in Bucharest in 1974, and the recommendations adopted at the International Conference on Population, held in Mexico City in 1984. It also built on the outcomes of the World Summit for Children (1990), the Earth Summit (1992), and the World Conference on Human Rights (1993).

89 See eg ICPD Programme of Action (n 88) para 4.25 objectives.

90 Held in Copenhagen, Denmark in March 1995.

91 United Nations World Summit for Social Development, Copenhagen Declaration on Social Development A/CONF.166/9 Annex I, 14 March 1995.

92 Copenhagen Declaration (n 91) para 7.

two unique provisions on the right to peace and the protection of women in armed conflict in articles 10 and 11 of the Maputo Protocol, respectively.⁹³

4.8 Paragraph 8

REAFFIRMING the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development.

The eighth paragraph of the Preamble to the Maputo Protocol features two different interlinked perspectives: the reiteration of the principle of gender equality at the highest institutional level and commitment to the full participation of women in development, which is also the focus of paragraph six.

The OAU Charter did not contain any reference to women's rights or gender equality but focused mainly on the equality of states, sovereignty, and territorial integrity. The reference to the promotion of gender equality as a foundational principle of the AU, together with the pledge to promote and protect human and peoples' rights, ultimately changed the operational framework of the AU. The reference in the Preamble to the Maputo Protocol to the AU Constitutive Act thus creates symmetry between these two treaties. From the perspective of the Maputo Protocol, it confirms the institutional recognition of the key principle of the Maputo Protocol: that is, gender equality, and from the perspective of the AU Constitutive Act it brings the Maputo Protocol within the realm of article 3(h) to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.⁹⁴

The latter perspective, women's participation in development, is closely related to the outcomes of the Earth and Social Summits and features in a multitude of ways in the operative part of the Protocol as mentioned above. Paragraph 8 specifically references NEPAD.⁹⁵ The objectives of NEPAD are to reduce poverty, put Africa on a sustainable development path, halt the marginalisation of Africa, and to empower women. In terms of declarations, resolutions and decisions relevant in this context, the UN Declaration of the Right to Development,⁹⁶ especially article 8 referring to the implementation of '[e]ffective measures ... to ensure that women have an active role in the development process', has specific reference. Other initiatives such as the Nairobi Forward-looking Strategies,⁹⁷ the Abuja Declaration on Women in Development⁹⁸ and the Kampala Action Plan on Women and Peace,⁹⁹ are also of relevance.

93 Resolutions of the UN Security Council are binding on UN member states under art 25 of the UN Charter. For further discussion see A Budoo-Scholtz 'Article 10' and TM Makunya & JM Abelungu 'Article 11' in this volume.

94 My emphasis.

95 Adopted by African Heads of State and Government of the OAU in 2001 and ratified by the AU in 2002.

96 Declaration on the Right to Development Adopted by General Assembly resolution 41/128, 4 December 1986.

97 Report of the world conference to review and appraise the achievements of the United Nations decade for women: equality, development and peace, Nairobi, Kenya, 15-26 July 1985. United Nations, New York, 1986.

98 Regional Conference on the Integration of Women in Development and on the Implementation of the Arusha Strategies for the Advancement of Women in Africa, Abuja, Federal Capital Territory, Nigeria, 1989.

99 The Regional Conference on Women, Peace and Development Kampala, Uganda 22-25 November 1993. Adopted by the Economic and Social Council, Economic Commission for Africa E/ECA/ATRCW/ARCC.XV/94/7 April 1994.

4.9 Paragraph 9

FURTHER NOTING that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women.

As mentioned in Chapter 1, the Fifth African Regional Conference on Women was held in Dakar in November 1994 in preparation for the Fourth World Conference on Women. The conference adopted the Dakar Platform,¹⁰⁰ a synthesis of regional perspectives and priorities as well as a framework for action for the formulation of policies and implementation of concrete and sustainable programs for the advancement of African women. The Dakar Platform was developed in consonance with the Nairobi Forward-looking Strategies, the Abuja Declaration and the Kampala Action Plan. The Fourth World Conference on Women was then held, which resulted in the Beijing Platform. The Beijing Platform covers 12 critical areas of concern regarding women's rights, most of which are featured in the Maputo Protocol.¹⁰¹

Importantly, paragraph 9 reiterates the main object and purpose of the Maputo Protocol, to eliminate all forms of discrimination and specifically brings the elimination of gender-based violence into the framework of the Preamble as a main objective alongside the elimination of gender-based discrimination and harmful practices.

4.10 Paragraph 10

RECOGNISING the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy.

As mentioned, under the drafting history, paragraph 10 was inserted at the very end of the drafting process. It is one of three paragraphs that acknowledges the role of women in different fields. As mentioned with regard to the previous paragraphs, the UN Security Council recognises the role of women in peace-making through Resolution 1325 and the Dakar and Beijing Platforms, alongside the references to the four world conferences, recognises women's role in development. Paragraph 10 adds to this by acknowledging women's agency or function in preserving African values.

The reference to 'African values' in the Preamble must be viewed in the context of the many different references to 'values' in the African Charter. The Preamble to the African Charter stipulates that states should consider the 'virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights'. Article 17 of the African Charter establishes that states are obligated to 'promote and protect the morals and traditional values recognized by the community'; article 18(2) appoints the family as the custodian of morals and traditional values recognized by the community; and article 29(7) spells out that it is the duty of every individual to 'preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society'.

100 African Platform for Action: African common position for the advancement of women E/ECA/CM/21/RES/802(XXX) Adopted at the 296th meeting, 3 May 1995 Economic Commission for Africa.

101 These are (1) women and poverty; (2) education and training of women; (3) women and health; (4) violence against women; (5) women and armed conflict; (6) women and the economy; (7) women in power and decision-making; (8) institutional mechanisms; (9) human rights of women; (10) women and media; (11) women and the environment; and (12) the girl child.

The Preamble to the Maputo Protocol picks up on the principle of positive culture in article 29(7) of the Charter, and this concept is then revisited in article 17 of the Maputo Protocol. However, as was discussed in Chapter 1 the concept and reference to ‘values’ or ‘African values’ are contested issues as some stereotypical values exist as an expression of tradition, culture or religion which discriminate against women.¹⁰² Much of such discrimination, including harmful practices and gender-based violence takes place within an intimate family or community setting.

In the Preamble, it is clear that African culture is to be interpreted and understood based on the principles of equality, peace, freedom, dignity, justice, solidarity, and democracy, which points to a positive cultural expression. The problem with this reference is not so much the reference to such positive culture *per se*, even though this concept largely remains undefined in the Protocol, but rather the lack of recognition, as was presented above, of the less favourable position of women in society and the acknowledgement of their contributions to breaking stereotypical perceptions of women’s capacity. Moreover, appointing women in this role without enabling them to play it actively and successfully is problematic. It should also be noted that ‘African values’ was used by the AU Executive Council in 2015 as a ground to request the African Commission to withdraw the observer status before the Africa Commission of the Coalition of African Lesbians and again in 2022 to deny three other NGOs observer status, an interpretation of ‘African values’ which clearly and without substance in law, limits the reach of the protection of the Maputo Protocol.¹⁰³

4.11 Paragraph 11

BEARING IN MIND related Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between women and men.

As mentioned above, the Preamble to the Maputo Protocol contains two paragraphs – 5 and 11 – that focus on treaty law and other international instruments. These are distinguishable from one another by the scope of international law referred to in each paragraph. Paragraph 5, as discussed above, refers to the broader scope of instruments ‘relating to the rights of women’; while paragraph 11, as is further discussed here, refers to instruments aimed at ‘eliminating all forms of discrimination and at promoting equality between women and men’. Arguably, a convention relating to the rights of women, as referred to in paragraph 5, is also aiming, in one way or another, to eliminate all forms of discrimination and to promote equality between women and men, as referred to in paragraph 11, thus creating some overlap. Moreover, while paragraphs 5 and 11 both refer to international and regional conventions, paragraph 11 also includes sub-regional instruments.

Paragraph 11 introduces the reference to regional and sub-regional soft law into the Preamble. The references in paragraph 11 are similar to those of paragraph 5 of the Preamble to CEDAW, which reference ‘resolutions, declarations and recommendations adopted by the United Nations and the

102 See A Rudman ‘Introduction’ sec 3.4 in this volume.

103 Decision of the AU Executive Council on the 38th Activity Report of the African Commission, EX.CL/Dec.887 (XXVII) para 7, in EX.CL/Dec.873-897(XXVII), 27th ordinary session 7-12 June 2015, Johannesburg South Africa. AU Executive Council, at its 2015 meeting the AU Executive Council requested the African Commission to ‘take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values’. In the Final Communiqué of its 73rd ordinary session held in Banjul, The Gambia, from 20 October to 9 November 2022, the African Commission further stated that it rejected the applications for observer status of Alternative Côte d’Ivoire, Human Rights First Rwanda, and Synergía – Initiatives for Human Rights, on the ground that ‘sexual orientation is not an expressly recognized right or freedom under the African Charter’ and is ‘contrary to the virtues of African values’. For further discussion on the Coalition of African Lesbians see A Rudman ‘“Recognition” by the African Union as a locus standi requirement in advisory opinions before the African Court: An analysis of NGOs’ access to justice under the African regional human rights system’ (2021) 35 *Speculum Juris: Special Issue on African Courts and Contemporary Constitutional Developments* 11-12.

specialized agencies'. The Preamble to CEDAW uses the word 'consider' with regard to the binding instruments referred to in its paragraph 4 and 'noted' with regard to the soft law referred to in paragraph 5 creating a hierarchy between hard and soft law. The Preamble to the Maputo Protocol does not create such a hierarchy as 'recalling' the conventions and 'bearing in mind' the soft law instruments arguably carry the same weight and meaning. Soft-law instruments of relevance existing at the conception of the Maputo Protocol are, for example, SADC Declaration on Gender and Development, the Maseru Declaration on the fight against HIV and Aids¹⁰⁴ and the Economic Community of West African States Declaration on the fight against trafficking in persons.¹⁰⁵

4.12 Paragraph 12

CONCERNED that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.

Similar to paragraph 6 of the Preamble to CEDAW, paragraph 12 of the Preamble to the Maputo Protocol turns from the normative background in paragraphs 5 and 11 to the reality that discrimination against women continues across the continent. Paragraph 12 focuses on the prevailing challenges that existed (and arguably continue to exist), although at the time the Maputo Protocol was adopted, all AU members except Morocco (that had withdrawn from the OAU in 1984) had ratified the African Charter. In fact, only Ethiopia, Eritrea and Eswatini had yet to ratify the African Charter when the Lomé Seminar took place in 1995.¹⁰⁶

It is interesting to note the difference in wording between the Preambles to CEDAW and the Maputo Protocol, where paragraph 6 of the Preamble to CEDAW refers to the 'extensive discrimination against women [that] continues to exist' while paragraph 12 of the Preamble to the Maputo Protocol simply indicates that 'women in Africa still continue to be victims of discrimination and harmful practices'. The statement in CEDAW arguably implies that discrimination against women is widespread and far-reaching. Nonetheless, underscoring the continuation of discrimination against women despite the various instruments alluded to in the earlier paragraphs justifies the adoption of the Maputo Protocol aimed at eliminating discrimination against women in all fields. Compared to CEDAW, this paragraph also makes an important addition in that it refers to 'discrimination *and* harmful practices'.¹⁰⁷

As mentioned above with regard to the drafting history, this paragraph was part of the Preamble from the Nouakchott Draft and onwards and attracted very little discussion. This is contrary to the drafting of paragraph 6 of the Preamble to CEDAW, where a number of States opposed the inclusion of this paragraph. Some states argued in favour of restricting the broad geographic scope through alternative wording such as 'in a number of regions' or 'in parts of the world', while others bolstered the idea that they had already successfully eliminated discrimination against women.¹⁰⁸ The unrestricted wording that was finally adopted in CEDAW and which is also similarly referred to in the reference to 'Africa' in the Preamble to the Maputo Protocol is an important reminder that no state or society is free

104 4 July 2003.

105 25th Ordinary session of Authority of Heads of State and Government Dakar, 20-21 December 2001.

106 Eswatini deposited its document of ratification on 9 October 1995; Ethiopia deposited its document of ratification on 22 June 1998; and Eritrea deposited its document of ratification on 15 March 1999.

107 My emphasis.

108 LA Rehof *Guide to the travaux préparatoires of the UN Convention on the Elimination of All Forms of Discrimination against Women* (1993) 36.

from gender-based discrimination.¹⁰⁹ This message has been repeated in, for example, the Preamble to the Niamey Guidelines, which states that ‘sexual violence remains widespread throughout Africa, in peacetime as well as in wartime, in public and in private’.¹¹⁰

4.13 Paragraph 13

FIRMLY CONVINCED that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated.

As established under the drafting history above, this paragraph stems from article 2 of the Draft OAU Convention on Harmful Practices urging states to ‘condemn all practices which hinder or endanger the normal growth, and affect the physical, emotional and psychological development of women and girls’. The fact that the terminology was not harmonised throughout the Protocol was briefly highlighted above. The reference to ‘harmful practices’ in the previous paragraph and the provision of a much more comprehensive definition in article 1(g) of the Protocol is curious. The reference in the Preamble arguably focuses on a more limited understanding of practices harmful to women, concentrating on physical alterations such as FGM and force-feeding while leaving out other behaviour, attitudes and practices which negatively affect the fundamental rights of women, such as child marriage, widowhood practices and witchcraft.¹¹¹ It is also important to note the use of ‘should be’ instead of ‘must be’ in paragraph 13. The word ‘should’ is generally used in relation to obligations that states consider optimal for the concerned subject but not compulsory. The word ‘must’ is generally used for obligations that are considered compulsory. It is, however, important to acknowledge that this reference, read together with the reference to ‘harmful practices’ in the previous paragraph, is important in determining the object and purpose of the Protocol. There is no equivalent reference to harmful practices in the Preamble to CEDAW.

4.14 Paragraph 14

DETERMINED to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights.

The final paragraph of the Preamble speaks to the comprehensive state obligations that are established through the operative provisions of the Maputo Protocol. Using the word ‘ensure’ to guarantee women’s rights indicates the far-reaching obligations that states undertake once they ratify the Protocol. By becoming parties to the Maputo Protocol, States assume four tiers of obligations and duties: the duty to respect, protect, promote, and fulfil these rights.¹¹² As stipulated by the African Commission, these obligations apply universally to all human rights and entail a combination of negative and positive duties. Each layer of obligation is equally relevant to the substantive right in question.¹¹³

109 See eg UN HRC Res 15/23 (8 October 2010) UN Doc A/HRC/RES/15/23 where the Human Rights Council states that it is ‘[d]eeply concerned by the fact that women everywhere are still subject to significant disadvantage as the result of discriminatory laws and practices and that de jure and de facto equality has not been achieved in any country in the world’.

110 African Commission on Human and Peoples’ Rights Guidelines on Combating Sexual Violence and its Consequences in Africa adopted during its 60th ordinary session held in Niamey, Niger from 8-22 May 2017 (Niamey Guidelines) Preamble.

111 See S Nabaneh ‘Article 5’ in this volume.

112 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 44-46.

113 *SERAC* (n 112) para 44.

5 Conclusion

With an article specifically dedicated to definitions – article 1 – and more than 20 comprehensive provisions following these definitions, the Preamble to the Maputo Protocol will arguably have a limited role to play in the process of interpreting the Protocol. However, questions relating to the definition of ‘women’ and the protection of ‘other’ intersectional grounds, such as sexual orientation and gender identity or expression, are bound to arise as they have in the international system and in other regional human rights systems.¹¹⁴ It is at such times that the Preamble may become critical.

Regardless of what questions may arise, the object and purpose of the Maputo Protocol, which guide the interpretation of the Protocol, is clearly set out in the Preamble: to eliminate *all* forms of discrimination and harmful practices against *all* women, including gender-based violence, and to promote women’s role in development and peace-making. This object and purpose is firmly anchored in the universality of human rights and the dignity of all women. Understood within the context of the four tiers of state obligations referred to in the Preamble, this creates the framework within which any interpretation of the text, context and object and purpose of the Maputo Protocol must take place.

114 See eg *Toonen v Australia* UN Doc CCPR/C/50/D/488/1992 (1994), *Karen Atala and Daughters v Chile* IACHR (23 July 2008) Ser L/Doc 22 Rev 1; *ADT v The United Kingdom* (App No 35765/97) (2000) 31 EHRR 803; *Alekseyev v Russia* (App Nos 4916/07, 25924/08 and 14599/09) (2010); *C and LM v UK* (App 14753/89) unpublished, *Cossey v UK* (App No 10843/84) (1990) 13 EHRR 622; *Dudgeon v The United Kingdom* (App No 7525/76) (1982) 4 EHRR 149; *EB v France* (App No 43546/02) (2008) 47 EHRR 509; *Fretté v France* (App No 3651/97) (2002) 38 EHRR 438; *Gas and Dubois v France* (App No 25952/07) (2010) ECHR 444; *Goodwin v UK* (App No 28957/95) (2002) 35 EHRR 18; *Hämäläinen v Finland* (App No 37359/09) (2014) ECHR 877; *Handyside v The United Kingdom* (App No 5493/72) (7 December 1976); *I v UK* (App No 25680/94) (2003) 36 EHRR 53; *Karlheinz Schmidt v Germany* (Judgment of 18 July 1994) Series A No 291-B; *Karner v Austria* (App No 40016/98) (2003) 38 EHRR 24; *Kozak v Poland* (App No 13102/02) (2010) 51 EHRR 16; *L and V Austria* (App Nos 39392/98 & 39829/98) (2003) 36 EHRR 55; *Lustig-Prean and Beckett v The United Kingdom* (App Nos 31417/96 and 32377/96) (2000) 29 ECHR 548; *Marckx v Belgium* (App No 6833/74) (1979) 2 EHRR 330; *Modinos v Cyprus* (App No 15070/89) (1993) 16 EHRR 485; *Mugenzi v France* (App No 52701/09) (2014) ECHR 752; *Neulinger and Shuruk v Switzerland* (App No 41615/07) (2010) ECHR 1053; *Norris v Ireland* (App No 10581/83) (1988) 13 EHRR 186; *PB and JS v Austria* (App No 18984/02) (2012) 55 EHRR 31; *Popov v France* (App 39470/07) (2012) ECHR 2070; *Rees v UK* (App No 9532/81) (1986) 9 EHRR 56; *S v UK* (App 11716/85) 47 DR 274; *Salguiero Da Silva Mouta v Portugal* (App No 33290/96) (2001) 31 EHRR 47; *Schalk and Kopf v Austria* (App No 30141/04) (2011) 53 EHRR 20; *Sheffield and Horsham v the United Kingdom* (App No 23390/94) (1999) 27 EHRR 163; *Smith and Grady v The United Kingdom* (App Nos 33985/96 and 33986/96) (1999) 29 EHRR 493; *Tyrer v UK* (App No 5856/72) (25 April 1978) 2 EHRR 1 xxi; *Vallianatos v Greece* (App Nos 29381/09 and 32684/09) (2014) 59 EHRR 12; *WB v Federal Republic of Germany* (App No 104/55) (1955); *X v Austria* (App No 19010/07) (2013) ECHR 425; *X and Y v UK* (App No 9368/81) 32 DR 220; *X, Y and Z v The United Kingdom* (App No 21830/93) (1997) 24 EHRR 1071; and *Yousef v The Netherlands* (App No 33711/96) (2002) ECHR 716. See also Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, Inter-American Court on Human Rights (2017), OC-24/17.

Article 1

Definitions

Mariam Kamunyu

For the purpose of the present Protocol:

- (a) 'African Charter' means the African Charter on Human and Peoples' Rights;
- (b) 'African Commission' means the African Commission on Human and Peoples' Rights;
- (c) 'Assembly' means the Assembly of Heads of State and Government of the African Union;
- (d) 'AU' means the African Union;
- (e) 'Constitutive Act' means the Constitutive Act of the African Union;
- (f) 'Discrimination against women' means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;
- (g) 'Harmful Practices' means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity;
- (h) 'NEPAD' means the New Partnership for Africa's Development established by the Assembly;
- (i) 'States Parties' means the States Parties to this Protocol;
- (j) 'Violence against women' means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war;
- (k) 'Women' means persons of female gender, including girls.

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1 Introduction

The evolution of women's rights in Africa is discernible through a number of developments. Undeniably, the most significant is the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in 2003. Hailed as a new dawn, the Maputo Protocol presents the key qualities of a human rights treaty while adding innovative scope to the human rights protection of women and girls. Article 1, the definitions clause of the Protocol,

introduces the key institutions and norms central to promoting and protecting women's rights in Africa. These definitions are the focus of this chapter.

A definition assigns meaning, gives clarity, and elucidates the scope of a term. A review of various drafts of the Maputo Protocol reveals that the definitions in article 1 underwent revision similar to other substantive provisions of the Protocol. This detail demonstrates that the final meanings arrived at are the subject of careful consideration and intentionality on the part of the drafters.

Article 1 of the Maputo Protocol provides a list of terms that ranges from those expounding on acronyms and short titles, such as 'AU' and 'NEPAD', to those whose definitions are linked to substantive rights in the Protocol, such as 'discrimination against women' (article 2), 'harmful practices' (article 5) and 'violence against women' (article 4).

Definition articles are a common feature of international human rights treaties with varying approaches. Some treaties, like the Maputo Protocol, include a broad definitions section; others define one or a few terms, while others, such as the African Charter on Human and Peoples' Rights (African Charter), exclude a definitions section altogether. The comparable United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) only defines the term 'discrimination against women'.¹ The United Nations Convention on the Rights of the Child (CRC),² as well as its counterpart, the African Charter on the Rights and Welfare of the Child (African Children's Charter),³ define the term 'child' only. These brief definition sections are perhaps a marker from older treaties as all the foregoing were drafted at least a decade, or two in the case of CEDAW, before the Maputo Protocol.

By and large, relatively newer treaties feature longer definitions sections.⁴ For example, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities) defines 20 terms with at least five being substantive.⁵ In Africa, the three latest additions to the African human rights treaty framework mirror the comprehensive substantive nature of the definitions section found in the Maputo Protocol. The most recent of these instruments is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security (Protocol on Social Security) which includes 18 terms in its definitions article.⁶ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons) contains 15 terms in its definitions article,⁷ some of which mirror the terms in the Maputo Protocol, such as those referring to AU organs. The Protocol on the Rights of Persons with Disabilities contains the longest definitions section yet with 20 terms, many of them substantive in nature.⁸ These three latter Protocols

1 Article 1.

2 Article 1.

3 Article 2.

4 A notable exception is the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which featured an extensive definition of the term 'refugee'.

5 Article 2.

6 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security, art 1. These terms include African Charter, African Commission, African Court, Assembly, AU, Citizen, Commission, Constitutive Act, Family, Informal Economy, Kafala system, member states, minimum package, social assistance, social insurance, social protection, social security and state parties.

7 Article 1. These terms include: African Charter, African Commission, ageing, Assembly, AU, Commission, Constitutive Act, harmful traditional practices, ICT, member states, older persons, residential care, states parties, the Advisory Council on Ageing and the words aged, seniors, senior citizens and the elderly which have the same meaning as older persons.

8 Article 1. These terms include African Charter, African Commission, African Court, Assembly, AU, Commission, deaf culture, discrimination on the basis of disability, habitation, harmful practices, legal capacity, persons with disabilities, Protocol, reasonable accommodation, rehabilitation, ritual killings, situations of risks, states parties, universal design and

and the Maputo Protocol reveal a contemporary drafting approach, where the definitions sections increasingly feature deeper substantive forays.

This chapter aims to unpack article 1 of the Maputo Protocol comprehensively and is organised into 7 sections. Section 2 explores the drafting history of article 1. Section 3 discusses the terms related to normative instruments and select organs of the African Union (AU). The terms ‘AU’, ‘Constitutive Act’ and ‘Assembly’ are discussed jointly because of their interrelatedness, particularly in practice. This discussion proceeds predominantly through an analysis of the direct and indirect implications of these organs’ mandate and practice for the Maputo Protocol in particular and women’s rights protection generally. Section 4 defines the term ‘states parties’, while section 5 discusses the definition of ‘women’ with specific reference to the use of ‘gender’ instead of ‘sex’ in this provision. Section 6 explores the definition of terms related to other substantive rights in the Protocol, that is, ‘discrimination against women’, ‘harmful practices’ and ‘violence against women’. Section 7 concludes the chapter.

2 Drafting history

A definitions section can be traced to the very first draft of the Maputo Protocol, the Nouakchott Draft.⁹ The section was brief, defining only the term ‘discrimination against women’ as being in conformity with the African Charter and as

any distinction, exclusion or restriction based on sex whose effects compromise or destroy the recognition, enjoyment or the exercise by women – regardless of their matrimonial status – on an equal basis with men, of human rights and fundamental freedoms.¹⁰

In the following draft, the Kigali Draft¹¹ retained the definition of only the term ‘discrimination against women’ while modifying parts of the text. In this draft, the definition included the phrase, ‘For the purposes of this present Additional Protocol, and in conformity with articles 2 and 18 of the African Charter on Human and Peoples’ Rights.’¹² Articles 2 and 18 are the Charter’s non-discrimination clauses, and this point reiterates the drafters’ intention to complement and expand the Charter’s normative landscape. In addition, this draft expanded the idea of discrimination to include difference wherein the definition of ‘discrimination against women’ then read as ‘any distinction, exclusion or restriction based on sex or any *differential treatment*’.¹³

In the intervening period before the next draft was developed, a parallel process emerged,¹⁴ the development of an Organisation of African Unity (OAU) Convention on the Elimination of All Forms of Harmful Practices Affecting the Fundamental Human Rights of Women and Girls.¹⁵ The Draft Convention on Harmful Practices defined ‘harmful practices’ in article 1 as follows: ‘harmful practices’

youth.

9 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples’ Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

10 Nouakchott Draft (n 9) art 1.

11 Draft Protocol to the African Charter on Women’s Rights, 26th ordinary session of the African Commission on Human and Peoples’ Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

12 Kigali Draft (n 11) art 1.

13 Kigali Draft (n 11) art 1. My emphasis.

14 Organisation of African Unity Interoffice Memorandum, Meeting on Draft Protocol on the Rights of Women in Africa, 20 July 2000, CAB/LEG/117.141/62/Vol.I.

15 Draft OAU Convention on the Elimination of All Forms of Harmful Practices (HPs) Affecting the Fundamental Human Rights of Women and Girls as transmitted to the OAU by the Inter-African Committee (IAC) on Traditional Practices on 9 May 2000 (Draft Convention on Harmful Practices). The draft OAU Convention in art 1 defined harmful practices as follows: ‘harmful practices’ shall mean all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health and bodily integrity.

shall mean all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health and bodily integrity. As discussed in chapter 1, the Draft Convention on Harmful Practices was relinquished in favour of a merger with the Kigali Draft.¹⁶ However, it clearly influenced the current formulation of the definition of ‘harmful practices’. The rights to education and dignity in the current formulation were added following an expert meeting on drafting the Maputo Protocol.¹⁷

The following draft of the Maputo Protocol, the Final Draft,¹⁸ featured an expanded definitions section that included nine terms, including the African Charter, African Commission, assembly, discrimination against women, harmful practices, OAU, states parties, violence against women, and women.¹⁹ In the Final Draft, in defining women, the phrase ‘means persons of female gender, including ...’ had been earmarked for deletion,²⁰ but this amendment did not succeed since subsequent drafts contain the current phrasing.

The Final Draft was reviewed at the Meeting of Experts in 2001,²¹ where the definitions section was adopted without amendment of sub-clauses (a) to (d) with some minor editorial amendments to some terms. The most significant changes were the agreement that the term women would include girls; and the amendment of harmful practices to include the ‘right to education’ and the ‘right to dignity’ as part of the rights that are negatively affected by harmful practices.²² A second Meeting of Experts in 2003 informed the text of the Addis Ababa Draft.²³ This version was the final one and matched the current text of article 1.

3 Concepts and definitions

This section considers the definition of terms related to normative instruments and selects organs of the AU, and where terms are closely related, their discussion is fused. These terms have a broad scope in meaning and they are explored here only in light of their implications for or relationship with the Maputo Protocol.

16 As illustrated in correspondence between the African Union's Office of the Legal Counsel to the Secretary of the African Commission on Human and Peoples' Rights on 17 May 2000 and the Inter-African Committee (IAC) on Traditional Practices to the Organisation of African Unity on 9 May 2000.

17 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

18 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

19 Final Draft (n 18) art 1(a)-(i).

20 Final Draft (n 18) art 1(i).

21 Report of the Meeting of Experts (n 17).

22 Report of the Meeting of Experts (n 17).

23 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

3.1 African Charter

Article 1(a) of the Maputo Protocol provides that the ‘African Charter’ means the African Charter on Human and Peoples’ Rights. The African Charter is the continent’s main human rights treaty and, as discussed in chapter 1, the Protocol’s parent treaty. From a women’s rights perspective, the African Charter lacks strong women’s rights protections and has been criticised for perpetuating a narrative of male dominance and female subordination in its exclusive use of male pronouns and terms like chairman.²⁴ In fact, apart from its non-discrimination and equality before the law clauses,²⁵ the Charter only has one women’s right-centric provision in article 18(3), which provides:²⁶

The [s]tate shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

This provision is important since it supplements the African Charter’s realm of women’s rights protection with protection in other treaties such as CEDAW and the Maputo Protocol. Article 18(3), singularly or as read together with articles 60 and 61 of the African Charter, codifies and provides a strong basis for normative complementarity between the African Charter and other international human rights treaties such as the Maputo Protocol. Articles 60 and 61 of the African Charter, as discussed in chapter 2 of this commentary, require the Commission to draw inspiration from international human rights law instruments and principles.

In interpreting article 18(3), the Commission can rely on the Maputo Protocol to extend the normative scope and content of women’s rights or utilise the Protocol as an interpretive guide. Accordingly, the African Commission has adopted the view that the Charter permits it to draw inspiration from other sources of international human rights law in the execution of its mandate and functions as is illustrative through its jurisprudence.²⁷ This inspirational scope includes the ability of the Commission to reach a violation of a provision of the African Charter on the basis of the disregard of a provision in another treaty ratified by the state in question.²⁸ In regard to the Maputo Protocol, in particular, the African Commission has affirmed its competence to interpret article 18(3) of the Charter, as read together with the Maputo Protocol.²⁹ This complementarity extends the normative scope of the African Charter and expands the realm of women’s rights protection.

Nevertheless, the African Charter as a whole proved too vague to protect the rights of African women, leading to the clamour for the development of the Protocol. Women’s rights advocates were discontented that the Charter had a single woman-specific clause, which had been located under the umbrella of family rights.³⁰ As discussed in chapter 1, the Preamble to the Maputo Protocol reflects this sentiment as it recalls various instruments and agreements designed to eliminate discrimination but expresses concern that despite these commitments, women in Africa were still victims of discrimination

24 F Viljoen *International human rights law in Africa* (2012) 251-252.

25 African Charter arts 2 & 3.

26 African Charter art 18(3).

27 See eg *Luke Munyandu Tembani & Benjamin John Freeth v Angola*, Communication 409/12, African Commission on Human and Peoples’ Rights para 131; *Institute for Human Rights and Development in Africa v Angola*, Communication 292/04, ACHPR para 46; *Spilg and Mack & Ditshwanelo v Botswana*, Communication 277/03, ACHPR paras 166 & 203; *Tsatsu Tsikata v Ghana*, Communication 322/06, ACHPR para 32.

28 See eg *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) para 87 where the Commission found the violation of art 22 of the African Charter on the basis of the disregard of art 34 of the First Protocol to the Geneva Conventions of 1949.

29 See *Organisation Mondiale Contre la Torture et Ligue de la Zone Afrique pour la Défense des Droits des Enfants et Elèves (pour le compte de Céline) c. République du Congo*, Communication 325/06, ACHPR para 83.

30 R Mayanja ‘The Protocol on the Rights of Women in Africa’ in AA Yusuf & F Ougergouz (eds) *The African Union: legal and institutional framework: a manual on the Pan-African organization* (2012) 458.

and harmful practices.³¹ The Maputo Protocol, therefore, sets out to expand the African Charter's protection of women's rights.

The African Charter extends its implementation and monitoring environment to the Maputo Protocol. It establishes the African Commission on Human and Peoples' Rights, which monitors the implementation of both the African Charter and the Maputo Protocol. Article 26 of the Maputo Protocol illustrates this point by requiring states parties to submit periodic reports following article 62 of the African Charter.

3.2 African Commission

Article 1(b) of the Maputo Protocol identifies the 'African Commission on Human and Peoples' Rights' as the 'African Commission'. The African Commission is a quasi-judicial body with a dual protective and promotional human rights mandate.³² It enjoys a unique historical affiliation with the Maputo Protocol. As discussed in chapter 1, the *travaux préparatoires* reveal that the African Commission, together with women's rights organisations, played a dominant role in facilitating the drafting and adoption of the Maputo Protocol.³³

In reiteration, since the Maputo Protocol supplements the African Charter, it shares the Charter's implementation mechanism, the oversight of which falls primarily (but not exclusively) to the African Commission.³⁴ In practice, the African Commission's protective mandate is exercised predominantly through its individual communications procedure.³⁵ This procedure has been underutilised with regard to women's rights, as 35 years into its existence, it has only adjudicated to completion three women's rights cases, and the reasons for this dearth are varied.³⁶ One is the African Charter's admissibility requirement to exhaust local remedies, a requirement which poses a challenge for women who carry a disproportionate burden in accessing justice.³⁷ The Commission's general ineffectiveness in managing its individual communications procedure is a second reason. This has correspondingly had a bearing on the dearth of women's rights cases. These first two reasons are responsible for the growing trend and preference to approach other forums such as the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court), which does not require exhaustion of

31 Preamble paras 5-12.

32 African Charter (n 25) art 45.

33 'Background: Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 1. It provides: 'The African Commission set up a Working Group and in collaboration with the Secretariat and with inputs from other women NGOs and groups, set about preparing the Protocol'.

34 The oversight is not exclusive since the African human rights system consists of a network of complementary bodies and institutions that also oversee the interpretation of the African Charter such as the African Court on Human and Peoples' Rights. More recently, interpretation of the African Charter has also been undertaken successfully by sub-regional organs such as the ECOWAS Community Court of Justice.

35 African Charter (n 25) arts 55-58.

36 *Egyptian Initiative for Personal Rights & Interights v Egypt (Interights)* Communication 323/06, African Commission on Human and Peoples' Rights, Combined 32nd and 33rd Annual Activity Report (2013); *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples' Rights 57th Annual Activity Report (2016) and *Organisation Mondiale Contre la Torture et Ligue de la Zone Afrique pour la Défense des Droits des Enfants et Elèves (pour le compte de Céline) c. République du Congo* Communication 325/06, ACHPR. For further discussion see M Kamunyu 'The gender responsiveness of the African Commission on Human and Peoples' Rights' PhD thesis, University of Pretoria, 2018 ch 5.4.1.2. On file with the author.

37 See eg M Mukhopadhyay & S Quintero 'Gender and access to justice in sub-Saharan Africa' in *KIT-CALS Conference, Johannesburg, South Africa* 2008 and R Omamo 'Women and access to justice' in YP Ghai (ed) *Gender and constitution-making in Kenya* (2002) 25.

local remedies and is also deemed more efficient.³⁸ A third reason relates to the attribution of cases. In addition, the mistaken apprehension that the Commission lacks jurisdiction to adjudicate on the Maputo Protocol is another reason that might contribute to the dearth of women's rights cases.³⁹

Under its promotional mandate, the Commission has furthermore created special mechanisms such as the Special Rapporteur on Women in Africa. Through this mandate, the Commission exercises part of its interpretive mandate through the development of soft law. In this regard, the Commission, mainly through the mechanism of the Special Rapporteur on Women in Africa, has formulated various General Comments and Guidelines providing clear interpretive guidance on varying provisions of the Maputo Protocol.⁴⁰ These soft law standards clarify state obligations as well as offer guidance in the implementation of women's rights and redress of violations. Significantly, the African Commission has also developed guidelines to facilitate state reporting under the Maputo Protocol in a manner that complements reporting under the African Charter since states are called upon to submit a joint report.⁴¹

As is further discussed in chapter 28, with reference to article 26, state reporting serves a monitoring function and provides an opportunity to strengthen constructive dialogue between the Commission, states, national human rights institutions and women's rights stakeholders involved in parallel processes

38 See the growing jurisprudence in this regard: *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/CCJ/JUD/06/08 (27 October 2008); *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017); *Mary Sunday v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/18 (17 May 2018); *Aminata Diantou Diane v Mali* Judgment No ECW/CCJ/JUD/14/18 (21 May 2018); *Aircraftwoman Beauty Igbobie Uzezi v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/21 (30 April 2021); *Women Against Violence & Exploitation in Society (WAVES) & Child Welfare Society Sierra Leone (CWS-SL) (On behalf of pregnant adolescent schoolgirls in Sierra Leone) v Sierra Leone* Judgment No ECW/CCJ/JUD/37/19 (12 December 2019); *Adama Vandi v Sierra Leone* Judgment No ECW/CCJ/JUD/32/22 (18 July 2022); and *EI v Nigeria* Judgment No ECW/CCJ/JUD/09/22 (25 April 2022).

39 See eg P Masore 'An evaluation of the role of the African Court on Human and Peoples' Rights in the protection of women's rights under the Maputo Protocol' LLM dissertation, University of Nairobi, 2021 31-32: 'It is critical to note that the Maputo Protocol categorically placed the mandate to interpret its application and implementation not on the already-existing African Commission but on the yet to be established on the African Court'; C Ocran 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2007) 15 *African Journal of International and Comparative Law* at 151: 'The African Court on Human and Peoples' Rights will eventually be charged with the responsibility of overseeing the Protocol, and will have jurisdiction to consider both individual and group complaints of women's rights abuses. Until it is established however, the African Commission of Human and Peoples' Rights will deal with issues of interpretation'. My emphasis. See F Viljoen & M Kamunyu 'Articles 27 and 32' in this volume.

40 These include: (1) African Commission General Comment 1 on art 14(1)(d) & (e) of the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 52nd ordinary session of the African Commission held in Yamoussoukro, Ivory Coast 9-22 October 2012.; (2) African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) and art 14(2)(a) & (c) of the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 54th ordinary session of the African Commission held in Banjul, The Gambia from 22 October to 5 November 2013; (3) Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage; (4) African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol): the Right to Property During Separation, Divorce or Annulment of Marriage (art 7(D)), adopted during the 27th extra ordinary session of the African Commission held in Banjul, The Gambia 19 February-4 March 2020; (5) Guidelines on Combatting Sexual Violence and its Consequences in Africa, African Commission on Human and Peoples' Rights; https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/05/report-guidelines-on-combating-sexual-violence-and-its-consequences-in-africa/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf (accessed 23 June 2023) and (6) Guidelines on Shadow Reporting to the African Commission on Human and Peoples' Rights <https://www.chr.up.ac.za/news-archive/2022/3157-guidelines-on-shadow-reports-of-the-african-commission-on-human-and-peoples-rights#:~:text=Shadow%20reports%20should%20consider%20any,for%20example%20from%20the%20UN> (accessed 23 June 2023).

41 The Guidelines for State Reporting under the Protocol to the African Charter on the Rights of Women in Africa Reporting Guidelines https://www.maputoprotocol.up.ac.za/images/files/instruments/state_reporting_guidelines_pages.pdf (accessed 23 June 2023).

such as shadow reporting.⁴² Reporting under the Maputo Protocol initially suffered an extensive dearth, with the first-ever report coming in almost a decade after the Protocol entered into force in 2005.⁴³

3.3 AU, Constitutive Act, Assembly and NEPAD

Article 1(c) of the Maputo Protocol identifies the Assembly of Heads of State and Government of the African Union as the ‘Assembly’; article 1(d) refers to the African Union as the ‘AU’; article 1(e) short titles the Constitutive Act of the African Union the ‘Constitutive Act’; and article 1(h) abbreviates the New Partnership for Africa’s Development established by the Assembly as ‘NEPAD’.

3.3.1 NEPAD

The *travaux préparatoires* do not provide insights informing the inclusion of NEPAD. Through a decision of the Assembly, NEPAD has since transitioned into the African Union Development Agency-NEPAD (AUDA-NEPAD),⁴⁴ with a mandate to accelerate the realisation of Agenda 2063 and to strengthen the capacity of states and regional bodies, including by facilitating stakeholder partnerships.⁴⁵ AUDA-NEPAD’s involvement so far in furtherance of the Maputo Protocol seems primarily to have been through funding women’s rights organisations to pursue ratification of the Maputo Protocol.⁴⁶

3.3.2 AU and Constitutive Act

The AU, through its governing treaty, the Constitutive Act, lists the promotion of gender equality⁴⁷ and respect for human rights⁴⁸ as part of its principles. From a historical perspective, the need to develop the Maputo Protocol ‘was identified after the Assembly acknowledged the importance of the place of the rights of women in the socio-political priorities of Africa’.⁴⁹ Further, the AU’s supreme organ, the Assembly of Heads of State and Government (Assembly), in reaffirming its commitment to gender equality, adopted the Solemn Declaration on Gender Equality in Africa (Solemn Declaration) in 2004. In the Solemn Declaration, the AU averred its ‘commitment to continue, expand and accelerate efforts to promote gender equality at all levels’.⁵⁰ Article 9 of the Solemn Declaration includes the member states’ undertaking to sign and ratify the Maputo Protocol and supported campaigns to ensure its entry into force by 2005. Compared to its predecessor, the OAU, the AU, through its Constitutive Act,

42 For an assessment on the African Commission’s state reporting practice see: M Kamunyu ‘The gender responsiveness of the African Commission on Human and Peoples’ Rights’ PhD thesis, University of Pretoria, 2018 ch 4.4.2.2. For a recent discussion on barriers to state reporting see: A Johnson ‘Barriers to fulfilling reporting obligations in Africa under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ (2021) 21 *African Human Rights Law Journal* 176-203.

43 Malawi was the first country to submit its report in 2015. See: African Commission on Human and Peoples’ Rights, States, ‘Malawi: Initial and combined reports, 1995-2013’ <https://achpr.au.int/index.php/en/state-reports/malawi-initial-and-combined-reports-1995-2013> (accessed 23 June 2023).

44 Assembly of the Union 31st ordinary session, 1-2 July 2018, Nouakchott Mauritania, Decision on the Transformation of the NEPAD Planning and Coordinating Agency (NPCA) into the African Union Development Agency (AUDA) – Doc. Assembly/AU/2 (XXXI), Assembly/AU/Dec.691(XXXI).

45 AUDA-NEPAD available at https://www.nepad.org/who-we-are#the_au_nda_nepad_journey (accessed 21 October 2022).

46 See eg AUDA-NEPAD ‘Promotion of women’s rights’ <https://www.nepad.org/nepadspanishfund/good-practice/promotion-of-women-rights> (accessed 21 October 2022); AUDA-NEPAD ‘Implementation of regional and international policies and frameworks for gender equality and women’s empowerment’ <https://www.nepad.org/nepadspanishfund/sub-topic/229> (accessed 21 October 2022); and AUDA-NEPAD ‘African women’s rights protection and advancement’ <https://www.nepad.org/nepadspanishfund/project/equality-now-0> (accessed 23 June 2023).

47 Constitutive Act of the African Union art 4(l).

48 Constitutive Act of the African Union art 4(m).

49 ‘Background: Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’.

50 Solemn Declaration on Gender Equality in Africa: Preamble.

recognises gender equality as a continental priority. In comparison, for instance, the OAU Charter made no provision for gender in any express or implied terms.

3.3.3 *Assembly*

Within the African Charter, the Assembly is assigned a number of functions in relation to the administrative functioning of the Commission.⁵¹ Article 59 of the African Charter further mandates the Commission not to publish its recommendations related to the consideration of communications until the activity report containing such findings has been ‘considered by the Assembly’.⁵² In practice, the Assembly has delegated the consideration of activity reports to the Executive Council, which has, on a number of occasions, used its political power to impede the work of the Commission by blocking the publication of, expunging content in or deferring consideration of the Commission’s activity reports.⁵³ A restrictive interpretation of article 59 as a strict confidentiality requirement could arguably portend a number of challenges in litigating the Maputo Protocol. For instance, strict confidentiality acts as an information barrier for potential amicus curiae briefs and contributes to the invisibility of the communications procedure.⁵⁴ Overall, the AU and its policy organs have received much criticism for their undermining of human rights discourse and compliance in the continent.⁵⁵

4 States parties

Article 1(i) of the Maputo Protocol defines ‘states parties’ as the state parties to the Protocol. The meaning of this term is clear in that treaties are international agreements concluded between states in written form and governed by international law.⁵⁶ Its provisions legally bind state parties that have ratified the Maputo Protocol. The act of ratification results in various state obligations. The Maputo Protocol in articles 2 to 25 frames women’s rights protection in the language of state obligations, and state parties are accordingly duty-bound to ensure the implementation of the Protocol at the national level.⁵⁷ In ratifying the Protocol, state parties undertake to adopt all necessary measures to fully and effectively implement women’s rights.⁵⁸ These measures, as discussed throughout this Commentary, include specific legislative, budgetary, administrative, social, economic, institutional and even cultural action, as elucidated in the substantive provisions of the Protocol. In addition, state parties have a duty to submit periodic reports to demonstrate the measures taken towards fully realising the rights in the Protocol.⁵⁹

51 African Charter arts 33 & 37 (election of Commission members), art 44 (provision for emoluments and allowances for Commission members), art 54 (receipt of the Commission’s activity reports).

52 African Charter art 59.

53 See eg J Biegon ‘Diffusing tension, building trust: proposals on guiding principles applicable during consideration of the activity reports of the African Commission on Human and Peoples’ Rights’ (2018) *Global Campus Policy Briefs* 7.

54 For a detailed discussion see R Nekura & S Ndashe ‘Confidentiality or secrecy? Interpretation of article 59, and implications for advocacy on pending communications before the African Commission’ in KK Mwikya, C Osero-Ageng’o & E Waweru (eds) *Litigating the Maputo Protocol: a compendium of strategies and approaches for defending the rights of women and girls in Africa* (2020) 47.

55 See further: TA Zewudie ‘Human rights in the African Union decision-making processes: an empirical analysis of states’ reaction to the Activity Reports of the African Commission on Human and Peoples’ Rights’ (2018) 2 *African Human Rights Yearbook* 295-320; TA Zewudie ‘Toward an effective African human rights system: the nature and implications of the relationship between the African Union policy organs and human rights bodies’ in M Addaney, M Gyan Nyarko & E Boshoff (eds) *Governance, human rights and political transformation in Africa* (2020) 17-40; J Sarkin ‘The need to reform the political role of the African Union in promoting democracy and human rights in domestic states: making states more accountable and less able to avoid scrutiny at the United Nations and at the African Union, using Swaziland to spotlight the issues’ (2018) 26 *African Journal of International and Comparative Law* 84-107.

56 Vienna Convention on the Law of Treaties art 2(1)(a).

57 Maputo Protocol art 26(1).

58 Maputo Protocol art 26(2).

59 Maputo Protocol art 26(1).

5 Definition of women

As articulated in the Maputo Protocol, the definition of women extends the conceptualisation of women beyond a homogenous entity or a demographic with shared biological features. The definition defines women as a social group formed by social and power relations. This conceptualisation allows intersectional gender inequalities to surface. In article 1(k), ‘women’, as rights holders, are defined as persons of the female gender, including girls. This definition utilises the concept of ‘gender’ to define women as opposed to ‘sex’, which is binary in nature. Sex refers to the biological and physiological attributes and claims to difference in humans. Through the various strains of feminism, there has been a disentanglement and distinction of the concept of gender from the dichotomous variable of biological sex.⁶⁰

Gender refers to a social relation that is specific to the context and historical time frame, and which is dynamic. A person is socially constituted to become a certain gender through societal norms, practices and power relationships. These norms, practices and power relations further shape the division of labour and distribution of resources. They are produced and reproduced at every institutional level ranging from the household, the community, the market, the state and even in international institutions. Because gender is given meaning by society in specific contexts and at specific times, the meaning of what it is to be a woman or other genders differs widely between contexts, places and times. The meaning assigned to the gender ‘woman’ therefore changes with societal, economic, political, environmental, and other changes.⁶¹

Gender identity refers to a person’s self-conceptualisation of their gender, whereas the performance and enactment of gender is one’s gender expression.⁶² Therefore, using the term gender in defining women expands the application of the Protocol to transgender persons.⁶³ Based on the terminology used, the Maputo Protocol offers protection to transwomen on account of their gender and transmen who may require its protection if their new identity is discredited by law. Transgender persons are therefore offered the rich protection of the Maputo Protocol, which has broad and progressive provisions, particularly on protection against violence to which transgender persons are disproportionately exposed, such as ‘corrective rape’.⁶⁴ A holistic reading of the Maputo Protocol also supports the understanding of ‘persons of female gender’ to include transgender women. The supportive provisions include the protection from discrimination in article 2, which calls for an end to all forms of discrimination and the state’s obligation to modify the stereotyped roles for women and men. Further, the right to dignity includes ‘the right to respect as a person and to the free development of her personality’.⁶⁵ Overall, the

60 See MG Dietz ‘Current controversies in feminist theory’ (2003) 6 *Annual Review of Political Science* 1-2.

61 See generally, E Meyer ‘Designing women: the definition of ‘woman’ in the Convention on the Elimination of All Forms of Discrimination Against Women’ (2016) 16 *Chicago Journal of International Law* 553-590, O Oyeronke *The invention of women: making an African sense of western gender discourses* (1997); M Mukhopadhyay ‘Gender relations, development practice and “culture”’ (1995) 3 *Gender and Development* 13-18 and N Kaber *Triple roles, gender roles, social relations: the political subtext of gender training* (1992).

62 TJ Jourian ‘Evolving nature of sexual orientation and gender identity’ (2015) 152 *New Directions for Student Services* 14.

63 For an elaborate discussion, see T Snyman & A Rudman ‘Protecting transgender women within the African human rights system through an inclusive reading of the Maputo Protocol and the proposed Southern African Development Community Gender-Based Violence Model Law’ (2022) 33 *Stellenbosch Law Review* 57-77.

64 See further Human Rights Watch ‘We’ll show you you’re a woman’: violence and discrimination against black lesbians and transgender men in South Africa (2011) <https://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> (accessed 25 November 2017); Coalition of African Lesbians & African Men for Sexual Health and Rights *Violence based on perceived or real sexual orientation and gender identity in Africa* (2013) 18-24 <https://www.pulp.up.ac.za/other-publications/violence-based-on-perceived-or-real-sexual-orientation-and-gender-identity-in-africa> (accessed 15 May 2023); L Mwambene & M Wheel ‘Realisation or oversight of a constitutional mandate? Corrective rape of black African lesbians in South Africa’ (2015) 15 *African Human Rights Law Journal* 58-88.

65 Maputo Protocol art 2(3).

right to non-discrimination protects the concept of sexual orientation, gender identity and expression and therefore, the protection of sexual minorities, including lesbian, bisexual and queer women, is envisaged.

The definition of the term women in the Maputo Protocol also includes girls. This formulation recognises how unique interlocking axes of social power disproportionately dispossess girls of autonomy and bodily integrity. Therefore, girls are afforded protection due to their varying vulnerabilities as children and as females. A further reading of the Maputo Protocol reveals a recognition of girls' need for special protection. Article 11 calls for measures to ensure that girls do not take part in direct hostilities; article 12 on the right to education calls for the protection of girls from abuse, including sexual harassment in schools, this article further calls for the promotion and enrolment of girls in schools; article 13 requires states to prohibit, combat and punish all forms of exploitation against the girls. While not all provisions of the Maputo Protocol may be relevant for girls,⁶⁶ the Protocol clearly bolsters their protection in line with the vulnerabilities resulting from their gender relations. In addition to the Maputo Protocol, girls, on the regional level, also have normative protection under the African Charter on the Rights and Welfare of the Child (African Children's Charter). Moreover, the intersection of these two instruments has resulted in the development and adoption of the Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage. The African Children's Committee has buttressed this intersectionality by mutually relying on the provisions of the African Children's Charter and the Maputo Protocol to develop girls' rights in its jurisprudence.⁶⁷

6 Definitions related to substantive rights in the Protocol

6.1 Discrimination against women

Article 1(f) of the Maputo Protocol defines 'Discrimination against women' to mean 'any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres in life.'

The definition of discrimination in international human rights law generally takes on two approaches. The first approach typically comprises a generic non-discrimination clause that prohibits discrimination and then lists a non-exhaustive list of potential grounds of discrimination, such as race, colour, sex, language, religion, political and such other status. This approach is found in instruments such as the African Charter,⁶⁸ the Universal Declaration of Human Rights,⁶⁹ the International Covenant on Civil and Political Rights,⁷⁰ and the International Covenant on Economic, Social and Cultural Rights.⁷¹

The second approach to defining discrimination can be discerned from equality-based treaties such as the Maputo Protocol, CEDAW,⁷² the Convention on the Rights of Persons with Disabilities,⁷³

66 Such as marriage rights in arts 6 & 7 eg. The Maputo Protocol art 6(b) provides the minimum age of marriage as 18 thereby excluding girls from these rights while at the same time securing their legal protection from child marriage.

67 African Committee of Experts in *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania* (2022) paras 40, 55, 86 & 78.

68 Article 2.

69 Article 2.

70 Article 2(1).

71 Article 2(2).

72 Article 1.

73 Article 2.

and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.⁷⁴ These instruments define discrimination using similar terms, that is, as deriving on the basis of *any distinction, exclusion or restriction which has the purpose or effect* of negating the enjoyment of human rights of the instrument's targeted rights holders. The Maputo Protocol's definition of discrimination against women is clearly influenced by CEDAW, which preceded it and carries almost identical language.⁷⁵

As stated in the drafting history, the Nouakchott Draft, in defining discrimination, contained the phrasing 'on an equal basis with men':⁷⁶

discrimination against women means any distinction, exclusion or restriction based on sex whose effects compromise or destroy the recognition, enjoyment or the exercise by women – regardless of their matrimonial status – *on an equal basis with men*, of human rights and fundamental freedoms.

Article 2 of the same Nouakchott Draft also provided that '[w]omen shall enjoy *on the basis of equality with men* the same rights and respect for their dignity'.⁷⁷ The highlighted phrasing amounts to an expression of formal equality, which is not desirable. Formal equality has received resounding criticism from feminists and other commentators for varying reasons, the most pertinent being that it fails 'to address deeply entrenched and complex patterns of group disadvantage'.⁷⁸ In fact, equal treatment in the context of past or structural discrimination actually perpetuates disadvantage and discrimination.⁷⁹ The removal of the impugned phrasing is therefore significant, and the current definition of discrimination against women embraces the notion of substantive transformative equality, which contextualises discrimination in light of its resultant inequalities and aims to improve women's lives. Authoritative interpretations of the Maputo Protocol similarly illustrate the recognition of the substantive equality approach. General Comment 6 on article 7(d) of the Protocol⁸⁰ defines substantive equality and uses it as the normative basis to elaborate on women's right to property on dissolution of marriage.

6.2 Harmful practices

Article 1(g) of the Maputo Protocol defines 'Harmful practices' to mean 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.⁸¹

Under article 5, states are required to take legislative and other measures towards eliminating all harmful practices.⁸² In article 2, the Protocol also expressly categorises harmful practices as a form of discrimination that endangers women's health and general well-being.⁸³ With these three provisions, the Maputo Protocol sets a strong normative foundation for protective and promotional measures towards eliminating harmful practices. In addition, the Protocol specifically prohibits female genital

74 Article 2.

75 Article 1.

76 Nouakchott Draft (n 9) art 1. My emphasis.

77 Nouakchott Draft (n 9) art 2. My emphasis.

78 C Albertyn, S Fredman & J Fudge 'Introduction. Substantive equality, social rights and women: a comparative perspective' (2007) 23 *South African Journal on Human Rights* 209.

79 S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 723.

80 African Commission General Comment 6 (n 40) art 7(d).

81 Maputo Protocol art 1(g).

82 Maputo Protocol art 5.

83 Maputo Protocol art 2(1)(b).

mutilation⁸⁴ and is the first international human rights law treaty to do so. It also prohibits child marriages by providing for the non-negotiable minimum age of marriage as 18 years.⁸⁵ In this way, the Protocol responds to lived realities by providing specific guidance on two harmful practices that disproportionately impact women and girls in Africa.

6.3 Violence against women

Article 1(j) defines ‘Violence against women’ to mean ‘all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or of war’.⁸⁶ The terms ‘perpetrated’, ‘economic’, ‘to undertake’ and ‘or of war’ were added following the expert meeting in 2001.⁸⁷

This definition of violence against women (VAW) is considered revolutionary for its novelty and breadth. On novelty, for instance, CEDAW does not include any reference to VAW in its treaty text. In terms of breadth, the definition ‘covers all the spheres in which women experience violence: the family, community and at the hands of the state’.⁸⁸ In addition to this expansive definition, the Protocol commendably situates VAW in the dignity discourse where, in article 3 on the right to dignity, it calls upon states to protect ‘every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence’.⁸⁹ Verbal violence, on its part, represents an innovation and it ‘may well be the first time that verbal violence against women has been recognised in an international human rights instrument’.⁹⁰ This is significant because the use of verbal abuse by way of insults, hurtful propaganda and smear campaigns are some of the most significant challenges that discourage women’s candidature for elective offices, for instance.⁹¹

The other substantive provisions on VAW are situated within the right to life, integrity and security of the person where the Protocol expansively articulates explicit state obligations towards addressing violence against women, including enactment of laws as well as other administrative, social and economic measures; an obligation to identify and address the causes and consequences of VAW; and punishment of perpetrators and rehabilitation of victims among many other unambiguously expressed obligations.⁹² Noteworthy is that state obligation for VAW is required ‘whether the violence takes place in private or public’⁹³ and, in doing so, addresses the problematic public/private divide in international human rights law that impedes state accountability for the actions of non-state actors.⁹⁴ The Protocol also provides protection of women from sexual violence during armed conflict.⁹⁵ The definition of VAW

84 Maputo Protocol art 5(b).

85 Maputo Protocol art 6(b).

86 Maputo Protocol art 1(j).

87 Report of the Meeting of Experts (n 17) 5.

88 F Banda ‘Blazing a trail: the African Protocol on Women’s Rights comes into force’ (2006) 50 *Journal of African Law* 79.

89 Maputo Protocol art 3(4).

90 Banda (n 88) 79.

91 Federation of Women Lawyers (FIDA) Kenya *Key gains and challenges: a gender audit of Kenya’s 2013 election process* (2013) 61-64.

92 Maputo Protocol art 4(2).

93 Maputo Protocol art 4(2)(a).

94 See a discussion on the public/private divide from a feminist perspective in: R Murray ‘A feminist perspective on reform of the African human rights system’ (2001) 1 *African Human Rights Law Journal* 211-212. See also a more general discussion of the public/private dichotomy with regards to the African Commission in: R Murray *The African Commission on Human and Peoples’ Rights and international law* (2000) 36-45.

95 For a comprehensive discussion see N Dyani ‘Protocol on the Rights of Women in Africa: protection of women from

considers acts perpetrated against women ‘in peace time and during situations of armed conflict’.⁹⁶ Further, in articulating protection of women in armed conflicts, the Protocol specifies states’ obligation to ‘protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of exploitation’.⁹⁷ The Protocol also notes the vulnerability of certain categories of women to VAW owing to the concept of intersectionality, which is the system of interacting axes of social power that produce specific identities. In this regard, the Maputo Protocol highlights elderly women, women with disabilities and women in situations of armed conflict.

7 Conclusion

The Maputo Protocol leads the way in charting out a new approach to definition sections in international human rights law. Article 1 sets out varying terms and concepts that set a strong normative foundation for elucidating substantive rights in the Protocol. The Protocol is pioneering in its utilisation of its definition section in the comprehensive and substantive manner illustrated in this chapter. This substantial approach to definitions clearly influences treaty development, particularly those within the African human rights system, as evidenced by the definitional approach taken by the Protocol on the Rights of Older Persons, the Protocol on the Rights of Persons with Disabilities and the Protocol on Social Security.

This chapter laid out article 1’s drafting history and it is clear the final meanings arrived at were the product of deliberation by state and non-state actors. This chapter considered the normative and institutional landscape that was envisaged when the Protocol was developed, in the discussion on the Protocol’s parent treaty, the African Charter and one of its primary supervision organs, the African Commission. Organs of the AU with a direct and indirect impact on the implementation of the Protocol were also mentioned. Beyond the terms mentioned in article 1, it must be noted that the normative and institutional landscape that interacts with the Protocol is much wider. In addition to the African Commission, the African human rights system consists of a network of complementary bodies and institutions that oversee the interpretation of the Maputo Protocol, such as the African Court on Human and Peoples’ Rights. More recently, sub-regional organs such as the ECOWAS Court have also successfully interpreted the Maputo Protocol.

This chapter also considered the definitions of the Protocol’s rights holders as well as its primary duty bearers. In defining the former, that is, women, it has been illustrated that the Protocol does not view women as a homogenous entity and is cognisant of the multiple social relations that reflect women’s lived realities. The Maputo Protocol’s duty bearers being state parties, have also been mentioned in the discussion highlighting the legal import of various statuses. The definition of terms related to substantive rights in the Protocol has also been highlighted briefly, with the more substantive discussions to follow in subsequent chapters.⁹⁸ Overall, it is intended that the unfolding of these terms through this chapter contributes toward an extensive interpretation of the Maputo Protocol, affording its robust protection to all women in Africa.

sexual violence during armed conflict’ (2006) 6 *African Human Rights Law Journal* 166-187.

96 Maputo Protocol art 1(j).

97 Maputo Protocol art 11(3).

98 See in particular E Lubaale ‘Article 2’; R Nukura ‘Article 4’; S Nabaneh ‘Article 5’, R Murray ‘Article 26’ and F Viljoen & M Kamunyu ‘Articles 27 & 32’ in this volume, on the interpretation of arts 27 & 32.

Article 2

Elimination of discrimination against women

Emma Lubaale

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:
- (a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
 - (b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
 - (c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
 - (d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
 - (e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.
2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped for women and men.

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1 Introduction

Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is at the heart of the Maputo Protocol and operationalises it. It is essential to the spirit of the Protocol, as all other provisions rest on the goal of eliminating discrimination against women. Elimination of discrimination confronts a long history of exclusion based on gender. With women still lagging behind in all spheres of life compared to their male counterparts, the need

to eliminate discrimination against women cannot be overemphasised. As detailed in amongst other chapters 7, 8, 9 and 23 of this Commentary, women continue to endure discriminatory practices such as widow inheritance, female genital mutilation (FGM), forced sterilisation, forced marriage and child marriage, with poor women and girls in rural areas being on the extreme end of the vulnerability continuum.¹

Economically, as further detailed in chapter 15, women are also still largely excluded.² Disparities between men and women regarding access to economic resources such as land and loans continue to hinder women's participation in economic activities in Africa. For example, while women constitute about 40 per cent of active labour in the agricultural sector, their access to agricultural resources remains limited.³ In addition, the wage gap between men and women in Africa remains significantly wide, with women often disadvantaged by factors including lower levels of education.⁴ As analysed in chapter 11, discrimination against women continues in the political arena.⁵ Despite progress in some African countries over the past years, women remain significantly underrepresented in executive, legislative, judicial, and other arenas.⁶ Conclusively, discrimination against women remains an issue of concern on the African continent.

Prohibition of discrimination on the ground of sex is a common provision in international human rights law. Article 2 of the African Charter on Human and Peoples' Rights (African Charter) prohibits discrimination based on sex. Article 18(3) of the African Charter moreover explicitly refers to the 'elimination of every discrimination against women'. The African Commission has occasionally found violations of articles 2 and 18(3) of the African Charter in the communications before it, thus providing clarity to the scope and nature of the obligation to eliminate discrimination against women.⁷ These provisions are referenced in the Preamble to the Maputo Protocol, as discussed in chapter 2, suggesting that they constitute part of the framework to elaborate a more specific treaty on eliminating

1 Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children', <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet23en.pdf> (accessed 6 April 2023); MJ Maluleke, 'Culture, tradition, custom, law and gender equality' (2012) 15 *Potchefstroom Electronic Law Journal* 2-22; M Ssenyonjo 'Culture and the human rights of women in Africa: between light and shadow' (2007) 51 *Journal of African Law* 39-67; N Wadesango et al 'Violation of women's rights by harmful traditional practices' (2011) 13 *The Anthropologist* 121-129. See also S Nabaneh 'Article 5', C Musembi 'Article 6', C Musembi 'Article 7' and Z Nampewo 'Article 21' in this volume.

2 See A Amin 'Article 13' in this volume.

3 The World Bank, 'Women, agriculture and work in Africa' (2022) <https://www.worldbank.org/en/programs/africa-myths-and-facts/publication/women-agriculture-and-work-in-africa> (accessed 17 May 2023); The World Bank 'Empower HER to address food and nutrition security in Africa' 13 October 2022, <https://blogs.worldbank.org/voices/empower-her-address-food-and-nutrition-security-africa> (accessed 11 April 2023); A Palacios-Lopez et al 'How much of the labour in African agriculture is provided by women?' (2017) 67 *Food Policy* 52-63.

4 International Labour Organisation (ILO) *Understanding the gender pay gap* (2020) 1-8. The ILO estimates that on average, women are paid 20 per cent less than men globally; A Bosch & S Barit 'Gender pay transparency mechanisms: Future directions for South Africa' (2020) 116 *South African Journal of Science* 1-6. See also A Amin 'Article 13' sec 5.2 in this volume.

5 See T Mkali & A Rudman 'Article 9' in this volume.

6 OO Ilesanmi 'Women's visibility in decision making processes in Africa – Progress, challenges, and way forward' (2018) *Frontiers in Sociology* <https://doi.org/10.3389/fsoc.2018.00038> (accessed 20 May 2023); DH Madsen (ed) *Gendered institutions and women's political representation in Africa* (2021) 1-127.

7 See eg, *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 323/06 African Commission on Human and Peoples' Rights, Combined 32 and 33 Annual Activity Report (2013) para 119. This was a communication against Egypt in respect of acts of gender-based violence committed by state actors and non-state actors under the control of the state actors. These acts went unpunished. In finding a violation of both arts 2 & 18(3) of the African Charter, the African Commission noted, among others, that '[t]he non-discrimination principle generally ensures equal treatment of an individual or group of persons irrespective of their particular characteristics, and the non-discrimination principle within the context of Article 2 and 18(3) of the African Charter ensures the protection from discrimination against women by States Parties to the African Charter'.

all discrimination against women.⁸ Various African Union (AU) and United Nations (UN) treaties also recognise the principle of non-discrimination.⁹ However, article 2 of CEDAW is the treaty provision that most closely mirrors article 2 of the Maputo Protocol.

The discussion on article 2 commences, in section 2 of this chapter, with a brief analysis of the drafting history of the provision. Section 3 then proceeds to discuss the concepts, nature, and scope of state obligations resting on the concepts and definition of discrimination set out in chapter 3.¹⁰ This discussion is followed by an analysis of the national implementation of article 2 in section 4. This is done with reference to state reports and the national legal and policy framework. Selected decisions of national courts are also discussed to assess judicial enforcement of the rights under this article. In section 5, the chapter concludes by highlighting the impact of constitutional, legislative and policy reforms and what remains to be done.

2 Drafting history

Article 2 can be traced back to the Nouakchott Draft.¹¹ This draft has two provisions, articles 3 and 4, with phrasing similar to article 2 of the Maputo Protocol. Article 3 of the Nouakchott Draft provides that ‘in order to eliminate effectively all forms of discrimination against women, state parties to [this] protocol shall take all necessary measures to integrate a gender perspective in their policy decisions, legislation and development plans’. A reading of article 3 of the Nouakchott Draft reveals that just like article 2 of the Maputo Protocol, the emphasis of the provision is the elimination of discrimination against women. However, it is evident that in the Nouakchott Draft, the means for eliminating discrimination were limited to integrating gender perspectives in laws, policies, and plans.

Article 4 of the Nouakchott Draft stipulates that,

‘[i]n order to attain equality between the sexes and redress the gender imbalance, State Parties to this Protocol shall take specific positive action in those areas where discrimination against women in law and in fact continues to exist’.

The crux of article 4 is eliminating discrimination against women, despite its use of different terminology – to ‘attain equality’ and ‘redress the gender imbalance’. However, the means through which to attain equality emphasises the role of the media. Article 4 indicates that ‘State Parties shall promote a positive image of women in the media in order to ensure that women are accorded their rightful place in society and to enhance their dignity’. In this regard, states are obligated to ‘[e]liminate stereotypes in the treatment of women by the media’. Furthermore, article 2(2) of the Maputo Protocol, which mandates states to modify the social and cultural patterns of conduct of women and men, can be traced back to article 4 of the Nouakchott Draft, which provides for the alteration of the ‘socio-cultural model of behaviours for women and men’.

8 See A Rudman ‘Preamble’ secs 4.2 & 4.3 in this volume.

9 See eg African Charter art 2; African Charter on the Rights and Welfare of the Child (African Children’s Charter) art 2; UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) art 2; UN Convention on the Rights of the Child (CRC) art 2; UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) art 2; UN International Covenant on Economic, Social and Cultural Rights (ICESCR) art 2; UN International Covenant on Civil and Political Rights (ICCPR); UN Convention on Protection of the Rights of All Migrant Workers and Members of their Families (CRMW) art 7.

10 See M Kamunyu ‘Article 1’ in this volume.

11 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples’ Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

The Kigali Draft¹² followed the Nouakchott Draft, which made the goal of eliminating discrimination against women more explicit. A subheading was introduced to this provision – ‘Discrimination against women’, under which article 4 of the Kigali Draft provided as follows:

State parties to this Protocol shall undertake to:

- (a) Take specific positive action in those areas where discrimination against women in law and in fact continues to exist;
- (b) Modify through special measures such as public education, the social and cultural patterns of conduct of men and women, with a view to achieving elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or the stereotyped roles for men and women.

In the Kigali Draft, the terms ‘elimination of’ were not part of the heading of the article. It also discarded the explicit mention of the media as the main channel through which discrimination against women would be addressed.

The Final Draft of the Maputo Protocol,¹³ which was presented to the Meetings of Experts, Ministers, and the NGO Forum, included major changes to the provision on ‘Discrimination against women’ as contained in the Kigali Draft. It set out four obligations critical to the elimination of discrimination against women.¹⁴ First, states are to include the principle of equality between women and men in their national constitutions and other legislative enactments.¹⁵ Second, states should enact and implement legislation geared towards eliminating harmful practices.¹⁶ Third, states must integrate gender perspectives into their law, policies, plans and activities.¹⁷ The fourth obligation on taking positive action in areas where discrimination against women exists is similar to the first obligation listed in the Kigali Draft.¹⁸ Another major change in the Final Draft was the incorporation of specific actions states must take to modify social and cultural patterns of men’s and women’s conduct.¹⁹ In this regard, public education and support of initiatives directed at eliminating discrimination against women were listed as key actions to be taken by states. This is arguably an outcome of the merger of the Kigali Draft with the OAU Convention on Harmful Practices.²⁰

Based on the Final Draft, the Meeting of Experts held in 2001 provided further input.²¹ Notably, it was proposed that the words ‘through appropriate legislative, institutional and other measures’ be added to paragraph 1 of article 2. The terms ‘if not already’ done were proposed for inclusion in paragraph 1(a), thus, taking cognisance of the fact that some states were progressive enough to already have

12 Draft Protocol to the African Charter on Women’s Rights, 26th Ordinary Session of the African Commission on Human and Peoples’ Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

13 Draft Protocol to the African Charter on Human and Peoples’ Rights on the rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa ‘A brief analysis of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women’ (2001) 1 *African Human Rights Law Journal* 53-63.

14 As above.

15 As above.

16 As above.

17 As above.

18 As above.

19 As above..

20 Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

21 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 12-16 November 2001 Addis Ababa, Ethiopia Expt/Prot.Women/Rpt(I) (Meeting of Experts 2001), creating the Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001 (Revised Final Draft).

incorporated provisions on non-discrimination. It was proposed that paragraph 1(b) be reformulated to read ‘enact and effectively implement appropriate legislative and regulatory measures, including prohibiting and combating all forms of discrimination and harmful practices which endanger the health and general well-being of women and girls’. It was further proposed that the word ‘programmes’ be added to paragraph 1(c) after the word ‘plan’. Regarding paragraph 1(d), it was agreed that the words ‘corrective and’ be inserted between the word ‘take’ and ‘positive’. This widened the scope of the obligation of states parties – not to merely take positive action, but also to ‘correct’. Some proposals were also made to paragraph 2, with suggestions that the word ‘modify’ as used in the previous drafts be amended to read, ‘commit themselves to modify’.

In December 2002, the African Union Office of the Legal Counsel (AUOLC) commented on the Revised Final Draft. It was suggested that the word ‘including’ in article 2(1)(b) be deleted and substituted with the word ‘and’ to ensure readability.²² It was also proposed that the word ‘girls’ be deleted since the definition section already defined the term ‘women’ to include girls.²³ Regarding article 2(2), it was recommended that the terms ‘through’ in line 2 and ‘education’ in line 3 be deleted to avoid repetition.²⁴

In 2003, the NGO Forum also provided feedback on the Revised Final Draft.²⁵ It is worth noting that the Revised Final Draft that the NGO Forum commented on had six action points on the elimination of discrimination against women under article 2(1).²⁶ This can be seen in article 2(1)(a)–(f) of the Revised Final Draft. These action points include a provision on equality between women and men in national constitutions and legislation, enacting and implementing legislation to eliminate discrimination against women, and integrating a gender perspective in policy decisions and legislation.²⁷ There is also an obligation to take positive and corrective action in areas where discrimination against women exists. Measures should also be taken to eliminate discrimination regardless of marital status in access to, acquisition and control of, and financing for land and property, and supporting local, national, regional, and continental initiatives directed at eliminating discrimination against women.²⁸

The NGO Forum suggested that the term ‘combat’ in article 2(1) be replaced with ‘condemn and eliminate’.²⁹ In the NGO Forum’s view, using the term ‘combat’ fell below the international standard that both the African Charter and CEDAW had already set.³⁰ In addition, instead of using the term ‘discrimination’, it was suggested that the word ‘sex’ be inserted before discrimination so that article 2(1) referred to the elimination of ‘sex discrimination’ rather than ‘discrimination’.³¹ In respect of article 2(1)(a), it was proposed that the words ‘and policies’ be included.³² This addition meant that the obligation to incorporate the principle of equality between women and men included policymaking, the same position as in respect of constitutions and legislation.

22 Comments by African Union Office of the Legal Counsel (AUOLC), CAB/LEG/66.6/Rev.1, 2002 (Comments by the AUOLC).

23 Comments by the AUOLC (n 22).

24 As above.

25 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003 (Comments by the NGO Forum).

26 Comments by the NGO Forum (n 25).

27 As above.

28 As above.

29 As above.

30 As above.

31 As above.

32 As above.

The NGO Forum further suggested that the words ‘sex-based violence including unwanted or forced sex in or outside marriage’ be included in article 2(1)(b).³³ This meant that the obligation to enact legislation, policy and regulations had to also cover the area of sex-based violence. This suggestion was arguably redundant, considering that article 1 of the Final Draft had already defined discrimination to mean differential treatment based on sex.³⁴

Moreover, suggestions were made for the words ‘including violence’ to be included in article 2(1)(d).³⁵ This addition meant that the corrective and positive actions envisaged in this provision had to target, violence, amongst others. It is, however, notable that the term ‘violence’ had already been defined, through a footnote, to mean a form of gender-based discrimination.³⁶ Thus, implementing this suggestion would have amounted to a repetition. As noted, the Revised Final Draft on which the NGO Forum commented had six action points, including an obligation on states under article 2(1) to ‘take all necessary measures to eliminate discrimination against women, regardless of marital status, in access to, acquisition and control of, and financing for land and property’.³⁷ However, with articles 6, 7, 19 and 21 all referring to different aspects of property, this provision on property seemed redundant. This suggestion, and all others made by the NGO Forum, were excluded in the Addis Ababa Draft.³⁸

All considered, the rights contained in article 2 of the Protocol differ significantly from the first attempt to craft this provision under the Nouakchott Draft. Earlier versions were vague, with very few obligations on the part of states. Aspects of article 2 of the Protocol could also be traced back to two different articles in the Nouakchott Draft. The content of these two articles was consolidated into one single article on ‘elimination of discrimination against women’ containing a comprehensive provision with far-reaching obligations for states. Given the focus of article 2 on the elimination of all discrimination against, any reservation by states to this article strikes at the core of the Protocol and has the effect of rendering its implementation at the national level illusory.

3 Concepts, nature and scope of state obligations

3.1 Combat all forms of discrimination

The obligation of states under article 2(1) is to combat discrimination against women. This provision makes use of the term ‘shall’ in its emphasis on addressing discrimination against women. The use of this term suggests that the obligation regarding the elimination of discrimination against women is an imperative command, thus, mandatory on states parties. For this purpose, a state party may not, for example, rely on culture to justify failure to act to combat harmful cultural practices that constitute discrimination against women. This is different from the word ‘may’, which implies some degree of discretion on the part of state parties.

The term ‘combat’ as used in this provision was subject to some debate during the drafting process. There was some indication that it imposed a standard lower than that established by other international treaties such as CEDAW and the African Charter. In guaranteeing non-discrimination, both CEDAW and the African Charter mandate states to ‘eliminate’ discrimination against women. The drafting history shows that there were concerns that ‘to merely combat sex discrimination is below

33 Comments by the NGO Forum (n 25).

34 As above.

35 As above.

36 As above.

37 As above.

38 Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

the international standards set forth both in CEDAW and in the African Charter'.³⁹ Considering the difference in meaning between the terms 'combat' and 'eliminate', these concerns appear to hold weight. Combat means to fight with or to struggle for victory against discrimination while eliminating connotes completely defeating discrimination. This suggests that 'elimination' imposes a higher standard on states parties than 'combating'.

In combating discrimination against women, article 2(1) requires states to take 'appropriate' measures. 'Appropriate' in the view of the UN Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) suggests that the intervention responds specifically to the resistance and obstacles to the elimination of discrimination against women.⁴⁰ Despite requiring states parties to take appropriate legislative and other measures, article 2(1) is silent on the timeline for the realisation of this right. This is arguably an oversight on the part of the drafters of the Maputo Protocol that could impact the enforcement of this provision by states parties. CEDAW, on the other hand, has made it explicit in its article 2 that a policy on the elimination of discrimination against women should be implemented 'without delay'. The CEDAW Committee has, in turn, interpreted the phrase 'without delay' under CEDAW to mean that this obligation is 'of an immediate nature'.⁴¹ Effectively, progressive realisation is not envisaged under article 2 of CEDAW and no justification for inadequate resources, culture, social norms, religion, or other considerations, suffices to vary this obligation.

Although the Maputo Protocol is silent on the immediate nature of the obligation to adopt a policy on eliminating discrimination against women, comparative insights from other treaties with similar provisions could lead to the conclusion that the obligation under article 2 of the Maputo Protocol is immediate. For example, like article 2 of the Maputo Protocol, article 2(2) of the International Covenant on Civil and Political Rights (ICCPR) mandates states parties to take necessary steps to adopt laws and other measures necessary in giving effect to the rights under the ICCPR. The Human Rights Committee has interpreted this obligation as unqualified and having immediate effect.⁴² On the issue of taking legislative measures the African Commission has adopted a similar stance regarding article 1 of the African Charter, which is similar in content to article 2(2) of the ICCPR. The African Commission has concluded that article 1 of the African Charter imposes obligations of an 'absolute character, with effect immediate, requiring the States Parties to take legislative, judicial, administrative, educational and other appropriate measures to fulfil their obligations'.⁴³

3.2 Include the principle of equality

National constitutions are generally considered the supreme laws, and any other national enactments or actions inconsistent with constitutions are invalid. The inclusion of provisions on equality between women and men is therefore critical to the elimination of discrimination against women in that all enactments and actions would have to measure up to the Constitution; otherwise, they are considered invalid.

39 Comments by the NGO Forum (n 25).

40 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28 (CEDAW Committee General Recommendation 28).

41 CEDAW Committee General Recommendation 28 (n 40) para 29.

42 Human Rights Committee (HRC) General Comment 31(80): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add.13 para 14.

43 *Association of Victims of Post Electoral Violence & Interights v Cameroon* (2009) AHRLR 47 (ACHPR 2009) para 76.

This provision imposes an obligation on states to make concrete reforms in national laws, including specific provisions for equality between women and men in national constitutions and legislation. This obligation requires states to go a step further than making provision for gender equality but also ensuring the implementation of national provisions on gender equality. The obligation to ensure equality between genders requires states to guarantee ‘the equal enjoyment of rights and the access to opportunities and outcomes, including resources, by women, men, girls and boys’.⁴⁴ This obligation can also be interpreted to require states to ensure ‘the absence of discrimination on the basis of one’s sex in the allocation of resources or benefits or in access to services’,⁴⁵ or, ‘equal access to the opportunities that allow people to pursue a life of their own choosing and to avoid extreme deprivations in outcomes’.⁴⁶ Drawing inspiration from the tripartite typology on obligations, respecting this obligation requires states to avoid enacting constitutional and legislative provisions that undermine equality between women and men. The obligation to fulfil imposes on states, *inter alia*, the responsibility to enact laws that ensure the equal enjoyment of rights and access to opportunities and outcomes, including resources.

The obligation to ensure equality between women and men is at the heart of article 2(1)(a). Some gender policies have described gender equality as ‘the absence of discrimination on the basis of one’s sex in the allocation of resources or benefits or in access to services’.⁴⁷ Similar to this definition is that offered by the SADC Protocol on Gender and Development, which conceptualises it as the ‘equal enjoyment of rights and the access to opportunities and outcomes, including resources, by women, men, girls and boys’.⁴⁸ However, as presented in the introduction to this chapter, equality between women and men remains a far-reaching goal, with women generally considered inferior and not equal to men.

3.3 Enact and effectively implement legislative measures

Legislation and regulations provide a framework for the implementation of norms on gender equality. The obligation enshrined in article 2(1)(b) requires states to enact legislation. The provision goes a step further to require states to implement the said legislation effectively. The term ‘appropriate’ suggests that the intervention responds specifically to the resistance and obstacles to the elimination of discrimination against women.⁴⁹ Africa is a diverse continent, and so are the women in it. ‘Appropriate’ in this regard means the ability of legislation and regulations to address the diverse experiences of women across regions rather than a one-size fits all approach. The CEDAW Committee has concluded that ‘each State party must be able to justify the appropriateness of the particular means it has chosen and demonstrate whether it will achieve the intended effect and result’.⁵⁰ Therefore, the emphasis must be on results. These interventions must be ‘action- and results-oriented in the sense that [states] should establish indicators, benchmarks and timelines, ensure adequate resourcing for all relevant actors and otherwise enable those actors to play their part in achieving the agreed benchmarks and goals’.⁵¹

44 Article 1 Southern African Development Community (SADC) Protocol on Gender and Development 2016 (SADC Protocol on Gender and Development).

45 East African Community Gender Policy 2018, 53 (EAC Gender Policy).

46 Economic Community of West African States (ECOWAS) Policy for Gender Mainstreaming in Energy Access 2017, 5.

47 EAC Gender Policy (n 45) 53.

48 SADC Protocol on Gender and Development (n 44) 53.

49 CEDAW Committee General Recommendation 28 (n 40) para 23.

50 As above.

51 CEDAW Committee General Recommendation 28 (n 40) para 28.

3.4 Integrate a gender perspective

If discrimination against women is to be eliminated, it is important to consider the concerns and experiences of men and women in all contexts. These perspectives must be integrated into all laws, policies, and programmes.

The terms ‘mainstream’ and ‘integrate’ have been used interchangeably in some instruments on gender, including the SADC Protocol on Gender and Development. In this instrument, gender mainstreaming means ‘the process of identifying gender gaps and making women’s, men’s, girls’ and boys’ concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programmes in all spheres so that they benefit equally’.⁵² The 2018 East African Community Gender Policy (EAC Gender Policy) considers mainstreaming to mean:

The process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all the areas and at all levels. It is a strategy for making women’s and men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.⁵³

Integrating a gender perspective in accordance with article 2(1)(c), therefore, imposes an obligation on states to ensure that laws, programs, and policies in all spheres of society ensure equality between women and men. Laws, policies, programmes, and activities must be scrutinised to evaluate whether they combat or exacerbate discrimination against women.

3.5 Take corrective and positive action

Article 2(1)(d) recognises the need for states to put in place measures that rectify or address past and existing discrimination. These measures recognise existing exclusion, discrimination, and disadvantage patterns.

The terms ‘corrective action’, ‘positive action’ and ‘affirmative action’ have often been used interchangeably to mean ‘positive steps taken to increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded’.⁵⁴ Affirmative action is defined as ‘a policy programme or measure that seeks to redress past discrimination through active measures to ensure equal opportunity and positive outcomes in all spheres of life’.⁵⁵ These measures aim to eliminate barriers preventing women from participating in various spheres of life.⁵⁶ They are considered ‘a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms’.⁵⁷ Moreover, the measures have to be time-bound, thus, presupposing that when goals are attained, these measures lapse.⁵⁸ These measures are ‘designed to secure to disadvantaged

52 SADC Protocol on Gender and Development art 1.

53 EAC Gender Policy (n 45) 53.

54 R Fullinwide *Stanford Encyclopedia of Philosophy* (2001) 1.

55 SADC Protocol on Gender and Development art 1. See also E Domingues-Redondo & E Howard ‘Introduction’ in E Howard et al (eds) *Affirmative action and the law: efficacy of national and international approaches* (2022) 3.

56 SADC Protocol on Gender and Development arts 2(2) & 5.

57 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 25 on art 4, para 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004 (CEDAW Committee General Recommendation 25) para 18.

58 CEDAW Committee General Recommendation 25 (n 57) para 15 & 20; UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation 32 The meaning and scope of special measures in the International

groups the full and equal enjoyment of human rights and fundamental freedoms'.⁵⁹ Gender quotas can be considered an example of affirmative action. Through the quota system, certain percentages in areas where women have suffered discrimination, such as political positions, jobs, and so forth, are reserved for women. It could also entail special consideration or preference being given to women in the selection processes. The aim is to include women based on their gender on account of the history and reality of discrimination against them.

The African Commission has moreover welcomed affirmative action aimed at tackling gender disparity in schools. However, it has cautioned that such actions should be implemented in a manner that does not negatively affect the standard of education for girls.⁶⁰ Effectively, quality must not be sacrificed on the altar of numbers. Moreover, the positive action invoked to address past discrimination should reflect the full diversity of women in a country, be they poor, migrant, minority, rural, or other considerations.⁶¹

3.6 Support local, national, regional and continental initiatives

The eradication of discrimination against women requires support from states. The CEDAW Committee has offered some guidance on what that support should look like. For example, states are mandated to provide financial support to independent centres and organisations that educate women about their rights to equality and help them to pursue remedies to address discrimination against them.⁶² Other types of measures include setting up structures at the national level that ensure the implementation of initiatives on gender equality and the promotion of education. It also includes all forms of support that ensure that the goal of eliminating all discrimination against women is realised, as well as the encouragement of women's rights organisations at local, national and international levels.⁶³ Support may also take the form of establishing the necessary machinery and national human rights institutions critical to eliminating discrimination against women. In addition, supporting gender equality throughout education systems and communities is equally included.⁶⁴ The role of financial resources in enforcing the rights of women cannot be overemphasised. Thus, the provision of adequate financial and administrative support to ensure that the measures adopted have tangible results in eliminating discrimination against women is a form of support envisaged.⁶⁵

3.7 Commitment to modify social and cultural patterns

As further discussed in chapter 7, discriminatory social and cultural norms are often rooted in traditions and cultures that cannot be dismantled through the mere enactment of legislation and policies.⁶⁶ While not all social and cultural norms are harmful, many pose threats to women, thus, perpetrating discrimination against them. Most of these practices reflect beliefs and values held by members of

Convention on the Elimination of All Forms of Racial Discrimination, 24 September 2009, CERD/C/GC/32 (CERD Committee General Recommendation 32) para 16. See also OVC Ikepeze 'Legislating women's affirmative action and its constitutionality in Nigeria' (2011) *Journal of International Law* 173.

59 CERD Committee General Recommendation 32 (n 58) para 11.

60 African Commission Concluding Observations and Recommendations – Tanzania: Consolidated 2nd to 10th Periodic Report adopted at 43rd ordinary session 7-22 May 2008, in Ezulwini, Swaziland para 11.

61 Concluding Comments of the Committee on the Elimination of Discrimination against Women: Norway 39th session, 23 July-10 August 2007, CEDAW/C/NOR/CO/7 para 23.

62 CEDAW Committee General Recommendation 28 (n 40) para 34.

63 CEDAW Committee General Recommendation 28 (n 40) para 36.

64 As above.

65 As above.

66 See S Nabaneh 'Article 5' in this volume.

communities for periods that often span generations, thus, necessitating interventions beyond legal enactments.

Article 2(2) recognises that enacting legislation is insufficient to eradicate harmful practices that perpetuate discrimination against women. It, therefore, implores states to invoke measures geared towards changing attitudes through education and communication. A similar obligation exists under CEDAW, which the OHCHR explained as follows: states are not only ‘to modify laws, but also to work towards the elimination of discriminatory customs and practices’.⁶⁷ Unlike CEDAW, which requires states ‘to modify or abolish’, the Protocol requires states to modify. By using the term ‘modify’, article 2(2) recognises that some cultural practices do not necessarily need to be abolished to foster equality. Moreover, article 17 of the Protocol recognises the fact that some cultures are positive, and women enjoy the right to live in a positive cultural context.⁶⁸ However, despite not using the term ‘abolish’, article 2(2) makes it clear that the aim of such modification should be to eliminate harmful practices based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles of women and men. It follows that the term ‘modify’ envisages abolishing harmful cultural and traditional practices that perpetuate the inferiority of women.

Article 2(2) also recognises that harmful social and cultural patterns are based on gender stereotypes. Gender stereotyping refers to the ‘constant portrayal in the media, the press or in the education system, of women and men occupying certain roles according to the socially constructed gender division of labour and expectations in behaviour’.⁶⁹ It occurs when ‘specific attributes, characteristics, or roles’ are ascribed to women because they are women.⁷⁰ Gender stereotyping can either be overt or subtle. An example of the former is the assumption that women are irrational, while the latter is exemplified by the assumption that women are nurturing.⁷¹ These stereotypes are directly linked to gender inequality, limiting women’s ‘capacity to develop their personal abilities, pursue their professional careers and/or make choices about their lives’.⁷² The wrongfulness of gender stereotyping lies in its violation of women’s rights. Accordingly, in terms of article 2(2), an obligation rests on states to use public education, information, education, and communication strategies to dismantle these stereotypes.

4 State practice and implementation

4.1 Insights from state reports, Concluding Observations, reports of special rapporteurs and national frameworks

A perusal of the constitutions of African states reveals that sex-based discrimination is outlawed.⁷³ However, implementation remains a major challenge. South Africa, which ratified the Maputo

67 OHCHR ‘Fact Sheet No.22, Discrimination against Women: The Convention and the Committee’ (1995) 5. This was in respect of art 1(1)(f) which is similar but not identical to art 2(2) of the Maputo Protocol.

68 See A Johnson ‘Article 17’ in this volume.

69 EAC Gender Policy (n 45) 54.

70 United Nations Human Rights Office of the High Commissioner ‘Gender stereotyping’ <https://www.ohchr.org/en/women/gender-stereotyping> (accessed 23 June 2023).

71 As above.

72 As above.

73 In East Africa, Uganda, Kenya, and Tanzania exemplify this. See Constitution of Uganda, 1995 art 21; Constitution of Kenya, 2010 art 27; Constitution of Tanzania, 1977 art 12. In West Africa, Nigeria, Ghana, and Senegal exemplify this. See Constitution of the Federal Republic of Nigeria, 1999 art 42; Constitution of Ghana, 1992 art 17; and Constitution of Senegal, 2001 art 7. In Southern Africa, South Africa, Botswana, and Zimbabwe exemplify this. See Constitution of the Republic of South Africa, 1996 sec 9; Constitution of Botswana, 1966 art 3; and Constitution of Zimbabwe, 2013 art 17. In North Africa, Egypt and Morocco’s Constitutions demonstrate this. See Constitution of Egypt, 2014 art 53 and art 19 of the Constitution of Morocco 2011.

Protocol in 2004, guarantees the right of equality under its Constitution.⁷⁴ Discrimination on several grounds, including sex and gender, is prohibited in South Africa.⁷⁵ South Africa has gone a step further to enact legislation that gives force to the notion of equality as guaranteed under the Constitution.⁷⁶ While the operationalisation of the Protocol through the Constitution and legislation is commendable, implementation challenges continue to linger. For example, in one of its Concluding Observations on South Africa, the CEDAW Committee expressed concern over the lack of implementation of legal measures despite the commendable effort by South Africa to enact legislation.⁷⁷ The African Commission has also noted similar concerns, concluding that despite the enactment of laws on gender equality, the representation of women in key sectors, such as the judiciary continues to fall short of the legislative commitment.⁷⁸

In its Concluding Observations of 2007, the African Commission recommended that Zimbabwe ratify the Maputo Protocol.⁷⁹ Heeding this recommendation, Zimbabwe ratified the Protocol in 2008 and has implemented article 2 at the national level. The Constitution of Zimbabwe guarantees the right to freedom from discrimination and requires the adoption of specific policies and measures that address discrimination issues. Various institutional measures have been established and laws and policies have been enacted to this effect.⁸⁰ Despite these developments, the African Commission observed in its 2021 Concluding Observations that discrimination against women remains rife in Zimbabwe ‘contrary to the provisions of the National Laws, Maputo Protocol and other human rights legal instruments’.⁸¹ Notably, women continue to be discriminated against in terms of political representation.⁸² Discrimination against women is generally much worse for rural women in Zimbabwe.⁸³ The heightening of discrimination against them is attributable to several factors, including exclusion, marginalisation, absence of rights empowerment and the deeply entrenched patriarchal tendencies in rural communities.⁸⁴

74 South African Constitution sec 9 (as set out in the Citation of Constitutional Laws Act 5 of 2005 sec 1(1)).

75 South African Constitution sec 9(3) & 9(5).

76 See eg, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which provides an extensive legislative framework for the right to equality as guaranteed under the South African Constitution sec 9; National Health Act 61 of 2003 which emphasises equal access to health care between men and women; Employment and Equity Act 55 of 1998 which operationalises equal access to work between men and women and the National Education Policy Act 27 of 1996 which establishes a framework for equal access to education for all including marginalised women.

77 Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa, 23 November 2021, CEDAW/C/ZAF/CO/5 paras 31 & 39.

78 Concluding Observations and Recommendations on the Combined Second Periodic Report under the ACHPR and the Maputo Protocol of the Republic of South Africa, adopted by the African Commission at its 20th extraordinary session held from 9-18 June 2016, The Gambia para 33.

79 Concluding Observations on the Second Periodic Report of the Republic of Zimbabwe presented to the 41st ordinary session of the African Commission on Human and Peoples’ Rights 16th to 30th May 2007, Accra, Ghana para 29.

80 See eg Zimbabwe Gender Commission Act Chapter 10:31, Domestic Violence Act Chapter 5:16 and The National Gender Policy (2013-2017). Institutional measures in the promotion of gender equality such as the Zimbabwe Gender Commission have also been established.

81 Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of Zimbabwe on the Implementation of the African Charter on Human and Peoples’ Rights (2007-2019) and the Initial Report on the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) (2008-2019), 69th ordinary session held virtually from 15 November-5 December 2021 para 48.

82 F Mahere, ‘Women need to see themselves in politics. It’s the only way change will come to Zimbabwe’ 15 March 2022 <https://www.theguardian.com/global-development/2022/mar/15/fadzayi-mahere-women-in-politics-zimbabwe> (accessed 11 April 2023). Zim Fact ‘Fact Sheet – Zimbabwe, Women and politics’ 13 April 2013, <https://zimfact.org/factsheet-zimbabwe-women-and-politics/> (accessed 11 April 2023).

83 Concluding Observations and Recommendations Zimbabwe (n 81) para 45.

84 Z Ncube ‘Socio-economic challenges of women in Ntepe Village, Gwanda District, Zimbabwe’ Masters dissertation, University of South Africa, 2021 i.

Similarly, to exemplify, the Constitution of Uganda⁸⁵ also contains provisions that refer to article 2. Article 33 makes provision for affirmative action and equal treatment of women and men in political, social, and economic matters and stipulates that women shall be accorded full and equal dignity of the person with men. Discrimination is also explicitly defined under the Constitution.⁸⁶ In its Concluding Observations of 2009, the African Commission implored Uganda to ratify the Maputo Protocol.⁸⁷ The African Commission further recommended that Uganda enact legislation addressing the harmful cultural practice of FGM. Such legislation was consequently enacted in 2010.⁸⁸

In its subsequent Concluding Observations of 2015, the African Commission noted with concern Uganda's failure to report on the implementation of the Maputo Protocol despite its ratification in 2010.⁸⁹ The African Commission raised concern about Uganda's failure to pass the Marriage and Divorce Bill⁹⁰ and the Succession Act⁹¹ – legislation with the potential to address issues of discrimination against women in marriage, divorce and succession. To date, the Marriage and Divorce Bill continues to sit in Parliament after close to two decades. However, in April 2022, Uganda passed several amendments to the Succession Act into law. These amendments have seen the demise of provisions discriminating against women in inheritance.⁹² While the progress made by Uganda is commendable, studies reveal that 'implementation of these laws remains limited'.⁹³

Moreover, some proposed laws directly threaten Uganda's obligations in terms of article 2 of the Maputo Protocol. For example, the Sexual Offences Bill,⁹⁴ first introduced before Parliament in 2014, despite having progressive provisions on the protection of women from sexual violence, is a step backwards in other respects. Notably, the Act criminalises sex work, a discriminatory move considering that women are the majority in the field of sex work, thus, most likely to be the ones to suffer the brunt of criminalisation. In addition, it exposes sex workers to further abuse, thus, increasing the risk of them falling prey to violence.⁹⁵ Such violence often stems from the stigma that comes with the criminalisation of sex work. It may take the form of extortion, harassment by law enforcement officials, sexual violence, assault and even murder.⁹⁶ This exposure often prompts sex workers to work in unsafe places that are out of reach by the Police.⁹⁷ Moreover, the criminalisation of sex work limits sex workers' right of access to justice, with victims of abuse being unable to obtain redress as to do so requires disclosure of their involvement in the 'criminal' conduct of sex work.⁹⁸ This discriminatory stance against women in Uganda falls short of the recommendations made by the CEDAW Committee

85 Constitution of the Republic of Uganda 1995, as amended to 2018 (Constitution of Uganda).

86 Constitution of Uganda art 21(3) – 'to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.'

87 Concluding Observations and Recommendations – Uganda: 3rd Periodic Report, 2006-2008, 2009 para 41.

88 Prohibition of Female Genital Mutilation Act 2010.

89 Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010-2012), 57th ordinary session 4-18 November 2015, Banjul, The Gambia, para 50.

90 Marriage and Divorce Bill 2009, Bill 19.

91 Succession (Amendment) Bill, 2021.

92 Succession (Amendment) Act, 2022.

93 International Federation for Human Rights 'Women's rights in Uganda: gaps between policy and practice' (2012) <https://www.fidh.org/IMG/pdf/uganda582afinal.pdf> (accessed 11 April 2023).

94 Human Rights Watch 'Uganda: Reject Sexual Offenses Bill Draft Law criminalizes consensual sex, lets down assault survivors' 6 May 2021, <https://www.hrw.org/news/2021/05/06/uganda-reject-sexual-offenses-bill> (accessed 11 April 2023).

95 Human Rights Watch 'Why sex work should be decriminalized' 7 August 2019 <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized> (accessed 11 April 2023).

96 Human Rights Watch (n 95).

97 As above.

98 As above.

in its Concluding Observations requiring Uganda to take targeted steps to address discriminatory stereotypes of women's participation in various sectors, including the labour market, the family setting, and the political arena relevant also to article 2 of the Maputo Protocol.⁹⁹

Kenya ratified the Maputo Protocol in 2010. In the African Commission's Concluding Observations of 2007, Kenya had been implored to ratify the Protocol.¹⁰⁰ In these Observations, the Commission raised concerns about discrimination against women. It recommended that Kenya undertake deliberate and concrete steps and policies to address discrimination against women. Although in its subsequent report to the African Commission, Kenya registered progress in terms of enactment of legislation and putting in place institutional measures to give effect to article 2 of the Maputo Protocol,¹⁰¹ the African Commission observed that discrimination against women across all sectors remained rife 'despite the concerted efforts made at ensuring gender equality in all sectors, policies and programmes'.¹⁰² The Commission recommended that Kenya enacts a comprehensive equality and non-discrimination law.¹⁰³ However, this recommendation has not yet been implemented.¹⁰⁴

Malawi ratified the Maputo Protocol in 2005. The Protocol has since been domesticated, with various national laws speaking directly to article 2 of the Maputo Protocol.¹⁰⁵ The Bill of Rights in Malawi's Constitution¹⁰⁶ guarantees the right to equality and prohibits discrimination on several grounds, including sex. Malawi has also adopted policies, institutional and other measures geared towards improving gender equality.¹⁰⁷ Various legislative and administrative measures have been taken to eliminate discrimination against women. However, in its Concluding Observations of 2015, the African Commission noted with concern the absence of a legislative framework that provides for affirmative action for women.¹⁰⁸ This has undermined efforts to address the history of discrimination against women in Malawi.

Malawi has adopted the Gender Equality Act Implementation and Monitoring Plan,¹⁰⁹ which seeks to ensure that the elimination of discrimination against women is addressed more practically. It

99 CEDAW Committee, 'Concluding observations of the Committee on the Elimination of Discrimination against Women Uganda' 22 October 2010, CEDAW/C/UGA/CO/7. See also CEDAW Committee, 'Concluding observations on the combined 8th and 9th Periodic Reports of Uganda' 1 March 2022, CEDAW/C/UGA/CO/8-9 paras 19 & 20.

100 Forty-first ordinary session 16-30 May 2007, Accra, Ghana Consideration of Reports submitted by states parties in accordance with Article 62 of the African Charter on Human and Peoples' Rights Concluding Observations and Recommendations on the Initial Report of the Republic of Kenya.

101 See eg, National Commission on Gender and Equality Act 2011, Prohibition of Female Genital Mutilation Act 2011, Matrimonial Property Act 2013, Marriage Act 2014, Domestic Violence Act 2015; National Gender and Equality Commission.

102 Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya, adopted at 19th extraordinary session 16 February to 25 February 2016 Banjul, Gambia para 39.

103 Concluding Observations and Recommendations Kenya (n 102) para 55.

104 A perusal through the current national laws in Kenya reveals that no such law has been enacted.

105 See eg, Gender Equality Act, Marriage Divorce and Family Relations Act 4 of 2015, the Prevention of Domestic Violence Act Chapter 7:05, and the Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011.

106 Constitution of Malawi, 1994.

107 See eg, the campaign to ensure that there is 50/50 representation of males and females in Parliament; efforts by the Ministry of Education to ensure an equal selection rate for girls and boys from primary to secondary schools; and the adoption of various measures to mitigate the gender disparities in tertiary education, including the 50/50 enrolment policy in Teachers Training, and the non-residential system.

108 Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995-2013), 57th ordinary session 4-18 November 2015, Banjul, The Gambia, para 103.

109 Gender Equality Act Implementation Plan (2016-2020), launched in 2016, <https://malawi.unfpa.org/> (accessed 23 June 2023).

has also committed to implementing Section 11 of the Gender Equality Act,¹¹⁰ which provides that an appointing or recruiting authority in the public service shall appoint no less than 40 per cent of either sex in any of the public service departments.¹¹¹ Furthermore, ministries, departments and agencies report on gender indicators and outcomes of the number of women recruited and sent for further studies and training.¹¹² Malawi's progress is indeed commendable. However, as is further mentioned in chapter 11, gender quotas for political positions and in the private sector still remain problematic.¹¹³ In addition, implementing affirmative action in civil service for women continues to be hampered by patriarchal cultural values that limit women's access to leadership opportunities.¹¹⁴

Eswatini ratified the Maputo Protocol in 2004. Article 2 of the Protocol has been implemented through various national enactments and initiatives, including the National Gender Policy,¹¹⁵ the Sexual Offences and Domestic Violence Act,¹¹⁶ and the National Strategy on women's participation in politics and decision-making.¹¹⁷ Despite these efforts, concerns have been raised regarding the persistence of discrimination against women.¹¹⁸ There have been undue delays and failure to repeal existing discriminatory laws, and these continue to perpetuate discrimination against women.¹¹⁹ Efforts to enact corrective laws have also been futile. The lack of resources has meant that the mandate of the Department of Gender and Family Issues (Department of Gender) has not been implemented.¹²⁰ The deep-rooted harmful gender stereotypes have also rendered otherwise progressive efforts unsuccessful in eliminating discrimination against women. In its 2022 Concluding Observation on Eswatini, the African Commission implored Eswatini to allocate resources to the Department of Gender and to commit to combatting deep-rooted harmful gender stereotypes.¹²¹ However, with specific regard to the allocation of resources, not much progress has been registered, with the current budget, not making provision for gender equality issues.¹²²

Nigeria ratified the Maputo Protocol on 16 December 2004. Despite this, Nigeria has failed to domesticate the Protocol. Nigeria drafted the Gender and Equal Opportunities Bill in 2016.¹²³ The Bill seeks to address discrimination challenges against women and, if passed into law, would enable legislation to domesticate the Maputo Protocol. However, since 2016 the Bill has been rejected several

110 Gender Equality Act, chap 25, 2014.

111 Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (2015-2019) and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2005-2013), 70th ordinary session of the African Commission on Human and Peoples' Rights 23 February-March 2022 para 62.

112 Concluding Observations and Recommendations Malawi (n 111) para 62.

113 See T Mkali & A Rudman 'Article 9' in this volume.

114 Concluding Observations and Recommendations Malawi (n 111) para 62.

115 The Swaziland National Gender Policy 2010.

116 Sexual Offences and Domestic Violence Act 2018.

117 National Strategy on Women's Participation in Politics and Decision-Making (2014).

118 Concluding Observations and Recommendations on the Kingdom of Eswatini's Combined 1st to 9th Periodic Report on the implementation of the African Charter on Human and Peoples' Rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa, ACHPR 70th ordinary session: 23 February-9 March 2022 para 48.

119 Concluding Observations and Recommendations Eswatini (n 118) para 48.

120 As above.

121 As above.

122 See Budget Speech 2022, presented by Neal Rijkenberg The Honourable Minister For Finance to the Parliament of the Kingdom of Eswatini, 18th February 2022, <https://parliament.gov.sz/media/speeches/budget/2022.pdf> (accessed 6 April 2023). The budget strategy for 2022/2023 makes no provision for issues of gender, let alone, gender equality.

123 Concluding Observations and Recommendations – Nigeria: 6th Periodic Report, 2015-2016, Adopted by the African Commission on Human and Peoples' Rights at the 65th ordinary session held from 21 October to 10 November 2019 in Banjul, The Gambia.

times by Nigerian lawmakers.¹²⁴ Opposition to the Bill centres around cultural, social and religious barriers that this Bill seeks to challenge.¹²⁵ In its 2019 Concluding Observations on Nigeria, the African Commission commended Nigeria for having in place the Gender and Equal Opportunities Bill.¹²⁶ The African Commission recommended that in its next report, Nigeria should include information on ‘the status of promulgation of the Gender and Equal Opportunities Bill’.¹²⁷ Given the history of rejection of this Bill, coupled with the social, cultural and religious barriers that have previously militated against its passage into law, the recommendations made by the Commission are too open-ended and vague to exert pressure on Nigeria. Requiring Nigeria to provide an update regarding the status in its next report does not necessarily require Nigeria to enact the Bill into law. Instead, the recommendations should have required Nigeria to enact the Bill into law rather than request for a mere update. More succinct recommendations could ensure adherence. Exemplary is the recommendation made by rights and feminist organisations in their Shadow Report to the African Commission. Regarding this Bill, these organisations made the following recommendation:

Ensure the speedy passage and adoption of the Gender and Equal Opportunities (GEO) bill into law by the National Assembly with resources provided for its effective implementation; and support states to adopt similar laws in their jurisdictions.¹²⁸

Cameroon ratified the Protocol on 25 July 2006. Cameroon submitted a report to the African Commission for the period between 2003–2005. Its report did not deal specifically with the implementation of the Maputo Protocol but rather, the African Charter generally. The Concluding Observations that followed the consideration of Cameroon’s report, however, resulted in some recommendations having a bearing on the rights of women. Amongst these, Cameroon was called upon to ‘take special measures to guarantee the protection and implementation of indigenous women’s rights due to their extreme vulnerability and the discrimination to which they are subjected to’.¹²⁹ There is still no specific legislation addressing the unique challenges of indigenous women in Cameroon, and this has undermined their rights, including the right to own and control land.¹³⁰ There were also recommendations regarding reforms to legislation to ensure that violence against women is effectively addressed.¹³¹ Despite showing an intention to review its laws, including the Civil Code, Family Code, and Penal Code, to include provisions related to violence against women, these reforms have not come to fruition.¹³² Thus, a lot still needs to be done to achieve gender equality in Cameroon.¹³³

124 AfricaNews, ‘Nigerian senators reject gender equality bill’ 17 December 2021, <https://www.africanews.com/2021/12/17/nigerian-senators-reject-gender-equality-bill/> (accessed 2 April 2023).

125 AfricaNews (n 124).

126 Concluding Observations and Recommendations Nigeria (n 123) para 77.

127 Concluding Observations and Recommendations Nigeria (n 123) para 111.

128 Shadow Report on Nigeria’s Implementation of the Protocol to the African Charter on Human and Peoples’ Right on the Right of Women in Africa, 21 April 2022, <https://alliancesforafrica.org/shadow-report> (accessed 2 April 2023).

129 Concluding Observations and Recommendations – Cameroon: 2nd Periodic Report, 2003-2005, 47th ordinary session 12-26 May 2010, in Banjul, The Gambia para 13.

130 EE Njieassam ‘Gender inequality and land rights: the situation of indigenous women in Cameroon’ (2019) 22 *Potchefstroom Electronic Law Journal* 18.

131 Concluding Observations and Recommendations – Cameroon (n 129) para 10.

132 Committee on the Elimination of Discrimination Against Women, Concluding Observations: Cameroon, 43rd session (19 January-6 February 2009) para 15.

133 UN Women ‘Cameroon’ <https://data.unwomen.org/country/cameroon> (accessed 2 April 2023).

4.2 Judicial enforcement of the obligation to eliminate discrimination against women

There is evidence of judicial commitment to enforcing the obligation to combat discrimination against women in several African countries. In the context of South Africa, a decision of the Constitutional Court consolidated two cases that dealt with the same issue. In *Bhe*,¹³⁴ the Court dealt with a customary law that deprived women of inheritance rights. The custom in issue had to be applied in accordance with section 23 of the Black Administration Act 38 of 1927, which made provision for an estate to be devolved according to custom. The Constitutional Court of South Africa held, amongst others, that section 23 of the Black Administration Act and the applicable regulations on the customary distribution of property in exclusion of women were unconstitutional as they discriminated against women in inheritance based on sex and gender. The court was of the view that ‘the exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors’.¹³⁵ Another notable decision is *Shilubana*.¹³⁶ In this case, the authority of a traditional community to develop their customs to promote gender equality in the succession to leadership in line with the Constitution was challenged by a male claimant of the chieftainship over a female heir. Emphasising the importance of equality, the Constitutional Court held that the traditional authorities were effecting a valid legal change in line with the Constitution, resulting in the succession of a female heir to the chieftainship.¹³⁷ Although this case did not specifically refer to the Protocol as South Africa ratified the Protocol a year after this judgment, the decision was based on the right to equality and the need to eliminate discrimination against women in terms of South Africa’s domestic laws.

In Uganda, the decision by the Constitutional Court of Uganda in *Uganda Association of Women Lawyers*¹³⁸ dealt with unjustified differential treatment between men and women in cases of divorce. The Divorce Act¹³⁹ permitted men to divorce their wives on the ground of adultery. On the other hand, women who wanted to divorce their husbands on the ground of adultery had to prove other factors, including cruelty, bigamy, and incest. The petitioners challenged these provisions of the Divorce Act on account of their gender-discriminatory nature. The court held that these provisions discriminated against women; thus, they were unconstitutional.¹⁴⁰ This decision came before Uganda ratified the Protocol. However, at the heart of the Court’s decision was the need to eliminate discrimination against women in terms of Uganda’s domestic laws.

In Kenya, several decisions have demonstrated the judiciary’s commitment to the elimination of discrimination against women. In *Rono*,¹⁴¹ Kenya’s Court of Appeal relied on article 18(3) of the African Charter to hold that the customary laws on succession which disinherited women were in violation of the Charter. The court was of the view that the national laws on the subject were insufficient to address the aspect of discrimination that it was confronted with, thus necessitating the reference to the international human rights treaties to which Kenya was a party. The decision in *Rono v Rono* was, in turn, applied by the court in the subsequent case of *Re Andrew Musyoka*.¹⁴² Here the High Court held that the African customary practice of preventing daughters from inheriting from their deceased

134 *Bhe v Magistrate and Shibi v Sithole* 2005 (1) SA 580 (CC).

135 *Bhe* (n 134) para 78.

136 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).

137 *Shilubana* (n 136) para 86.

138 *Uganda Association of Women Lawyers v Attorney General* (2004) UGCC 1 (Constitutional Court of Uganda).

139 Divorce Act Chapter 249 of the Laws of Uganda 1904.

140 *Uganda Association of Women Lawyers* (n 138) 59.

141 *Rono v Rono* (2005) AHRLR 107 (KeCA 2005).

142 *Re Andrew Musyoka (deceased)* (2005) eKLR.

father's estate was a violation of article 18 of the African Charter. In an earlier decision in *the Matter of the Estate of Mburugu Nkaabu*,¹⁴³ the High Court found in favour of a wife, proceeding to redistribute the property of the deceased to ensure that the deceased's wife and daughters received a fair share. In doing this, the court relied on provisions of Kenya's Constitution on eliminating customs related to property and land that were discriminatory against women.¹⁴⁴

However, it is notable that not all cases relating to eliminating discrimination against women have had a positive outcome. For example, in *Re Estate of CCBH*,¹⁴⁵ a High Court in Kenya took a turn from the progressive strides made in the preceding three decisions. In this case, the court upheld Sharia law, which unjustly discriminates against women from inheriting from the estates of husbands and fathers.¹⁴⁶ The court held that the applicants in this case (who were granddaughters to the deceased) were not entitled to inherit from the deceased's estate in terms of Sharia law. The applicants' reference to various international treaties, including article 18(3) of the African Charter and article 2 of the Maputo Protocol fell on deaf ears. Although the court acknowledged the role of international law in the protection against discrimination as well as the constitutionally entrenched right to freedom from discrimination, it deferred to article 24(4) of the Constitution, which allows the right to equality to be qualified to the extent 'strictly necessary' for the application of Sharia law in proceedings before the Kadhi's court involving practising Muslims who opt to use the Kadhi's court.¹⁴⁷ It is, however, notable that while the effect of article 24(4) is arguably to deny Muslim women's full enjoyment of the right to equality at par with other women, it sets constitutional boundaries on the scope of the application of Muslim personal law, and at least recognises the right of litigants to opt out of the Kadhi's court altogether.

5 Conclusion

There is no doubt that the Maputo Protocol has impacted the national laws of state parties, with the constitutional, legislative and policy reforms at the national level being a testament to this. However, the implementation of these reforms remains a challenge. It is also apparent that these national efforts are being stifled by negative attitudes, practices and stereotypes that are too deeply rooted to be uprooted by legislation, policies or court judgments. Against this backdrop, it is recommended that states and civil society organisations intensify their efforts in raising awareness on issues of gender equality. Education plays an important role in questioning and deconstructing the stereotypes in which discriminatory practices are anchored. A critical look at the state reports and national framework, discussed in section 4.1 suggests that states are generally reporting on the legislative, policy and institutional reforms at the national level. This is commendable. However, these reports should report on the tangible results, if any, arising from the national reforms, as it is becoming increasingly clear that such reforms are not always translating into the actual elimination of all discrimination against women.

143 *Matter of the Estate of Mburugu Nkaabu (deceased)* (2010) eKLR.

144 Article 60(f) Constitution of the Republic of Kenya 2010.

145 *Re Estate of CCBH* (2018) eKLR (High Court, Kenya) 4-7.

146 *Re Estate of CCBH* (n 145) 4-7.

147 Constitution of Kenya, 2010 art 24(4) provides that '[t]he provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance'.

Article 3

Right to dignity

Charlene Kreuser

1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.
2. Every woman shall have the right to respect as a person and to the free development of her personality.
3. States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.
4. States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

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1 Introduction

Human dignity is a founding principle of international law, recognising that all human beings are equal and that their rights should be respected and protected.¹ Similar to the rights to equality and non-discrimination, the right to human dignity underscores all other human rights and is given content through other rights.² On the African continent, human dignity represents a decisive break from the past. It recognises that 'a human being is an end in itself and not simply a means to an end'.³ Human dignity is, therefore, central to the decolonial process. The African Commission on Human and Peoples' Rights (African Commission) succinctly described the importance of the right to human dignity under the African human rights system in *Open Society Justice Initiative v Côte d'Ivoire*. In this case, the African Commission stated that:

[Human dignity is] the soul of the African human rights system ... and inherent to the human person. In other words, when the individual loses [their] dignity, it is [their] human nature itself which is called into question ... In short, when dignity is violated, it is not worth the while to guarantee most of the other rights.⁴

1 C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) 19 *European Journal of International Law* 656.
2 McCrudden (n 1) 679.
3 H Botha 'Human dignity in comparative perspective' (2009) 2 *Stellenbosch Law Review* 175 & 183.
4 *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06, African Commission on Human and Peoples' Rights, 17th extraordinary session (2015) para 139.

In general, human rights treaties either recognise and affirm all persons' inherent dignity and worth in preambles⁵ or set out the right to human dignity in broad terms under a substantive provision.⁶ In comparison, article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) contains a defined right to human dignity, connecting it to other rights that are not traditionally included in a provision outlining the right to human dignity, but that has become associated with it through interpretation.

Beyond a broad recognition of women's dignity, article 3 guarantees the right of women to be protected from all forms of violence, prohibits any exploitation and degradation, and promotes the free development of their personalities.⁷ Despite this, women on the African continent, as discussed throughout this *Commentary*, continue to suffer from physical and sexual violence, female genital mutilation (FGM), and child marriage, amongst others, all of which violate their right to human dignity.

High incidences of intimate partner physical or sexual violence have been reported in both Sub-Saharan and North Africa.⁸ Data published in 2022 by the United Nations Children's Fund further indicate that the African continent has the highest prevalence of both child marriage and FGM. Approximately 130 million women were married under the age of 18 and 140 million women and girls have undergone FGM.⁹ Considering the estimated population of 721 million women on the African continent, this means that almost 1 in 5 women and girls were child brides or have undergone FGM.¹⁰ Against this backdrop, the right to human dignity enshrined in article 3 of the Maputo Protocol not only recognises the wide range of violations of women's inherent dignity but also provides the foundation for addressing it.

This chapter, aimed at unpacking the right to dignity as it is featured in the Maputo Protocol, takes as its point of departure the drafting of article 3 of the Protocol. The discussion proceeds by engaging with the debate between cultural relativism, the principle of universality, and the legal concepts that make up this provision. The obligations imposed by article 3 on state parties are then set out and the manner and extent of parties' compliance with these obligations are considered. The chapter concludes by briefly assessing the challenges that arise in the implementation of the right and provides recommendations to state and non-state actors to ensure that the human dignity of all women is protected and fulfilled.

5 See, UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); UN Convention on the Rights of the Child Convention on the Rights of the Child (CRC); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR). The Preambles to the ICCPR, ICESCR, CEDAW, and the CRC all recognise that human rights derive from the inherent dignity of human beings and that, as a result, these rights are worthy of protection.

6 African Charter on Human and Peoples' Rights (African Charter); Universal Declaration of Human Rights (Universal Declaration). Universal Declaration art 1 states that '[a]ll human beings are born free and equal in dignity and rights'. Similarly, art 5 of the African Charter enshrines the right to human dignity, also prohibiting 'cruel, inhuman or degrading punishment and treatment'.

7 See R Nekura 'Article 4' in this volume.

8 Statista Research Department 'Physical or sexual violence against women in Africa, 2017' 31 March 2022 <https://www.statista.com/statistics/1299878/physical-or-sexual-violence-against-women-in-africa/> (accessed 12 April 2023).

9 UNICEF 'Towards ending harmful practices in Africa: a statistical overview of child marriage and female genital mutilation' June 2022 <https://data.unicef.org/resources/harmful-practices-in-africa/> (accessed 12 April 2023).

10 Country Meters 'Africa population clock (live)' 15 May 2023 <https://countrymeters.info/en/Africa> (accessed 15 May 2023).

2 Drafting history

From the outset, it was clear that the Maputo Protocol would include an explicit right to human dignity. Article 2 of the Nouakchott Draft provided that:

Women shall enjoy on the basis of equality with men the same rights and respect for their dignity and contribute to the preservation of those African cultural values that are positive and based on the principles of equality, justice and democracy.¹¹

Article 2 of the Kigali Draft was similar to the Nouakchott Draft in that it recognised the human dignity of women and their contribution to the preservation of African values. The Kigali Draft, however, accepted that respect for women's rights has its foundation in the 'dignity inherent in human beings' and is not granted 'on the basis of equality with men'. Furthermore, while the Nouakchott Draft referred to the preservation of *positive* African values, the Kigali Draft simply referred to 'African values that are based on the principles of equality, dignity, justice, and democracy'.¹²

In the Final Draft of the Maputo Protocol, considered at the Meeting of Experts in November 2001, respect for dignity was outlined in article 3. Although the core of article 2 of the Kigali and Nouakchott Drafts was retained, article 3 had as its point of departure the preservation of African values instead of recognising that women's rights stem from their inherent dignity as human beings. Article 3, nonetheless, added obligations on state parties to 'ensure that women enjoy rights and dignity inherent in all human beings' and 'adopt appropriate measures to prohibit any exploitation and degradation of women'.¹³

The Report of the Meeting Experts recommended minor amendments to article 3 – changing the order of principles referred to, explicitly including girls as beneficiaries of the right to human dignity, and outlining states' obligation to implement measures prohibiting any exploitation and degradation of women.¹⁴ These recommendations were contained in the Revised Final Draft. The African Union Office of the Legal Counsel (AUOLC)'s commented on the Revised Final Draft in December 2002, proposing that explicit references 'girls' be removed from multiple provisions, including article 3.¹⁵ This is arguably because all women, including girls, would be beneficiaries of the rights and protections enshrined under the Maputo Protocol.

In 2003, the NGO Forum's feedback on the Revised Final Draft proposed more substantial amendments to article 3 to align the language with article 5 of the African Charter.¹⁶ The NGO Forum proposed that article 3 state as follows:

11 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

12 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

13 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

14 Comments by African Union Office of the Legal Counsel (AUOLC) on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted by the Meeting of Governments Experts on 16 November 2001) CAB/LEG/66.6/Rev.1, 2002.

15 Comments by African Union Office of the Legal Counsel (AUOLC), CAB/LEG/66.6/Rev.1, 2002 (Comments by the AUOLC).

16 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003 (Comments by the NGO Forum).

Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights. In this regard, the states parties shall adopt and implement appropriate measures to prohibit any exploitation and degradation of women.¹⁷

The proposed amendment also removed the reference to the preservation of African values. The Addis Ababa Draft, approved at the Meeting of Ministers in March 2003, reflected the NGO Forum's recommendations in article 3(1) and (3).¹⁸ Despite its absence from the drafting process, women's 'right to respect as a person and to the free development of her personality' was included under article 3(2) of the Addis Ababa Draft for the first time. Of interest is also the obligation on states to adopt and implement appropriate measures to ensure women's right to dignity and protection from violence under article 3(4). Although protecting women from violence was always envisioned as part of the Maputo Protocol, previous drafts included it as a stand-alone right.¹⁹ The drafting process, however, does not explain the reason behind incorporating the right to be free from violence under the umbrella of article 3. That said, violence necessarily negates dignity and article 3(4) recognises this.

The development of the right to human dignity throughout the drafting process reflects a recognition that human dignity does not only relate to situations of degrading treatment, as suggested by article 5 of the African Charter. Instead, article 3 of the Maputo Protocol reflects the relationship between human dignity, women's developmental potential, and safety from all forms of harm.

3 Interpretation of conceptual issues arising out of article 3

3.1 The principle of universality and cultural relativism

The principle of universality versus cultural relativism debate is particularly relevant when interpreting the right to human dignity under the Maputo Protocol. At the core of the principle of universality is the notion that all persons have certain inherent rights based on being human. The implication is that because being human is an inalterable fact of nature, human rights must be inalienable and held by all persons in equal measure.²⁰ Commitment to the principle of universality is most often seen in the preambles of human rights treaties, framed as, for example, a recognition that 'fundamental rights stem from the attributes of human beings which justifies their national and international protections ... and respect of peoples' rights should necessarily guarantee human rights'.²¹

Cultural relativism should not be viewed in opposition to the principle of universality. Instead, it refers to how culture can influence the interpretation of human rights.²² Donnelly describes cultural relativism as a 'normative doctrine that demands respect for cultural differences'.²³ However, the issue that arises is that cultural relativism often has as its goal cultural absolutism.²⁴ The consequence is that

17 Comments by the NGO Forum (n 16).

18 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

19 Nouakchott Draft (n 11) art 12; Kigali Draft (n 12) art 13; Final Draft (n 14) art 5.

20 J Donnelly 'The relative universality of human rights' (2007) 29 *Human Rights Quarterly* 282; S Rădulețu 'Regional human rights systems and the principle of universality' (2013) 38 *Revista de Științe Politice* 284; M Rosenfeld 'Can human rights bridge the gap between universalism and cultural relativism – A pluralist assessment based on the rights of minorities' (1999) 30 *Columbia Human Rights Law Review* 249.

21 African Charter Preamble. See also, Universal Declaration Preamble; ICCPR Preamble; ICESCR Preamble; CEDAW Preamble.

22 BG Ramcharan 'A debate about power rather than rights' (1998) 4 *IPG* 423.

23 Donnelly (n 20) 294.

24 EH Howard 'Cultural absolutism and the nostalgia for community' (1993) 15 *Human Rights Quarterly* 315 quoted in Donnelly (n 20) 294.

the interpretation of human dignity and other rights under international law is deemed to have ‘no normative force in the face of divergent cultural traditions’.²⁵

As discussed in chapter 2, the reason for the adoption of the Maputo Protocol was to ‘ensure that the rights of women are promoted, realised and protected’ because, despite the ratification of the African Charter, ‘women in Africa still continue to be victims of discrimination and harmful practices’.²⁶ Thus, culture and religion have been used to justify discrimination and harmful practices against women in the past, disregarding the right of women to have their inherent dignity respected.

The Maputo Protocol arguably presents a universalist approach to women’s rights by recognising that ‘[e]very woman shall have the right to dignity inherent in a human being’.²⁷ This is supported not only by the recognition that all forms of violence, degrading treatment, and harmful practices infringe on women’s dignity but also that states have an obligation to ensure that conditions exist that promote the free development of women’s personalities. As such, the Maputo Protocol embodies a balance between the principle of universality and cultural relativism, acknowledging that the mere fact that certain practices were accepted or celebrated in the past does not mean that its continuation in the present can be justified.

3.2 The meaning of human dignity under the Maputo Protocol

Despite the wide recognition that respect for human dignity is central to human rights discourse, human dignity is not easily defined as a separate term. Rather, it is often defined with reference to other rights.²⁸ There has been limited engagement with the right to human dignity under the Maputo Protocol by the African Court on Human and Peoples’ Rights (African Court) and the African Commission. As such, it is useful to take guidance from how human dignity has been interpreted elsewhere, particularly under the African Charter.

3.2.1 *The right to human dignity and the free development of the personality*

The African Charter explicitly guarantees the right to human dignity under article 5, also incorporating it as part of the right to life under article 4. Importantly, the African Court and the African Commission have interpreted the right to human dignity in a manner similar to how it has been treated constitutionally, as mentioned in section 5. For example, like in South Africa,²⁹ the African Court and the African Commission have widely interpreted the right to life, recognising not only the ‘inviolable nature and integrity of the human being’³⁰ but also the right to a dignified life.³¹ In this regard, reference has also been made to the relationship between a dignified life and the progressive realisation of economic, social, and cultural rights.³²

25 Donnelly (n 20) 294.

26 See A Rudman ‘Preamble’ secs 3.4 & 4.12 in this volume.

27 Article 3(1).

28 McCrudden (n 1) 678.

29 *S v Makwanyane* 1995 (3) SA 391 (CC).

30 *African Commission on Human and Peoples’ Rights v Kenya* (merits) (2017) 2 AfCLR 9 (*ACHPR v Kenya*).

31 African Commission General Comment 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (art 4), adopted during the 57th ordinary session of the African Commission held in Banjul, The Gambia from 4 to 18 November 2015.

32 *Almas Mohamed Muwinda v Tanzania* (merits) (3 June 2016) 1 AfCLR 599. See also, General Comment 3 (n 32) para 43; African Commission ‘Working Group on Economic, Social and Cultural Rights’ (18 April-2 May 2012) African Commission <https://www.achpr.org/sessions/sessionsp?id=108> (accessed 4 August 2022).

The right to a dignified life is closely related to the free development of the personality which, in turn, is tied to the individual's right to pursue their life project. It is significant that the right to human dignity explicitly includes women's right to the free development of their personality.³³ Until the adoption of the Maputo Protocol, the right to the free development of the personality was associated primarily with the aims of education.³⁴ Although the Maputo Protocol recognises women's right to the free development of their personality, no reference has been made to what it means by the African Commission or the African Court. Interestingly, at the sub-regional level, the East African Community Gender Policy includes women's right to human dignity as one of its guiding principles, specifically referring to the promotion of the dignity and respect of women through the free development of their personality.³⁵

Article 11 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) enshrines a comprehensive right to education. It provides that one of the aims of education is to promote the 'development of the child's personality, talents and mental and physical abilities to their fullest potential'. Therefore, children should be brought up in an environment that enables them to become active members of their communities and empowers them to contribute to its future improvement.³⁶

In this context, article 21 of the African Children's Charter also becomes relevant, requiring states parties to protect children against and 'eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child'. In the General Comment on the Responsibilities of the Child, outlined under article 31, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) explained that a development-focused environment is one where children are not exposed to harmful social and cultural practices, as these practices infringe on their rights and well-being.³⁷ Similar to the Maputo Protocol, harmful practices are given a broad meaning with specific instances mentioned by the African Children's Committee including FGM, child marriage, and sexual exploitation.³⁸

Like the African Children's Charter, the Universal Declaration,³⁹ the ICESCR,⁴⁰ and the CRC⁴¹ also require education to be aimed at the development of the personality. According to Arajarvi, the full development of the personality refers to creating conditions amenable to developing the intellectual, psychological, and social dimensions of the individual.⁴² Beiter adds hereto that individuals should not only develop a sense of their own dignity but also that of others.⁴³ Ultimately, the free development of

33 Article 3(2).

34 C Chinkin 'Article 3' in MA Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* (2012) 109. CEDAW (n 5) art 3 requires states parties to take appropriate measures to ensure the full development and advancement of women. Although not speaking directly to the free development of the personality, the CEDAW Committee has made clear that development denotes progress, and that progress can only be made if women's needs, and concerns are given the same priority as those of men.

35 EAC Secretariat 'East African Community Gender Policy' (2018) 29 <http://repository.eac.int/bitstream/handle/11671/24328/EAC%20GENDER%20POLICY-2.PDF?sequence=1&isAllowed=y> (accessed 30 August 2022).

36 African Committee of Experts on the Rights and Welfare of the Child General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on 'the responsibilities of the child' (2017) (African Children's Committee General Comment on art 31) para 33.

37 African Children's Committee General Comment on art 31 (n 36) para 22.

38 African Children's Committee General Comment on art 31 (n 36) paras 22 & 76.

39 Universal Declaration art 26(2).

40 ICESCR art 13(1).

41 CRC art 29(1)(a).

42 P Arajarvi 'Article 26' in A Eide, G Alfredsson, G Melander, LA Rehof & A Rosas (eds) *The Universal Declaration of Human Rights: a commentary* (1992) 409.

43 KD Beiter *The protection of the right to education by international law* (2005) 471.

the personality requires that children be provided with ‘life skills, to strengthen the child’s capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values’.⁴⁴

Taking inspiration from human rights treaties that primarily seek to protect the rights of children in no way infantilises women. The fact that discussion on the free development of the personality has occurred primarily concerning the right to education also does not mean that its application is limited to education. Instead, these instruments can provide guidance to contextualise article 3(2).

Considering the interpretation of the development of the personality above in light of women’s right to human dignity, it can be argued that, first, state parties must ensure that women are enabled to develop their intellectual, psychological, and social capacities. Second, harmful social and cultural practices, discussed in more detail below, and under chapter 7, prevent women from enjoying the right to the free development of their personalities with the consequence that they cannot participate meaningfully in their societies.⁴⁵ Finally, that meaningful participation is necessary for the development of the human personality to enable women to contribute equally to the improvement of their communities.

3.2.2 Prohibition of exploitation or degradation and the obligation to protect women from all forms of violence

Article 5 of the African Charter recognises the right of all persons to have their human dignity respected and also recognises their legal status. Simultaneously, this article also prohibits all forms of exploitation, degradation, and inhuman or degrading treatment or punishment. The African Court and African Commission have dealt extensively with the right to human dignity in the context of the right of persons deprived of their liberty, requiring that detention conditions must be humane⁴⁶ and establishing that mandatory death penalties⁴⁷ and unlawful detention violate the right to human dignity.⁴⁸ The African Commission has, moreover, given a broad interpretation to inhuman or degrading treatment or punishment, stating that it includes the ‘widest possible protection against abuses, whether physical or mental’.⁴⁹ As such, addressing individuals in degrading language constitutes an infringement of article 5.⁵⁰

Similar to article 5 of the African Charter, article 3 of the Maputo Protocol recognises the inherent dignity of women, prohibiting any exploitation or degradation of women. In this regard, the African Commission has declared that involuntary sterilisation,⁵¹ child marriage,⁵² and the death sentence⁵³

44 CRC Committee General Comment 1 on art 29(1) (17 April 2001) CRC/GC/2001/1 para 2.

45 See S Nabaneh ‘Article 5’ in this volume.

46 *Purohit and Moore v Gambia* (2003) AHRLR 96 (ACHPR 2003) See also, *Guehi v Tanzania* (merits and reparations) (2018) 2 AfCLR 477; *Institute for Human Rights and Development in Africa v Republic of Angola* (2008) ACHPR 83 (22 May 2008); *Huri-Laws v Nigeria* (2000) ACHPR 23 (6 November 2000).

47 *Ally Rajabu v Tanzania* (merits and reparations) (2019) 3 AfCLR 539. See also *Gozbert Henerico*, Application 056/2016 (10 January 2022); *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

48 *African Commission on Human and Peoples’ Rights v Libya* (merits) (2016) 1 AfCLR 153 paras 78-85. See also: *IHRDA v Angola* (n 46) para 50; *Huri-Laws* (n 46) para 40.

49 *Purohit* (n 46) para 58. See also, *Media Rights Agenda v Nigeria* (2000) ACHPR 24 (6 November 2000) para 71; *Curtis Doebbler v Sudan* (2009) ACHPR 103 (ACHPR 2009) para 37.

50 *Purohit* (n 46) paras 58-59.

51 Resolution on involuntary sterilisation and the protection of human rights in access to HIV services (22 October-5 November 2013) ACHPR/Res.260 (LIV) 2013.

52 Resolution on the need to conduct a study on child marriage in Africa (20-29 July 2014) ACHPR/Res.292 (EXT.OS/XVI) 2014.

53 Resolution on the need for better protection of women sentenced to death in Africa (12-19 July 2021) ACHPR/Res. 483 (EXT.OS/XXXIII) 2021.

constitute degrading treatment and, therefore, violate the right to human dignity under the Maputo Protocol.

3.2.2.1 Physical and sexual violence

The African Commission is vocal in drawing attention to various forms of physical and sexual violence against women in general, requesting states parties to address these violations in its Concluding Observations. In this regard, the African Commission has, for example, expressed concern over national legislation not specifying corrective rape⁵⁴ or marital rape⁵⁵ as a sexual offence, the failure to criminalise FGM,⁵⁶ forced sterilisation of women with HIV/AIDS,⁵⁷ and the inadequate prosecution of sexual harassment in educational institutions and employment.⁵⁸ The African Commission has also confirmed that subjecting women and children to sexual and gender-based violence as a tactic of war during armed conflicts disregards their right to human dignity.⁵⁹

Although not stated in relation to violence against women in particular, the African Commission has expressed concern over violence and other human rights violations committed against persons based on their real or imputed non-heteronormative sexual orientation or gender identity. Drawing from the right to human dignity, amongst other rights, the African Commission has urged states to end all forms of violence against sexual minorities and to adopt legislation protecting sexual minorities.⁶⁰ In this manner, the African Commission recognises that violence and discrimination based on sexual orientation and gender identity violate the right to human dignity.⁶¹

In May 2017, the African Commission adopted the Guidelines on Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines).⁶² The Niamey Guidelines establish the obligation to address sexual violence as flowing from numerous rights protected under the African human rights treaties, specifically referring to article 3(4) of the Maputo Protocol.⁶³ In discussing the investigation of sexual violence, the Niamey Guidelines refer to the importance of guaranteeing the dignity of victims and witnesses. This can be done through, for example, using video conferencing or altering the voice or image of the person speaking when gathering testimonies.⁶⁴ The Niamey Guidelines, moreover, refer to the role of the right to human dignity in considering restitution as a reparation for the victim of sexual violence.⁶⁵

54 Concluding Observations and Recommendations – South Africa: 2nd Periodic Report, 2003-2014 (2016) para 49.

55 Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi, 2015-2019, African Commission on Human and Peoples' Rights, adopted at the 70th ordinary session (23 February-9 March 2022) para 73.

56 Concluding Observations and Recommendations – Sierra Leone: Initial and Combined Reports, 1983-2013 (2016) para 77.

57 Concluding Observations and Recommendations – Namibia: 6th Periodic Report, 2011-2014 (2016) para 33.

58 Concluding Observations – Namibia (n 58) para 33.

59 Resolution on the situation of women and children in armed conflict (28 April-12 May 2014) ACHPR/Res.283 (LV) 2014.

60 African Commission Resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity (28 April-12 May 2014) ACHPR/Res.275 (LV) 2014.

61 A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 23-24.

62 African Commission on Human and Peoples' Rights Guidelines on Combating Sexual Violence and its Consequences in Africa adopted during its 60th ordinary session held in Niamey, Niger from 8-22 May 2017 (Niamey Guidelines).

63 Niamey Guidelines (n 63) 12.

64 Niamey Guidelines (n 63) 35.

65 42. See also, art 20(3) of the Southern African Development Community Protocol on Gender and Development, which requires States Parties to 'eliminate gender bias; and ensure justice and fairness are accorded to survivors of gender-based violence in a manner that ensures dignity, protection and respect'.

More recently, the African Commission adopted Resolution 522 on the Protection of Women against Digital Violence in Africa, drawing attention to online violence. This Resolution specifically refers to the right of women not to be exploited or degraded and to be protected from all forms of violence as enshrined under article 3 of the Maputo Protocol. Significantly, it confirms that human rights protections apply online and offline.⁶⁶

Where the African Commission and African Court can be deemed not yet to have gone far enough to protect women from physical and sexual violence, whether under the African Charter or Maputo Protocol, the Economic Community of West African States Community Court of Justice (ECOWAS Court) has made significant strides in three separate decisions.

In the first decision of an international court on a violation of the Maputo Protocol, the ECOWAS Court in *Dorothy Chioma Njemanze v Nigeria* found that Nigeria had failed to protect the applicants from sexual and gender-based violence, gender-based discrimination, as well as inhuman and degrading treatment.⁶⁷ The abduction, unlawful arrest and detention, sexual assault, sexual humiliation, and verbal abuse that the applicants suffered at the hands of police officials who believed that they were sex workers were found to infringe on numerous rights under the African Charter and Maputo Protocol, including the right to human dignity.⁶⁸ Although the Court's decision is welcome, both Rudman⁶⁹ and O'Connell⁷⁰ criticise the ECOWAS Court for protecting women who are not sex workers at the expense of women who are sex workers and for failing to grant the educational and preventative measures that the applicants sought.

In *Mary Sunday v Nigeria*,⁷¹ the ECOWAS Court considered a complaint of inter-partner violence where the applicant was denied access to justice through the failure of the state to investigate her abuse. The ECOWAS Court rejected the state's argument that domestic violence constitutes a private matter, stating that the law 'does not stop at the doors of marital homes'.⁷² Despite recognising that the suffering experienced by the applicant infringed on her right to human dignity, the ECOWAS Court denied that domestic violence constitutes gender-based violence.⁷³ According to Rudman, this illustrates a disregard for the obligation imposed under the Maputo Protocol to 'enforce laws that prohibit all forms of violence against women, regardless of whether the violence takes place in private or public'.⁷⁴

Finally, in *Aircraftwoman Beauty Igbobie Uzezie v the Federal Public of Nigeria*,⁷⁵ the ECOWAS Court found that the applicant's right to human dignity under article 5 of the African Charter was violated as a result of her rape and sexual assault by an employee of the Nigerian Airforce. The Court held the state

66 African Commission Resolution on the Protection of Women Against Digital Violence in Africa (19 July-2 August 2022) ACHPR/Res. 522 (LXXII) 2022 (Resolution 522).

67 *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017). For a comprehensive discussion and commentary of the case, see A Rudman 'A feminist reading of the emerging jurisprudence of the African and ECOWAS Courts evaluating their responsiveness to victims of sexual and gender-based violence' (2020) 31 *Stellenbosch Law Review* 443-446.

68 *Dorothy Chioma Njemanze v Nigeria* (n 67).

69 Rudman (n 67).

70 C O'Connell 'Reconceptualising the first African Women's Protocol case to work for all women' (2019) 19 *African Human Rights Law Journal* 510-533.

71 *Mary Sunday v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/18 (17 May 2018).

72 *Mary Sunday* (n 71) para IV.

73 *Mary Sunday* (n 71) para IV. See also *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/CCJ/JUD/06/08 (27 October 2008). Unofficial English translation available at https://www.refworld.org/cases,ECOWAS_CCJ,496b41fa2.html (accessed 30 July 2022).

74 Rudman (n 67) 448.

75 *Aircraftwoman Beauty Igbobie Uzezi v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/21 (30 April 2021).

may be liable for the conduct of non-state actors due to its responsibility to prevent sexual violence.⁷⁶ The ECOWAS Court drew attention to the fact that rape constitutes an act of torture because it violates the victim's right to human dignity, also considering the failure of the state to conduct a proper investigation into the applicant's allegation, including the proper collecting and storing of evidence.⁷⁷

At a national level, the Supreme Court of Appeal of South Africa (SCA) has also drawn attention to article 3 of the Maputo Protocol in considering violence against women. In *Naidoo v Minister of Police*,⁷⁸ it was held that a police official was negligent in refusing to provide adequate assistance to the applicant, a victim of domestic abuse. The SCA made specific reference to the Maputo Protocol, referring to States Parties' obligation to enforce legislative measures to protect women's right to human dignity and protect them from all forms of violence.⁷⁹

Considering the above, it can be argued that any act of violence against women would mean that both the prohibition of degrading treatment and women's right to be free from all forms of violence have been violated. This is because an act of violence is necessarily degrading, and a degrading act necessarily causes harm. According to article 1(j), violence against women includes 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts'.⁸⁰ Similarly, degrading treatment intends to undermine the dignity of the individual through the same harms. As such, degrading treatment and violence against women as violations of human dignity cannot be separated. However, violence and degrading treatment are not limited to obvious physical violations.

3.2.2.2 Harmful cultural practices

Article 1(g) of the Maputo Protocol defines harmful practices as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to ... *dignity* (emphasis added)' with articles (2)(b), 2(2) and 5 placing an obligation on states parties to prohibit discrimination against women, including harmful practices.⁸¹ Article 4(2) of the Southern African Development Community Protocol on Gender and Development echoes the sentiment of the Maputo Protocol, requiring state parties to implement measures to eliminate practices which negatively affect fundamental rights, such as the right to dignity.⁸²

The African Court dealt with the prohibition of harmful practices in the context of the Maputo Protocol in *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali*.⁸³ However, it did not find a violation of the right to human dignity.⁸⁴ Nonetheless, the African Court adopted a broad understanding of what constitutes harmful practices – unequal inheritance rights, forced marriage and the removal of free consent, and cultural and religious practices that are based on men's superiority over women.⁸⁵

76 *Aircraftwoman* (n 75) para 67.

77 *Aircraftwoman* (n 75) paras 39 a& 71. See also *Adama Vandi v Sierra Leone* Judgment No ECW/CCJ/JUD/32/22 (18 July 2022) paras 117-144.

78 (20431/2014) (2015) ZASCA 152; (2015) 4 All SA 609 (SCA); 2016 (1) SACR 468 (SCA) (2 October 2015).

79 *Naidoo* (n 78) para 27.

80 See M Kamunyu 'Article 1' sec 6.3 in this volume.

81 See M Kamunyu 'Article 1' sec 6.2, E Lubaale 'Article 2' sec 3.7 and S Nabaneh 'Article 5' in this volume. My emphasis.

82 SADC Protocol on Gender and Development <https://www.tralac.org/documents/resources/sadc/1186-sadc-protocol-on-gender-and-development-17-august-2008/file.html> (accessed 30 August 2022).

83 (merits) (2018) 2 AfCLR 380 (APDF).

84 The applicants did not allege a violation of art 3 of the Maputo Protocol.

85 APDF (n 83) para 135.

In the context of article 21 of the African Children's Charter, it has also become clear that the African Children's Committee gives a wide interpretation to harmful social and cultural practices, stating that it includes 'all behaviours, attitudes and/or practices' that undermine fundamental rights regardless of whether it is 'condoned by a society, culture, religion or tradition'.⁸⁶ The obligation to eliminate harmful practices exists precisely because practices that undermine fundamental rights cannot be justified.

At the sub-regional level, the ECOWAS Court in *Hadijatou Mani Koraou v Niger* has also dealt with harmful practices, holding that slavery under the guise of custom constitutes a harmful practice and infringes on the right to human dignity under the African Charter. The applicant was sold to a tribal chief as a minor in accordance with the practice of *Wahiya*, in terms of which a man acquires a slave girl who must then work as a servant and is available to the man for sexual relations.⁸⁷ After being liberated from slavery, the applicant fled the tribal chief's home despite his assertion that she must remain there because she was his wife.⁸⁸ What followed was lengthy domestic litigation on the issues of whether the applicant was married to the tribal chief and whether her enslavement in terms of the custom was unlawful.⁸⁹

As a result of 'passiveness, inaction, and abstention' of the local authorities, the applicant approached the ECOWAS Court, which recognised that the applicant was, in fact, held in slavery in contravention of article 5 of the African Charter and that the respondent had not done enough to protect the applicant from the harmful practice.⁹⁰ Instead, the authorities' conduct illustrated acceptance or at least tolerance of the custom.⁹¹ Like in *Dorothy Chioma Njemanze v Nigeria*, the ECOWAS Court failed to grant educational and preventative measures, thereby limiting the potential of the decision to bring about real change.

The UN Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) and the UN Committee on the Rights of the Child (CRC Committee) have also echoed the findings on harmful practices as a violation of the right to human dignity.⁹² In a joint general recommendation, it was explained that harmful practices are often rooted in the presumed superiority of men over women and are sustained by sex and gender stereotypes, social inequalities, control over the female body, social inequalities, and male-dominated power structures.⁹³ Based on this, the joint general recommendation identified FGM, child marriage, forced marriage, polygamy, and honour crimes as harmful practices.⁹⁴ Importantly, the joint general recommendation explained that a practice constitutes a harmful practice if it infringes on a fundamental human right and denies the individual's inherent dignity.⁹⁵

86 African Children's Committee General Comment 2 on art 6 of the African Children's Charter: The Right to a Name, Registration at Birth, and to Acquire a Nationality' (16 April 2014) ACERWC/GC/02 (2014) para 30.

87 *Hadijatou Mani Koraou* (n 73) paras 8-9.

88 *Hadijatou Mani Koraou* (n 73) paras 13-14.

89 *Hadijatou Mani Koraou* (n 73) paras 15-28.

90 *Hadijatou Mani Koraou* (n 73) paras 77 & 83.

91 *Hadijatou Mani Koraou* (n 73) para 85.

92 Committee on the Elimination of Discrimination against Women/Committee on the Rights of the Child 'Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women and 18 of the Committee on the Rights of the Child on Harmful Practices' (4 November 2014) CEDAW/C/CG/31-CRC/C/GC/18.

93 Joint General Recommendation/General Comment on Harmful Practices (n 92) paras 17-18.

94 Joint General Recommendation/General Comment on Harmful Practices (n 92) paras 19-29.

95 Joint General Recommendation/General Comment on Harmful Practices (n 92) paras 15-16.

In light of this discussion, it is clear that cultural and religious freedom, as the grounds on which harmful cultural practices are sought to be justified, cannot outweigh international human rights standards grounded in human dignity, thereby showing an alignment to the principle of universality. Considering these decisions in the context of violence against women and degrading treatment, harmful cultural practices constitute a violation of women's human dignity under the Maputo Protocol.

3.2.2.3 Verbal abuse

Degrading treatment extends beyond harmful practices, including verbal abuse or violence. Interestingly, in the decision of *Josephine Oundo Ongwen v Attorney General*,⁹⁶ the High Court of Kenya found a violation of the applicant's human dignity, referring to article 3(4) of the Maputo Protocol. The finding was based on the inappropriate hospital setting in which the applicant had to give birth to her child, inadequate medical assistance, and verbal abuse from healthcare practitioners.⁹⁷ Similarly, in *Mugwadi v Dube*,⁹⁸ the High Court of Zimbabwe found that a media article driven by gender biases and stereotypes regarding how women should conduct themselves defamed the applicant and that she was, therefore, entitled to compensation. Although not discussing article 3 of the Maputo Protocol, the High Court nonetheless referred to articles 3(1) and (2) in a footnote in its discussion on how gender discrimination undermines women's rights.⁹⁹

When considering the meaning of the right to human dignity and its relationship with the prohibition of degrading treatment in the absence of clear physical violence, the African Commission's decision in *Purohit v The Gambia* offers interpretive guidance. In this case, the African Commission had to consider whether the Lunatics Detention Act of 1917, which prescribed that any 'lunatic' must be automatically and indefinitely institutionalised, violated the right to human dignity of the complainants.¹⁰⁰

In determining whether a violation had occurred, the African Commission outlined that the right to human dignity demands that individuals be protected from inhuman or degrading treatment or punishment.¹⁰¹ Therefore, ensuring respect for human dignity requires that degrading treatment be given a broad definition to include the 'widest possible protection against abuses, whether physical or mental'.¹⁰² The African Commission established that human dignity would be violated where the individual is exposed to 'personal suffering and indignity' and that a violation can occur where undignified language is used.¹⁰³

Although important for expanding the meaning of degrading treatment, the importance of the African Commission's decision in *Purohit* for purposes of women's right to human dignity lies in the proclamation that 'at the heart of the right to human dignity ... (is the) right to enjoy a decent life, as normal and full as possible'.¹⁰⁴ Part of this is the right to have hopes, dreams and goals, and the right to pursue it. Central to this is the individual's right to make decisions about their life and their bodies.

96 Petition Case No 5 of 2014 (2018) eKLR (High Court, Kenya).

97 Joint General Recommendation/General Comment on Harmful Practices (n 92) paras 59-64.

98 (HC 6913 of 2011) (2014) ZWHHC 314 (17 June 2014).

99 *Mugwadi v Dube* (n 96) 22.

100 *Purohit* (n 46) para 44.

101 *Purohit* (n 46) para 55.

102 *Purohit* (n 46) para 58.

103 *Purohit* (n 46) para 58. See also *George Iyanyori Kajikabi v The Arab Republic of Egypt*, Communication 344/07 African Commission on Human and Peoples' Rights, Thirteenth Annual Activity Report (2021) para 161. Here, the African Commission explained that verbal abuse refers to insulting language which includes 'offensive, derogatory, abusive and negative stereotyping remarks'. Importantly, verbal abuse intends to impair the dignity of the victim.

104 *Purohit* (n 46) para 61.

3.2.2.4 Sexual and reproductive health

General Comment 1 on article 14(1)(d) and (e) of the Maputo Protocol sets out the interpretation of the ‘right to self-protection and the right to be protected from HIV and sexually transmitted infections’ and to be ‘informed on one’s health status and on the health status of one’s partner’.¹⁰⁵ In considering the normative content of the right to self-protection and the right to be protected, the African Commission drew attention to the fact that these rights are ‘intrinsically linked to other women’s rights including ... dignity ... and the right to be free from all forms of violence’.¹⁰⁶ As such, states parties must ensure the legal and social environment is such that women are empowered to exercise their right to self-protection and be protected and that these rights are fully realised.¹⁰⁷ In General Comment 1, the African Commission also places a specific obligation on states to train healthcare workers on ‘respect for dignity, autonomy and informed consent’ in providing sexual and reproductive health services to women.¹⁰⁸ Through this, the African Commission recognises the connection between human dignity and women’s right to make informed decisions about their bodies.

General Comment 2 gives broader guidance on states parties’ obligations in respect of women’s right to health, which includes sexual and reproductive health.¹⁰⁹ Speaking to women’s right to exercise control over their fertility, to decide whether to have children and to choose any method of contraception, the African Commission referred to the relationship between human dignity and the independence of women to make their own decisions, stating that:

The right to dignity enshrines the freedom to make personal decisions without interference from the State or non-state actors. The woman’s right to make personal decisions involves taking into account or not the beliefs, traditions, values and cultural or religious practices, and the right to question or to ignore them.¹¹⁰

Here, the African Commission recognises the role of culture and religion in upholding harmful practices and acknowledges that states cannot justify infringing on the right to human dignity based on these grounds. Its statement, moreover, emphasises women’s right over their own bodies in contrast with the state’s desire to interfere in these decisions.

Despite the above, the Maputo Protocol does not recognise the right to abortion out of free will, reserving it for ‘cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus’.¹¹¹ Therefore, women’s right to exercise their human dignity by making personal decisions about their sexual and reproductive health stops short of choosing whether or not to have children.

In General Comment 2, the African Commission also refers to states’ obligation to ‘ensure that women are not treated in an inhumane, cruel or degrading manner when they seek to benefit from reproductive health services’. However, it does not explain what it means.¹¹² Viewed in the context of

105 General Comment 1 on Article 14(d) and (e) of the Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted during the 52nd ordinary session of the African Commission held in Yamoussoukro, Ivory Coast 9-22 October 2012 (African Commission General Comment 1). See E Durojaye ‘Article 14’ in this volume.

106 General Comment 1 (n 105) para 11.

107 General Comment 1 (n 105) para 10.

108 General Comment 1 (n 105) para 42.

109 African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) and art 14(2)(a) & (c) of the Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted during the 54th ordinary session of the African Commission held in Banjul, The Gambia from 22 October to 5 November 2013.

110 General Comment 2 (n 109) para 24.

111 Maputo Protocol art 14(2)(c).

112 General Comment 2 (n 109) para 36.

the fact that the right to human dignity entitles women to make personal decisions, the limitation of abortion rights can arguably be deemed to constitute degrading treatment, thereby infringing on article 3(3).

4 State practice and implementation

As a point of departure, it should be noted that many constitutions of countries on the African continent enshrine the right to human dignity in broad terms, recognising that human dignity is an inviolable right that accrues to all persons and must therefore be respected and protected.¹¹³ Equally, many constitutions refer to the right to human dignity in relation to specific rights, including the right to work;¹¹⁴ conditions of detention;¹¹⁵ the rights of older persons;¹¹⁶ the rights of persons with disabilities;¹¹⁷ and the realisation of economic, social, and cultural rights.¹¹⁸ The explicit recognition of the right to human dignity in a national constitution arguably provides impetus to states to comply with the obligations imposed on it by human rights treaties such as the Maputo Protocol.

As discussed under section 3 of this contribution, article 3 places obligations on states parties to guarantee women the right to human dignity. First, state parties must protect women's right to dignity. Second, state parties must protect women from all forms of violence, degrading treatment, and exploitation. To this end, states parties must adopt and implement appropriate measures that prohibit conduct that infringes on women's right to human dignity. The Guidelines for State Reporting under the Protocol to the African Charter on the Rights of Women in Africa require states to report on the legislative, judicial, administrative, and other measures taken to ensure the realisation of rights enshrined under the Maputo Protocol, thereby defining a baseline for appropriate measures.¹¹⁹

The Reporting Guidelines indicate a preference that states report on all the provisions of the Maputo Protocol, grouped according to eight themes. Articles 3 and 4 should be reported on together under the second theme, which concerns protecting women from violence. Harmful practices, female stereotypes, sexual harassment, domestic violence, and support to victims of violence should also be reported on under this theme. Considering this, it is not surprising that states parties have primarily referred to human dignity in reporting on these themes.

Although not necessarily referring directly to the right to human dignity under the Maputo Protocol, states have nonetheless reported on measures taken to protect women from violence, degrading treatment, and exploitation, all of which strike the core of human dignity. Measures taken generally include the implementation of legislation, policies, and programmes that seek to: criminalise indecent assault;¹²⁰ criminalise and eradicate non-consensual sexual acts;¹²¹ protect women from and address

113 Constitution of Ghana, Mali, Namibia, South Africa, and Eritrea. For an overview of human dignity in national constitutions, see D Shultiner & G E Carmi 'Human dignity in national constitutions: functions, promises and dangers' (2014) 62 *The American Journal of Comparative Law* 461-490.

114 Angola, Mozambique, and Seychelles.

115 Egypt, Democratic Republic of the Congo, Ethiopia, Malawi, and Tanzania.

116 Kenya.

117 Eswatini, Kenya, and Uganda.

118 Burundi.

119 African Commission 'Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 2016 https://www.maputoprotocol.up.ac.za/images/files/instruments/state_reporting_guidelines_pages.pdf (accessed 27 July 2022) (Reporting Guidelines).

120 The Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa' (2018).para 325.

121 Lesotho: Periodic Report, 2001-2017 (n 120) para 326; Kingdom of Eswatini Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa (2022) para 374.

domestic violence, including providing support to survivors of domestic violence;¹²² protect women from sexual harassment in the workplace;¹²³ adjust criminal court proceedings to be less traumatising for the victims of sexual violence;¹²⁴ eradicate FGM and educate the public on issues related to FGM;¹²⁵ address gender-based violence;¹²⁶ address stereotypes and cultural practices that undermine women's rights;¹²⁷ prohibit child marriage¹²⁸ and eliminate the trafficking of women.¹²⁹

Although speaking of sexual orientation in reporting on steps taken to comply with state obligations in respect of human dignity, it is concerning that Lesotho, for example, reports that the law does not recognise persons with non-heteronormative sexual orientations or gender identities while also recognising that individuals face societal discrimination and persecution based on these grounds.¹³⁰ Eswatini reported on the occurrence of an event celebrating persons with non-heteronormative sexual orientations or gender identities but without engaging on why it reports on the issue in relation to the right to human dignity under the Maputo Protocol.¹³¹

Despite the steps taken, the African Commission highlights the lack of real change for women. For example, in its Concluding Observations on Lesotho, the African Commission expressed concern over the persistence of cultural practices that engrain gender prejudice despite laws and policies addressing the inequalities these practices create.¹³² While welcoming the measures taken in Botswana to address gender-based violence, the African Commission nonetheless drew attention to its prevalence.¹³³ Similarly, although many countries prohibit FGM and other forms of violence against women and have taken various measures to protect women, women continue to be exposed to these harms as a result of ineffective implementation, whether due to administrative, financial, or other constraints.¹³⁴ The African Commission has, furthermore, recommended that Malawi criminalise marital rape. Yet, by 2022, this has not been complied with.¹³⁵ This by no means represents an exhaustive list of the

122 Republic of Angola: 6th Periodic Report, 2011-2016 (2018) at Part B: paras 106-108 and Part C: paras 9, 16, 26-37; Burkina Faso: 3rd and 4th Periodic Report, 2011-2013 (2015) para 328; Eswatini: Periodic Report, 2001-2019 (n 122) para 373.

123 Lesotho: Periodic Report, 2001-2017 (n 120) paras 324-326; Burkina Faso: Periodic Report, 2011-2013 (n 121) para 326.

124 Lesotho: Periodic Report, 2001-2017 (n 120) paras 330-331.

125 Most African states prohibit FGM. See, eg: Burkina Faso: Periodic Report, 2011-2013 (n 122) para 331; Federal Democratic Republic of Ethiopia: 5th and 6th Periodic Report, 2009-2013 (2015) 100.

126 Republic of Botswana: 2nd & 3rd Periodic Report, 2011-2015 (2018) 27; Ethiopia: Periodic Report, 2009-2013 (n 125) 102.

127 Botswana: Periodic Report, 2011-2015 (n 126) 28-29; Republic of The Gambia: 2nd Periodic Report, 1994-2018 (2018) 23-26.

128 Ethiopia: Periodic Report, 2009-2013 (n 126) 101-102; Kenya: Combined report of the 12th and 13th Periodic Report (2021) para 266.

129 Kenya: Periodic Report (2021) (n 128) para 244.

130 Lesotho: Periodic Report, 2001-2017 (n 120) para 342.

131 Eswatini: Periodic Report, 2001-2019 (n 121) para 377; Mauritius: 9th to 10th Combined Periodic Report, 2016-2019 (2020) paras 296-299.

132 African Commission Concluding Observations and Recommendations on the Kingdom of Lesotho's Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa' adopted at its 68th ordinary session 14 April to 4 May 2021 para 33.

133 Concluding Observations and Recommendations – Botswana: 2nd and 3rd Periodic Report, 2011-2015 (2019) para 52.

134 Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso, 2011-2013 (2017) para 62; Concluding Observations and Recommendations – Kingdom of Eswatini's Combined 1st to 9th Periodic Report, 2001-2020 (2022) para 49; Concluding Observations and Recommendations – Ethiopia: 5th and 6th Periodic Report, 2009-2013 (2015) para 36; Concluding Observations and Recommendations – Gambia: 2nd Periodic Report, 1994-2018 (2021) para 62.

135 Concluding Observations and Recommendations – Malawi, 2015-2019 (n 55) para 74.

concerns highlighted by the African Commission. Instead, it illustrates that despite steps taken by state parties to ensure women's right to human dignity, practices that undermine women's dignity remain alive across the continent.

5 Conclusion

Article 3 guarantees a comprehensive right to human dignity for women. It goes further than the conventional protection against degrading treatment, explicitly outlining an obligation on states to not only address all forms of violence against women but also ensure their right to the free development of the personality. Despite the scope of article 3, the African Commission falls short in utilising the provision. This is evident from the lack of engagement with article 3 in its communications. In contrast, the ECOWAS Court has relied extensively on human dignity concerning complaints of sexual violence and harmful cultural practices.

Considering the contexts in which human dignity has been referred to under the Maputo Protocol by the African Commission and the ECOWAS Court, it is not unreasonable to fear that its scope will remain limited to violence-related issues. Unlike in relation to the right to non-discrimination, the African Commission has not yet sufficiently elaborated on how human dignity informs other rights, for example, the right to education and training or economic and social welfare rights. This can be deemed a missed opportunity to strengthen human dignity as an underlying right, giving content to all rights enshrined under the Maputo Protocol.

For the right to human dignity to have this impact, states must commit to complying with reporting timelines and improve the quality of state reports. States must commit to engage seriously with the African Commission's recommendations in its Concluding Observations, interrogating the underlying cultural, religious, and moral considerations that may prevent them from ensuring that women's inherent human dignity is guaranteed, respected, and protected. This includes utilising the Maputo Protocol in national case law and taking guidance from article 3 when implementing legislation and policies aimed at protecting women from violence. These recommendations also speak to the challenges to the implementation of article 3. Finally, non-state actors have an important role to play not only in contributing to research on the right to human dignity of women, but also in advocating for changes in policy and legislation aimed at, for example, addressing violence against women and facilitating litigation against states parties, as well as educating women on the various aspects of human dignity and enabling them to take ownership of this right.

Article 4

The rights to life, integrity and security of the person

Ruth Nekura

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.
2. States Parties shall take appropriate and effective measures to:
 - (a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;
 - (b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
 - (c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
 - (d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;
 - (e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;
 - (f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;
 - (g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;
 - (h) prohibit all medical or scientific experiments on women without their informed consent;
 - (i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
 - (j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women;
 - (k) ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.

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1 Introduction

Violence against women (VAW) is a pervasive violation of human rights and a form of gender-based discrimination.¹ Worldwide, 31 per cent of women have experienced physical and/or sexual violence.² Comparative studies show that the prevalence of VAW in Africa is 36 per cent, which is higher than the global average.³ In sub-Saharan Africa, 44 per cent of women, or more than two in five, have been subjected to intimate partner violence.⁴ Further, 38 per cent of all murders of women are committed by intimate partners.⁵ Statistics show that the magnitude of femicide or gender-related killings remains largely consistent, with negligible increases and decreases over the past decade.⁶ Moreover, there is a rise in digital violence which also disproportionately affects women.⁷ In response, several mobilisation campaigns have arisen, showing outrage on the streets and online.⁸

Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) provides for the rights of African women to live their lives free from all forms of violence. This right is expressed within the ambit of three foundational rights: the rights to life, to integrity and to security of the person, and to be free from all forms of exploitation, cruel, inhuman, and degrading treatment.

Article 4 is an advance in normative standards compared to the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) because it creates binding state obligations to eradicate VAW. Except for article 6 of CEDAW, which requires state parties to suppress all forms

- 1 UN Declaration on the Elimination of Violence Against Women (DEVAW) Preamble, arts 1 and 2. This chapter uses the terminology VAW in line with the language used in art 4 of the Maputo protocol, with the exception that the terms 'gender-based violence' or 'gendered violence' are used where there is a need to emphasise the gendered nature of VAW.
- 2 WHO 'Violence against women: 2018 estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women' (2021) <https://www.who.int/publications/i/item/9789240022256> (accessed 28 April 2023) 35.
- 3 As above.
- 4 MD Muluneh, V Stulz, L Francis & K Agho 'Gender based violence against women in sub-Saharan Africa: a systematic review and meta-analysis of cross-sectional studies' (2020) 17 *International Journal of Environmental Research and Public Health* 903. See also WHO (n 2) 35.
- 5 WHO (n 2) 1.
- 6 UNODC *Killings of women and girls by their intimate partner or other family members Global estimates* (2020). Reports from Africa confirm this trend. See S Fröhlich 'Violence against women: Africa's shadow pandemic' DW-Africa 2020 <https://www.dw.com/en/africa-pandemic-violence-rape-women/a-55174136> (accessed 26 April 2023); UN Women 'Facts and figures: Ending violence against women' February 2022 <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>; (accessed 28 April 2023) Muluneh et al (n 4).
- 7 African Commission on Human and Peoples' Rights (the African Commission), Resolution on the Protection of Women Against Digital Violence in Africa—ACHPR/Res. 522 (LXXII) 2022 adopted at 72nd Ordinary 2 August 2022; OA Makinde, E Olamijuwon, NK Ichegebo, C Onyemelukwe & MG Ilesanmi 'The nature of technology-facilitated violence and abuse among young adults in sub-Saharan Africa' in J Bailey, A Flynn & N Henry (eds) *The emerald international handbook of technology-facilitated violence and abuse* (2021) 83-101.
- 8 A Okech 'Feminist digital counter publics: Challenging femicide in Kenya and South Africa' (2021) 46 *Signs: Journal of Women in Culture and Society* 1013-1033. Such as the #TotalShutDown protests in South Africa, the #State of Emergency movement in Nigeria, and the #HerLifeMatters and #NoToFemicide movements in Kenya.

of trafficking in women,⁹ there are no specific provisions on VAW in CEDAW. To remedy this, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) has issued several General Recommendations.¹⁰

This chapter provides a commentary on article 4 in light of national, regional, and global normative standards, including comparative perspectives and implementation practices. The chapter is divided into six sections and aims to analyse one of the most comprehensive rights in the Maputo Protocol. Section 2 begins by reviewing the drafting history of article 4. Section 3 then unpacks the foundational rights under article 4(1), drawing linkages with related provisions in other treaties. Section 4 proceeds with an analysis of the nature of state obligations created under article 4(2) and explicates the scope and content of these obligations. Section four further highlights the obligation that rests on all states to invest financial and other resources to eradicate VAW. Section 5 elaborates on state practice through a review of domestic legislation and state reports submitted to the African Commission on Human and Peoples' Rights (African Commission) under article 26(1) of the Maputo Protocol alongside the related Concluding Observations. Section 6 of this chapter concludes by briefly assessing the challenges that arise in implementing article 4, highlighting its conceptual limits and providing entry points for advancing the realisation of women's right to be free from all forms of violence.

2 Drafting history

The Maputo Protocol was drafted out of concern that despite the existence of the African Charter on Human and Peoples' Rights (African Charter), discrimination against women, especially manifested through VAW, persisted on the continent.¹¹ Article 4 was developed to further concretise the international recognition of VAW as a violation of human rights and as a form of gender-based discrimination.¹² Earlier drafts did not strongly articulate state responsibility to eliminate VAW. Instead, the focus was on physical security, specifically prohibiting the death penalty on pregnant women, commercial sexual exploitation, medical and scientific experiments on women without their consent and rape, especially in times of war.¹³ This initial articulation did not include VAW as it affects women in the so-called¹⁴

9 UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 38 on trafficking in women and girls in the context of global migration, 20 November 2020, CEDAW/C/GC/38 (CEDAW Committee General Recommendation 38) para 10; the CEDAW Committee has acknowledged that 'trafficking and exploitation of prostitution in women and girls is unequivocally a phenomenon rooted in structural, sex-based discrimination, constituting gender-based violence'.

10 UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 12, Violence Against Women, 8th session 1989; UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, A/47/38; UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 35 on Gender-Based Violence Against Women, Updating General Recommendation 19, 26 July 2017, CEDAW/C/GC/35; UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations, 18 October 2013, CEDAW/C/GC/30.

11 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 5.

12 Report of the Meeting of Experts (n 11).

13 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft); Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

14 So-called is used here to show the fallacy of the public/private divide that has been used historically to delegitimize state accountability for VAW by non-state actors or occurring in 'private'. This false dichotomy has been dismantled by scholars and the mandate of the Special Rapporteur on VAW its causes and consequences. See eg R Manjoo UN Special Rapporteur on violence against women its causes and consequences, Developments in the United Nations regarding violence against women over approximately 20 years UN Doc A/HRC/26/38/2014; CH Chinkin & S Wright 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 613; C Romany 'State responsibility goes private: a feminist critique of the public/private distinction in international human rights law' in RJ Cook (ed) *Human rights of women: national and international perspectives* (1994) 85.

'private sphere', nor the broad range of manifestations of protection against VAW that already existed in global and regional human rights conventions such as CEDAW.¹⁵

In the Nouakchott and Kigali Drafts, provisions presently under article 4 were spread between articles 4 and 5 and included the prohibition of harmful cultural practices and non-discrimination provisions.¹⁶ Although the Kigali Draft went further to separate provisions on discrimination under article 4 and the right to physical security under article 5, it overlapped the obligation to modify socio-cultural practices and gender stereotypes as part of the provision on non-discrimination.¹⁷ In an attempt to resolve the overlaps, the Final Draft merged some of the provisions scattered across articles 4 and 5 to create the present article 4.¹⁸ The Final Draft also separated some provisions, moving the provisions on non-discrimination to article 2, and some provisions on sexual and verbal violence were retained under article 3 on dignity. The provision on harmful cultural practices was moved to article 5 to be addressed more comprehensively in line with the merger between the draft OAU Convention on Harmful Practices and the Kigali Draft.¹⁹

The drafting process included discussions which emphasised the importance of anchoring the protection of women from violence in international standards and ensuring that article 4 secured and advanced rights rather than regressing from existing standards.²⁰ Such discussions included a meeting convened by Equality Now in January 2003 which resulted in the Comments by the NGO Forum seeking to strengthen and align the Final Draft with international standards.²¹ With regard to article 4, the main advancement sought by this NGO commentary was the recognition of VAW as a form of discrimination. This is demonstrated by the mark-ups by the NGO Forum integrating discrimination under article 4 and incorporating the right to be free from violence into article 2 on non-discrimination.²² These proposals were not included in the Addis Ababa Draft.²³

Article 4 should be read within the context of the global trajectory of legal standards and jurisprudence on VAW at the time the Protocol was drafted. The human rights standards recognising VAW as a form of discrimination emerged as part of the CEDAW Committee's attempt to address the major normative gap of CEDAW not including binding provisions on VAW. Through its General

15 See also Vienna Declaration and Programme of Action (Vienna Declaration); DEVAW; United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995; UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).

16 Nouakchott and Kigali Drafts (n 13).

17 Kigali Draft (n 13) arts 4 and 5.

18 Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

19 OAU Legal Counsel Inter Office memorandum to the Secretary of the African Commission subject: OAU Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls, I CAB/LEG/117.141/62/Vol.I 17 May 2000. On file with the author. See also Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

20 Equality Now Regional Office, Letter to the Interim Commissioner for Peace, Security and Political Affairs African Union, Ambassador Djinnit Said, 13 January 2003.

21 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003.

22 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft) arts 2 & 4.

23 Addis Ababa Draft (n 22).

Recommendation 12,²⁴ updated by General Recommendation 19,²⁵ the CEDAW Committee concluded that gender-based violence (GBV) is a form of discrimination within the meaning of article 1 of CEDAW. This standard is reiterated in article 4 of the DEVAW.

The General Recommendations by the CEDAW Committee and DEVAW are soft law and do not create binding obligations. In contrast, article 4 of the Maputo Protocol creates binding state obligations with respect to VAW. Therefore, the non-integration of discrimination in article 4 does not weaken the Protocol's stance on VAW. Nonetheless, the Preamble to the Maputo Protocol, as discussed in chapter 2, recognises this integration in the 'commitments to eliminate all forms of discrimination and gender-based violence against women'.²⁶ It further emphasises the importance of interpreting and applying the Protocol in line with other global and regional standards.²⁷

3 Concepts and definitions

This section provides a conceptual analysis of the different rights protected under article 4. It includes discussions on the right to be free from violence, the right to life, the right to integrity and security of the person, and the prohibition of all forms of cruel, inhuman, and degrading treatment. It also highlights specific contexts within which VAW takes place: that is, as human trafficking, as medical and scientific experiments and in relation to refugee women.

3.1 Violence against women as a form of gender-based discrimination

VAW as a form of discrimination is evident in the disproportionate and systematic way in which women are targeted by gendered violence at individual and structural levels.²⁸ VAW results from gender-based discrimination and perpetuates gender-based discrimination.²⁹ Article 4(1) of the Maputo Protocol, read with article 4(2), recognises that VAW violates women's rights, whether in public or private. Thus, article 4 aligns Africa's regional human rights system with the consensus which exists in the global human rights system and other regional human rights systems.³⁰

3.2 Right to life

The right to life is foundational, without which other human rights cannot be realised. It is recognised as part of customary international law and 'as a *jus cogens* norm, universally binding at all times'.³¹ It is non-derogable and applies to all persons at all times.³² Thus, it is well recognised in regional³³ and

24 General Recommendation 12 (n 10).

25 General Recommendation 12 (n 10). See also CEDAW Committee General Recommendation 35 (n 10).

26 See A Rudman 'Preamble' sec 4.9 in this volume.

27 See A Rudman 'Preamble' secs 3.3, 4.4, 4.5 & 4.6 in this volume.

28 R Manjoo Report of the Special Rapporteur on violence against women, its causes and consequences, Human Rights Council Seventeenth session, 2 May 2011, UN Doc A/HRC/17/26.

29 Manjoo (n 28) 25-27.

30 DEVAW arts 1 & 2; CEDAW Committee General Recommendation 12 (n 10); CEDAW Committee General Recommendation 19 (n 10); CEDAW Committee General Recommendation 35 (n 10); CEDAW Committee General Recommendation 30 (n 10). The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention); and Convention of Belém do Pará.

31 African Commission on Human and Peoples' Rights, General Comment 3 on the African Charter on Human and Peoples' Rights the Right to Life (art 4), 18 November 2015 (African Commission General Comment 3) para 5.

32 General Comment 3 (n 31) para 1.

33 African Charter art 4, African Charter on the Rights and Welfare of the Child, arts 5 & 30. American Convention on Human Rights (ACHR) art 4. European Convention on Human Rights (ECHR) art 2.

global³⁴ human rights instruments. The African Commission and the United Nations (UN) Human Rights Committee (HRC) have emphasised that the right to life should be interpreted as broadly as possible to secure a dignified life for all.³⁵ Beyond simply preventing death, the right to life involves states securing the conditions for a dignified life and protecting the right to life of individuals or groups who are particularly at risk, including women.³⁶

The normative standards on the right to life usually cover issues such as extrajudicial killings by state agents, abolition of the death penalty, and enforced disappearances.³⁷ It also includes standards regulating the use of force in law enforcement and armed conflict and the prohibition of arbitrary deprivation of life, and protection of rights of persons held in custody.³⁸

While women's right to life is affected in these ways, it is a narrow purview. The greatest threat to a woman's life is GBV, often by an intimate partner or family member.³⁹ Further, women are targeted through specific gender-related killings occurring in communities and perpetrated or condoned by the state.⁴⁰ Manjoo concludes that such killings are not 'isolated incidents that arise suddenly and unexpectedly but are rather the ultimate act of gendered violence which is experienced as a continuum of violence'.⁴¹

Women's right to life is violated through physical, sexual, psychological and economic violence targeted at women simply because they are women. Direct gender-related killings include femicide as a result of domestic or intimate partner violence, honour-related killings, dowry-related femicide, ethnic- and indigenous identity-related killings, targeted killing of women at war, female infanticide, gender-based sex-selective foeticide and the killing of women due to accusations of witchcraft.⁴² There are also indirect gender-related killings of women, for example, through unsafe abortions, maternal mortality, deaths from harmful practices such as female genital mutilation and deaths linked to human trafficking.⁴³ In terms of reproductive rights, the HRC has elaborated that the right to life for women

34 International Covenant on Civil and Political Rights (ICCPR) art 6; Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty; UN Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW) art 9. UN Convention on the Rights of the Child (CRC) art 6. Universal Declaration on Human Rights (Universal Declaration) art 3.

35 African Commission General Comment 3 (n 31) paras 6, 11, 41-43. UN Human Rights Committee (HRC), General Comment 36, art 6 (Right to Life), 3 September 2019, CCPR/C/GC/35 (HRC General Comment 36) para 12.

36 African Commission General Comment 3 (n 31) para 11.

37 See eg *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995), where the Africa Commission found violations of the right to life against Chad for failing to prevent disappearances. See also *Achuthan (on behalf of Banda) v Malawi* (2000) AHRLR 144 (ACHPR 1995) (*Achuthan v Malawi*) for violations relating to extrajudicial executions where in Malawi the police shot and killed peacefully striking workers. As to the death penalty, see *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

38 African Commission General Comment 3 (n 31), HRC General Comment 36 (n 35).

39 WHO (n 2) 22; *Killings of women and girls* (n 6).

40 R Manjoo Report of the Special Rapporteur on violence against women, its causes and consequences on gender related killings of women, Human Rights Council Twentieth Session, 23 May 2012, UN Doc A/HRC/20/16.

41 Manjoo (n 40) para 15.

42 UNODC Global Study on Homicide. Gender-related killing of women and girls, 2018, https://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18_Gender-related_killing_of_women_and_girls.pdf (accessed 28 April 2023); A Kulczycki A & S Windle 'Honor killings in the Middle East and North Africa: a systematic review of the literature' (2011) 17 *Violence against women* at 1442. During war and conflict women, civilian and combatants are systematically targeted through mass rape and murder to annihilate local communities and humiliate opponents. This form of femicide has been termed by UNODC as 'unrecorded gender-killings' and found in conflicts in Darfur, the Democratic Republic of Congo, Iraq, Rwanda Afghanistan, Bosnia and Herzegovina. See C Corradi Femicide, its causes and recent trends: What do we know? European Parliament 2021, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/653655/EXPO_BRI\(2021\)653655_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/653655/EXPO_BRI(2021)653655_EN.pdf) (accessed 28 April 2023).

43 Manjoo (n 40) 16.

includes access to reproductive health services, specifically in state regulation of voluntary termination of pregnancy, especially ‘where the life and health of the pregnant woman or girl is at risk’.⁴⁴

Therefore, when interpreting the right to life under the Maputo Protocol, the gendered context of the lived realities of African women must inform the analysis, and that article 4 is read together with the rest of the Protocol, especially articles 2, 3, 5, 8, 10, 11 13 and 14 to holistically understand the nature of the right to life as it affects African women.

Article 4(1), read with 4(2) of the Maputo Protocol, provides a comprehensive normative framework for defending women’s right to life, whether violated in the typical ways that the generic right to life is understood in international law or the specific ways in which the right to life affects women. For instance, article 4(2)(j) includes prohibiting the death penalty on pregnant or nursing women.⁴⁵ This aligns with the African Commission’s soft law calling on states to abolish the death penalty or establish a moratorium in line with the continental and global trend.⁴⁶ The majority of African states have abolished the death penalty in law or in practice.⁴⁷ The right to life is also protected under humanitarian and international criminal law.⁴⁸

Ultimately, applying the recommended broad interpretation of the right to life means that African women have a right to enjoy a dignified life since ‘the right to life and the right to dignity cannot be divorced – they are, in the standard language, interrelated and indivisible’.⁴⁹

3.3 The right to integrity and security of the person

Although the rights to integrity and security are separate, they are discussed together in this section because they are conceptually linked. Moreover, the right to integrity and security overlaps with the right to dignity, as discussed in chapter 3.⁵⁰

Integrity rights are protections which seek to safeguard the control of one’s personhood, free from unconsented intrusion and interference by others. Integrity is a broad right, sometimes considered a group of rights.⁵¹ It has the capacity to cover a multitude of human rights violations, including

44 UN HRC General Comment 36 (n 35) para 8.

45 The exclusion of women from death penalty especially because of pregnancy or nursing roles is a subject of longstanding contentious debate outside the scope of this chapter, including concerns of protectionist patriarchal chivalry discourse, stereotypes on women’s gender roles, and the value placed on the life of the child as opposed to the woman’s life. See AE Pope ‘A feminist look at the death penalty’ (2002) 65 *Law and Contemporary Problems* 257-282; E Rapaport ‘The death penalty and gender discrimination’ (1991) 25 *Law and Society Review* 367-383; S Hynd ‘Deadlier than the male? Women and the death penalty in colonial Kenya and Nyasaland 1920-57’ (2007) *Vienna Journal of African Studies* 13-32; L Black ‘“On the other hand the accused is a woman ...”: women and the death penalty in post-independence Ireland’ (2018) 36 *Law and History Review* (2018) 139-172.

46 African Commission Resolution 136 Calling on State Parties to Observe a Moratorium on the Death Penalty, ACHPR/Res.136 (XXXXIV) 8 adopted at the 44th ordinary session, Abuja, Nigeria, 10-24 November 2008. See also African Commission General Comment 3 (n 31).

47 A majority of African Union Member States have abolished the death penalty (23) or are applying a de facto moratorium on capital punishment (17); fifteen states have retained the death penalty (15). See La Fédération Internationale des ACAT (FIACAT), A continental trend towards abolition, 2021 http://www.fiacat.org/attachments/article/2507/FIACAT_leaflet-UK_2021_PRINT.pdf (accessed 28 April 2023).

48 See Convention on the Prevention and Punishment of the Crime of Genocide and the I to IV Geneva Conventions. See further TM Makunya & JM Mumbala ‘Article 11’ in this volume for further discussion on the protection of women in armed conflicts.

49 C Heyns ‘Autonomous weapons in armed conflict and the right to a dignified life: an African perspective’ (2017) 33 *South African Journal on Human Rights* 17.

50 See C Kreuser ‘Article 3’ in this volume.

51 AM Viens ‘The right to bodily integrity cutting away rhetoric in favour of substance’ in AV Arnauld, KV Decken & M Susi (eds) *The Cambridge handbook of new human rights: recognition, novelty, rhetoric* (2020) 374 & 375.

manifestations of VAW.⁵² When framed as ‘bodily integrity’, this right includes issues such as bodily autonomy, agency, privacy and self-determination rights.⁵³ As a normative principle integrity has also been broadly invoked in health law and ethics.⁵⁴

Integrity rights also go beyond the physical body to protect against non-bodily interferences, including the protection of mental integrity.⁵⁵ More comprehensive conceptions of integrity will therefore be framed as a right to ‘integrity of the person’ denoting rights over the holistic self, beyond the body, what is sometimes referred to as ‘personal rights’.⁵⁶

In international law, the right to integrity is enshrined in different ways. Sometimes integrity is expressed as a component of the right to liberty and security.⁵⁷ For example, the HRC has defined the right to security of persons as ‘freedom from injury to the body and the mind, or bodily and mental integrity’.⁵⁸ In other frameworks, the right to bodily integrity is a free-standing right and a separate consideration from security. For example, the African Charter provides for the right to ‘integrity of the person’ in article 4 alongside the right to life and the right to liberty and security under article 6.

The jurisprudence of the African Commission has expounded on the right to integrity of the person in its decisions in contexts of VAW. In *Equality Now vs Ethiopia*,⁵⁹ the African Commission affirmed that ‘outside of the law, no one’s person or body should be invaded or exposed to the risk of invasion by state or non-state actors’.⁶⁰ In this case, the Commission found that rape constituted a serious violation of dignity, integrity, and personal security as guaranteed under articles 4, 5 and 6 of the African Charter, respectively.

The European Court of Human Rights (European Court) has also developed jurisprudence on integrity rights in this context. For instance, finding violations of physical integrity in cases of forced gynaecological examination of women while in detention.⁶¹ The European Court has also found that secondary victimisation in the criminal justice system through the use of humiliating and offensive language against a rape victim during cross-examination violated the woman’s right to personal integrity.⁶²

52 CEDAW Committee General Recommendation 19 (n 13) paras 11 & 24(b).

53 Viens (n 51) 374.

54 J Herring & J Wall ‘The nature and significance of the right to bodily integrity (2017) 76 *The Cambridge Law Journal* 566-588.

55 JC Publitz ‘The nascent right to psychological integrity and mental self-determination’ in AV Arnould, KV Decken & M Susi (eds) *The Cambridge handbook of new human rights: recognition, novelty, rhetoric* (2020) 387-403.

56 T Douglas ‘From bodily rights to personal rights’ in AV Arnould, KV Decken & M Susi (eds) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (2020) 378 383.

57 Article 6 of the African Charter, similar to art 9 of the ICCPR.

58 UN Human Rights Committee (HRC) General Comment 35 on art 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35 (HRC General Comment 35) para 3.

59 *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples’ Rights 57th Annual Activity Report (2016). Ethiopia ratified the Maputo Protocol in 2018, this communication was therefore heard under the provisions of the Africa Charter.

60 *Equality Now v Ethiopia* (n 59) para 116.

61 *Juhnke v Turkey* ECHR 52515/99, 2008; *YF v Turkey* ECHR 24209/94, 2003.

62 *Y v Slovenia* ECHR 41107/10, 2015.

The individual right to ‘security of the person’ is well established in several international⁶³ and regional⁶⁴ human rights instruments. Theorists have provided different conceptions of security. Fredman, for example, considers the right to security as a ‘platform for the exercise of real freedom and agency including the duty to provide for basic needs of individuals’.⁶⁵ Viens regards the right to security as a framework for the ‘protection of one’s physical integrity’.⁶⁶ Thus, the right to security can be applied specifically or generally, depending on the context.

Under international law, the right to security of the person is often paired with the right to liberty. Article 6 of the African Charter, similar to article 9 of the International Covenant on Economic, Social and Cultural Rights (ICCPR) provides that everyone has the right to liberty and security of the person. The HRC has clarified that ‘[s]ecurity of person concerns freedom from injury to the body and the mind, or bodily and mental integrity’, and it applies to all persons whether detained or not.⁶⁷ Moreover, ‘everyone’ should be interpreted holistically to include ‘lesbian, gay, bisexual and transgender persons’.⁶⁸ The right to security also includes protection against systemic violations targeted at marginalised groups, such as ‘violence against women, including domestic violence’.⁶⁹

Therefore, at the core of the right to integrity and security, for the purposes of article 4 of the Maputo Protocol, is the protection of women, in their diverse identities, from intentional infliction of bodily or mental injury. Article 4 can thus be invoked to cover a broad range of violations of a woman’s holistic wellness, including protection against physical, sexual, emotional, and psychological violence.

3.4 The prohibition of all forms of exploitation, cruel, inhuman or degrading punishment and treatment

The right to be free from cruel, inhuman, and degrading treatment (ill-treatment) is often categorised with torture within the umbrella of the rights to security, sometimes collectively referred to as ‘integrity rights’.⁷⁰ Unlike other rights, it is not possible to justify restrictions to these rights, and they cannot be derogated from in times of public emergency.⁷¹

Unlike other human rights treaties, article 4(1) of the Protocol does not include ‘torture’ in the framing of the rights that constitute protection against ill-treatment.⁷² It is not clear from the preparatory work why torture was not included. Nonetheless, it is well established under international law that VAW may amount to torture in certain circumstances, including in cases of rape, domestic violence, or harmful practices.⁷³

63 Universal Declaration art 3; the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) art 5; ICCPR art 9.

64 ECHR art 5; African Charter art 6; ACHR art 7; Charter of Fundamental Rights of the European Union, 2000/C 364/1 art 6; League of Arab States, Revised Arab Charter on Human Rights 2008 art 14.

65 S Fredman ‘The positive right to security’ in L Lazarus & B Goold (eds) *Security and human rights* (2007) 307.

66 Viens (n 51) 364.

67 HRC General Comment 35 (n 58) para 3.

68 As above.

69 HRC General Comment 35 (n 58) para 9.

70 NS Rodley ‘Integrity of the person’ (2018) 3 *International human rights law* 174.

71 *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 98; N Mavronicola ‘Is the prohibition against torture and cruel, inhuman and degrading treatment absolute in international human rights law? A reply to Steven Greer’ (2017) 17 *Human Rights Law Review* 479-498.

72 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art 1.1; African Charter art 5.

73 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General recommendation 35 on gender-based violence against women, updating General Recommendation 19, 26 July 2017, CEDAW/C/GC/35 (CEDAW Committee General Recommendation 35) paras 5 & 16; Human Rights Committee (HRC) General Comment

Unlike torture, ill-treatment is not expressly defined in international law. However, it is often understood based on its distinction from torture. Torture is the intentional infliction of severe pain or suffering involving a public official to extract a confession, obtain information, or as punishment, intimidation, or discrimination.⁷⁴ Acts which fall short of the definition of torture, especially in terms of the intent or such specific purposes, are usually categorised within the concept of ill-treatment.⁷⁵ A distinction can also be drawn based on the severity of pain.⁷⁶ In this regard, the Special Rapporteur on Torture notes that ‘only acts which cause severe pain or suffering can qualify as torture’.⁷⁷

The UN Committee Against Torture (CAT Committee) has clarified that VAW may constitute torture or ill-treatment when it is carried out by the instigation of, or with the consent or acquiescence of the state or its agents.⁷⁸ The ‘acquiescence of the state’ includes instances where the state fails to intervene, is passive, acts with indifference, or enhances the danger of violence even if a private individual inflicts it.⁷⁹

Article 5 of the African Charter guarantees human dignity and prohibits a range of violations, including ‘exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment’. The African Commission’s jurisprudence has not consistently distinguished between torture and ill-treatment.⁸⁰ This lack of distinction has been argued to undermine attempts to understand the differences among the elements of violations under article 5.⁸¹ However, on the threshold for torture and ill-treatment, the African Commission has aligned with the definition under article 1 of the UN Convention Against Torture (CAT).⁸² The African Commission has also found that article 5 applies both to state and non-state actors, and states can be held responsible for acts of private individuals where there is a lack of due diligence on the part of the state to prevent the violations or respond effectively to provide reparations to victims.⁸³

In General Comment 4, the African Commission further provides a framework for remedying those manifestations of VAW that amount to torture and ill-treatment under article 5 of the African

28 on the equality of rights between men and women (art 3) CCPR/C/21Rev.1/Add.10; Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 5 January 2016 UN Doc A/HRC/31/57; African Commission General Comment 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Art 5), adopted during the 21st extraordinary session of the African Commission, held in Banjul The Gambia, from 22 October to 5 November 2013 (African Commission General Comment 4) para 57.

74 CAT art 1.

75 CAT arts 1 & 16. See also Manfred Nowak Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment on *Civil and political rights, including the questions of torture and detention* E/CN.4/2006/6 23 December 2005 para 35; CAT (n 72) arts 1 & 16.

76 UN Committee Against Torture General Comment 2 Implementation of art 2 by States Parties, 24 January 2008, CAT/C/GC/2 (CAT Committee General Comment 2) para 10; *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) para 4.

77 Human Rights Council (HRC) Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment, Manfred Nowak, Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention (5 February 2010) UN Doc.A/HRC/13/39/Add.5 (2010) para 32.

78 CAT Committee General Comment 2 paras 7, 17 & 18.

79 Human Rights Council (HRC) Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, (5 January 2016) UN Doc A/HRC/31/57 (2016) (Report of the Special Rapporteur on Torture (2016)) para 51.

80 See eg *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000); *Achuthan v Malawi* (n 41) where the Commission found violations of art 5 without specifying which particular element was violated.

81 F Viljoen & C Odinkalu *The prohibition of torture and ill-treatment in the African human rights system: a handbook for victims and their advocates* (2014) 47-51.

82 *Sudan Human Rights Organisation v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 155.

83 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 143.

Charter.⁸⁴ Based on the African Charter, the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court) has similarly conceptualised torture and ill-treatment. In *Aircraftwoman Beauty Igbobie Uzezi v Nigeria*,⁸⁵ it found that the rape of a woman was a violation of the right to be free from torture. It also observed that rape, being an act of torture, amounts to a violation of the right to dignity.

The challenge of using the framework of torture and ill-treatment to protect women against GBV is that it evolved 'largely in response to practices and situations that disproportionately affected men'.⁸⁶ With a focus on violence inflicted to extract confessions in prison or in armed conflict, torture and ill-treatment frameworks are designed to capture violations that men are more likely to experience at the hands of state agents or armed militia in the 'public sphere'. While women suffer such violence too, they are more likely to suffer violence by private individuals or non-state actors in the 'private sphere'.⁸⁷ Even though the CAT Committee has extended these frameworks to VAW in the private sphere, the focus has been on rape in war or aggravated rape as torture without addressing other forms of VAW in the same way.⁸⁸

The Special Rapporteur on Torture has examined the relevance of this framework in the context of domestic violence.⁸⁹ He concluded that 'domestic violence *may not always* amount to torture, but it amounts to ill-treatment and *very often* to physical or psychological torture'.⁹⁰ However, he also cautioned against the 'tendency to regard violations against women, girls, and lesbian, gay, bisexual and transgender persons as ill-treatment even where they would more appropriately be identified as torture'.⁹¹

In response, the UN Special Rapporteur on VAW has stressed that a different set of normative and practical measures is required to respond to and prevent VAW in a way that factors in the individual, institutional and structural factors that create and sustain inequitable gender norms which are the root causes of VAW.⁹² Therefore, while the integration of VAW within torture and ill-treatment may be useful, this integration has limited transformative potential for women because the definitional threshold between ill-treatment and torture will continue to be hierarchical, with typical manifestations of VAW being classified as less serious.

3.5 Special considerations

Article 4 contains some considerations of women in specific contexts: trafficking in women, medical and scientific experiments on women and the protection of refugee women.

84 African Commission General Comment 4 (n 73).

85 *Aircraftwoman Beauty Igbobie Uzezi v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/21 (30 April 2021) (*Aircraftwoman*).

86 Report of the Special Rapporteur on Torture (n 79) para 5.

87 C Benninger-Budel *Due diligence and its application to protect women from violence* (2008) 4.

88 Human Rights Council (HRC) Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (28 May 2014) UN Doc A/HRC/26/38 (2014) (Report of the Special Rapporteur on violence against women (2014)) para 24. See also the emphasis on sexual violence and traumatic experiences used to qualify the type of GBV that is applicable under the African Commission General Comment 4 (n 73) para 57.

89 United Nations General Assembly (UNGA) Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence (12 July 2019) UN Doc A/74/148 (2019) (Interim Report of the Special Rapporteur on Torture).

90 Interim report of the Special Rapporteur on Torture (2019) (n 89) para 10, emphasis added.

91 Report of the Special Rapporteur on Torture (2016) (n 79) para 8.

92 Report of the Special Rapporteur on Violence Against Women (2014) (n 88) para 61.

3.5.1 *Trafficking in women*

Although not defining trafficking, article 4 pays special attention to the trafficking of women. Article 4(2)(g) calls on states to prevent and condemn trafficking in women and protect the women most at risk. Trafficking in women is a form of VAW and gender-based discrimination.⁹³ This provision should be read together with the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol),⁹⁴ which was the first international instrument to define human trafficking. However, being a protocol to the Convention on Transnational Organised Crime, the Palermo Protocol fundamentally adopts a criminal justice-centric approach with a limited human rights approach.⁹⁵ In this regard, the Recommended Principles and Guidelines on Human Rights and Human Trafficking are a critical standard that provides an important framework for integrating a human rights-based approach into all anti-trafficking interventions.⁹⁶ The Special Rapporteur on trafficking in persons, especially women and children, has developed normative clarity on the scope of protection of women from human and state responsibility to prevent and effectively respond to trafficking.⁹⁷

3.5.2 *Medical and scientific experiments on women*

Article 4(2)(h) of the Maputo Protocol prohibits all medical and scientific experiments on women without their informed consent. The provision recognises the historic problem that black African women are among the vulnerable population groups subjected to violent scientific experiments as research subjects without consent.⁹⁸ The OAU resolution of bioethics, as well as article 7 of the ICCPR, recognise this right.⁹⁹ The HRC has concluded that this prohibition relates not only to acts that cause physical pain but also to medical and scientific research that causes mental suffering to the victim.¹⁰⁰

3.5.3 *Women refugees*

Article 4 further includes the protection of refugee women, which should be read together with articles 10 and 11 of the Maputo Protocol.¹⁰¹ The CEDAW Committee has noted that VAW is ‘one of the major forms of persecution experienced by women in the context of refugee status and asylum’.¹⁰²

93 CEDAW Committee General Recommendation 38 (n 9).

94 Supplementing the United Nations Convention against Transnational Organized Crime.

95 Human Rights Council (HRC) Report of the Special Rapporteur on trafficking in persons, especially women and children, MG Giammarinaro, Trafficking in persons, especially women and children (6 April 2020) UN Doc A/HRC/44/45 (2020) paras 4, 6, 7, 49 & 50.

96 Office of the United Nations High Commissioner for Human Rights (OHCHR), Recommended Principles and Guidelines on Human Rights and Human Trafficking (20 May 2002) UN Doc E/2002/68/Add.1 (2002).

97 United Nations General Assembly (UNGA) Report of the Special Rapporteur on trafficking in persons, especially women and children, MG Giammarinaro (3 August 2015) UN Doc A/70/260 (2015) para 27; The first decade of the mandate of the Special Rapporteur on trafficking in persons, especially women and children https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/FirsDecadeSRon__trafficking.pdf (accessed 2 May 2023).

98 K Dineo, K Holcomb, NK Connors & L Bradley ‘A perspective on James Marion Sims, MD, and Antiracism in obstetrics and gynecology’ (2021) 28 *Journal of Minimally Invasive Gynecology* at 153. H Lacks & B Holland the ‘Father of modern gynecology’ performed shocking experiments on enslaved women, use of black bodies as medical test subjects falls into a history that includes the Tuskegee syphilis experiment (2017) <https://www.history.com/news/the-father-of-modern-gynecology-performed-shocking-experiments-on-slaves> (accessed 20 May 2023).

99 OAU Resolution of Bioethics AHG/Res.254 (XXXII) adopted by the Assembly of Heads of State and Government of the Organization of African Unity meeting in its 32nd ordinary session in Yaounde, Cameroon, from 8 to 10 July.

100 UN Human Rights Committee (HRC), General Comment 20 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (art 7), 10 March 1992, UN Doc A/44/40.

101 See A Budoo-Scholtz ‘Article 10’ and TM Makunya & JM Mumbala ‘Article 11’ in this volume.

102 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32 (CEDAW Committee General Recommendation 32) para 15.

In the cycle of regularising their immigration status, refugee women are often exposed to violations such as trafficking, sexual violence, physical violence, discriminatory justice systems, and political violence, which is exacerbated when they are detained as refugees or asylum seekers. Freedom from violence for refugee, asylum-seeking and stateless women should be seen as part of ‘their rights to non-discrimination and substantive equality’.¹⁰³ Article 4 should therefore be applied complementary to international refugee law to ensure that there is a response to GBV against refugee women.

4 Nature and scope of state obligations

Article 4(2) of the Maputo Protocol contains 11 sub-articles, each containing different state obligations. The following sections provide an analysis of these comprehensive obligations.

4.1 State parties ‘shall’ take ‘appropriate’ and ‘effective’ measures

The term ‘shall’ denotes mandatory intent.¹⁰⁴ It is an imperative command, usually indicating that certain actions are obligatory.

The term ‘appropriate’ means that state parties have an obligation to use means or conduct through legal, political, economic, administrative and institutional frameworks in a way that VAW. According to the CEDAW Committee, ‘appropriateness’ means applying the core state obligations to respect, protect, promote and fulfil women’s right to be free from violence.¹⁰⁵ In *Equality Now v Ethiopia*, the African Commission anchors its finding that the state failed to prevent and protect a victim from rape, abduction and forced marriage on the basis of these four duties which are ‘concomitant to all the rights and freedoms under the Charter’.¹⁰⁶ Accordingly, a state ‘incurs international responsibility if it fails to meet the demands of these duties’.¹⁰⁷

The term ‘effective’ means that the state party must take the type of measures that will enable it to fulfil its obligations. Effectiveness goes beyond the mere recognition and existence of a measure. Under article 1 of the African Charter, state parties must not only ‘recognise rights, but they are obligated to undertake measures to give effect to them’. For state measures to be effective, they must be capable of challenging patterns of discrimination and systemic inequalities that produce VAW. In *Maria da Penha Fernandes v Brazil*¹⁰⁸ a woman had suffered years of domestic violence, and her case was delayed in the criminal justice system for 15 years while her husband remained free. Although Brazil had put in place measures such as specialised police units, the Inter-American Commission on Human Rights (Inter-American Commission) found that they were ineffective, as there was a widespread failure to protect women and to investigate and prosecute VAW, creating a pattern of discrimination enabling domestic violence.

103 CEDAW Committee General Recommendation 32 (n 102) para 4.

104 BA Garner & H Campbell *Black’s Law Dictionary* 11th ed (2019).

105 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28 (CEDAW Committee General Recommendation 28) para 37.

106 *Equality Now v Ethiopia* (n 59) para 114.

107 As above.

108 *Maria da Penha Maia Fernandes v Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. 704 (2000) (*Maria da Penha*).

4.2 Obligation to act with due diligence

Under international law states are traditionally held accountable for its acts or omissions occasioned through its agents or actors over which it has control.¹⁰⁹ A long-standing exception to this is that states may be held accountable for violations by non-state actors if the state fails to act with due diligence in preventing or responding to such violations.¹¹⁰ In *Velásquez Rodríguez v Honduras*, which is considered the contemporary debut of due diligence obligations in human rights law, the Inter-American Court of Human Rights (Inter-American Court) held that the state was responsible for forced disappearance occasioned by non-state actors because it had failed to prevent the violations, to investigate, identify and punish the perpetrators and to provide adequate compensation to the victims.¹¹¹

Article 4(2) of the Maputo Protocol creates obligations on the state to act with due diligence to prevent, protect, prosecute, punish, and provide effective remedies to victims of VAW. The mandate of the UN Special Rapporteur on VAW has been instrumental in developing the scope and meaning of the obligations of states to act with due diligence.¹¹² Further, these obligations have been reiterated in several resolutions of UN bodies¹¹³ and consistently developed in comparative regional human rights mechanisms.¹¹⁴

The CEDAW Committee has also developed elaborate jurisprudence on due diligence. In *AT v Hungary* the CEDAW Committee found that the state had failed to fulfil its due diligence obligation by failing to prioritise domestic violence cases due to entrenched gender stereotypes.¹¹⁵ The CEDAW Committee instructed the state to protect domestic violence victims, promptly investigate domestic violence matters, and enact domestic violence law. The CEDAW Committee has also found that even where laws and other frameworks exist, the state can be held accountable where there is a lack of political will to ensure these measures are sufficient.¹¹⁶ Their jurisprudence has further clarified that state officials should treat VAW seriously even where the violence does not seem life-threatening.¹¹⁷

The Inter-American Court has also contributed to the jurisprudence on due diligence within the context of VAW. In *González et al v Mexico (Cotton Field)*,¹¹⁸ it found that the killings of three women constituted systematic GBV and discrimination against women and that Mexico had failed to exercise

109 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II (Part Two) para 77.

110 Human Rights Council (HRC) Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, (14 May 2013) UN Doc A/HRC/23/49 (2013).

111 IACHR (29 July 1988) Ser C No 4.

112 Commission on Human Rights (CHR) Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Integration of human rights of women and gender perspective; Due diligence standard as a Tool for the Elimination of Violence Against Women (20 January 2006) UN Doc E/CN.4/2006/61 (2006) (Report of the Special Rapporteur on Violence Against Women (2006)).

113 Eg, General Assembly Resolutions 64/137 and 65/187, and Human Rights Council Resolution 14/12.

114 Istanbul Convention and Convention of Belém do Pará.

115 *AT v Hungary* Communication 2/2003, CEDAW Committee (26 January 2005) UN Doc CEDAW/C/32/D/2/2003 (2005).

116 *Şahide Goekce v Austria* Communication 5/2005 CEDAW Committee (6 August 2007) UN Doc CEDAW/C/39/D/5/2005 (2007); *Fatma Yildirim v Austria* Communication 6/2005 CEDAW Committee (1 October 2007) CEDAW/C/39/D/6/2005 (2007).

117 *VK v Bulgaria* Communication 20/2008 CEDAW Committee (17 August 2011) UN Doc CEDAW/C/49/D/20/2008 (2011); *IJ v Bulgaria* Communication 32/2011 (28 August 2012) UN Doc CEDAW/C/52/D/32/2011 (2012).

118 Inter-American Court of Human Rights (IACrHR), Judgment of November 16, 2009, https://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf.

due diligence in preventing the violence and investigating and punishing the perpetrators.¹¹⁹ Similarly, in *Bevacqua and S v Bulgaria*, the European Court found that Bulgaria had violated its positive obligations by failing to protect the victim and punish her husband when it chose not to intervene in the private sphere.¹²⁰

The African Commission Guidelines on Combating Sexual Violence and its Consequences in Africa¹²¹ affirm the due diligence principle, indicating that states must ensure that agents acting on their behalf or under their control refrain from committing sexual violence.¹²² In addition, states must adopt the necessary legislative and regulatory measures to act with due diligence to prevent, investigate, prosecute, and punish perpetrators of sexual violence committed by state and non-state actors and provide remedies to victims.¹²³ In addition, the HRC has emphasised that states parties must respond appropriately to patterns of VAW, including domestic violence.¹²⁴

In *Equality Now v Ethiopia*, the African Commission concluded that when applying the due diligence standard, what is decisive is whether the state has allowed the acts of violence to take place without taking measures to prevent it or to punish those responsible.¹²⁵ The ECOWAS Court has also affirmed some aspects of the due diligence obligations in some of its decisions while rejecting it in others. In *Aircraftwoman*, the ECOWAS Court found Nigeria responsible for the rape of a woman employed by the Nigeria Air Force committed by one of its officials.¹²⁶ Although this case involved rape by a state agent, the ECOWAS Court affirmed the due diligence responsibility of states to prevent, investigate and prosecute VAW, even when non-state actors perpetrate it.¹²⁷ Similarly, in *Adama Vandi v Sierra Leone*, the ECOWAS Court found that by failing to investigate, prosecute and punish the rape of a woman, the state had failed to protect her.¹²⁸

4.2.1 *Obligation to enact and enforce laws*

Article 4(2)(a) creates the obligation to ‘enact and enforce laws to prohibit all forms of VAW including unwanted forced sex, whether the violence takes place in public or private spheres’. It importantly recognises that state parties have an obligation to address VAW, including in situations where the violation occurs in the private sphere. The CEDAW Committee has found that these obligations require states to adopt laws and other measures prohibiting VAW as a form of gender-based discrimination.¹²⁹

119 IACHR (16 November 2009) Ser C No 205; see also *Fernández Ortega Et Al v Mexico* IACHR (30 August 2010) Series C No 215.

120 *Bevacqua and S v Bulgaria* ECHR Appl No 71127/01 (12 June 2008) paras 65 and 83; See also *Opuz v Turkey* (2010) 50 EHRR 28 paras 84 & 159.

121 African Commission on Human and Peoples’ Rights Guidelines on Combating Sexual Violence and its Consequences in Africa adopted during its 60th ordinary session held in Niamey, Niger from 8-22 May 2017 (Niamey Guidelines) 7. These guidelines were designed by the Commission through a consultative process ‘as a tool to offer a methodology to African States, and to serve as the foundation for an adequate legal and institutional framework’.

122 Niamey Guidelines (n 121) para 6.

123 Niamey Guidelines (n 121) para 6. See also Southern Africa Development Community (SADC) Protocol on Gender and Development art 20.

124 HRC resolution 14/12 on Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention, 30 June 2010 A/HRC/RES/14/12.

125 *Equality Now v Ethiopia* (n 59) para 122.

126 *Aircraftwoman* (n 85) paras 75 & 81.

127 *Aircraftwoman* (n 85) para 67.

128 *Adama Vandi v Sierra Leone* Judgment No ECW/CCJ/JUD/32/22 (18 July 2022) paras 143-144.

129 *X & Y v Georgia* Communication 24/2009 CEDAW Committee (25 August 2015) UN Doc CEDAW/C/61/D/24/2009 (2015).

Article 1 of the African Charter requires states to adopt and implement laws and other measures to prevent violations, including by non-state actors, or to provide for redress when the rights and freedoms have been violated.¹³⁰ The Niamey Guidelines elucidate that states must ensure that national laws criminalise all forms of sexual violence consistent with international standards.¹³¹ They also provide that domestic law must guarantee the effectiveness of any investigation and prosecution of VAW, the right to free legal assistance and medical and forensic costs. Further, the law should contain clear and specific provisions on evidence and ensure that sexual offences that are criminalised are not subject to prescription. The Niamey Guidelines also call on states to prohibit any type of mediation between the victim and the perpetrator of sexual violence and requires states to provide penalties commensurate with the violations.¹³²

4.2.2 *Obligation to prevent*

Article 4(2)(b) creates the obligation of states to adopt legislative, administrative, social, and economic measures to prevent VAW. The UN Special Rapporteur on VAW elaborates that states fulfil the obligation to prevent VAW when they take all necessary means to ensure VAW is considered illegal, transform patriarchal structures and values that perpetuate VAW, and ensure there is the punishment of perpetrators and redress for victims.¹³³

In *Equality Now vs Ethiopia*,¹³⁴ the African Commission found that Ethiopia had failed to prevent the relevant violations because it did not take all appropriate actions to ensure the victim was secure in her rights and freedoms as soon as the state authorities became aware of the danger she faced. The duty to prevent violations requires the state to adopt and diligently implement customised measures of protection that would avert the impending violations or curb or eliminate the prevailing violations altogether.¹³⁵

Article 4(2)(c) of the Maputo Protocol recognises the importance of challenging the root causes of VAW. These root causes are structural in nature, stemming from patriarchal dominance, control and social mechanisms that force women into a subordinate position in both the public and private spheres.¹³⁶ Therefore prevention goes beyond the criminalisation of VAW to targeting the underlying gender inequalities, patriarchal attitudes, practices, and stereotypes that justify the subjugation and discrimination of women. In this regard, article 4(2)(d) calls on states to promote peace education and eradicate beliefs, practices and stereotypes which legitimise and exacerbate VAW.¹³⁷ Peace education refers to a means of socialising society for peace and social justice to prevent VAW.¹³⁸

4.2.3 *Obligation to protect*

Article 4(2)(f) sets out the obligation to establish mechanisms and accessible services for victims of VAW, including ensuring effective access to information and rehabilitation. This is also restated under article 4(2)(e). These comprise the obligation to protect, which requires state parties to only to keep women safe from harm, but to ensure there are mechanisms for redressing violations when they occur.

130 *Equality Now v Ethiopia* (n 59).

131 Niamey Guidelines (n 121) para 39.

132 As above.

133 Report of the Special Rapporteur on violence Against Women (2006) (n 121) paras 15, 38.

134 *Equality Now v Ethiopia* (n 59).

135 *Equality Now v Ethiopia* (n 59) para 125.

136 Report of the Special Rapporteur on Violence Against Women (2006) (n 121).

137 See *KT Vertido v the Philippines* Communication No 18/2008 CEDAW Committee (1 September 2010) UN Doc CEDAW/C/46/D/18/2008 (2010).

138 JS Page *Peace education: International Encyclopedia of Education* (2010).

In *Aircraftwoman*, Nigeria was found to have failed in its due diligence obligation because the state did not ‘intervene to stop, sanction and provide remedies’ for the rape of the victim, ‘thereby encouraging impunity’.¹³⁹

The obligation to protect also requires that states act in a way that responds to patterns of VAW that women are likely to suffer because they are women. This principle was established by the Inter-American Court in *Cotton Field*, where Mexico failed to protect women from violence despite being fully aware of a pattern of GBV specifically targeting women and girls.¹⁴⁰

Protection is also a form of secondary prevention because the recurrence of violence can be reduced through rehabilitation and access to adequate and timely support services.¹⁴¹ Such support services include hotlines, safe houses, protection orders, legal services, emergency medical and forensic services, and continued health services. Protection also includes legal protection, guaranteeing, for example, women’s property rights such as housing, especially in instances of domestic violence where women are at times evicted from their homes by the perpetrator.¹⁴²

4.2.4 Obligations to investigate, prosecute and punish

Article 4(2)(e) of the Maputo Protocol creates an obligation on states to punish perpetrators of VAW. Effective punishment for the criminal justice system depends on effective investigation and prosecution. The obligation to investigate effectively involves diligence in establishing the facts related to VAW and collecting evidence to enable prosecution and punishment of the perpetrator.¹⁴³

Effective punishment requires that state parties not only prosecute but also do so effectively, promptly, impartially and without excuses. Punishment, at the core, is about bringing the perpetrator to justice and ensuring negative consequences for committing VAW.¹⁴⁴ This was demonstrated in *In Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*, where the African Commission found that ‘a failure to investigate effectively towards an outcome that will bring the perpetrators to justice, shows lack of commitment to take appropriate action by the state, especially when this lack of commitment is buttressed by excuses such as lack of sufficient information to carry out a proper investigation’.¹⁴⁵

In *MC v Bulgaria*, the European Court held that the investigation must be independent, thorough, and effective, that access to a judicial remedy must be available, and the state may be obliged to provide compensation.¹⁴⁶ The ECOWAS Court in *EI v Nigeria* similarly found that investigation and prosecution should be prompt, effective and impartial.¹⁴⁷

Investigation and prosecution of VAW should also be free from gender stereotypes such as rape myths about what ‘proper’ victim behaviour is before, during and after rape, which is often used

139 *Aircraftwoman* (n 85) para 73.

140 *Cotton Field* (n 118) paras 18 and 19.

141 CEDAW General Recommendation 19 (n 13); TL Cornelius & N Resseguie ‘Primary and secondary prevention programs for dating violence: a review of the literature’ (2007) 12 *Aggression and Violent Behaviour* at 364; *Equality Now v Ethiopia* (n 59).

142 *Cecilia Kell v Canada* Communication 19/2008 CEDAW Committee (26 April 2012) CEDAW/C/51/D/19/2008 (2012).

143 *Adama Vandi v Sierra Leone* (n 128) paras 83 & 88-91.

144 *Cecilia Kell v Canada* (n 142).

145 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt (Interights)* Communication 323/06 African Commission on Human and Peoples’ Rights, Combined 32nd and 33rd Annual Activity Report (2013) para 163.

146 (2005) EHRR 20.

147 *EI v Nigeria* Judgment No ECW/CCJ/JUD/09/22 (25 April 2022) (*EI*).

to assess women's believability.¹⁴⁸ Judicial processes should also not subject victims to secondary victimisation and should take into account victims' particularities, such as age and disability, when providing assistance.¹⁴⁹ In addition, victims' participation in the criminal justice system is important, and they should be supported to participate since the best witness evidence, especially in rape cases, is the victim.¹⁵⁰

4.2.5 *Obligation to provide an adequate remedy*

Article 4(2)(f) requires state parties to establish mechanisms and accessible services for effective information, rehabilitation, and reparation for victims of VAW. To fulfil the obligation to provide an adequate remedy, states should take the:

[N]ecessary legislative and other measures required to guarantee access to appropriate, efficient, accessible, timeous, and long-lasting reparation for injury and loss suffered by victims of sexual violence, as well as access to appropriate information regarding reparation mechanisms.¹⁵¹

Moreover, the obligation to provide an adequate remedy to VAW victims applies at individual and systemic levels of state responsibility.¹⁵² At the individual level remedies seek to redress the harm to the victim directly, while systemic-level remedies should respond to the root causes of VAW, their gendered manifestations and the structural impediments to eliminating VAW.¹⁵³ Systemic remedies acknowledge that the obligation to act with due diligence creates the nexus between individual women's experiences of VAW and the failure of the state to prevent and protect women from VAW. In *EI v Nigeria*, there was a clear need for remedying VAW at the systemic level. However, the ECOWAS Court found that the rape and the subsequent 10-year delay in the criminal justice system only violated the right to a fair trial.¹⁵⁴ In failing to apply the due diligence standard to explore state accountability outside the right of access to justice, the ECOWAS Court concluded that since neither the state itself nor its agents raped the woman, holding the state accountable was not possible. Damages claimed by the victim were not awarded as the court did not make the connection between the harm occasioned by the rape and the failure of the state to prevent, protect and effectively respond to the sexual violence endured by the victim.

Maria da Penha and Maia Fernandes v Brazil is an example of a decision that addressed both individual and systemic-level remedies.¹⁵⁵ The Inter-American Commission recognised the pattern of discrimination that produced VAW as a violation that was tolerated by the state.¹⁵⁶ It recommended that Brazil not only swiftly prosecute the offenders but also exhaustively investigate why the justice system was delayed. It further recommended Brazil to expand law reform processes to end state condonation of VAW as a form of gender-based discrimination. The Inter-American Commission concluded that '[i]neffective judicial action, impunity, and the inability of victims to obtain compensation is

148 See eg *Uganda v Muhwezi Lamuel* [2010] HC, where the court addressed the issue that delayed reporting in rape does not mean that the victim is lying.

149 *RPB v The Philippines Communication 34/2011* CEDAW Committee (12 March 2014) UN Doc CEDAW/C/57/D/34/2011 (2014) 2003.

150 *Diha Matofali v Republic of Tanzania* CA Criminal Appeal 245 of 2015.

151 Niamey Guidelines (n 121) para 53.

152 Manjoo (n 110).

153 R Manjoo 'Introduction: reflections on the concept and implementation of transformative reparations' (2017) 21 *International Journal of Human Rights* 1193.

154 *EI* (n 147) para 92.

155 *Maria da Penha* (n 108).

156 *Maria da Penha* (n 108) para 55.

an example of the lack of commitment to take appropriate action'.¹⁵⁷ Therefore, it is not sufficient that a court grants remedies; they must be capable of being obtained, including recovery of adequate compensation for damages.¹⁵⁸ Remedies should also take into account not only the immediate but long term consequences of VAW on victims, including the impact of cruelty suffered and prolonged trauma that affects victims' quality of life.¹⁵⁹

Through its jurisprudence, the African Commission has interpreted the right to a remedy at the domestic level to include three parameters: availability, effectiveness and sufficiency.¹⁶⁰ A remedy is considered available 'if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint'.¹⁶¹ Although the African Charter does contain an explicit right to remedy, this right is implied as reflected in the maxim 'for the violation of every right, there must be a remedy'.¹⁶² The African Commission Principles and Guidelines on the Right to a Fair Trial further clarify that the right to an effective remedy includes access to justice, reparation for the harm suffered and access to the factual information concerning the violation.¹⁶³

4.3 Obligation to finance eradication of violence against women

In addition to the generic provision on the allocation of resources under articles 26(2) and 4(2)(i) calls on states to specifically provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating VAW.¹⁶⁴ This is an imperative obligation without which none of the rights and state obligations elaborated under article 4 can be realised. The CEDAW Committee has clarified that the obligation on states to adequately resource implementation of laws and mechanisms to address VAW should be linked to mainstream governmental budgetary processes to ensure they are adequately funded.¹⁶⁵ The Niamey Guidelines also require states parties to prioritise establishing national funds to afford reparations to victims of sexual violence. Such funds need to be appropriately financed by states in partnership with their development partners, private sector stakeholders and, if possible, by perpetrators of VAW.¹⁶⁶

157 *Maria da Penha* (n 108).

158 *V.P.P. v. Bulgaria* Communication 31/2011 (24 November 2012) CEDAW/C/53/D/31/2011 (2012).

159 *Uganda v Tumwesigye Ziraba alias Sigwa* [2013] HC Criminal Session Case 92 of 2011; 3 December 2013; *Rwanda v Uwiringiyimana* [2017] SC Case No. RPA 0099/13/CS of 17 March 2017; *Rwanda v Uwizeye Eustache* Supreme Court Case No. RPA 0225/13/CS of 21 April 2017.

160 *Sir Dawada K Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

161 *Dawada* (n 160) para 32.

162 G Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 447. See also S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118-148.

163 African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Commission Principles and Guidelines on the Right to a Fair Trial), DOC/OS(XXX)247. For a further discussion on remedies see M Lasseko-Phooko 'Article 25' in this volume.

164 See R Murray 'Article 26' in this volume.

165 CEDAW General Recommendation 28 (n 105).

166 Niamey Guidelines (n 121) para 55. As part of transformative remedies, a system of punitive damages can be developed where perpetrators of VAW pay fines that contribute to the national fund.

5 State practice and implementation

This section evaluates jurisprudence and state practice in relation to article 4. The section reviews state practice with respect to the implementation of legislative measures, administrative, prevention and response measures in practice, challenges, and gaps in state reporting.

5.1 Legislative measures

Various African states have attempted to implement article 4 by enacting sexual offences, domestic violence, and counter-trafficking laws.¹⁶⁷ Therefore, states often report on this provision by listing national or legal frameworks.¹⁶⁸ State reports also often focus on constitutional protections on the right to life and criminal laws enacted to protect the rights to life, integrity and security of the person and freedom from ill-treatment.¹⁶⁹ For example, The Gambia reports on implementing article 4 through the enactment of the Women's Act which complements the domestic violence and sexual violence laws to prohibit various manifestations of VAW, including protecting women from torture or inhuman or degrading treatment or punishment.¹⁷⁰ Niger alludes to enacting VAW laws which include the Ordinance on Trafficking, which also punishes domestic and sexual violence.¹⁷¹ Similarly, Namibia reports on its Combating Domestic Violence Act and Combating Rape Act as part of fulfilling the state obligation to legislate on VAW as a protection measure.¹⁷² However, despite many states having laws against VAW, legal gaps remain in some contexts, most notably the failure to criminalise or sanction

167 See eg Concluding Observations and Recommendations on the Initial and Combined Periodic Report of Sierra Leone on the implementation of the African Charter on Human and Peoples' Rights 1983-2013, African Commission on Human and Peoples' Rights adopted at 19th extraordinary session 16-25 February 2016, Banjul, The Gambia; Concluding Observations and Recommendations on the Initial and Combined 2nd Periodic Report of The Gambia on the implementation of the African Charter on Human and Peoples' Rights 1994-2018, and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005-2014 adopted at 31st extraordinary session February 19-25 February 2021. Banjul, The Gambia; Concluding Observations and Recommendations on the Combined 1st to 9th Periodic Report of Eswatini on the implementation of the African Charter on Human and Peoples' Rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa 2001-2020 African Commission on Human and Peoples' Rights, adopted at 70th ordinary session 23 February-9 March 2022, Banjul, The Gambia; Concluding Observations and Recommendations on the Initial and Combined Periodic Report of Liberia on the implementation of the African Charter on Human and Peoples' Rights 1982-2012, African Commission on Human and Peoples' Rights adopted the following Concluding Observations and Recommendations at its 17th extraordinary session, held from 19-28 February 2015, Banjul, The Gambia.

168 Arab Republic of Egypt combined 9th to 17th Periodic Reports 2001-2017 on the African Charter on Human and Peoples' Rights, October 2018; Republic of Kenya combined 12th and 13th Periodic Reports 2015-2020 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, April 2020; Republic of Namibia 7th Periodic Report 2015-2019 on the African Charter on Human and Peoples' Right., February 2021.

169 See eg Republic of Algeria combined 5th and 6th Periodic Reports 2010-2014 on the African Charter on Human and Peoples' Rights, November 2015; The Republic of Botswana combined 2nd and 3rd Periodic Reports 2011-2015 on the African Charter on Human and Peoples' Rights, November 2018; Central African Republic initial and cumulative Report 1988-2006 on the African Charter on Human and Peoples' Rights, 25 May 2006; Republic of Eswatini combined 1st to 9th Periodic Reports 2001-2020 on the African Charter on Human and Peoples' Rights, March 2021.

170 Republic of The Gambia 2nd Periodic Report 1994-2018 on the African Charter on Human and Peoples' Rights, September 2018.

171 Republic of Niger 14th Periodic Report 2014-2016 on the African Charter on Human and Peoples' Rights, November 2017.

172 7th Periodic Report of Namibia (2015-2019) (n 168).

some forms of VAW. For instance, Malawi,¹⁷³ Kenya¹⁷⁴ and Tanzania¹⁷⁵ still do not have laws outlawing marital rape.

Moreover, practice has shown that enacting laws alone is insufficient to eliminate VAW. For example, in its Concluding Observations to Liberia, while the Commission commends enactment of legislation, it raises concern about the persisting magnitude of VAW, especially against young women and girls.¹⁷⁶ The Commission has also noted that in some instances, even where there is legislation, there is a lack of resolve to implement it, which impedes the realisation of the rights under article 4.¹⁷⁷

5.2 Administrative, prevention and response measures in practice

Some states have provided details beyond legal frameworks to administrative and other measures taken to address VAW.¹⁷⁸ For example, Liberia,¹⁷⁹ Zimbabwe,¹⁸⁰ South Africa,¹⁸¹ Côte d'Ivoire,¹⁸² and Eswatini¹⁸³ have developed national action plans, strategies, or multi-sectoral guidelines to implement practical measures for preventing or responding to VAW. Some states have also reported on the use of existing gender equality commissions to, for example, train state officers.¹⁸⁴

In addition, several states have set up mechanisms such as multi-sectoral agencies, inter-ministerial committees and special agencies to coordinate the fight against VAW.¹⁸⁵ In its 2007-2019 combined report, Zimbabwe reports under article 4 by referencing implementation mechanisms such as the Anti-Domestic Violence Council and an inter-ministerial GBV Committee charged with coordinating the implementation of VAW-related laws.¹⁸⁶ This is similar to Mauritius' National Coalition Against

173 Republic of Malawi 2nd-3rd Periodic Report 2015-2019 on the African Charter on Human and Peoples' Rights, February 2020.

174 Combined Report of Kenya (2015-2020) (n 168).

175 Concluding Observations and Recommendations on the Combined 2nd to 10th Periodic Report of Tanzania on the implementation of the African Charter on Human and Peoples' Rights 1992-2006, African Commission on Human and Peoples' Rights, adopted at 43rd ordinary session 7-22 May 2008, Banjul, The Gambia.

176 African Commission Concluding Observations Liberia (2015) (n 167).

177 Concluding Observations and Recommendations on the 2nd Periodic Report of Benin on the Implementation of the African Charter on Human and Peoples' Rights 2000-2008, African Commission on Human and Peoples' Rights, adopted at 45th ordinary session 13 May 27 2009, Banjul, The Gambia.

178 Republic of Togo combined 6th to 8th Periodic Reports 2011-2016 on the African Charter on Human and Peoples' Rights, March 2018; Republic of Zimbabwe combined 11th to 15th Periodic Reports 2007-2019 on the African Charter on Human and Peoples' Rights, August 2019.

179 Africa Commission Concluding Observations Liberia (2015) (n 167).

180 Concluding Observations and Recommendations on the combined 11th to 15th Periodic Reports of Zimbabwe on the Implementation of the African Charter on Human and Peoples' Rights 2007-2019, adopted at 69th ordinary session 15 November-5 December 2021, Banjul, The Gambia.

181 Department of Women, Youth and Persons with Disabilities, South Africa Gender-based Violence and Femicide National Strategic Plan (GBVF-NSP), Interim Steering Committee, 2020 <https://www.justice.gov.za/vg/gbv/nsp-gbvfinal-doc-04-05.pdf> (accessed 6 May 2023).

182 Republic of Côte d'Ivoire Periodic Report 2016-2019 on the African Charter on Human and Peoples' Rights, October 2022.

183 Republic of Eswatini Combined 1st-9th Periodic Reports 2001-2021 on the African Charter on Human and Peoples' Rights, March 2021.

184 Concluding Observations and Recommendations on the Combined 3rd and 4th Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights 2011-2013, African Commission on Human and Peoples' Rights adopted at 21st extraordinary session 23 February-4 March 2017, Banjul, The Gambia; Africa Commission Concluding Observations Zimbabwe (2021) (n 180).

185 Democratic Republic of Congo combined 11th to 13 Periodic Reports 2005-2015 on the African Charter on Human and Peoples' Rights and 1st-3rd Periodic Reports on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, November 2017.

186 Combined Report of Zimbabwe (2007-2019) (n 178).

Domestic Violence Committee¹⁸⁷ and the Democratic Republic of Congo's (DRC) use of a National Agency to combat VAW.¹⁸⁸ Coordination measures also include Namibia's National GBV Plan of Action, which is aimed at strengthening integration and coordination of GBV programs.¹⁸⁹

On implementing the obligation to protect and rehabilitate survivors of VAW under article 4, a common practice by states is the establishment of one-stop centres for integrating health, legal and psychosocial services such as Thuthuzela Care Centres in South Africa,¹⁹⁰ Gender-Based Violence Recovery Centres in Kenya,¹⁹¹ Victim Friendly System,¹⁹² and national GBV Help Lines in Zimbabwe.¹⁹³ Malawi's report shows that one-stop GBV centres expanded to 18 in the country, which provide victims with emergency safety and protection as well as providing initial care and support to victims before being referred to hospitals or any relevant authority.¹⁹⁴ Other examples of victim support services include Angola's network of legal and free counselling centres¹⁹⁵ and The Gambia's establishment of a shelter for victims of trafficking.¹⁹⁶

Some states also report on having established specialised mechanisms for reporting, investigation, and prosecution of VAW, such as specialised sexual offences courts, police, and prosecutorial units.¹⁹⁷ Other measures commended by the Commission include capacity-strengthening initiatives such as developing GBV training manuals for the police¹⁹⁸ and mandatory training of prosecutors on prevention and response to VAW.¹⁹⁹

State reports also show the use of public awareness and education campaigns, including advocacy and monitoring mechanisms to prevent and strengthen VAW responses. For example, Zimbabwe reports on rolling out national awareness campaigns on ending GBV with a reach of over 8 million people.²⁰⁰ However, in its Concluding Observations to Zimbabwe, the Commission raised concern about the persisting prevalence of GBV despite numerous sensitisation activities conducted.²⁰¹

187 Republic of Mauritius combined 6th to 8th Periodic Reports, 2009-2015 on the African Charter on Human and Peoples' Rights, November 2016.

188 Combined Report of Democratic Republic of Congo (2005-2015) (n 185).

189 Concluding Observations and Recommendations on the 6th Periodic Report of Namibia on the Implementation of the African Charter on Human and Peoples' Rights 2011-2014, African Commission on Human and Peoples' Rights, adopted at 58th ordinary session 6-20 April 2016, The Gambia, Banjul.

190 Concluding Observations and Recommendations on the 2nd Periodic Report of South Africa on the Implementation of the African Charter on Human and Peoples' Rights 2003-2014, African Commission on Human and Peoples' Rights, adopted at 58th ordinary session 6-20 April 2016, The Gambia.

191 Concluding Observations and Recommendations on the Combined 8th-11th Periodic Report of Kenya on the Implementation of the African Charter on Human and Peoples' Rights 2008-2014, African Commission on Human and Peoples' Rights, adopted at 19th extraordinary session 16-25 February 2016, Banjul, The Gambia.

192 Africa Commission Concluding observations Zimbabwe (2021) (n 180).

193 African Commission Concluding Observations Kenya (2016) (n 191).

194 Combined Report of Malawi (2015-2019) (n 173).

195 Republic of Angola 6th Periodic Report 2011-2016 on the African Charter on Human and Peoples' Rights, March 2018.

196 2nd Periodic Report of The Gambia (1994-2018) (n 170).

197 Combined Report of Liberia (1982-2012) (n 168); Republic of Zambia initial Report 1986-2004, on the Implementation of the African Charter on Human and Peoples' Rights, January 2005; African Commission Concluding Observations Kenya (2016) (n 191).

198 African Commission Concluding Observations The Gambia (2021) (n 167).

199 Republic of Ethiopia combined 5th and 6th Periodic Reports 2009-2013 on the African Charter on Human and Peoples' Rights, May 2015.

200 Combined Report of Zimbabwe (2007-2019) (n 178).

201 African Commission Concluding Observations Zimbabwe (2021) (n 180).

Rwanda similarly reports on various efforts targeting grassroots through community policing and anti-GBV committees at village level to provide an opportunity for awareness raising and elevating VAW as an internal state security issue.²⁰² Kenya and Chad reported having launched national campaigns to speak out against and combat VAW.²⁰³ Moreover, Eswatini has set up the National Surveillance System on Violence, which tracks trends in reported GBV cases, showing which forms are most prevalent.²⁰⁴ Burkina Faso reported on investigative research to understand and create awareness of the underlying drivers of VAW and legal gaps on how to strengthen legal instruments.²⁰⁵

5.3 Persisting challenges in practice

Despite these interventions reported by states, several challenges remain. First is the persistent prevalence of VAW among marginalised groups such as sex workers, LGBTIQ+ women, women with disabilities, young women, and indigenous women.²⁰⁶

Further, states still have inadequate financial investment to ensure the effective implementation of laws, functioning response systems and prevention mechanisms.²⁰⁷ For example, Zimbabwe reports that the challenge to implementing article 4 is inadequate resources to support GBV programs.²⁰⁸ In this regard, Senegal also highlights inadequate mobilisation of resources to promote women's rights and the failure to systematically incorporate resourcing of gender into public policies as among their main challenges.²⁰⁹

As a result of the limited resource investment by states, NGOs bear the greater burden of this work, especially in the provision of victim support services and awareness campaigns to challenge regressive attitudes and gender stereotypes.²¹⁰ Yet, these stereotypes, social norms, and deep-rooted cultural practices that condone gender inequality persist as the root causes and drivers of VAW.²¹¹ For example, Lesotho notes that the greatest challenge to ending VAW is the general acceptance of wife battering within society.²¹² Similarly, Kenya reports that the main challenge to ending VAW is

202 Republic of Rwanda combined 11th to 13th Periodic Reports 2009-2016 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in, May 2017.

203 Republic of Chad combined 2nd to 9th Periodic Reports 1998 to 2015 on the African Charter on Human and Peoples' Rights, April 2018; Combined Report of Kenya (2015-2020) (n 168)

204 Combined Report of Eswatini (2001-2021) (n 183).

205 Republic of Burkina Faso 3rd and 4th Periodic Reports 2011-2013 on the African Charter on Human and Peoples' Rights Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, August 2015.

206 Africa Commission Concluding Observations South Africa (2016) (n 190); Combined Report of Democratic Republic of Congo (2005-2015) (n 186); Combined Report of Kenya (2015-2021) (n 168).

207 See eg Concluding Observations and Recommendations on the combined 2nd and 3rd Periodic Reports of Malawi on the Implementation of the African Charter on Human and Peoples' Rights 2015-2019, African Commission on Human and Peoples' Rights, adopted at 70th ordinary session 23 February-23 February 23-9 March 2022; Combined Report of Kenya (2015-2020) (n 169); Concluding Observations and Recommendations on the Combined 2nd, to 5th Periodic Report of Angola on the Implementation of the African Charter on Human and Peoples' Rights 2002-2010, African Commission on Human and Peoples' Rights, adopted at 12th extraordinary session 30 July-August 04, 2012, Algiers, Algeria.

208 Combined Report of Zimbabwe (2007-2019) (n 178).

209 Republic of Senegal combined 8th-11th Periodic Reports 2004-2013 on the African Charter on Human and Peoples' Rights, May 2015.

210 See eg Combined Report of Zambia (1986-2004) (n 198); African Commission Concluding Observations Burkina Faso (2017) (n 184).

211 African Commission Concluding Observations The Gambia (2021) (n 167).

212 Kingdom of Lesotho combined 2nd to 8th Periodic Reports 2001-2017 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, April 2018.

patriarchal unequal gender power dynamics and social norms expressed through family honour and a culture of silence that perpetuates VAW.²¹³ Eswatini reports that despite the existence of laws, a lot still needs to be done to address the causes of VAW rooted in societal stereotypes of ‘men’s superiority over women in that men still perceive women as subjects to their authority and control’.²¹⁴

Another challenge to implementing article 4 is that VAW remains underreported due to the shame and stigma associated with it, fear of reprisals and distrust in the legal system.²¹⁵ In addition, the criminal justice systems remain ineffective or inconsistent and thus not sufficiently deterrent. For example, the Commission recommends Namibia and the Gambia to strengthen the criminal justice system by institutionalising gender-specific mandatory training for law enforcement officials and health service personnel to ensure their full capacity in responding to all forms of VAW.²¹⁶

Further, despite the existence of specialised GBV interventions, there is a challenge of implementing these victim protection and support services at scale.²¹⁷ For example, Lesotho reports that there is a GBV care centre, but it is the only one within the country which is barely able to service victims from different regions.²¹⁸ In addition, such protection services may exist, but their effectiveness is compromised when there are regulatory environment gaps. For instance, Nigeria reported an increase in shelters and protection services for VAW survivors, such as counselling and medical services.²¹⁹ However, the African Commission noted that despite an increase in such services, implementation is compromised by the failure to enact the VAW Bill, which would ensure there is an enabling legal environment for these interventions.²²⁰

In some contexts, state reports lack clarity on the measures put in place to monitor the implementation of VAW laws and how these laws are invoked before courts.²²¹ In terms of jurisprudence, while some national courts have contributed positively to the development of progressive VAW precedent, clarifying state obligations and protection measures,²²² there are regressions in other contexts, such as

213 Combined Report of Kenya (2015-2020) (n 168).

214 Combined Report of Eswatini (2001-2021) (n 183) para 405.

215 Combined Report of Mauritius (2009-2015) (n 187).

216 2nd Periodic Report of The Gambia (1994-2018) (n 170).

217 African Commission Concluding Observations Zimbabwe (2021) (n 180).

218 Combined Report of Lesotho (2001-2017) (n 212).

219 Federal Republic of Nigeria 5th Periodic Report, 2011-2014 on the African Charter on Human and Peoples’ Rights, May 2015.

220 Concluding Observations and Recommendations on the 5th Periodic Report of Nigeria on the Implementation of the African Charter on Human and Peoples’ Rights 2011-2014 African Commission on Human and Peoples’ Rights, adopted at 57th ordinary session 4-18 November 2015, Banjul Gambia.

221 Concluding Observations and Recommendations on 5th Periodic Report of Uganda on the Implementation of the African Charter on Human and Peoples’ Rights 2010-2012, African Commission on Human and Peoples’ Rights, adopted at 56th ordinary session 4-18 November, 2015, Banjul, The Gambia; Republic of Algeria combined 3rd and 4th Periodic Reports 2001-2006 on the African Charter on Human and Peoples’ Rights, November 2007; Republic of The Gambia NGO shadow report on the combined 4th and 5th state report on the Convention on The Elimination of All Forms Of Discrimination Against Women (CEDAW) CEDAW/C/GMB/4-5, July 2015.

222 See eg *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC), where the South Africa Constitutional court found that rape is not only a penetrative offense and anyone who assists or facilitates rape can be convicted as a co-perpetrator even if they themselves do not engage in penetrative sex; *AK v Minister of Police* 2023 (2) SA 321 (CC), where negligent investigation by police was found to have prolonged the harm to the victim; *CK (a child) through Ripples International as her guardian and next friend v Commissioner of Police/Inspector General of the National Police Service* [2013] eKLR where the Kenyan high court elaborated on due diligence obligations of states to investigate, prosecute and punish sexual violence in Kenya; *Uganda v Yiga Hamidu* [2004] HC Criminal Session Case No. 5 of 2002; 9 February 2004, where the court found that marriage is not a defense to rape in Uganda; *Bizimana Jean Claude v Uganda* [2014] CA where the court found that corroboration is not a requirement to convict for sexual offences where the victim’s testimony can be established as accurate. Other decisions on due diligence jurisprudence in South Africa include *Suzette Irene Nelson v Minister of Safety and Security* (2006) ZANCHS 88, High Court of South Africa; *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA); *S v Baloyi* 2000 (1) BCLR 86 (CC).

the failure to acknowledge how gender power relations in social contexts results in rape, especially in cases of intimate partner violence.²²³ In addition, in Kenya, there is a clawback on legislative reforms such as the mandatory minimum sentencing standards, which were established as part of fulfilling the obligation to punish VAW in response to judicial disregard for sexual offences.²²⁴

The African Commission has highlighted another important area of concern in relation to most state reports: the lack of gender-disaggregated data and the lack of statistics on the prevalence and patterns of VAW.²²⁵ While some state reports are more detailed than others, overall, the prevalence and the full range of manifestations of VAW remain unclear. For instance, Lesotho's report relies on some estimated statistics from NGOs but maintains that there are no statistics on GBV in the country.²²⁶ Some states, such as Cameroon, report in more detail on VAW statistics covering prevalence, number of cases reported to the police, prosecuted and the forms of violence disaggregated by gender.²²⁷ Others, like Malawi, provide general statistics on GBV reported to the police annually; however, the data is not disaggregated by gender.²²⁸

Other crosscutting challenges in state practice include the public/private dichotomy in responses to VAW, which keeps women's experiences of VAW outside of state accountability.²²⁹ For instance, the ECOWAS Court still struggles to understand state responsibility to act with due diligence and define VAW as gender-based discrimination.²³⁰ For example, in *Mary Sunday v Nigeria*, the ECOWAS Court held that a state cannot be held liable for domestic violence as the state or its organs are not involved in the imputed conduct – the physically violent act against the woman.²³¹ The court found that the strictly private nature of the violent acts against Mary, even the very context of where they were committed – the couples' household – precludes any connection with public authority.²³² This trajectory of jurisprudence is a dangerous regression from international and regional standards discussed in this chapter, which have evolved to disrupt the public/private dichotomy that has historically been used to keep VAW outside of state responsibility.

223 *Coko v S* (CA&R 219/2020) [2021] ZAECGHC 91.

224 *Edwin Wachira v DPP* High Court of Kenya Consolidated petition 97 of 2021; *Philip Maingi v DPP* High Court of Kenya Petition E017 of 2021.

225 Concluding Observations and Recommendations on the combined 4th and 5th Periodic Report of Sudan on the Implementation of the African Charter on Human and Peoples' Rights adopted at 12th extraordinary session 30 July 30-4 August 2012 Algiers, Algeria.

226 Combined Report of Lesotho (2001-2017) (n 212).

227 Republic of Cameroon combined 4th-6th Periodic Reports 2015-2019 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, January 2020.

228 Combined Report of Malawi (2015-2019) (n 173).

229 Manjoo (n 88) para 63.

230 See examples of decisions where the ECOWAS Court missed opportunities to hold states accountable for gender discrimination; *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/CCJ/JUD/06/08 (27 October 2008); *EI* (n 147); *Adama Vandi v Sierra Leone* (n 128). For analysis see O Ojigbo 'Litigating gender discrimination cases before the ECOWAS Community Court of Justice and the African Court on Human and Peoples' Rights' in JJ Dawuni (ed) *Gender, judging and the courts in Africa: selected studies* 142-158; A Rudman 'A feminist reading of the emerging jurisprudence of the African and ECOWAS Courts evaluating their responsiveness to victims of sexual and gender-based violence' (2020) 31 *Stellenbosch Law Review* 424-454.

231 *Mary Sunday v Federal Republic of Nigeria* Judgment No ECW/CCJ /JUD/11/18 (17 May 2018) 5.

232 As above. See also *EI* (n 147) paras 45 & 46, where the court insisted that it could only cite the state for violation of the right to a fair trial for delay in prosecution, but not for the rape itself.

5.4 Gaps in state reporting under article 4

Some state reports address implementation measures for article 4 when reporting under other provisions, including article 18 of the African Charter.²³³ Aspects of article 4 that lack attention are details on how the obligation to prevent VAW is operationalised beyond what seems to be sporadic awareness campaigns. While state reports, like the report submitted by Seychelles, record that prevention is important to the government, it does not articulate what the state does towards fulfilling this obligation.²³⁴ There is also limited reporting on medical and scientific experiments on women without consent. Some states, such as the DRC, mention that such cases have neither been reported nor recorded.²³⁵ In addition, there is limited information on what the obligation to provide an adequate remedy for victims of VAW entails beyond criminal justice consequences for perpetrators.²³⁶ State reports also show a lack of data on the extent of trafficking in women, with some states like Rwanda reporting that this manifestation of VAW is not common.²³⁷

Another gap is that most states report primarily on criminal laws enacted to protect the right to life, integrity and security of the person, torture and ill-treatment in a gender-neutral way without specifics on how women are affected as directed under article 4 of the Protocol.²³⁸ For example, in its most recent state report, Togo explains the legal protections for attacks on the physical integrity and ill-treatment with a focus on criminal sanctions that apply without distinction of sex, much like it is reported under the African Charter.²³⁹ Thus, there is also a lack of reporting on the full range of measures required under state obligations in article 4 beyond criminalisation.²⁴⁰ In addition, state reports on article 4 also focus on detention-related rights, such as in the practice of *habeas corpus* and the abolition of or moratorium on the death penalty, with limited or no information on how women are affected.²⁴¹ For example, Niger reports that part of detention practice is that a medical certificate must be issued for all prisoners indicating that they have not been subjected to torture or ill-treatment whether mental or physical.²⁴²

It is important to note that even in instances where states have not reported on article 4, the African Commission has made recommendations for the implementation of its provisions. For instance, recommending Mozambique to adopt robust measures to combat VAW, including by ensuring prompt

233 Combined Report of Mauritius (2009-2015) (n 187); Republic of Mauritius combined 9th to 10th Periodic Reports 2016-2019 on the African Charter on Human and Peoples', February 2020; Combined Report of Liberia (1982-2012) (n 167).

234 Republic of Seychelles 3rd Periodic Report 2006-2019 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, April 2021.

235 Combined Report of Democratic Republic of Congo (2005-2015) (n 185).

236 Concluding Observations and Recommendations on the combined 8th-11th Periodic Report of Senegal on the Implementation of the African Charter on Human and Peoples' Rights 2004-2013, African Commission on Human and Peoples' Rights, adopted at the 18th extraordinary session 29 July-7 August 2015, Nairobi, Kenya.

237 Combined Report Rwanda (2009-2016) (n 202).

238 Combined Report of Togo (2011-2016) (n 178).

239 As above.

240 Combined Report of Algeria (2010-2014) (n 169); Combined Report of Botswana (2011-2015) (n 169); Combined Report of Central African Republic (1988-2006) (n 169).

241 Republic of Cameroon 2nd Periodic Report 2003-2005 on the African Charter on Human and Peoples' Rights, May 2010 sec 2; Combined Report of Egypt (2001-2017) (n 168); 7th Periodic Report of Namibia (2015-2019) (n 168); Combined Report of Lesotho (2001-2017) (n 212).

242 Republic of Niger Periodic Report 2014-2016 on the African Charter on Human and Peoples' Rights, November 2017.

investigation and prosecution of such cases and building operational and institutional capacity to combat VAW.²⁴³

6 Conclusion

Article 4 of the Maputo Protocol is progressive and comprehensive in its state obligations to act with due diligence to prevent, protect, investigate, prosecute, and punish perpetrators of VAW and to provide adequate reparations to victims. However, this chapter has shown that the conception of the foundational rights under article 4(1), the right to life, integrity and security of the person, finds limited application in terms of how women experience violence. They are mainly conceptualised on the basis of violence perpetrated by the state in the ‘public sphere’ and largely framed around men’s lived experiences. As the UN Special Rapporteur on VAW has emphasised, to address VAW, a different set of normative and practical measures is required so as not to invisibilise the everyday violence that women experience at the interpersonal level, in the family, in the community, and condoned by the state.²⁴⁴ Article 4 also lacks an explicitly intersectional approach that articulates how GBV affects certain groups, such as LGBTIQ+ persons in Africa.

Article 4(2) moreover provides a robust framework of state obligations to address VAW, which in turn provides an opportunity for domestic and regional judicial bodies to develop jurisprudence in line with human rights standards. In this regard, there is a dire need to specifically challenge the trajectory of the jurisprudence of the ECOWAS Court on VAW, which maintains the fallacious public/private divide and fails to hold states accountable for VAW as a human rights violation and as gender-based discrimination wherever it occurs. The conceptualisation of VAW as gender-based discrimination remains important, and there is opportunity to develop jurisprudence that will continue to clarify state obligations to address VAW as both a cause and consequence of gender-based discrimination. A transformative approach to the analysis of discrimination and VAW is intersectional and situates violence on a continuum that spans interpersonal and structural violence.²⁴⁵

Further, the scope and content of state obligations must be clarified in the areas of the rights of victims in the criminal justice system, the meaning of concepts such as exploitation, cruel, inhuman and degrading treatment to expand protections across the various manifestations of VAW; ensuring that the accused’s fair trial rights do not erode the perspectives and lived experiences of women who experience violence.

State practice shows that there is cross cutting advancement in law reform and administrative measures through national action plans and GBV coordination mechanisms. However, they remain under-resourced. A critical entry point is the need to hold states accountable for funding VAW prevention and response interventions, including through public-private sector funding partnerships. NGOs need to resist the *status quo* of assuming state functions, including providing victim support services, which continue to be implemented piecemeal, with limited potential for sustainability or scale. In conclusion, addressing the normative, interpretative and implementation aspects appropriately and effectively is key to achieving the legal obligations set out in article 4.

243 Concluding Observations and Recommendations on the 2nd and combined Periodic Report of Mozambique on the Implementation of the African Charter on Human and Peoples’ Rights 1999-2010, African Commission on Human and Peoples’ Rights, adopted at 17th extraordinary session February 19 to February 28, 2015, Banjul, The Gambia.

244 R Manjoo ‘The continuum of violence against women and the challenges of effective redress’ (2012) 1 *International Human Rights Law Review* 1.

245 Manjoo (n 244) 1.

Article 5

Elimination of harmful practices

Satang Nabaneh

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- (a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- (b) prohibition, through legislative measures backed by sanctions, of all forms of female genital

mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;

- (c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- (d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

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1 Introduction

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) is a crucial instrument in guaranteeing the extensive rights of African women and girls, including explicit provisions on harmful practices. State parties are obligated to condemn and prohibit all practices that undermine women’s human rights and violate internationally recognised standards. The Maputo Protocol is the first human rights treaty to explicitly call for the prohibition of female genital mutilation (FGM).¹ This is a significant step for women in Africa, where FGM is

1 S Nabaneh & A Muula ‘Female genital mutilation/cutting: a complex legal and ethical landscape’ (2019) 145(2) *International Journal of Gynecology & Obstetrics* 255.

prevalent in 29 countries² and affects more than 200 million girls and women worldwide.³ The World Health Organization (WHO) estimates that 100-140 million girls and women worldwide are affected by FGM, which is typically performed on young girls between infancy and the age of 15.⁴ In Africa alone, an estimated 92 million girls aged ten years and above have undergone FGM.⁵ The treatment of FGM-related complications costs billions of dollars every year in high-prevalence countries. If no action is taken, this cost is expected to rise to 2.3 billion USD by 2047.⁶

Consequently, extensive efforts have been made to promote the abandonment of the practice and international mobilisation against harmful practices. In the past 30 years, global efforts have been made to combat harmful practices, including the 1994 African Platform for Action and the Dakar Declaration⁷ and the 1994 International Conference on Population and Development (ICPD).⁸ African feminists played a significant role in calling for the explicit condemnation of FGM in the 1995 Beijing Declaration and Platform for Action, which consequently called for legislation against perpetrators of such practices.⁹

At the global level, while the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not reference FGM, it explicitly prohibits traditional practices that discriminate against women (articles 2 and 5). The Convention on the Rights of the Child (CRC) also obligates states under article 24(3) to abolish traditional practices harmful to children. The CEDAW Committee, under General Recommendation 24, specifically recommended that governments devise health policies that consider the needs of girls and adolescents who may be vulnerable to traditional practices such as FGM.¹⁰ Joint General Recommendation/General Comment 31 of the CEDAW Committee and 18 of the Committee on the Rights of the Child highlights various legislative measures to eliminate the practice of FGM.¹¹

While the Maputo Protocol strongly condemns FGM, it also applies to other harmful practices affecting women and girls. These practices include child marriage,¹² virginity testing, widowhood practices, witchcraft, extreme dietary restrictions (forced feeding, food taboos- including during

2 The countries with high prevalence of FGM include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda and Zambia. Knowledge and data gaps still do exist for countries such as Malawi, Mozambique, South Africa, Zambia, which are not usually listed among the countries with a prevalence of FGM.

3 United Nations Children's Fund (UNICEF) 'Female genital mutilation/cutting: a global concern' 2016 [https://data.unicef.org/resources/female-genital-mutilationcutting-global-concern/#:~:text=Female%20genital%20mutilation%2Fcutting%20\(FGM,efforts%20to%20end%20the%20practice.](https://data.unicef.org/resources/female-genital-mutilationcutting-global-concern/#:~:text=Female%20genital%20mutilation%2Fcutting%20(FGM,efforts%20to%20end%20the%20practice.) (accessed 10 May 2021). See D Gollaher *Circumcision: a history of the world's controversial surgery* (2000).

4 WHO 'FGM fact sheet' (2022) <https://www.who.int/en/news-room/fact-sheets/detail/female-genital-mutilation> (accessed 16 May 2022).

5 UNICEF (n 3); Gollaher (n 3).

6 WHO (n 4).

7 African platform for action: African common position for the advancement of women: adopted at the Fifth African Regional Conference on Women, Dakar, Senegal 16-23 November 1994 E/ECA/ACW/RC.V/CM/3 <https://repository.uneca.org/handle/10855/1147> (accessed 5 June 2022) paras 38 & 84.

8 UN 'International Conference on Population and Development Programme of Action' (1994) para 7.

9 Beijing Declaration and Platform for Action Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

10 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 14 Female Circumcision, 1990, A/45/38 and Corrigendum (CEDAW Committee General Recommendation 14)

11 Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women and 18 of the Committee on the Rights of the Child on harmful practices (14 November 2014), CEDAW/C/GC/31/CRC/C/GC/1.

12 C Musembi 'Article 6' in this volume.

pregnancy), binding, breast ironing, beading¹³ and son preference and its implications for the status of the girl child.¹⁴ While there has been increased momentum in the generation of evidence on FGM, this is not the same for other harmful practices. Despite the persistence of these practices that violate international human rights law, there is a shortage of information and data.¹⁵

It is crucial to contextualise the discussion of harmful practices against women and girls within the broader framework of patriarchal control and regulation of women's sexuality. These practices serve to restrict women's autonomy and agency, particularly in relation to their sexual lives, and reinforce traditional gender roles and power dynamics. Against this backdrop, this chapter seeks to provide a comprehensive understanding of article 5 of the Maputo Protocol, which addresses the issue of FGM and other harmful practices affecting women and girls. Through exploring its drafting history, the concepts of 'harmful' and 'FGM,' the obligations imposed on states, implementation measures undertaken by states, and recommendations for both state and non-state actors, this chapter aims to contribute to the growing discourse around the eradication of harmful practices and the promotion of women's human rights.

2 Drafting history

During the drafting process of the Maputo Protocol, the initial version, known as the Nouakchott Draft, which was presented at a 1997 meeting organised by the International Commission of Jurists and the African Commission on Human and Peoples' Rights (African Commission), included a provision for protecting 'women and society from the harmful effects of fundamentalism and of cultural and religious practices which oppose this right.' This right referred to the right to a positive cultural environment, which was included in article 18 of the draft.¹⁶ Similarly, the second draft, known as the Kigali Draft, which was presented at a meeting in Kigali in 1999, did not have a provision on harmful practices.¹⁷ Instead, its draft article 19 focused on cultural practices, stating that states should take appropriate measures to 'protect women and society against all forms of intolerance and repugnant cultural and religious practices'.¹⁸

Part of the reason for the absence of a provision on the elimination of harmful practices was that there was an ongoing parallel process for a specific treaty, the Organization of African Unity (OAU) Convention on the Elimination of All Forms of Harmful Practices (HPs) Affecting the Fundamental Human Rights of Women and Girls (Draft OAU Convention on Harmful Practices).¹⁹ This was led by the Inter-African Committee on Harmful Traditional Practices Affecting the Health of Women and Children (IAC) and the Women's Unit of the OAU (now the African Union (AU)).²⁰ The Draft OAU Convention on Harmful Practices recognised that:²¹

13 See K McLay 'Beading practice among the Samburu and its impact on girls' sexual and reproductive health: a critical overview of the literature' (2020) 1 *Publications and Scholarship* 1-52.

14 CEDAW Committee General Recommendation 14 (n 10) para 8.

15 Majority of national demographic health surveys focus on FGM and child marriage.

16 See generally Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

17 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

18 Kigali Draft (n 17) art 19.

19 R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2019) 466.

20 See also M Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40-63.

21 Preamble, Draft Harmful Practices Convention.

the health and basic human rights of women and girls, such as the right to life, health and bodily integrity, continue to be impinged upon by harmful practices, which include widowhood rites, nutritional taboos, female genital mutilation, forced and/or early childhood marriage.

Article 1 of the Draft Convention defined HPs. Article 2 required states to enact legislation to prohibit HPs. Article 3 further required states to conduct public awareness campaigns, working with a broad range of stakeholders. Article 4 dealt with banning the medicalisation and paramedicalisation of FGM and scarification. Furthermore, article 5 obligated states to take necessary measures to rehabilitate victims of HPs by providing social support services. The Draft Convention further called for the establishment of appropriate institutions where they do not exist in order to ensure implementation of the Draft Convention. In addition, the Draft Convention also called for the setting up of a five-person committee to oversee the monitoring of the Convention.

To avoid duplication, there was a proposal about merging the two initiatives.²² A series of discussions followed, resulting in a merger of the two drafting initiatives.²³ Subsequently, the OAU Legal Unit passed the IAC/Women's Unit Draft Convention on Harmful Practices to the Chairperson of the African Commission, with a suggestion that the IAC Convention be incorporated into the process of drafting the Protocol on the Rights of Women.²⁴ This was duly done, with article 5 of the Maputo Protocol drawing heavily from the Draft OAU Convention on Harmful Practices. Thus, the first time the definition of HPs was offered was in the 2001 draft (the Addis Ababa Draft) presented during the Meeting of Experts held in Addis Ababa, Ethiopia.²⁵ The first draft of the article (6 as it then was) provided as follows:

State Parties shall condemn all forms of harmful practices which affect the fundamental human rights of women and girls and which are contrary to recognised international standards/and therefore commit themselves

to create awareness, prohibit FGM, provide support to victims and protect women and girls at risk of being subjected to HPs and all other forms of violence/abuse and intolerance.

At a meeting of NGOs convened in 2003 in Addis Ababa, by the Equality Now Africa Regional Office, editorial changes were proposed to the Addis Ababa Draft.²⁶ The participants of the NGO meeting observed that the current draft fell below international standards as contained in the African Charter on the Rights and Welfare of the Child (African Children's Charter), the CRC and the Beijing Platform for Action. It was therefore suggested that the draft should explicitly recognise that all forms of HPs are a form of discrimination. This speaks to the issue of discrimination also arising from social

22 See Nsibirwa (n 20) 42. See letter, ES/WU/IAC/18/6.00 (20 March 2000).

23 Letter from Berhane Ras-work, President IAC to HEC Dr Salim A. Salim (10 May 2000) File No IAC/OAU/197.00. On file with the author.

24 Interoffice Memorandum addressed to the Secretary, ACHPR (17 May 2000) File No CAB/LEG/117.141/62NoI.I. On file with the author.

25 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

26 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (as adopted by the Meeting of Government Experts in Addis Ababa on 16 November 2001) 6 January 2003 markup from the meeting convened on 4-5 January 2003 in Addis Ababa, by the Africa Regional Office and the Law Project of Equality Now, CAB/LEG/66.6/Rev.1. (Revised Final Draft).

practice and not just law.²⁷ Emphasis was also placed on clearly articulating an obligation on states to enact legislation with sanctions attached.²⁸

With further minor editorial changes, the proposals emanating from the 2003 meeting were accepted and incorporated into the Maputo Protocol's final draft, which was adopted by the Meeting of Ministers on 28 March 2003.²⁹

3 Exploring key concepts: definitions, interpretations and interlinkages with other human rights treaties

3.1 Defining key concepts

Article 5 of the Maputo Protocol deals with conceptual issues that require definition and interpretation, including the concept of HPs, the particular case of FGM, and the vulnerability of women and girls who are at risk of being subjected to such practices.

3.1.1 Harmful practices

'Harmful practices' is defined in article 1(g) of the Maputo Protocol to mean 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.' This definition is unique as it addresses both 'acts' that negatively impact the rights of women and girls and 'attitudes,' which require changing opinions and ways of thinking. In an attempt to avoid the skewed perception of culture as only harmful- as is dominant in Western feminist discourse – the Maputo Protocol intentionally uses the term 'harmful practices' instead of 'harmful cultural practices.'³⁰ The Maputo Protocol, it seems, is careful to avoid the presumption that culture and human rights are inevitably in tension with each other.

Arguably, the African Commission on Human and Peoples' Rights (African Commission) has paid more attention to child marriage and FGM than to other aspects of HPs.³¹ However, recently the

27 F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 75. See eg, art 2(2) of the Protocol, which provides that 'States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.'

28 With the proposed changes, the provision read thus:
State Parties shall condemn and prohibit all forms of harmful practices which affect the fundamental human rights of women and which as a form of discrimination are contrary to recognized international standards.
State Parties shall take all measures necessary to eliminate such practices, including, but not limited to:
 (a) creating public awareness in all sectors of society regarding harmful practices through information, formal and informal education, communication and outreach programmes;
 (b) prohibiting through legislation with sanctions, all form of female genital mutilation, including medicalization and paramedicalization. State Parties shall take effective measures to enforce such prohibition.
 (c) providing the necessary support to victims of harmful practices through basic services such as professional health and legal services, emotional and psychological counseling, and skills training aimed at making them selfsupporting;
 (d) protecting those women and girls who are at risk of being subjected to harmful practices and all other forms of violence, abuse and intolerance.

29 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

30 However, art 2(2) of the Protocol uses the term 'harmful cultural and traditional practices.'

31 See eg: 449 Resolution on Human and Peoples' Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts – ACHPR/Res. 449 (LXVI) 2020; Press Release on the Promotion Mission of the African

Commission has made pronouncements on HPs targeted at specific categories of persons, including older persons and persons with disabilities. For instance, the Working Group on the Rights of Older Persons and Persons with Disabilities have noted the ‘association of Older Persons with witchcraft or other unnatural practices or beliefs [which] often lead to serious abuses and violations of the human rights of Older Persons.’³² The focus on HPs against older persons is incorporated into the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons), which was adopted in January 2016.³³ The Protocol on the Rights of Older Persons calls on states to prohibit and criminalise ‘harmful traditional practices that target older persons.’³⁴ States commit to taking all the necessary measures to eliminate HPs, including witchcraft accusations which affect the welfare, health, life and dignity of older persons, especially older women.³⁵

Harmful practices targeted at persons with disabilities are also further noted in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities (African Disability Rights Protocol), which was adopted on 30 January 2018.³⁶ The Protocol addresses HPs, specifically providing under article 11(1):

States Parties shall take all appropriate measures and offer appropriate support and assistance to victims of harmful practices, including legal sanctions, educational and advocacy, to eliminate harmful practices perpetrated on persons with disabilities, including witchcraft, abandonment, concealment, ritual killings or the association of disability with omens.

While FGM is clearly articulated in the Maputo Protocol, and the phrase ‘and all other practices’ would indicate a broad interpretation, this may not necessarily be so. In practice, it is argued that certain practices, not explicitly enumerated in the Maputo Protocol are deemed not be prohibited, even if they are harmful to women.³⁷ This becomes problematic as the Maputo Protocol is silent, for example, on the ‘practices of lobola (bride price) or leviratic marriages (the practice of inheriting a wife).’³⁸ However, through their various mechanisms, the African Commission and the African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee) have made detailed pronouncements on what may constitute HPs. The Commission has noted the need for states to take measures to ‘protect women against all forms of violence, as well as traditional beliefs and practices such as burying wives alive with their dead husbands, FGM, despoilment of widows’.³⁹ The African

Commission on Human and Peoples’ Rights to the Republic of The Gambia (25 April 2017); Joint Statement by UN human rights experts, the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples’ Rights (28 September 2015).

32 Statement of the Working Group on the Rights of Older Persons and Persons with Disabilities in Africa of the African Commission on Human and Peoples’ Rights, at the occasion of the 26th International Day of Older Persons (1 October 2016) <https://www.achpr.org/news/viewdetail?id=52> (accessed 15 May 2022).

33 The Protocol is yet to come into force. There are currently 6 ratifications (Benin, Ethiopia, Kenya, Lesotho, Malawi and South Africa) https://au.int/sites/default/files/treaties/36438-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_OLDER_PERSONS.pdf (accessed 15 May 2022).

34 Protocol on the Rights of Older Persons art 8(1).

35 Protocol on the Rights of Older Persons art 8(2).

36 The Protocol is yet to come into force. There are currently 3 ratifications (Kenya, Malawi & Rwanda) https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESaEUtm_RIGHTS_ON_THE_RI_.pdf (accessed 16 May 2022).

37 K Davis ‘The Emperor is still naked: Why the Protocol on the Rights of Women in Africa leaves women exposed to more discrimination’ (2009) 950(42) *Vanderbilt Journal of Transnational Law* 964.

38 Davis (n 37) 965.

39 Activity Report of Commissioners: Commissioner Julienne Ondziel-Gnelenga (Item 7b), DOC/ OS(XXIX)/ 217/ 5 (7 May 2001) 6.

Commission has also recognised other forms of HPs such as *Ukuthwala*,⁴⁰ (falling within the ambit of child marriage), which continues to restrict South African women and girls from fully enjoying their rights as guaranteed both in the African Charter on Human and Peoples' Rights (African Charter) and the Maputo Protocol.⁴¹ This practice – essentially forced marriage – is also common in other countries, known by the respective local terms: *unwendisa* in Swaziland, and *telefa* in Ethiopia.⁴²

The African Commission and the African Children's Committee have both recognised other HPs.⁴³ These include 'abduction and kidnapping for purposes of marriage,' which is the taking of a person against their will to force them into marriage; 'virginity testing,' which is a non-scientific examination of a girl or woman's hymen to determine her virginity; 'breast ironing,' a harmful practice that involves the flattening of a young girl's breasts; 'forced feeding,' which is the forceful feeding of girls or women to make them gain weight; 'forced marriages,' which are arranged without the free and full consent of both parties, and 'tourist marriages,' which are contracted to gain citizenship or residency status in another country, all of which can lead to physical, emotional, and psychological harm. The African Commission's ongoing elaboration on HPs allows for the interpretation and application of measures to be flexible and adaptable to emerging trends.

3.1.2 Female genital mutilation

FGM comprises all procedures that involve partial or total removal of the external female genitalia or other injuries to the female genital organs for non-medical reasons.⁴⁴ According to the WHO, there are four types of FGM.⁴⁵ Type I (clitoridectomy) is the partial or total removal of the clitoris (a small, sensitive, and erectile part of the female genitals) and, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris). Type II (excision) is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva). Type III (infibulation) is the narrowing of the vaginal opening by creating a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy). Type IV includes all other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping, and cauterising the genital area.

In addition, the introduction of harmful substances into the vagina by mostly adult women to strengthen the vagina to enhance their own or their partner's sexual pleasure fall within the ambit of Type IV. For example, the introduction of tobacco in the vagina has been found to be common in

40 'Ukuthwala' is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations. See South Africa: Combined 2nd Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2015) para 364.

41 Concluding Observations and Recommendations on the Combined 2nd Periodic Report of the Republic of South Africa on the implementation of the African Charter on Human and Peoples' Rights and the initial report on the Maputo Protocol, African Commission on Human and Peoples' Rights, adopted at the 58th ordinary session (6-20 April 2016) paras 23 & 33.

42 Similar practices are found among the Himba in Namibia, Umutara in Rwanda, the Nyanza region in Kenya, some Bantu tribes of Uganda and among the Latuka of Sudan. See Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage (2017) available at https://www.acerwc.africa/sites/default/files/2022-09/Joint_General_Comment_ACHPR_Ending_Child_Marriage_March_2018_English.pdf (accessed 6 May 2023) para 19.

43 Joint General Comment on Child Marriage (n 42) para 49. See also Concluding Observations on the 2nd Periodic Report of South Africa, UN Committee on the Rights of the Child (CRC) (27 October 2016) UN Doc CRC/C/ZAF/CO/2 (2016).

44 WHO (n 4).

45 WHO (n 4).

Northern Nigeria,⁴⁶ with the trend gaining ground recently in The Gambia with the use of a stimulant commonly called ‘tabaa’ to enhance sexual pleasure.⁴⁷ However, it is important to note that varied contexts of the practices subsumed under Type IV, and as the WHO pointed out ‘it is not always clear, however, what harmful genital practices should be defined as Type IV’.⁴⁸

A key issue to raise is whether FGM is distinct from other practices that involve alteration of the female genitalia, which might be medically necessary. An unresolved issue is whether Female Genital Cosmetic Surgeries (FGCS), which are globally prevalent, should be considered FGM. For example, there has been an uptake in clitoral reconstruction ‘despite the absence of conclusive evidence regarding its benefits or absence of harm’.⁴⁹ As noted by the WHO, while practices, including genital cosmetic surgery and hymen repair, are legal in many countries, these practices fall within the definition of what constitutes FGM even if they are not generally considered to be.⁵⁰

The WHO and its partners have further reiterated the need to maintain a broad definition of FGM to avoid loopholes. While the Maputo Protocol uses the term FGM, it is important to note that this framing is not universal and is contested.⁵¹ African feminists have decried the framing of FGM based on a Western bias premised on colonial and neo-colonial off-hand and totalising condemnation of the practice as morally repugnant, primitive, and barbaric.⁵² This critique does not necessarily undermine the significance of the Maputo Protocol’s stance against FGM, but rather calls for a nuanced and culturally-sensitive approach that avoids the imposition of Western values on African societies.

3.1.3 Women who are ‘at risk’

Women are vulnerable to HPs when they live in societies where such practices are prevalent or belong to social circles that subscribe to patriarchal values and traditional gender norms, which prioritise male control over women’s bodies and sexuality. In the case of FGM, ‘at risk’ denotes women and girls who are more likely to be subjected to the practice, including those living in countries where it is widespread and those residing in diaspora communities where it persists. Identifying and supporting these vulnerable individuals is essential to prevent them from experiencing HPs.

46 African Tobacco Control Alliance (ATCA) ‘Vaginal tobacco: a hidden health danger for women’ (6 April 2022) <https://atca-africa.org/vaginal-tobacco-a-hidden-health-danger-for-women/> (accessed 10 June 2022). See generally T Okeke et al ‘An overview of female genital mutilation in Nigeria’ (2012) 2(1) *Annals of Medical and Health Sciences Research* 70-73.

47 K Manneh ‘Dr Daffeh: “Taba” is not medically or scientifically confirmed to be used on genital part’ *The Voice* 4 October 2021 <https://www.voicegambia.com/2021/10/04/dr-daffeh-taba-is-not-medically-or-scientifically-confirmed-to-be-used-on-genital-part/> (accessed 4 June 2022).

48 World Health Organization (WHO) ‘Eliminating female genital mutilation: an interagency statement - OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO’ (2018) 26-28.

49 J Abdulcadir et al ‘A systematic review of the evidence on clitoral reconstruction after female genital mutilation/cutting’ (2015) 129(2) *International Journal of Gynecology and Obstetrics* 96.

50 WHO (n 48) 28.

51 See H Lewis ‘Between Irua and ‘Female Genital Mutilation’: feminist human rights discourse and the cultural divide’ (1995) 8 *Harvard Human Rights Law Journal* 1; IR Gunning ‘Arrogant perception, world-travelling and multicultural feminism: the case of female genital surgeries’ (1992) 23 *Columbia Human Rights Law Review* 189.

52 See A Thiam *Speak out, black sisters: black women and oppression in black Africa* (trans DS Blair, 1995); O Nnaemeka *Sisterhood, feminism and power: from Africa to the diaspora* (1998); O Nnaemeka ‘Theorizing, practicing, and pruning Africa’s way’ (2004) 29(2) *Signs: Journal of Women in Culture & Society* 357-385. See also S Tamale ‘Researching and theorising sexualities in Africa’ in S Tamale (ed) *African sexualities: a reader* (2011) 19-20.

3.2 Related provisions

3.2.1 *Interconnected Maputo Protocol provisions*

There are other provisions in the Maputo Protocol relevant to eliminating HPs. For instance, article 5 of the Maputo Protocol must be read together with article 2, which relates to the elimination of all discriminatory practices against women.⁵³ Article 2(2) of the Protocol provides that:⁵⁴

States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the *elimination of harmful cultural and traditional practices* and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

As noted in the Joint General Comment on Child Marriage, HPs ‘perpetuate gender inequality because they violate girls’ fundamental rights to life, health, dignity, education and physical integrity’.⁵⁵ Article 3 on the right to dignity further calls on states to ensure respect for the dignity and protection of women from all forms of violence. Moreover, the Maputo Protocol in article 4 on the elimination of violence against women mandates respect for the life, integrity, and security of the person of every woman.⁵⁶ The African Commission’s Guidelines on Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines) also recognise FGM as a form of sexual violence that can constitute torture or cruel, inhuman and degrading treatment.⁵⁷

Article 8 of the Maputo Protocol, which addresses access to justice and equal protection before the law, is also relevant. Of particular relevance is the state obligation to equip law enforcement organs to interpret and enforce gender equality rights effectively and to reform existing discriminatory laws and practices to promote and protect women’s rights. Article 17 of the Protocol also recognises the right of women to live in a positive cultural context and to participate at all levels in the determination of cultural policies. It further obligates states to take ‘all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels’. Article 17 recognises the interlinkages between human rights and culture and the important role that women can play in the determination of culture that advances women’s rights. However, this should be ‘based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy’.⁵⁸ In essence, article 5 of the Maputo Protocol acknowledges that culture has often been deployed to encroach on women’s rights. Although article 17 of the African Charter and article 17 of the Maputo Protocol recognise the right to culture, with article 18 of the Charter making reference to ‘traditional’ values, this does not absolve states of their responsibility to eliminate harmful traditional practices that violate human rights.⁵⁹ In other words, while cultural rights are important, they cannot be used as an excuse to perpetuate HPs that have a negative impact on individuals’ well-being and human rights. States have an obligation to eradicate such practices and ensure that they do not continue to harm individuals within their jurisdiction. Article 5, coupled with these provisions, provides a strong normative basis for protection and promotional measures to eliminate HPs.

53 See also art 2 of the African Charter.

54 Emphasis added.

55 Joint General Comment on Child Marriage (n 42) para 49.

56 See R Nekura ‘Article 4’ in this volume. See also art 4 of the African Charter.

57 African Commission on Human and Peoples’ Rights, ‘The Guidelines on Combating Sexual Violence and its Consequences in Africa’ adopted during its 60th ordinary session held in Niamey, Niger from 8-22 May 2017 15 (Niamey Guidelines).

58 Preamble, Maputo Protocol.

59 Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) para 9.

While the Maputo Protocol is the only binding human rights treaty that explicitly prohibits FGM, article 21(1) of the African Children's Charter prohibits harmful social and cultural practices that are prejudicial to the health or life of the child. The Committee has also adopted Agenda 2040, which prohibits FGM by all African states as a goal under Aspiration 7 (Every child is protected against violence, exploitation, neglect, and abuse).⁶⁰ The African Commission adopted a resolution in 2007 urging African states to outlaw FGM.⁶¹ Moreover, on 8 February 2018, the African Commission and the African Children's Committee adopted their first Joint General Comment on Child Marriage.⁶² The Joint General Comment seeks to clarify and elaborate on the nature of rights set out in article 6(b) of the Maputo Protocol and article 21(2) of the African Children's Charter, respectively. The Commission and Committee addressed human rights violations in the context of child marriage and other harmful cultural practices.⁶³ Currently, there is an ongoing process for the development of a Joint General Comment of the African Children's Committee and African Commission on FGM. This is in recognition of the fact that national frameworks for addressing FGM in Africa have been insufficient and non-uniformed, despite international and regional norms.⁶⁴

3.2.2 Other international treaties

Harmful practices – which include FGM – are well recognised as a gross violation of the human rights of girls and women in numerous international declarations and treaties.⁶⁵ All forms of FGM violate a range of human rights of girls and women, including the right to non-discrimination, to protection from physical and mental violence to the highest attainable standard of health, and in the most extreme cases, to the right to life. For instance, the UN Human Rights Committee has stated that FGM is in breach of article 7 of the International Covenant on Civil and Political Rights (ICCPR)⁶⁶ and constitutes torture or other cruel, inhuman, or degrading treatment or punishment.⁶⁷ The UN Human Rights Council has also raised concerns regarding its persistence.⁶⁸

Over the past two decades, international human rights norms have evolved significantly to recognise FGM as a fundamental human rights violation against women and girls.⁶⁹ For instance, UN treaty monitoring bodies have also addressed the practice of FGM as a human rights violation.⁷⁰ Furthermore, the former UN Special Rapporteur on the Right of Everyone to the Enjoyment of the

60 African Children's Committee, 'Africa's Agenda for Children 2040' (2016) https://www.acerwc.africa/wp-content/uploads/2018/06/Agenda_2040_for_Children_Rights_in_Africa_15x24.pdf.

61 Resolution on the Health and Reproductive Rights of Women in Africa ACHPR/Res.110(XXXXI)07.

62 Joint General Comment on Child Marriage (n 42).

63 Joint General Comment on Child Marriage (n 42) para 49.

64 See generally first draft joint general comment on FGM, discussed at the Experts Meeting organised by the African Children's Committee and the African Commission in collaboration with the Social Welfare Unit at the Department of Health, Humanitarian Affairs and Social Development of the African Union Commission, 7-8 June 2022, Pretoria, South Africa. Draft on file with author.

65 See E Durojaye & S Nabaneh 'Addressing female genital cutting/mutilation (FGC/M) in The Gambia: beyond criminalisation' in E Durojaye, G Mirugi-Mukundi & C Ngwenya (eds) *Advancing sexual and reproductive health and rights in Africa: constraints and opportunities* (2021) 117.

66 Article 7 of ICCPR; art 37 of Convention on the Rights of the Child; art 3 of Convention Against Torture. See Human Rights Committee, General Comment 28: art 3 (the equality of rights between men and women), CCPR/C/21/Rev.1/Add.10 (29 March 2000).

67 See Committee Against Torture (CAT) General Comment 2: implementation of art 2 by States Parties CAT/C/GC/2 (24 January 2008).

68 See Human Rights Council 'Report of the Special Rapporteur on torture and other cruel, inhuman nor degrading treatment or punishment, Manfred Nowak' A/HRC/7/3 (15 January 2008).

69 Nabaneh & Muula (n 1) 253.

70 See Human Rights Committee General Comment 28: art 3 (The equality of rights between men and women) CCPR/C/21/Rev.1/Add.10 (29 March 2000).

Highest Attainable Standard of Physical and Mental Health said in his report that FGM represents ‘serious breaches of sexual and reproductive freedoms, and are fundamentally and inherently inconsistent with the right to health.’⁷¹ The CEDAW Committee under its General Recommendation 24, specifically urged governments to devise health policies that take into account the needs of girls and adolescents who may be vulnerable to traditional practices.⁷²

Additionally, on 25 September 2015, the global community agreed to a new set of development goals – the Sustainable Development Goals (SDGs) – which include a target under Goal 5 to eliminate all HPs, such as child, early and forced marriage and FGM, by the year 2030.⁷³ The UN General Assembly also adopted a resolution that will no doubt intensify the global movement towards eradicating FGM.⁷⁴

4 Nature and scope of state obligations

States have various obligations under article 5 of the Maputo Protocol, such as obligations to prevent HPs, provide protection against FGM and provide effective remedies and reparation for victims of HPs. These are explained below relating to specific obligations such as legislative, institutional, or other measures.

4.1 Legislative measures

Article 5(b) requires states parties to prohibit and condemn all forms of FGM through legislative and other measures. This complements article 2, which requires states to take legislative action against discrimination, particularly HPs that endanger women’s health and well-being. Due to the very prescriptive nature of the article, states are obligated to enact national legislation that prohibits FGM along with prescribed sanctions for those that perpetuate the practice. The Commission has called on states to institute harsher penalties for all persons involved, including parents and family members.⁷⁵ In legislating against FGM, states must ensure that victims of FGM are not prosecuted or portrayed as having participated in the commission of the crime. In addition, states are obligated to prevent third parties from coercing women to undergo traditional practices, such as FGM.⁷⁶ The continued practice of FGM despite criminalisation can be attributed to a number of reasons, as argued by Nabaneh and Muula, including the ‘lack of accountability procedures and of strong national law enforcement mechanisms due to ineffective governmental coordinating bodies, weak human rights institutions, and ineffective judiciaries.’⁷⁷ Thus, it is critical to engage a broad range of stakeholders, including the National Human Rights Institutions (NHRIs) in order to ensure robust accountability.⁷⁸ The obligation to protect women and girls from HPs, including FGM requires states, their agents and officials to not only take action to prevent violations but also to impose sanctions for violation of their

71 Human Rights Council ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Pūras’ A/HRC/29/33 (2 April 2015).

72 CEDAW Committee General Recommendation 14 (n 10).

73 See Resolution adopted by the General Assembly on 25 September 2015 ‘Transforming our world: the 2030 Agenda for Sustainable Development’ A/RES/70/1.

74 General Assembly Resolution. Intensifying global efforts for the elimination of female genital mutilations, A/RES/71/168 (2017).

75 See Concluding Observations and Recommendations on the Combined 3rd and 4th Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples’ Rights 2011-2013, African Commission on Human and Peoples’ Rights adopted at 21st extraordinary session 23 February-04 March 2017, Banjul, The Gambia.

76 See Committee on Economic, Social and Cultural Rights (ICESCR) ‘General Comment 22 on the right to sexual and reproductive health (art 12 of the International Covenant on Economic, Social and Cultural Rights)’ E/C.12/GC/22. 2016 (2 May 2016) paras 29, 49(a) & 59.

77 Nabaneh & Muula (n 1) 256.

78 Niamey Guidelines (n 57) 48-49.

rights by private parties, and to exercise due diligence in investigating, prosecuting and punishing such violators.⁷⁹

4.2 Institutional measures

The nature of victim support envisaged under article 5(c) of the Maputo Protocol includes 'health services, legal and judicial support, emotional and psychological counselling, and vocational training to make them self-supporting'. Banda aptly captures the holistic approach of this provision, noting as follows:⁸⁰

The strength of the African Protocol is in its recognition that violence against women, including the elimination of harmful practices, requires [a] holistic approach which goes beyond law and punishment to embrace the totality of the person whose rights have been violated.

To ensure access to justice, states must build the capacity of law enforcement, prosecution, and judicial officers on handling HPs cases, including FGM. The African Commission has recommended that states train judicial officers on human rights, particularly in handling cases of violence against women.⁸¹ Where necessary, it has recommended, victims should be provided with legal aid.

The short- and long-term medical and psychological consequences of FGM are well-researched.⁸² In particular, FGM 'may have various immediate and/or long-term health consequences, including severe pain, shock, infections and complications during childbirth, long-term gynaecological problems such as fistula, psychological effects and death.'⁸³ It is critical that states provide adequate, affordable, and accessible health services at the time of first response, but also later in terms of management of pregnancy, childbirth and the postpartum period for women who have undergone FGM.⁸⁴ Access to psychological counselling should be provided for women and girls, within reasonable distances and at no cost. For example, the African Children's Committee recommended Eritrea to provide financial, medical and psychological assistance to victims of FGM.⁸⁵ In addition, states must ensure that vocational training programmes are offered to all victims of FGM.

4.3 Other measures

In *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia*⁸⁶ the African Commission further elaborated on other measures that states may take in addition to legislation on

⁷⁹ As above 18.

⁸⁰ F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 80-81.

⁸¹ See eg, *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples' Rights 57th Annual Activity Report (2016) para 160(d).

⁸² See I Sunday-Adeoye & G Serour 'Management of health outcomes of female genital mutilation: systematic reviews and evidence syntheses' (2017) 136 (Suppl. 1) *International Journal of Gynecology and Obstetrics* 1-2.

⁸³ CEDAW Recommendation 19, para 19. See also WHO Study Group on Female Genital Mutilation and Obstetric Outcome 'Female genital mutilation and obstetric outcome: WHO collaborative prospective study in six African countries' (2006) 367(925) *Lancet* 1835-1841.

⁸⁴ See generally obligations arising from art 14(2)(a) & (b) of the Protocol and the African Commission's General Comments on art 14(1), (d) and (e) and on art 14(2)(a) and (c) of the Maputo Protocol. See also R Khosla et al 'Gender equality and human rights approaches to female genital mutilation: a review of international human rights norms and standards' (2017) 14(59) *Reproductive Health* 1-9.

⁸⁵ Concluding Recommendations on the initial report of Eritrea, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 28th session (21 October-1 November 2016).

⁸⁶ *Equality Now v Ethiopia* (n 81).

issues of abduction, rape, and other harmful practice such as forced marriage. The Commission noted that other measures may include:⁸⁷

immediately launching sensitisation campaigns in the area about the illegality of the practice of forced marriage by abduction and rape and the attendant penal consequences; providing direct security at the residences of girls attending school; conducting random patrols of the areas where the practice was rampant; or indeed requiring the owners of properties accommodating school-attending girls ... to adequately secure the premises.

In line with article 5(a) of the Maputo Protocol, states have an obligation to create public awareness of HPs, through information, formal and informal education, and outreach programmes. This is important given the need to change social norms.⁸⁸ It has been observed that in countries where the enactment of anti-FGM law is accompanied by culturally-sensitive education and sensitisation, there is evidence to show a decline in both practice and support for it.⁸⁹ The African Commission has called on states to not only sensitise, but also closely collaborate with religious, traditional and political leaders in efforts to eliminate HPs.⁹⁰ The African Children's Committee has also recommended that the state take necessary measures to create awareness about the adverse effect of FGM among all relevant stakeholders to eliminate the practice.⁹¹

The Maputo Protocol calls on states parties to take measures to protect women who are at risk of FGM (article 5(d)). Such measures may include the provision of state-funded rescue centres that shelter victims or girls and women at risk. States have a duty to ensure the availability of these shelters with adequate funding. Toll-free helplines can also be a means through which girls and women at risk may access protection. States should also commit themselves to protecting and granting asylum to those women and girls who are at risk of or have been or are being subjected to HPs.

In sum, article 5 of the Maputo Protocol has adopted a three-prong approach to eradicating HPs as noted.⁹² The Maputo Protocol obligates states to exercise due diligence, end impunity and adopt a multi-sectoral approach.

5 State practice

Article 26 of the Maputo Protocol calls upon states parties to 'ensure the implementation of this Protocol at the national level' indicating in their periodic reports 'legislative and other measures' undertaken.⁹³ This section gives a brief snapshot of the various steps states parties have undertaken in line with the above-mentioned obligations.

The evolution of strong international and regional human rights standards recognising HPs as a human rights violation has significantly influenced law reform at the national level. Domestic legal framework plays an essential role in protecting the rights of women and girls against such practices.

87 *Equality Now v Ethiopia* (n 81) para 128.

88 UNICEF 'The dynamics of social change: Towards the abandonment of female genital mutilation/cutting in five African countries' (2010) 6.

89 See AU Commission & United Nations Office of the High Commissioner for Human Rights 'Women's rights in Africa' (2017) 37.

90 See eg African Commission General Comment on art 14(1)(d) & (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa paras 23 & 46.

91 Concluding Recommendations on the initial report of Sierra Leone, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 30th ordinary session (6-16 December 2017).

92 Durojaye & Nabaneh (n 65) 119.

93 Article 26(1) of the Protocol.

For instance, section 8(d) of the South African Equality Act stipulates that unfair discrimination on the ground of gender includes ‘any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child’.⁹⁴ Similarly, the constitutions of countries such as Ghana, Kenya, Namibia, Uganda, and Malawi, provide for the equality or non-discrimination clause to take precedence over custom or culture in the event of a conflict. However, the constitutions of countries such as Botswana, The Gambia, Ghana, Lesotho, Sierra Leone, and Zambia all contain provisions that exempt the general area of ‘personal’ law from the guarantee of protection against discrimination.⁹⁵ This divergence in constitutional provisions on protection against discrimination highlights the challenges that may arise in implementing anti-FGM obligations. While some countries prioritise the equality or non-discrimination clause over cultural practices, others exempt certain areas, including ‘personal’ law, from these protections. This may make it more difficult to hold perpetrators accountable and to fully eradicate the harmful practice of FGM in those countries.

Article 5(b) of the Maputo Protocol requires states parties to prohibit and condemn all forms of FGM through legislative and other measures. Evidence shows that at least 60 countries have adopted laws that criminalise FGM, 24 of them African.⁹⁶ In Africa, using legal sanctions to address FGM is the most common response. Criminalisation often involves the imposition of jail sentences or fines. Countries such as Ghana (1994), Burkina Faso (1996), Ivory Coast (1998), Senegal (1999), Djibouti (1995) and Togo (1998) have criminalised the practice of FGM.⁹⁷

Over the past decade, there has been a growing trend towards criminalising FGM. This trend is reflected in a range of laws, including penal codes, specific anti-FGM legislation, laws on women’s rights or equality, and domestic violence legislation. Between 2007 and 2018, countries such as Zimbabwe, Uganda, South Sudan, Kenya, Guinea Bissau, Mozambique, The Gambia and Cameroon all enacted or amended laws so as to punish the practice of FGM. For instance, The Gambia amended its Women’s Act 2015. Nigeria adopted the Violence Against Persons (Prohibition) Act in 2015, whose article 6 prohibits FGM, although the statute only has direct application in the Federal Capital Territory, Abuja, and not in all 36 states. In Mauritania, the Children’s Code of 2015 prohibits FGM (article 12). Guinea also adopted a similar provision in articles 405-410 in its Children’s Code, 2008. Guinea-Bissau is the only country in West Africa with a specific law prohibiting FGM, which has an extraterritorial clause. Article 9 of Law No. 14/2011 explicitly extends the applicability of the law to citizens and foreign residents in Guinea-Bissau who have performed or undergone FGM in a foreign country.⁹⁸ In 2020, Sudan passed a law banning FGM.⁹⁹

Burkina Faso is increasingly being recognised as one of the few countries where FGM legislation is effectively and systematically enforced. In 2017, data collected over a six-month period showed that 51 people (perpetrators and accomplices) were prosecuted for performing FGM on 49 girls; a total of 32 people were sentenced to either firm or conditional sentences.¹⁰⁰ The Commission applauded Burkina

94 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

95 See UN Women’s Global Gender Equality Constitutional Database <https://constitutions.unwomen.org/en> (accessed 20 June 2023).

96 See World Bank ‘Compendium of international and national legal frameworks on female genital mutilation’ (2018).

97 RJ Cook et al ‘Female genital cutting (mutilation/circumcision): ethical and legal dimensions’ (2002) 79 *International Journal of Gynaecology and Obstetrics* 285.

98 Law 14/2011. See generally, UNFPA Regional Office for West and Central Africa ‘Analysis of legal frameworks on female genital mutilation in selected countries in West Africa’ (2017).

99 Law 12 of 2020. See 28TooMany ‘Sudan: The Law and FGM’ (2020) [https://www.28toomany.org/media/uploads/Law%20Reports/sudan_law_report_v2_\(march_2022\).pdf](https://www.28toomany.org/media/uploads/Law%20Reports/sudan_law_report_v2_(march_2022).pdf) (accessed 20 June 2023).

100 28Too Many ‘Burkina Faso: The Law and FGM’ (2018) 5 [https://www.28toomany.org/media/uploads/Law%20Reports/burkina_faso_law_report_v1_\(september_2018\).pdf](https://www.28toomany.org/media/uploads/Law%20Reports/burkina_faso_law_report_v1_(september_2018).pdf) (accessed 20 June 2023).. See also Concluding Observations on the 7th Periodic Report of Burkina Faso, Committee on the Elimination of Discrimination Against Women (27 May 2016), UN Doc CEDAW/C/BFA/7 (2016).

Faso in its 2015 Concluding Observations, noting the government's commitment, including by training paralegals.¹⁰¹ While there have been numerous reports of the commission of FGM, very few cases have resulted in convictions. In Kenya, following the enactment of the Prohibition of Female Genital Mutilation Act 32 of 2011 (FGM Act), a special unit was created in the Office of the Director of Public Prosecution (ODPP) to handle FGM cases.¹⁰² In its report on the Maputo Protocol, Kenya noted that for the period 2017 to 2018, the ODPP handled 346 cases of FGM. Out of the 346, there were 34 convictions, 10 acquittals, 22 withdrawals and 280 pending trials.¹⁰³ In 2019, it was reported that 76 people (59 females and 17 males) were arrested in connection with the cutting of 50 girls while five girls and women were provided with legal aid, counselling and representations.¹⁰⁴ The Commission has also expressed concerns over the snail's pace of prosecution and completion of few reported cases due to insufficient evidence in The Gambia.¹⁰⁵ Since the law was enacted in late 2015, there have been two cases relating to FGM, one of which involved a 5-month-old baby who died as a result of FGM in Sankandi Village, which has not resulted in a successful conviction¹⁰⁶

Evidently, there are varied penalties at the domestic level for contravening such laws. For example, section 2 of Kenya's FGM Act defines FGM types I, II and III but excludes Type IV. This results in a lacuna, (as further discussed below), that hampers the effective enforcement of the law. In addition, in efforts to evade the national laws prohibiting FGM in the country of residence, women and girls have increasingly been taken across the borders to undergo FGM in neighbouring countries. Despite the evident progress in commitment from stakeholders, including regional initiatives such as the Mombasa Declaration and the Action Plan on Cross Border FGM adopted in 2019,¹⁰⁷ and the Pan African Parliament (PAP) 2016 Action Plan to end FGM that highlighted the need to strengthen actions against cross-border FGM,¹⁰⁸ this has largely not translated into domestic policies and actions.¹⁰⁹ Thus, cross-border movements for the purpose of FGM is mainly unaddressed.¹¹⁰ This is evident in the East African region except for Kenya and Uganda, which have specific provisions for cross-border practice of FGM.¹¹¹ Despite the commendable increase in the number of African countries with specific legislation prohibiting FGM, there are limitations to the laws implemented, as they primarily follow a crime and punishment model with little emphasis on awareness-raising or victim support measures. Kenya is an exception in that its laws on FGM include provisions for raising awareness about the harmful effects of the practice and for supporting victims. However, in general,

101 Concluding Observations and Recommendations on the Combined 3rd and 4th Periodic Report of Burkina Faso 2011-2013, African Commission on Human and Peoples' Rights, adopted at the 21st extraordinary session (23 February-4 March 2017) para 45.

102 12th and 13th Periodic Reports of Kenya on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa, African Commission on Human and Peoples' Rights, adopted at the 71st ordinary session (21 April-13 May 2022) para 246.

103 As above, para 247.

104 UNICEF 'Case Study on the End Female Genital Mutilation (FGM) programme in the Republic of Kenya' (2021) 9.

105 Concluding Observations and Recommendations on the Combined Periodic Report of The Gambia on the Implementation of the African Charter on Human and Peoples' Rights 1994-2018 and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa 2005-2014, African Commission on Human and Peoples' Rights, adopted at the 64th ordinary session (24 April-19 May 2019) (2021) para 45.

106 Durojaye & Nabaneh (n 65) 125.

107 UNFPA 'Ending cross-border female genital mutilation' (4 October 2019) <https://kenya.unfpa.org/en/publications/ending-cross-border-fgm> (accessed 6 June 2022).

108 'Pan African Parliament Endorses Ban on FGM' ReliefWeb 7 August 2016 <https://reliefweb.int/report/uganda/pan-african-parliament-endorses-ban-fgm> (accessed 6 June 2022).

109 See UNICEF & UNFPA 'Beyond the crossing: female genital mutilation across borders, Ethiopia, Kenya, Somalia, Tanzania and Uganda' (2019).

110 See IRIN 'West Africa: Cross-border FGM on the rise' (17 October 2008).

111 Art 21 of the Kenya Prohibition of Female Genital Mutilation Act, 2011 and sec. 15 of the Ugandan Prohibition of Female Genital Mutilation Act 2010.

laws against FGM in many countries do not include such measures. In light of the limited approach of criminalisation, the Commission has emphasised the need for a more comprehensive approach to combating FGM. This includes empowering girls with information, skills, and support networks, as well as engaging with communities to raise awareness about the harmful effects of the practice and promote its abandonment.¹¹²

Merely enacting legislation is not enough to effectively combat HPs, as the persistent prevalence of such practices in African countries demonstrates. The Commission in examining state reports has raised concerns, for example, Cameroon,¹¹³ and Ethiopia,¹¹⁴ on the persistence of the ongoing HPs, including FGM despite the existence of national laws. The African Children's Committee has also on several occasions, made recommendations to states- such as Sierra Leone- to strengthen laws and institutions addressing FGM and other forms of HPs against girls.¹¹⁵ Power relations, culture, and religion continue to be the drivers and determinants of the practice, and these impact public discourses that shape policy. Thus, the trend of criminalisation of FGM has been accompanied by a push to ensure that legislation functions as a supportive tool that catalyses social change and fosters an enabling environment for the abandonment of the practice. For example, section 27 of the FGM Act imposes a mandatory duty on the government to provide support services to victims of FGM.

There is emerging constitutional jurisprudence on FGM in the region. For instance, in *Law and Advocacy for Women in Uganda v Attorney General*,¹¹⁶ on the issue of whether the custom and practice of FGM was unconstitutional, the Ugandan Constitutional Court held that FGM violates the rights of women enshrined in articles 21, 24, 32(2), 33, and 44 of the Constitution, and, to the extent that girls and women are known to die as a direct consequence of FGM, also article 22 of the Constitution. This was a petition filed at the Constitutional Court of Uganda asking the Court to declare that FGM, which is practised by several Ugandan communities, contravenes several women's rights under the Constitution of Uganda. The petitioner asked the Constitutional Court of Uganda to declare FGM unconstitutional in accordance with article 2(2) of the Constitution, alleging that it violated the right to life guaranteed under article 22(1); the right to dignity and protection from inhuman treatment, secured under article 24; the rights of women recognised under article 33; and the right to privacy guaranteed under article 27(2) of the Constitution.

The Court recognised the right to practice one's culture, religion, and tradition as provided under article 37 of the Constitution of Uganda but emphasised that such practices should not subject any person to any form of torture, cruel, inhuman, and degrading treatment. Consequently, the court held that FGM should be prohibited in the jurisdiction as it violates the Constitution and international law. While the court did not specifically mention the Maputo Protocol, it referred generally to treaties ratified by Uganda. This decision marks a significant milestone in the development of progressive jurisprudence on state obligations under international and national law to protect women's rights against the practice of FGM and other HPs.

112 African Commission, Concluding Observations The Gambia (2021) (n 105) para 62.

113 See eg: Concluding Observations and Recommendations on the 2nd Periodic Report of Cameroon, African Commission on Human and Peoples' Rights, adopted at the 47th ordinary session (12-26 May 2010).

114 Concluding Observations and Recommendations on the 5th and 6th Periodic Reports of Ethiopia on the implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 56th session (2015) para 36.

115 See eg: African Children's Committee Concluding Observations on: Sierra Leone (2017) (n 91); Eritrea (2016) (n 85); Initial report of Cameroon, adopted at the 28th ordinary session (21 October-1 November 2016); Initial report of Ghana, adopted at the 28th ordinary session (21 October-1 November 2016); Initial report of Sudan, adopted at the 20th ordinary session (12-16 November 2012); Initial and first period report of Nigeria, adopted at the 12th session (July 2006)

116 *Law and Advocacy for Women in Uganda v The Attorney General* [2010] UGCC 4 Constitutional Petition no 8 of 2007 Uganda, Constitutional Court.

Recently in Kenya, a medical practitioner, Dr Tatu Kamau, challenged the constitutionality of the FGM Act. She argued that sections of the Act contravened the Kenyan Constitution by denying an adult woman the freedom to choose to undergo FGM under a trained and licensed medical practitioner, which constituted a denial of the right to access healthcare.¹¹⁷ She also argued that the legislation denied adult women the right to practice their culture. Dismissing her petition, the High Court of Kenya reiterated that the practice of FGM violates a woman's right to health, human dignity and, in instances where it results in death, the right to life, adding that the practice also undermines international human rights standards.

Due to COVID-19 disruptions, a one-third reduction in the progress towards ending FGM by 2030 is anticipated, according to the UNFPA.¹¹⁸ For instance, the President of Kenya in 2020 ordered an investigation into reports of rising violence against women and girls – including rape, domestic violence, FGM and child marriage – attributed to COVID-19 restrictions.¹¹⁹ The African Commission, in 2020, also adopted a resolution on COVID-19, which raised concerns about the 'unprecedented scale in the deprivation of the rights of women and girls reported in the context of the pandemic across the continent'. In particular, the Commission expressed concern about 'the rise in harmful practices including forced child marriage and female genital mutilation.'¹²⁰

In addition, Agenda 2063 (Aspirations 3, 4 and 6) of the AU also condemns all forms of violence and discrimination against women and girls, including FGM.¹²¹ A continental campaign to end FGM was launched by the AU in 2019.¹²² The campaign, also known as the Saleema initiative, was adopted and launched to save more than 50 million girls in Africa under the age of 15 who are at risk of FGM by 2030 if urgent action is not taken. The Initiative calls for regular reporting by member states to AU statutory bodies and requests the African Union Commission (AUC) to develop the AU Accountability Framework on Eliminating Harmful Practices.

6 Conclusion

Addressing HPs requires a multi-faceted approach beyond criminalisation and punishment, and article 5 of the Maputo Protocol highlights the need for holistic interventions that focus on victim support, education, and rehabilitation. However, implementing and enforcing laws against FGM and other HPs remain limited, and practising communities have responded with changed tactics, making it crucial to engage with stakeholders and develop comprehensive solutions to protect the rights of vulnerable individuals.

In addition, we must recognise that HPs extend beyond FGM to include child marriage, beading, breast ironing, and son preference. Therefore, efforts to combat HPs should take a comprehensive approach that addresses all forms of such practices. Rather than solely addressing these practices, it is imperative to tackle the root causes of the issue. This includes challenging the entrenched patriarchal power dynamics that seek to control and diminish women's autonomy, particularly as it relates to their

117 *Dr Tatu Kamau v Attorney General* [Constitutional Petition no 244 of 2019] High Court of Kenya.

118 UNFPA-UNICEF 'COVID-19 Disrupting SDG 5.3. Eliminating Female Genital Mutilation. Technical Note' (2020), https://www.unfpa.org/sites/default/files/resource-pdf/COVID_19_Disrupting_SDG.3_Eliminating_Female_Genital_Mutilation.pdf. See also UN Women and UNFPA 'Impact of COVID-19 on gender equality and women's empowerment in East and Southern Africa' (2021).

119 UN Women & UNDP 'COVID-19 Global Gender Response Tracker. Factsheet: Sub-Saharan Africa (2020), <https://data.undp.org/gendertacker/> (accessed 20 November 2021).

120 449 Resolution on Human and Peoples' Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts – ACHPR/Res. 449 (LXVI) 2020.

121 African Union. Agenda 2063: The Africa we want. 2013. https://au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf.

122 AU Assembly Decision 737/2019.

sexual and reproductive rights. By doing so, meaningful steps can be taken towards ending HPs and advancing gender equality.

State actors play a critical role in combating HPs by adopting multi-faceted strategies that go beyond criminalisation, allocate resources towards victim support, and education programs to modify attitudes. Enforcing laws and engaging with stakeholders such as religious and community leaders is also vital. Non-state actors, including NGOs and civil society organisations, can also contribute significantly by supporting community-led initiatives, building partnerships with state actors and other stakeholders, providing support to victims, and undertaking awareness-raising campaigns. To implement article 5(a) of the Maputo Protocol, public awareness of HPs can be raised through formal education, such as revising school curricula, informal education through community outreach programs and engaging community leaders, mass media campaigns, and organising events and campaigns that bring together survivors, activists, and community leaders. Overall, creating public awareness requires a sustained effort that involves various stakeholders and approaches. It is essential to prioritise education and outreach programmes targeting vulnerable communities and focus on changing social norms perpetuating HPs.

Further progress can be made by building on the advancements made at the regional level in terms of human rights instruments and policies through the development of effective national and regional strategies. While ongoing research and data collection on HPs is important, gaining a comprehensive understanding of these practices is equally vital to inform the creation of effective strategies. Investing in interventions that promote education, rehabilitation, and support to victims of HPs while enforcing laws against these practices and engaging with communities to create a positive change in attitude is important. Eliminating HPs requires the involvement of various sectors of society, such as communities where it is practiced, cultural and traditional leaders, religious institutions, healthcare workers, law enforcement, the media, national human rights institution, and the judiciary. Collaboration between state and non-state actors, as well as development partners is crucial to develop comprehensive and sustainable solutions that address HPs and protect the rights of women and girls.

Article 6

Marriage

Celestine Nyamu Musembi

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

- (a) no marriage shall take place without the free and full consent of both parties;
- (b) the minimum age of marriage for women shall be 18 years;
- (c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;
- (d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;
- (e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;
- (f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;
- (g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;
- (h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;
- (i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;
- (j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

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1 Introduction

References to the family as the fundamental unit of society abound in international and regional human rights documents.¹ Family relations are the primary context for social interaction. The family is foundational in embedding in one's consciousness a template of rights and responsibilities. For this reason, marriage is a crucial site for nurturing respect for women's human rights and redressing gender injustice. The text of article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) reveals that its adoption was driven by a concern to redress a pattern of gender injustice. The emphasis on equal rights during and after marriage, consent to marry and minimum age speak to the persistence of child and forced marriage on the continent. Twenty years after the adoption of the Maputo Protocol, sub-Saharan Africa has the highest prevalence rates of child marriage.² For example, 35 per cent of women between the ages of 20 and 24 are married by the age of 18 and 11 per cent by the age of 15.³ The Maputo Protocol's insistence on the registration of marriages is part of seeking a solution to these grim statistics, as well as easing access to justice for women in scenarios such as child support and contestation over marital property. The emphasis on equal parental rights, including with respect to the nationality of children and marital property rights, reflects a concern to overcome the legacy of the alchemy of customary norms and colonial laws that encoded automatic father preference and the subsuming of a wife's legal personality into that of her husband.⁴

At the adoption of the Maputo Protocol, the constitutions of some African states contained personal law exemption clauses, which made non-discrimination clauses inapplicable within the sphere of family as long as the relationships were governed by customary or religious law. Given the centrality of marriage and family to shaping gender relations, the effect of these clauses was to render gender equality virtually unattainable. Constitutional and legislative reforms since the 1990s through to the adoption of the Maputo Protocol in 2003 have improved the picture somewhat but have by no means eradicated the injustices.⁵

This chapter provides commentary on the normative content of article 6 and assesses the status of its implementation. The chapter is organised into seven sections. Following this introduction, the second section discusses the drafting history of article 6. Section 3 draws out linkages between article 6 and other provisions within and beyond the Maputo Protocol. Section 4 discusses the concepts at the heart of the article, while section 5 analyses the nature and scope of state obligation. Section 6 evaluates state practice in the implementation of article 6, drawing mainly from the Concluding Observations of the African Commission on Human and Peoples' Rights (African Commission or the commission). The final section reflects on the progress made so far in developing jurisprudence around article 6 and evaluates the prospects for full implementation, highlighting the indispensable role that civil society continues to play.

1 See, eg, the African Charter on Human and Peoples' Rights (the African Charter), art 18; the International Covenant on Civil and Political Rights (ICCPR), art 23; the International Covenant on Economic, Social and Cultural Rights (ICESCR), art 10; the Universal Declaration of Human Rights (UDHR), art 16.

2 At 76% Niger has the highest rate globally. The Central African Republic registers 68%, Chad 67%, Mali 54%, and Mozambique 53%. See Girls Not Brides *Child marriage atlas: sub-Saharan Africa*, <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/sub-saharan-africa/> (Child Marriage Atlas).

3 See Child Marriage Atlas (n 2).

4 The alchemy of customary law and colonial legal doctrines is discussed under sec 4 below.

5 Personal exemption clauses are discussed in sec 5 below.

2 Drafting history

The first draft of the Maputo Protocol was discussed by a Meeting of Experts in 1997 (the Nouakchott Draft).⁶ It provided for women's equal rights within marriage as article 6.⁷ It provided for free and full consent as the basis for marriage, and the same minimum age for marriage for both men and women, corresponding to the age of majority at the very least. The third sub-clause stated that polygamy 'shall be prohibited'.⁸ Formal and immediate registration before competent authorities would be made a precondition for legal recognition of any marriage. The draft also recognised the right of husband and wife, by mutual agreement, to choose their place of residence. The draft guaranteed a married woman the right to keep her maiden name and 'use it as she pleases, jointly or separately with her husband's surname, and to give her maiden name to her husband and children'.⁹ Draft article 6 recognised that a married woman is free to retain or change her nationality, pass it on to her husband and children, or acquire a new nationality. Finally, the draft article provided for a married woman's right to acquire, administer and manage her own property and, in case of joint ownership with her husband, have the same rights with respect to such property.

The next draft was discussed in Kigali, Rwanda in 1999 (the Kigali Draft).¹⁰ In this draft, marriage appears under article 7. The coverage of issues is virtually identical to the Nouakchott Draft and organised into ten numbered clauses in much the same order. The content of the draft article on marriage remained the same, with only a few changes in phrasing.

At the next discussion of the draft in 2001,¹¹ three issues proved contentious: polygamy, the minimum age for marriage, and nationality. The sub-clause on the passing on of nationality to husbands and children drew objections from Algeria, Egypt, Libya and Sudan.¹²

With respect to the clause on the minimum age for marriage, the Meeting of Experts resolved to retain the stipulation of 18 as the minimum age for marriage, despite concerns expressed by some delegations. The justification given was that it was necessary to align the Maputo Protocol to the African Charter on the Rights and Welfare of the Child (African Children's Charter), as well as the United Nations Convention on the Rights of the Child (CRC), to which most African Union (AU) member states were signatories.¹³ This achievement is no doubt to the credit of civil society groups across the continent, who had for a long time mobilised for the stipulation of 18 as the minimum age for marriage in collaboration with the Inter-African Committee on Traditional Practices affecting the Health of Women and Children.¹⁴

6 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

7 Nouakchott Draft.

8 Nouakchott Draft, art 6, second bullet point.

9 Nouakchott Draft, art 6, sixth bullet point.

10 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

11 See Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

12 See Report of the Meeting of Experts (n 11) paras 55 & 56.

13 See Report of the Meeting of Experts (n 11) para 49.

14 See, for instance, Girls Not Brides (girlsnotbrides.org), Plan International's 18+ campaign (<https://plan-international.org/srhr/child-marriage-early-forced/> (accessed 6 May 2023)), and the Inter-African Committee on Traditional Practices affecting the Health of Women and Children <https://iac-ciaf.net/about-iac/#:~:text=The%20Inter%2DAfrican%20Committee%20on,the%20African%20Region%20and%20worldwide> (accessed 6 May 2023).

The issue of polygamy proved so contentious that the meeting could not come to a consensus. The draft that resulted from that first Meeting of Experts resorted to bracketing the three options that were on the table. The first option was to retain the outright prohibition of polygamy contained in the Nouakchott Draft. The second option called on states to ‘adopt appropriate measures in order to recognize monogamy as the sole legal form of marriage’ while also committing themselves to provide for the rights and welfare of women in existing polygamous unions. The third option took the position that polygamy was a matter of personal choice and mutual agreement among spouses, and all that a state could do was encourage monogamy as the preferred form of marriage.

What was finally adopted in 2003 as article 6(c) of the final text of the Maputo Protocol represents a compromise between the second and third options.¹⁵

3 Linkage to related treaty provisions

Article 6 must be read together with related provisions within the Maputo Protocol and in other human rights treaties. Within the Maputo Protocol, most closely related is article 7, which deals with divorce, separation or annulment, requiring equality in all aspects of the consequences of the termination of marriage. Framing all the rights in the Maputo Protocol are the provisions for the elimination of discrimination in law and practice (articles 2, 8(f)). Article 4, in so far as it addresses violence against women in both the public and the private sphere, has relevance for marriage. Article 5 aims at eliminating harmful practices, among them child and forced marriage. Article 14 on health and reproductive rights is relevant to marriage. Also relevant are the provisions requiring equality with respect to inheritance and treatment of widows (articles 20 and 21), as they relate to the consequences that flow from dissolution of marriage by death.

In other international treaties, the issue of equal rights for women in marriage had been addressed previously in article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW’s article 9 on nationality also refers to marriage. Prior to CEDAW, UN resolutions and declarations touched on the subject: Resolution 843 on ‘The Status of Women in Private Law: Customs, Ancient Laws, and Practices Affecting the Human Dignity of Women’ (1954), the Convention on the Consent to Marriage, Minimum Age of Marriage, and Registration of Marriage (1962), and article 16 of the Universal Declaration of Human Rights which provided for equality of men and women to and within marriage. Article 23(3) and (4) of the International Covenant on Civil and Political Rights (ICCPR) also highlights the equal right of men and women in marriage as a fundamental right.

At the African regional level, the main preceding document is the African Charter on Human and Peoples’ Rights (African Charter), whose sole provision on gender equality (article 18(3)) is cast in broad terms and does not make specific reference to marriage.

15 See also accounts in F Viljoen ‘An introduction to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ (2009) 16(1) *Washington & Lee Journal of Civil Rights and Social Justice* 22; R Murray ‘Women’s rights and the Organization of African Unity and African Union: the Protocol on the Rights of Women in Africa’ in D Buss & A Manji (eds) *International law: modern feminist approaches* (2005) 267; F Banda ‘Blazing a trail: the African Protocol on Women’s Rights comes into force’ (2006) 50(1) *Journal of African Law* 77.

4 Key concepts and definitions

Article 6 contains key concepts and terms whose elaboration is crucial to understanding the content of the provision. Each subheading in the following discussion refers to these key concepts.

4.1 Minimum age and consent for marriage

4.1.1. Interpretation of minimum age and consent for marriage in African regional forums

The Maputo Protocol addresses the issue of ‘free and full consent’ under article 6(a). Free and full consent is negated overtly by practices such as arranged marriage (betrothal), forced marriage or forced remarriage, and covertly in situations where women subject themselves to unions in search of financial security.¹⁶

Article 6(b) addresses itself to the issue of minimum age for marriage, stipulating 18 as the age of marriage. This subsection tackles consent in tandem with minimum age, since child marriage has raised the greatest concern and received the greatest attention in relation to the issue of consent.

Interpretation of consent and minimum age for marriage has been dealt with comprehensively in a 2017 Joint General Comment on Ending Child Marriage issued by the African Commission on Human and Peoples’ Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee).¹⁷ The joint General Comment defines child marriage as any union in which one or both parties is – or was – below the age of 18 at the time of entry into the union. In a bid to seal any loopholes at national level, the joint General Comment unequivocally states that 18 is the minimum age, regardless of any national law that may stipulate a lower age of majority. In addition, by defining marriage to mean ‘formal and informal unions between men and women recognised under any system of law, custom, society or religion’, the joint General Comment ensures that the choice of system of marriage is not deployed to circumvent the human rights treaties.¹⁸

The joint General Comment takes the position that child marriage violates foundational principles, namely the best interests of the child, child survival, development, protection and participation, and the principle of non-discrimination. The latter undergirds both women’s rights and children’s rights.¹⁹

Regarding consent, the joint General Comment underlines that the consent must be given by the parties themselves; even where the consent of a parent or guardian is required by law, it does not replace the consent of the parties entering into the marriage.²⁰ Free and full consent is defined as ‘a non-coercive agreement to the marriage with a full understanding of the consequences of giving consent’.²¹ Concerning older children, the joint General Comment takes the position that while their evolving

16 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 21: Equality in marriage and family relations, 1994, A/49/38 para 16. Forced remarriage of widows is discussed in UC Mokoena ‘Article 20’ sec 3 & sec 6.1(c) in this volume.

17 Joint General Comment of the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage, adopted at the 29th session of the African Committee of Experts on the Rights and Welfare of the Child 2-9 May 2017 in Maseru (https://www.acerwc.africa/wp-content/uploads/2018/07/Website_Joint_GeneralComment_acerwc-AFRICANCOMMISSION_Ending_Child_Marriage_20_January_2018.pdf) (Joint General Comment on Child Marriage).

18 Joint General Comment on Child Marriage (n 17) para 6.

19 See arts 4 & 5 of the African Children’s Charter.

20 See Joint General Comment on Child Marriage (n 17) para 22.

21 Joint General Comment on Child Marriage (n 17) para 6.

capacity for decision-making may arguably enable them to consent to sex, medical treatment and other acts, ‘the language of the Maputo Protocol and the African Children’s Charter clearly stipulates that children under the age of 18 are not capable of giving full and free consent to a marriage’.²²

The African Court of Human and Peoples’ Rights (African Court) had the opportunity to develop the jurisprudence on consent and minimum age for marriage in *APDF and IHRDA v Mali* (2018).²³ Mali’s Family Code set the marriage age for boys at 18 and 16 for girls. The marriage age could be lowered further to 15 with parental consent. The government of Mali justified this position by asserting that for girls, ‘in all objectivity’ at age 15, ‘the biological and psychological conditions for marriage are in place ...’.²⁴ The Court ruled that Mali’s Family Code offended the Maputo Protocol, as well as the African Children’s Charter and CEDAW.

Regarding free and full consent to marry,²⁵ Mali’s Family Code requires that consent must be given orally by parties physically present at the marriage ceremony. It imposes sanctions on civil registry officials for conducting marriages without ascertaining the consent of the parties. However, no such sanctions are imposed on religious officials conducting marriage ceremonies, yet the prevailing practice in Mali is that marriage ceremonies are largely conducted by family representatives in the absence of the parties. The African Court ruled that the code’s provisions on consent violated article 6(a) of the Maputo Protocol as well as article 16(1)(b) of CEDAW.²⁶

At the sub-regional level, the Southern Africa Development Cooperation (SADC) Parliamentary Forum has adopted a model law on ending child marriage (SADC Model Law).²⁷ The SADC Model Law’s Preamble reproduces article 6 of the Maputo Protocol, along with article 21(2) of the African Children’s Charter and CEDAW’s article 16(2). It defines child marriage expansively as ‘a statutory or customary union in which one party is a child or both parties are children’, having defined a ‘child’ as anyone below the age of 18 years and ‘marriage’ as ‘a union of persons contracted statutorily, religiously, verbally or customarily’.²⁸

4.1.2 Pronouncements on minimum age and consent for marriage in other international forums

In 2019 the CEDAW Committee and the CRC Committee issued a revised joint declaration on harmful practices, which gives considerable attention to elaborating on the concepts of child and forced marriage.²⁹ The joint declaration defines child marriage as ‘any marriage where at least one of the parties is under 18 years of age. Child marriage is considered to be a form of forced marriage, given that one or both of the parties have not expressed full, free and informed consent’.³⁰ The joint

22 See Joint General Comment on Child Marriage (n 17) para 6.

23 *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Mali* (merits) (2018) 2 AfCLR 380 (*APDF v Mali*).

24 *APDF v Mali* (n 23) para 66.

25 *APDF v Mali* (n 23) paras 79-95.

26 The CEDAW Committee had the opportunity to engage Mali on the issues raised by the case. See Concluding Observations on the combined 6th and 7th Periodic Reports of Mali, Committee on the Elimination of all Forms of Discrimination against Women (25 July 2016) UN Doc CEDAW/C/MLI/CO/6-7 (2016) paras 43, 44.

27 The Southern Africa Development Cooperation (SADC) consists of 15 states in the southern Africa region. All except two (Botswana and Madagascar) are also parties to the Maputo Protocol, which makes the model law crucially significant.

28 See SADC Parliamentary Forum, *SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage* (2018), <https://www.girlsnotbrides.org/documents/484/MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf> (accessed 8 May 2023).

29 Joint General Recommendation/Comment of the CEDAW and CRC Committees on Harmful Practices CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1 (Joint CEDAW/CRC Declaration).

30 As above para 20.

declaration defines forced marriage as any marriage ‘in which one or both parties have not personally expressed their full and free consent to the union.’³¹

According to this interpretation, non-compliance with the minimum age stipulation under article 6(b) of the Maputo Protocol would obviate article 6(a) on full and free consent for marriage since underage consent is not, by definition, consent. Prior to the joint declaration in 2019, the CRC Committee’s position on a minimum age for marriage was not as precisely stated as the Maputo Protocol article 6(b)’s unequivocal stipulation of 18 years. The CRC Committee’s position in 2003 simply stated that the minimum age for consent to sexual relations and to marriage must be the same for boys and girls and must come as close as possible to recognising 18 as the age of majority.³² The Maputo Protocol can therefore be said to have blazed a trail on the issue of consent and the minimum age for marriage.

4.2 Monogamy versus polygamy

As the discussion of the drafting history under section 2 has shown, the issue of polygamy triggered contestation. This reflects the tension between the various views on family form in the African context. On the one side are those who view the nuclear family as a colonial imposition, and laud the extended family – including polygamous arrangements – as more reflective of African realities. On the other side are those who take the view that monogamy is more reflective of the ideal of equality between spouses.³³ This subsection discusses the manner in which human rights bodies regionally and internationally have interpreted the issue.

4.2.1 Pronouncements on monogamy versus polygamy in African regional forums

The text of the Maputo Protocol offers no definition of polygamy, nor does it situate it in relation to the concept of gender equality. None of the regional human rights forums have issued any interpretive statement touching on the issue of polygamy, which is a practice or custom that allows a man to have more than one wife at the same time.³⁴ However, the African Children’s Committee’s engagement with some states’ reports suggests that the committee takes the position that growing up in a polygamous family may be detrimental to child development.³⁵

31 Joint CEDAW/CRC Declaration (n 29) para 20.

32 African Commission General Comment 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art 5), adopted during the 21st extraordinary session of the African Commission, held in Banjul The Gambia, from 22 October to 5 November 2013, para 9.

33 See S Cotton & A Diala ‘Silences in marriage laws in Southern Africa: women’s position in polygamous customary marriages’ (2018) 32(1) *Speculum Juris* 18-32; A Armstrong, C Beyani et al ‘Uncovering reality: excavating women’s rights in African family law’ (1993) 7 *International Journal of Law and the Family* 342-344; C Musembi ‘Pulling apart? Treatment of pluralism in CEDAW and the Maputo Protocol’ in A Hellum & HS Aasen (eds) *Women’s human rights: CEDAW in international, regional, and national law* (2013) 186-194.

34 Concise Oxford English Dictionary, 11th edition (revised), 2009.

35 See for instance, the African Children’s Committee’s engagement with Algeria and Gabon, in which the African Children’s Committee takes note of the fact that in those states ‘polygamy is not a prohibited act’ and calls upon the state to ensure that ‘the practice of polygamy does not affect the upbringing and development of children in a polygamous family.’ See African Children’s Committee, Concluding Observations on: Initial report of Algeria on the implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 26th ordinary session held virtually (16-19 November 2015) para 24; held virtually (16-19 November 2015) para 28.

4.2.2 Pronouncements on monogamy versus polygamy in other international forums

The CEDAW Committee issued General Recommendation 21 on equality in marriage and family relations.³⁶ In General Recommendation 21, the CEDAW Committee interpreted polygamy as being inimical to the concept of equality in marriage and called on state parties ‘to discourage and prohibit’ it, highlighting that it can have ‘serious emotional and financial consequences’ for women and their dependents.³⁷ Similarly, the UN Human Rights Committee, which oversees the implementation of the ICCPR, takes the view that polygamy constitutes ‘inadmissible discrimination’ against women.³⁸

This same position was reiterated in 2013 in CEDAW’s General Recommendation 29 (CEDAW Committee General Recommendation 29)³⁹ and also in a declaration issued jointly by the CEDAW Committee and the CRC Committee, in 2014 and revised in 2019.⁴⁰ Both reiterate the CEDAW Committee’s 1994 position, the joint declaration terming polygamy as ‘contrary to the dignity of women and girls’ and an infringement on their human rights, including the right to equality and protection within the family.⁴¹ Both statements call on states to ‘discourage and prohibit’ polygamy.⁴² The CEDAW Committee’s Concluding Observations on the periodic reports of African states reflect this position.⁴³

36 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 21: Equality in Marriage and Family Relations (adopted 13th session 1994) A/49/38 (CEDAW Committee General Recommendation 21).

37 As above para 14.

38 UN Human Rights Committee (HRC), CCPR General Comment 28: art 3 (The Equality of Rights Between Men and Women), 29 March 2000, CPR/C/21/Rev.1/Add.10.

39 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 29 on art 16 of the Convention on the Elimination of All Forms of Discrimination against Women, Economic consequences of marriage, family relations and their dissolution, 26 February 2013, CEDAW/C/GC/29 (General Recommendation 29) para 27.

40 Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child (2019) on harmful practices, CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1 (Joint CEDAW/CRC Declaration).

41 Joint CEDAW/CRC Declaration (n 40) para 25.

42 Joint CEDAW/CRC Declaration (n 40) para 28.

43 Musembi (n 33) 186-194. For more examples of recent CEDAW Concluding Observations castigating African states for not outlawing polygamy see CEDAW Committee Concluding Observations on: 7th Periodic Report of Burkina Faso (22 November 2017), UN Doc CEDAW/C/BFA/CO/7 (2017) para 50; Combined 4th and 5th Periodic Report of Cameroon (9 March 2014), UN Doc CEDAW/C/CMR/CO/4-5 (2014) para 39; Initial and 2nd to 5th Periodic Reports of the Central African Republic (24 July 2014) UN Doc CEDAW/C/CAF/CO/1-5 (2014) para 45; 9th Periodic Report of Cabo Verde (30 July 2019) UN Doc CEDAW/C/CPV/CO/9, para 47 (the CEDAW committee urged Cabo Verde to ‘strengthen its efforts to prevent and end de facto polygamy’); Combined 1st to 4th Periodic Reports of Chad (4 November 2011) UN Doc CEDAW/C/TCD/CO/1-4 (2011) paras 42-43 (the CEDAW committee was dissatisfied with Chad’s approach of giving parties the option of expressly renouncing polygamy at the time of entering into the marriage contract, urging prohibition instead); 4th Periodic Report of Côte d’Ivoire (30 July 2019), UN Doc CEDAW/C/CIV/CO/4 (2019) paras 51, 52 (the CEDAW committee recommends that the revised Criminal Code should explicitly prohibit polygamous, levirate and sororate marriages); Combined initial to 4th Periodic Reports of Comoros (8 November 2012) UN Doc CEDAW/C/COM/CO/1-4 (2012) paras 39,40; 7th Periodic Report of the Congo (14 November 2018) UN Doc CEDAW/C/COG/CO/7 (2018) paras 50,51; Combined Initial to 3rd Periodic Reports of Djibouti (2 August 2011), UN Doc CEDAW/C/DJI/CO/1-3 (2011) para 36; 6th Periodic Report of Gabon (11 March 2015), UN Doc CEDAW/C/GAB/CO/6 (2015) para 44; Combined 4th and 5th Periodic Reports of The Gambia (28 July 2015) UN Doc CEDAW/C/GMB/CO/4-5 (2015) para 48; Combined initial to 6th Periodic Reports of Guinea-Bissau (14 August 2009), UN Doc CEDAW/C/GNB/CO/6 (2009) para 41; Combined 7th and 8th Periodic Reports of Guinea (14 November 2014) UN Doc CEDAW/C/GIN/CO/7-8 (2014) para 54; 8th Periodic Report of Kenya (22 November 2017) UN Doc CEDAW/C/KEN/CO/8 (2017) para 50 (the CEDAW Committee stated that recognition of polygamy in the Marriage Act contravenes the Constitution); Combined 6th and 7th Periodic Reports of Madagascar (24 November 2015) UN Doc CEDAW/C/MDG/CO/6-7 (2015) para 46; Mali (2016) n 25, para 43; 8th Periodic Report of Mauritius (14 November 2018) UN Doc CEDAW/C/MUS/CO/8 (2018) para 38; Combined 7th and 8th Periodic Reports of Nigeria (24 July 2017) UN Doc CEDAW/C/NGA/CO/7-8 (2017) para 45(d); Combined 3rd and 4th Periodic Reports of Niger (24 July 2017) UN Doc CEDAW/C/NER/CO/3-4 (2017) para 43; Combined 6th and 7th Periodic Reports of Togo (8 November 2012), UN Doc CEDAW/C/TGO/CO/6-7 (2012) para 40; 8th and 9th Periodic Reports

Article 6(c) of the Maputo Protocol takes the ‘discourage’ rather than the ‘prohibit’ path: rather than outright prohibition, it urges states to encode within their laws a preference for monogamy while guaranteeing legal protection for women in all unions, including polygamous unions.⁴⁴

4.3 Compulsory and universal registration of marriage

The benefits of a nationwide registry of marriages have been widely acknowledged: it protects against multiple (secret) marriages, makes it easier to eradicate child marriage, provides proof of marriage for purposes such as division of marital property and inheritance, and proof of parental rights.

The contentious point has been whether non-registration should invalidate a marriage. The African Court missed out on the opportunity to interpret this clause of the Maputo Protocol because a request for an advisory opinion on the matter was ruled to be inadmissible for the petitioners’ lack of standing.⁴⁵ The request for an advisory opinion had been prepared by four civil society organisations in Kenya, Nigeria, South Africa, and Zimbabwe. The organisations sought to have the African Court affirm that article 6(d) imposes on states the obligation to enact legislation on registration of all forms of marriages but to reject an interpretation that renders a marriage invalid for non-registration. Given the prevalence of unregistered marriages on the continent, an interpretation that results in invalidation of unregistered marriages would render many women vulnerable, which would defeat the overall objective of eliminating discrimination against women as expressed under article 2 of the Maputo Protocol.⁴⁶

4.4 Equality in choice of matrimonial regime and residence

Matrimonial regime simply refers to the relevant legal system governing a marriage, which determines the validity of the marriage, the procedure for its termination, how property acquired before and during the marriage will be administered and owned, and matters of custody and nationality of children. Its greatest practical implications are to do with property administration and ownership.⁴⁷

Residence in ordinary usage refers to no more than the geographical location in which one resides. In law, however, residence attaches legal consequences; for instance, it will determine which entity one pays taxes to, one’s immigration status, as well as where one may file divorce proceedings. When employed in this sense, the term is usually rendered as ‘domicile’. In the context of article 6(e), since the Maputo Protocol specifies ‘place of residence’, it seems that the provision intended no more than a geographical designation. It simply guarantees the equal right of spouses to decide where the family will establish its dwelling. The African Commission’s General Comment 5 – interpreting article 12 of the African Charter, which deals with freedom of movement and residence- confirms this interpretation by defining residence as simply the ‘place of dwelling’, and avoiding any reference to domicile.⁴⁸

of Uganda (1 March 2022), UN Doc CEDAW/C/UGA/CO/8-9 (2022) para 49; 6th Periodic Report of Zimbabwe (10 March 2020) UN Doc CEDAW/C/ZWE/CO/6 (2020) para 49 (the CEDAW Committee termed polygamy a ‘harmful practice’).

44 For detailed discussion of these divergent paths (between CEDAW and the Maputo Protocol); see Musembi (n 33) 196-197.

45 The request was dismissed because the four organizations’ only had observer status with the African Commission on Human and Peoples’ Rights but none of them was formally recognised before the African Union Commission as the Court’s rules require. See <https://www.chr.up.ac.za/units/about-liu/30-units/litigation-and-implementation/2778-litigation> (accessed 8 May 2023).

46 For this reason, South Africa and Namibia have entered reservations to this article of the protocol. The approach taken by various states and by the commission itself on the matter of registration is discussed further under sec 6.3 below.

47 See UN-Women *Families in a changing world*, (Progress of the World’s Women 2019-2020) 122-124.

48 African Commission General Comment 5 on the African Charter on Human and Peoples’ Rights: The right to freedom of movement and residence (art 12(1)), adopted during the 64th ordinary session of the African Commission on Human and

There is not enough information to determine whether the choice of ‘residence’ over ‘domicile’ in the Maputo Protocol was deliberate, but it is likely that the controversy over the transmission of nationality prompted the drafters to steer clear of terms overtly laden with legal consequences.

African legal systems have been influenced by the colonial legacy of either the English common law, the French civil law tradition, or Roman-Dutch law, all of which subsumed the wife’s legal personality into that of her husband.⁴⁹ The law, therefore, automatically recognised him as the sole decision maker in all matters, including the choice of what legal regime would govern the marriage and what the family’s residence would be. This has implications for other rights, such as nationality and marital property, as will be discussed below.

At the conceptual level, the issue of choice of matrimonial regime and residence has not drawn much by way of interpretive statements, and so it will be revisited in the section on implementation below.

4.5 Right to maiden name

While the text of article 6(f) relates specifically to a married woman’s freedom to retain and use her maiden name, the corresponding provision in CEDAW is worded in terms of the same right between husband and wife to choose the family name. As with the provision on equal choice of matrimonial regime and residence, this provision of the Maputo Protocol was necessitated by the specific legacy of colonial legal doctrines on a married woman’s loss of legal personality, including the automatic dropping of her maiden name in favour of her husband’s.

The wording of article 6(f) does not expressly grant a married woman the right to confer her maiden name on the children. Only a broad interpretation of ‘to use it as she pleases’ could support such an extension of the right. A narrow reading suggests that the text only refers to the form: whether she chooses to use her maiden name separately or jointly with her husband’s name. CEDAW’s wording, therefore, gives this right weightier consequence.

There has been no interpretive statement on the scope of this right.⁵⁰

4.6 Equal rights as to nationality

Nationality is a concept used in public international law to denote an individual’s connection to a specific state, which places an obligation of protection on that state. Within the meaning of both the Maputo Protocol and CEDAW, the term is used synonymously with citizenship, a concept that denotes entitlement to full membership in a polity with its attendant rights and obligations.⁵¹

The Maputo Protocol sets out two dimensions of equal rights as to nationality. The first concerns a woman’s right to choose to retain her nationality or to acquire the nationality of her husband (article 6(g)). This clause is of crucial importance in the African context, where most states’ laws have historically been informed by the concept of dependent nationality, which is rooted in English common

Peoples’ Rights (24 April-14 May 2019) para 11.

49 See B Kombo ‘Napoleonic legacies, postcolonial state legitimation, and the perpetual myth of non-intervention: Family Code reform and gender equality in Mali’ (2020) XX(X) *Social and Legal Studies* 1-22, 7-11.

50 The discussion on implementation below will highlight the instances when the African Commission has raised issues concerning this right in the specific practices of certain states.

51 M Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary* (2012) ‘Article 9’ 234.

law and civil law doctrines that fuse the wife's legal personality with that of her husband.⁵² Marriage, therefore, entails the automatic loss of a married woman's nationality and acquisition of her husband's nationality; and a husband's change of nationality in the course of the marriage automatically leads to a change of nationality for the wife. These restrictive concepts found resonance with the attitudes and practices embedded in various African customary laws and continued to operate in post-colonial settings, so it was crucial for the Maputo Protocol to lift this restriction on women's nationality rights.

The second dimension concerns equal rights of male and female parents with respect to the nationality of their children. However, article 6(h) carries a proviso, which essentially claws back the rights granted by the Maputo Protocol: 'except where this is contrary to a provision in national legislation or is contrary to national security interests.' Effectively, this dimension of equal rights with respect to children's nationality is made subordinate to national law and to 'national security interests'. The 2001 draft discussed at the Meeting of Experts did not contain this proviso. Instead, it simply gave a mother the right to transfer her nationality to her children by mutual consent of the spouses. Algeria, Egypt, Libya and Sudan objected to this.⁵³ A draft proposed in January 2003 by a representation of NGOs convened by the Organisation of African Unity's (OAU) regional office sought to align the content of the article with CEDAW's article 9 by providing as follows: 'a woman shall have the right to keep her nationality, obtain another one or take up the nationality of her husband and the ability without legal restriction to transfer her nationality to her husband and her children.'⁵⁴ This tighter formulation was clearly rejected since the proviso showed up in the draft subsequently presented for discussion by the ministerial meeting held in March 2003 and remained in the final version.

This proviso sets the bar rather low. By contrast, article 9 of CEDAW grants a wide latitude of nationality rights to women, including an unqualified right to transmit their nationality to their children on the basis of equality with men.

As shall become evident in the discussion on implementation below, the African Commission does, despite the proviso, question states whose laws restrict women's ability to transmit nationality to their children.

4.7 Equal parental rights and responsibilities

Article 6(i) is worded as an obligation rather than as a right, placed on men and women to jointly contribute to the safeguarding of the interests of their family, with specific attention being given to the protection and education of children.

While the Maputo Protocol refers to 'a woman and a man' rather than to a wife and a husband, it is clear that the context is one of marriage since the clause refers to their joint contribution to 'safeguarding the interests of the family, protecting and educating their children' (article 6(i)). The clause does not make explicit provision for equal parental rights and responsibilities in the context of parenting outside of marriage, despite this being a prevalent feature of parenting in the contemporary African context. In this respect, the wording of the corresponding clause in CEDAW gives greater scope to the right: 'The same rights and responsibilities as parents, irrespective of their marital status ...'.⁵⁵ This envisions a more even-handed apportionment of rights and responsibilities even in the case

52 Freeman et al (n 51) 235-236.

53 See Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, November 2001, Addis Ababa, Ethiopia, paras 55, 56. On file with the author.

54 See Organisation of African Unity, '6th January Markup from the Meeting Convened on 4-5 January 2003 in Addis Ababa, by the Africa Regional Office and the Law Project of Equality Now', p 8. On file with the author.

55 CEDAW, art 16(1)(d).

of unwed fathers. This is important because problems in the enforcement of child support obligations arise mostly against unwed fathers or former husbands.

There are still states whose family laws work with the presumption that the father is the default legal guardian and custodial parent.⁵⁶ This presumption is based on the same convergence of African customary laws and colonial legal doctrines that gave rise to the dependant nationality discussed above. In states that have undertaken reforms, the application of the principle of the paramountcy of the best interests of the child has had to contend with prevailing customary and religious rules and practices that operate on the basis of a father preference.⁵⁷ It has been noted that the conferring of legal rights and authority on the father has not always been matched by the conferring of responsibilities.⁵⁸ This is especially true in the African context, where enforcement of child support obligations is generally weak. The Maputo Protocol's framing of the clause in terms of parental obligations (rather than rights) is therefore understandable.

The issue of equal parental responsibility tends to arise in the context of custody and maintenance disputes at the point of dissolution of marriage, which is addressed under article 7 of the Maputo Protocol. However, inequality in parental rights and responsibilities may also manifest itself in other areas of law, such as employment law. The granting of shared parental leave or paternity leave is a relatively new phenomenon in African states, and roughly half of them were yet to legislate for it as of 2015.⁵⁹ The International Labour Organization has not developed a standard, and so state practice globally is varied.⁶⁰ Elaborating on the content of article 6(i) of the Maputo Protocol positions the African human rights regional system in a good place to begin to set some concrete standards in areas such as paternity leave.

4.8 Equal marital property rights

Article 6(j) of the Maputo Protocol is about married women's property rights, but it restricts itself to women's property rights during the subsistence of the marriage. It is, therefore, not concerned with the division of marital property upon dissolution of a marriage, which is dealt with by article 7(d). As part of ensuring that women and men enjoy equal rights and are regarded as equal partners in marriage, states are required to encode in legislation a woman's right to acquire and manage property in her own right during marriage.

This clause was necessitated by the reality of formal and informal restrictions on women's legal capacity to enter into transactions. These restrictions can be traced back to the English common law doctrine of coverture and the civil law doctrine of *parens patriae*, both of which subsumed a married woman's legal personality into that of her husband, depriving her of contractual and proprietary capacity. When these were combined with restrictive interpretations of customary laws, the result was to cast married women in the role of perpetual dependants lacking authority to exercise control over

56 These states include Burkina Faso, Cameroon, Central African Republic, Democratic Republic of Congo, Gabon, Senegal, Togo and Tunisia. See discussion under sec 6.7.

57 In Kenya, for instance, it was only in 1970 that a court ruled that the principle of the best interests of the child meant the displacement of customary laws that automatically grant custody to one parent over the other: *Wambwa-v-Okumu* [1970] EA 578.

58 Freeman et al (n 51) art16, 427.

59 As of 2015, 55% of African states had undertaken legislative reform to recognise paternity leave, some paid and some unpaid. Among these states are Kenya, Mauritius, South Africa, Tanzania, and Uganda. See MenCare *State of the world's fathers report* (2015) 107-110.

60 See K Feldman & B Gran 'Is what's best for dads best for families? Paternity leave policies and equity across forty-four nations' (2016) 43(1) *Journal of Sociology and Social Welfare* 101 (but the only African country included in the study is South Africa).

family resources.⁶¹ This combined legacy is the basis for laws granting husbands marital power, which makes a husband the sole economic agent of the family and administrator of all the marital property, with absolute authority to transact without any reference to the wife.⁶²

An important corollary to a wife's contractual and proprietary capacity is recognition of her right to have a say over her spouse's dealings with marital property so as to safeguard her interests. A spouse's written consent must be a mandatory requirement if the equal right to manage marital property is not to be rendered nugatory. The African Commission's General Comment 6 adopted in 2020 concerning marital property rights under article 7(d) of the Maputo Protocol also underlines this dimension of the right.⁶³

The CEDAW Committee makes a link between women's capacity to acquire and manage property on the one hand and laws that limit their capacity to initiate proceedings or diminish the weight of women's testimony as witnesses. This has an adverse effect on women's ability to defend their claims, including claims to property. This, in turn, is interlinked with the right of choice of residence under article 6(e) because the ability to choose residence has implications for women's legal standing to pursue their claims in court. These interlinkages underline the need for harmonisation in the design of laws and policies to give effect to the provisions of the Maputo Protocol.

The African Commission's General Comment underlines that the changed socio-economic context in Africa makes the safeguarding of women's right to acquire and administer property all the more important: women now have increased capacity and opportunity to earn income and contribute to the family's resources, in addition to their contribution in the form of unpaid care and reproductive work.⁶⁴ Despite this changed socio-economic context, social expectations may leave women without much of a say over the proceeds of their economic activity, including their own wages.⁶⁵ Indeed, some states still have laws that give a husband power to forbid his wife from engaging in paid work.⁶⁶

Thus, clarity in how the law will delineate the boundaries between the separate property of the parties to the marriage and the community property of the union and give effect to the express or implied wishes of the parties while recognising the spouses' equal capacity to acquire and manage both types of property is crucial.

In states where the law recognises and enforces prenuptial agreements in which parties set out in advance how property matters are to be determined in their marriage, the state must put in place measures to ensure that unequal bargaining power does not translate into unconscionable outcomes for wives. Ideally, information on the economic consequences of marriage and its dissolution ought to be provided to parties at the point of getting into marriage, at the very least.⁶⁷

61 Armstrong et al (n 33) 342-344. See also Kombo (n 49) 7-11.

62 Recent repeal of marital power laws in some African countries is discussed in sec 6 on implementation. CEDAW expressed concern over the designation of the husband as sole economic agent in CEDAW Committee General Recommendation 29 (n 39) para 36.

63 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples Right on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (art 7(D)), adopted during the 27th extra ordinary session of the African Commission held in Banjul, The Gambia 19 February-4 March 2020, para 55.

64 African Commission General Comment 6 (n 63) para 23.

65 CEDAW General Recommendation 29 (n 39) para 37.

66 See CEDAW Concluding Observations Gabon (n 42) para 44(b).

67 CEDAW General Recommendation 29 (n 39) paras 32, 34 & 35.

How the law gives effect to married women's contractual and proprietary capacity has significance beyond women's financial independence and ability to meet their family obligations, as the CEDAW Committee observed.⁶⁸ It has implications for overall decision-making power within the family and the perception of women's status in society broadly.⁶⁹

5 Nature and scope of state obligations

Article 6 calls upon state parties to ensure that women and men enjoy equal rights and that they are regarded as equal partners in marriage. At a minimum, therefore, every state's constitutional framework must grant equal rights and freedom from non-discrimination to women and men alike, in line with article 2 of the Maputo Protocol. Some recent constitutions do go further to provide for the right to marry or the right to a family on the basis of equality between men and women.⁷⁰ It is the exception rather than the norm for constitutions to address the other specific issues covered by article 6. Côte d'Ivoire is one such exception, guaranteeing the exercise of parental authority equally by father and mother under its Constitution.⁷¹

Article 6 then requires states to enact 'appropriate national legislative measures' to provide for all the issues spelt out in the article. States parties must therefore enact, amend, or repeal laws as may be necessary to bring their legislative framework into compliance with the Maputo Protocol. In the case of the minimum age of marriage, for instance, fulfilment of the state's obligation would require that the law explicitly stipulates 18 as the minimum age. This would be followed through with criminal sanctions for breach of that stipulation, as well as remedies for the victims of child marriage, as is demonstrated in the SADC Model Law on Ending Child Marriage.⁷²

In areas where the legislature has been silent, new laws would need to be enacted. Examples of such legislative silences include marital property and polygamy, discussed in detail under the respective sub-sections below on implementation.

Beyond legislation, a state must demonstrate investment in institutional infrastructure for implementation. In the case of implementing a minimum age for marriage, a birth registration system is indispensable, as is a system of registration of marriages, preferably decentralised and accessible.⁷³ It also calls for a system of data gathering to enable monitoring and evaluation of progress⁷⁴ and the inevitable allocation of budgetary, human and other relevant resources.⁷⁵

68 CEDAW General Recommendation 21 (n 36) para 26.

69 Armstrong et al (n 33) 343; Food and Agriculture Organization (FAO) 'The state of food and agriculture: women in agriculture. Closing the gender gap for development 2010-2011' (2011) 23 <http://www.fao.org/3/i2050e/i2050e.pdf> (accessed 8 May 2023). See also studies making a link between control of assets and women's decisional autonomy in the context of domestic violence, eg Asia Pacific Forum on Women, Law and Development (APWLD) and others, *Proceedings of the Asia Regional Consultation on 'The interlinkages between violence against women and women's right to adequate housing'* (New Delhi, India, 2003) <https://www.hic-net.org/fr/interlinkages-between-violence-against-women-and-womens-right-to-adequate-housing/> (accessed 11 May 2023); CD Deere & CR Doss, 'The gender asset gap: what do we know and why does it matter?' (2006) 12(1-2) *Feminist Economics* 36-39.

70 Several recently enacted constitutions contain provisions on the equal right of men and women to marry or found a family: Angola (2010, art 35(2)); Burkina Faso (2015, art 23); Burundi (2018, art 29); Democratic Republic of Congo (2011, art 40); Eritrea (1997, art 22(2)); Gambia (2020, art 54); Kenya (2010, art 45(2)); Malawi 2017, art 22(3); Uganda (2017, art 31(1)); Zimbabwe (2013, sec 78(1)).

71 Côte d'Ivoire Constitution, 2016 (art 31).

72 See also Joint General Comment on Child Marriage, paras 29-30 & 59-60.

73 See Joint General Comment on Child Marriage, paras 26 & 28.

74 See Joint General Comment on Child Marriage, para 51.

75 See Joint General Comment on Child Marriage, paras 45-47.

In addition, both rights holders and duty bearers must be made aware of the rights in question and the remedies available for their breach. This is particularly important for the implementation of rights with respect to matters that are considered ‘sticky’ and likely to encounter relatively stiffer social resistance. The Joint General Comment on Child Marriage even recommends that states disseminate relevant court judgments.⁷⁶ In the *APDF* case, in addition to requiring Mali to amend its Family Code to align with article 6(b) of the Maputo Protocol, the court also required the government to undertake a thorough sensitisation campaign to counter the negative mobilisation against the proposed reforms to the code, and report back to the court within two years on the matter.⁷⁷

It is not enough that a state simply legislates; the legislation must be ‘national’. The language of the chapeau to article 6 suggests that the Maputo Protocol aspires to have the legislation apply nationally, leaving no pockets of non-compliance. Such pockets of non-compliance might result from polite nods in the direction of social and religious norms in the name of cultural and religious pluralism. The joint General Comment emphasises this point with respect to child marriage: ‘Legislative measures that prohibit child marriage must take precedence over customary, religious, traditional or sub-national laws and States Parties with plural legal systems must take care to ensure that prohibition is not rendered ineffectual by the existence of customary, religious or traditional laws that allow, condone or support child marriage.’⁷⁸ This means that states whose constitutions contain personal law exemption clauses fall foul of the Maputo Protocol.⁷⁹

As the African Court underlined in *APDF*, the state should not, under any circumstances, abdicate its obligation to legislate. Mali pleaded *force majeure*, arguing that socio-cultural realities prevailing in Mali thwarted earlier reform efforts (2009) towards aligning its Family Code with its international human rights obligations. The state made the pragmatic argument that it would be self-defeating to enact a law which would meet with guaranteed non-compliance.⁸⁰ The African Court rejected Mali’s arguments, underlining that the obligation to comply with the Maputo Protocol’s requirement to legislate 18 years as the minimum age rests solely on the state.⁸¹

6 Implementation

Relying primarily on a review of states’ reports and the African Commission’s Concluding Observations on those reports submitted since 2005⁸² this section discusses the status of implementation of article

76 See Joint General Comment on Child Marriage, para 63.

77 The court’s decision was rendered in 2018. As of 2022, the government had not submitted any report to the court. Civil society groups are engaged in efforts to hold the government to account, and to dialogue so as to chart a way forward, in view of the difficult political environment prevailing in the country. Personal communication with Edmund Foley, Head of Programs, Institute for Human Rights and Development in Africa, email dated 30 May 2022.

78 See Joint General Comment on Child Marriage, para 19.

79 See Joint General Comment on Child Marriage, para 24. Treaty bodies have cited African states whose constitutions still contain personal law exemption clauses (i.e. exempting customary and religious norms from application of the non-discrimination clause). See, eg, CEDAW Committee Concluding Observations on: Combined initial to 3rd Periodic Report of Botswana (26 March 2010), UN Doc CEDAW/C/BOT/CO/3 (2010) para 11-12; Combined initial to 4th Periodic Reports of Lesotho (8 November 2011), UN Doc CEDAW/C/LSO/CO/1-4 (2011) para 12-13; African Commission Concluding Observations on: 1st to 9th Periodic Reports of Eswatini 2001-2020, adopted at the 70th ordinary session (23 February-9 March 2022); Combined 6th to 8th Periodic Report of Mauritius 2009-2015 adopted at the 60th ordinary session (8-22 May 2017) para 62.

80 *APDF* (n 23) paras 59-78.

81 The court did not engage with the Malian government’s claim of *force majeure* or on the broader issue of derogation, about which the African regional human rights instruments are silent. Some commentators argue that the African Court thereby missed an opportunity to contribute to the jurisprudence. See B Kombo ‘Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women’s human rights on the continent’ (2019) *African Human Rights Yearbook* 389.

82 For the status of each country’s submission of reports to the African Commission see <https://www.achpr.org/statereportsandconcludingobservations>. The Commission engages states on matters covered under the Maputo Protocol as it reviews reports submitted under the African Charter on Human and Peoples’ Rights (African Commission), even

6 through legislation, policies, and other measures. This review is supplemented by CEDAW and the African Children's Committee Concluding Observations as well as national reported cases where available, discussing the eight components of the content of article 6 discussed in section 4 above.

6.1 Implementation of minimum age and consent for marriage

The African Commission's Concluding Observations contain, in equal measure, commendation for states that have stipulated 18 as the minimum age and condemnation for those that have not taken adequate steps towards this goal.⁸³

Among the African states that have reviewed their constitutions since the mid-1990s, it is not uncommon to find a provision relating to the right to found a family, which is conferred on adult men and women equally. Kenya's 2010 constitution in article 45(2) confers the right to marry on 'every adult', while the Children Act defines a child as a person under the age of 18 years. Zimbabwe's constitution of 2013 similarly sets the age of 18 as the age at which one acquires the right to found a family (section 78(1)). Uganda makes a similar provision under article 31(1). Malawi amended its constitution to stipulate 18 as the marriage age in 2017.⁸⁴

In the best-case scenario, these constitutional revisions are then followed by the harmonisation of the various relevant laws to bring them into alignment with the constitution. The experience has been mixed. There is still progress to be made, but significant gains can be made when national courts commit to affirming the Maputo Protocol's stipulation of 18 as the minimum age for marriage, as three landmark cases from Tanzania, Kenya, and Zimbabwe illustrate.

when no report is submitted specifically on the protocol. This way, even states that have not ratified the protocol have their records on women's human rights opened up to scrutiny by virtue of their obligations under art 18 of the African Charter.

- 83 For the states that have been commended see African Commission Concluding Observations on: Algeria: Fifth and 6th Periodic Reports of Algeria, adopted at the 57th ordinary session (4-18 November 2015); Benin: Second Periodic Report of Benin, adopted at the 45th ordinary session (13-27 May 2009); Democratic Republic of Congo: 11th to 13th Periodic Reports of the Democratic Republic of Congo, adopted at the 61st ordinary session (1-15 September 2017); Djibouti: Initial and Combined Periodic Reports of Djibouti 1993-2013, adopted at the 56th ordinary session (21 April-7 May 2015); Kenya: 12th and 13th Periodic Reports of Kenya, adopted at the 71st ordinary session (21 April-13 May 2022); Malawi: Initial and combined reports of Malawi 1995-2013, adopted at the 57th ordinary session (4-18 November 2015); Mauritania: Combined 15th to 17th Periodic Report of the Islamic Republic of Mauritania 2018-2021, adopted at the 73rd ordinary session (21 October-10 November 2022); Namibia: 7th Periodic Report of Namibia 2015-2019, adopted at the 72nd ordinary session (19 July-2 August 2022); Nigeria (commended for the 22 federal states that had adopted the Child's Rights Act): 5th Periodic Report of Nigeria, adopted at the 56th ordinary session (21 April-7 May 2015); Rwanda: Combined 11th to 13th Periodic Reports of Rwanda 2009-2016, adopted at the 61st ordinary session (1-15 November 2017); and Sierra Leone: Initial and combined reports of Sierra Leone 1983-2013, adopted at the 57th ordinary session (4-18 November 2015). For states that have been urged to comply see African Commission Concluding Observations on: Angola: 6th Periodic Report of Angola 2011-2016, adopted at the 62th ordinary session (25 April-9 May 2018); Botswana (even though Botswana has neither signed nor ratified the protocol): Combined 2nd and 3rd Periodic Reports of Botswana, adopted at the 63rd ordinary session (24 October-13 November 2018); Ethiopia: Combined 5th and 6th Reports of Ethiopia 2009-2013, adopted at the 56th ordinary session (21 April-7 May 2015); Lesotho: Initial and Combined 2nd to 8th Periodic Reports 2001-2017, adopted at the 68th ordinary session (14 April-4 May 2021); Liberia: Initial and combined reports of Liberia 1982-2012 adopted at the 17th extraordinary session (19-28 February 2015); Namibia: 6th Periodic Report of Namibia 2011-2014, adopted at the 58th ordinary session (6-20 April 2016); Niger: 15th Periodic Report of Niger 2017-2019, adopted at the 66th ordinary session (4-18 November 2015); Senegal: Combined reports of Senegal 2004-2013 adopted at the 18th extraordinary session (28 July-7 August 2015); South Africa: 2nd Periodic Report of South Africa 2003-2014 adopted at the 58th ordinary session (6-20 April 2016) (the African Commission cited South Africa for failing to harmonise various laws on minimum age). Mauritius has entered a reservation in respect of art 4(d), subordinating the Protocol's provision on minimum age to national legislation.
- 84 The amendment resulted from a 2016 amicable settlement of a complaint before the African Children's Committee concerning Malawi's constitution that defined a child as a person below the age of 16 years. Sections 22(6) and 23(6), Malawi Constitution (1994, with amendments to 2017). See 'Malawi, IHRDA reach amicable settlement in child rights case before the Committee of Experts', www.ihirda.org. See also BD Mezmur 'No second chance for first impressions: the first amicable settlement under the African Children's Charter' (2019) 19 *African Human Rights Law Journal* 62-84.

In the Tanzanian case of *Attorney-General v Rebecca Gyumi*, the Attorney-General (AG) appealed against a high court decision that had declared unconstitutional sections of the Law of Marriage Act that permitted marriage of a girl below the age of 18 with parental consent and also set a lower legal age of marriage for girls (at 15, compared to 18 for boys). The AG's objection was on the ground that boys and girls could be treated differently in this case since girls mature earlier than boys, and therefore the provisions did not offend equality, as the two categories are not similarly situated. Rejecting the AG's argument, the Court interpreted article 6 of the Maputo Protocol as imposing a specific obligation on Tanzania to adopt 18 as the minimum age of marriage for both men and women.⁸⁵ The Court rejected the argument that marriage is in the best interests of the girls in cases of pregnancy, a position that resonates with the joint General Comment.⁸⁶

Zimbabwe's Constitution of 2013 provides in section 78(1) that persons aged at least 18 years have the 'right to found a family'. The marriage statute, which predated the constitution, permitted girls to marry at the age of 16. The *Mudzuru* case⁸⁷ was filed on behalf of affected girls, challenging the constitutionality of the marriage law. The court ruled that the constitutional provision had to be interpreted in the context of Zimbabwe's existing obligations under relevant international treaties.⁸⁸ The Maputo Protocol is not cited in the judgment, but CEDAW and the CEDAW Committee's General Recommendations, as well as the African Children's Charter, are cited extensively to yield an interpretation that is in line with the Maputo Protocol's explicit stipulation of 18 years as the minimum age for marriage.⁸⁹

As a result of the *Mudzuru* case, a new marriage law was enacted in March 2022, setting the marriage age in Zimbabwe at 18 years, regardless of the system under which a marriage is conducted.⁹⁰

In Kenya, a High Court decision similarly dismissed an attempt by the Council of Imams and Preachers to block the criminal prosecution of persons charged with arranging the marriage of a girl under 18, citing Islamic law.⁹¹ The Court did not specifically cite the Maputo Protocol but cited the CRC and affirmed 18 years as the universal standard, thus upholding the principle established under the Maputo Protocol.⁹²

However, the experience across the board is that customary and religious personal law systems recognise underage marriages. In their reports, states almost uniformly decry the persistence of deeply rooted customary practices which permit the marriage of persons (especially girls) under the age of 18, despite minimum age legislation.⁹³

85 *Attorney-General v Rebecca Gyumi* Civil Appeal 204 (2017) 17, 30-31. Despite this ruling, three years on, Tanzania had not yet aligned its Law of the Child Act and Law of Marriage Act. See I Warioba 'Child marriage in Tanzania: a human rights perspective' (2019) 23 *Journal of Law, Social Justice and Global Development*, available at <http://www2.warwick.ac.uk/research/priorities/internationaldevelopment/lgd/> (accessed 23 June 2023).

86 See Joint General Comment on Child Marriage, para 10.

87 *Loveness Mudzuru & Ruvimbo Tsopodzi v Minister for Justice, Legal and Parliamentary Affairs & 2 others*, Constitutional Court of Zimbabwe, Judgment CCZ 12/2015.

88 *Mudzuru* (n 87) 26.

89 *Mudzuru* (n 87) 42.

90 See 'Zimbabwe: Marriages Bill Passed', <https://allafrica.com/stories/202203090145.html>.

91 *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General* (2015) eKLR.

92 *Council of Imams* (n 91) p 8-9.

93 See eg, African Commission Concluding Observations on: Combined 3rd and 4th Periodic Reports of Burkina Faso 2011-2013, adopted at the 57th ordinary session (4-18 November 2015); Cumulative Periodic Report of Chad 1998-2015, adopted at the 72nd ordinary session (19 July-2 August 2022); Periodic Reports of the Democratic Republic of Congo (n 83); 2nd Periodic Report of The Gambia 1994-2018, adopted at the 64th ordinary session (24 April-19 May 2019) Cairo, Egypt; Periodic Reports of Kenya (n 83); Periodic Reports of Lesotho (n 83); Periodic Report of the Islamic Republic of Mauritania (n 83); 3rd Periodic Report of Togo 2003-2010, adopted at the 50th ordinary session (24 October-5

A study of 11 West African countries conducted in 2021 found that there was still a high prevalence of child marriage (41.6 per cent) and that progress toward ending child marriage was extremely slow. On average, the prevalence of child marriage in the region had decreased by a meagre 0.01 per cent annually, with some countries recording an increase (Nigeria, Niger and Côte d'Ivoire).⁹⁴

The Joint General Comment on Child Marriage observes that the issue of bride price or bride wealth plays a role in contributing to the incidence of child and forced marriages.⁹⁵ Yet the Maputo Protocol is silent on this issue, and national laws are similarly silent.⁹⁶ If Zimbabwe's experience is anything to go by, reform efforts in this area are likely to encounter opposition.⁹⁷ The CEDAW Committee has flagged bride price as a driver of child and forced marriage.⁹⁸

Another factor identified as a drawback to effective enforcement of minimum age is the failure to implement universal birth registration, particularly in rural areas. This makes it impossible to definitively identify cases of child marriage and take the necessary action. For this reason, the SADC Model Law guides states to make it a right of every child to have their birth registered, as is also stipulated in the African Children's Charter.⁹⁹

It is encouraging that some states have taken a comprehensive approach beyond legislation to address the socio-economic conditions that drive child marriage.¹⁰⁰ The SADC Model Law points in this direction.¹⁰¹

November 2011); Combined 11th to 15th Periodic Reports of Zimbabwe 2007-2019, adopted at the 69th ordinary session (15 November-5 December 2021).

94 A Fatusi, S Adedini & J Mobolaji 'Trends and correlates of girl-child marriage in 11 West African countries: evidence from recent demographic and health surveys' (2021) 4 *AAS Open Research* 35.

95 See Joint General Comment on Child Marriage, para 49.

96 Warioba, *Child Marriage in Tanzania* (n 85). See also RI Danpullo 'The Maputo Protocol and the eradication of the cultural woes of African women: a critical analysis' (2017) 20(1) *RiA Recht in Afrika/Droit en Afrique*, 93-111. Danpullo (95-98) also notes a silence in the Protocol on the institution of 'woman-to-woman' 'marriage', an arrangement through which an older woman of means engages a younger (often poor) woman or girl to have children on her behalf. While this arrangement does not fit into the legal definition of 'marriage', its exploitation of poor girls and women is real and remains unaddressed. The arrangement is also distinct from same-sex marriage, which the Maputo Protocol does not address itself to.

97 An earlier (Senate) version of the Marriages Bill in Zimbabwe contained a provision to the effect that payment or non-payment of *lobola* (bridewealth) would not affect the validity of a marriage. Under pressure from traditional leaders, the National Assembly removed that clause in order for the Bill to be enacted. See 'Zimbabwe: Marriages Bill Passed', <https://allafrica.com/stories/202203090145.html>.

98 See CEDAW General Recommendation 21 (n 36). See also CEDAW Committee Concluding Observations on: 7th Periodic Report of Congo (14 November 2018) UN Doc CEDAW/C/COG/CO/7 (2018) paras 50, 51; Combined initial to 3rd Periodic Reports of Djibouti (2 August 2011) UN Doc CEDAW/C/DJI/CO/1-3 (2011) para 36; 8th Periodic Report of the Democratic Republic of Congo (30 July 2019) UN Doc CEDAW/C/COD/CO/8 (2019) paras 52, 53; 6th Periodic Report of Equatorial Guinea (9 November 2012) UN Doc CEDAW/C/GNQ/CO/6 (2012) para 43; 6th Periodic Report of Eritrea (10 March 2020) UN Doc CEDAW/C/ERI/CO/6 (2020) para 52; 6th Periodic Report of Tanzania (11 May 2009) UN Doc CEDAW/C/TZA/CO/6 (2009) para 146; Combined 4th to 7th Periodic Report of Uganda (5 November 2010) UN Doc CEDAW/C/UGA/CO/7 (2010) para 47; Mali (2016) n 25, para 43; CEDAW Committee List of issues and questions prior to the submission of the 7th Periodic Report of Tunisia (19 August 2019) UN Doc CEDAW/C/TUN/QPR/7 (2019) para 23.

99 SADC Model Law, sec 14.

100 See, eg, Tanzania's National Survey on the Drivers and Consequences of Child Marriage in Tanzania (2017) available at <https://www.forwarduk.org.uk/wp-content/uploads/2019/06/Forward-230-Page-Report-2017-Updated-Branding-WEB.pdf>.

101 See SADC Model Law, secs 15, 26.

6.2 Implementation of provisions on monogamy versus polygamy

Some states have gone beyond the language of the Maputo Protocol to outlaw polygamy altogether or recognised it only in limited instances. Rwanda's and Seychelles' laws only recognise civil monogamous marriages.¹⁰² The Democratic Republic of Congo (DRC) only recognises polygamous marriages conducted before 1951.¹⁰³ Some states have taken steps to legislate monogamy as the preferred form of marriage, in line with the Maputo Protocol. Examples include states whose laws permit conversion from polygamous to monogamous marriage but not the reverse, such as Kenya and Uganda.

Some states have also complied with the Maputo Protocol by taking steps to extend legal protection to women in polygamous unions. Examples of protective steps include matrimonial property laws that set out the criteria to be used in determining marital property rights in polygamous unions.¹⁰⁴ Another protective measure is the requirement that the first or all wives in a subsisting marriage must consent to a husband's subsequent marriage.¹⁰⁵

Some African states have maintained laws that simply place polygamous unions outside of the formal regulation of marriage.¹⁰⁶ This essentially exonerates the state from regulating polygamous unions in line with its human rights obligations under the Maputo Protocol, thus denying women in those relationships the legal protection that the Maputo Protocol calls for.

6.3 Implementation of compulsory and universal registration of marriages

Progress in establishing systems for compulsory and universal marriage registration has been slow. The main reason is that although a majority of the population relies on customary and religious marriages, they tend not to be covered by the official marriage registry.¹⁰⁷ A few states are singled out for their efforts in establishing a marriage registration system that extends to marriages conducted before traditional and religious authorities, even though uptake remains low.¹⁰⁸

Namibia and South Africa have entered reservations to article 6(d) on account of the absence from their laws of a legal requirement and mechanism for the registration of customary marriages.

102 African Commission Concluding Observations on: Rwanda (n 83); 3d Periodic Report of Seychelles 2006-2019, adopted at the 69th ordinary session (15 November-5 December 2021).

103 African Commission Concluding Observations Democratic Republic of Congo (n 83).

104 See for instance Kenya's Matrimonial Property Act 2013, sec 8.

105 Examples of states whose laws require consent of the first or existing wives include: Algeria and Mauritania. See African Commission Concluding Observations, Algeria (n 83); and Mauritania (n 83). South Africa, following the Constitutional Court's decision in *Modjadji Florah Mayelane v Mphephu Maria Ngwenyama & Minister for Home Affairs* 2013 (4) SA 415 (CC). In Morocco, at the point of entering into a marriage contract, a woman is given the option of indicating that she will not accept a polygamous marriage. However, if a wife objects to her husband's decision to take an additional wife, the law provides for automatic commencement of divorce proceedings on grounds of discord, so objection comes at a high price. See CEDAW Committee Concluding Observations on the combined 5th and 6th Periodic Report of Morocco (4 July 2022) UN Doc CEDAW/C/MAR/CO/5-6 (2022) para 39.

106 See, eg, Lesotho, whose law on registration of marriages forbids the District Administrator from registering a marriage 'if either party thereto is at the time legally married to some other person.' See Cotton & Diala (n 33) 26. Another example is Seychelles whose report submitted to the African Commission in 2021 simply stated that bigamy is criminalised but gave no information on how legal protection is extended to women in polygamous relationships as the Protocol requires. See African Commission Concluding Observations Seychelles (2021) n 101.

107 See African Commission Concluding Observations on: Botswana (n 83); Eswatini (n 79). See also CEDAW committee Concluding Observations on: Côte d'Ivoire (n 43) para 51; Gabon (n 43) paras 44 & 45; The Gambia (n 43) para 49; 6th and 7th Periodic Reports of Ghana (14 November 2014) UN Doc CEDAW/C/GHA/CO/6-7 (2014) para 40; Zimbabwe (2020) (n 42) para 50.

108 For states that are commended for efforts made toward registering customary and religious marriages see CEDAW Committee Concluding Observations on: Guinea (n 43) para 54; Madagascar (n 43) para 46; Mauritius (n 43) para 37; 8th Periodic Report of Senegal (1 March 2022), UN Doc CEDAW/C/SEN/CO/8 (2022) para 42.

Namibia's reservation is worded as temporary, pending legislative and institutional changes, but South Africa's is worded indefinitely.¹⁰⁹

A minority of states have put in place laws and mechanisms for the universal registration of marriages. Rwanda has made registration of marriages compulsory.¹¹⁰ The DRC requires registration of all marriages, including customary marriages, within a month. The DRC's report indicates that marriage registries have been decentralised to encourage compliance but that *de facto* unions are still prevalent.¹¹¹ Zimbabwe's Marriages Act, enacted in 2022, requires registration of all marriages and allows retrospective registration of customary marriages and *de facto* unions that have been in existence for at least five years as long as the parties were legally eligible to marry at the time the union commenced. To make registration accessible, chiefs at the lowest administrative level are designated as marriage registrars. Malawi, too, delegates to traditional authorities the power to register marriages.¹¹²

While the treaty bodies would like to see marriages registered, they are nonetheless concerned about the use of a punitive approach to enforce registration. They have therefore raised concern over the use of penalties, strict timelines in the absence of decentralised, accessible services, invalidation of unregistered marriages, and making marriage registration a precondition for access to essential services such as obtaining a passport.¹¹³

6.4 Implementation of equality in choice of matrimonial regime and residence

While some states have undertaken reforms in the post-independence period to remove restrictions on women's legal capacity,¹¹⁴ restrictions still persist, mostly in the civil codes of Francophone countries.¹¹⁵ What is more, in some instances, recent revisions of civil codes have left existing restrictions intact or only modified them slightly. For instance, CEDAW took issue with the fact that article 294 of Burkina Faso's revised Personal and Family Code gives deference to the husband's choice of domicile.¹¹⁶ Taking a similar approach, Benin's Persons and Family Code (2004) defaults to the husband's choice of matrimonial domicile if the parties fail to agree and gives the wife the option of initiating legal proceedings to allow a separate domicile if she can demonstrate that the husband's choice poses a real danger to her and the children.¹¹⁷ Regarding the matrimonial regime, the choice of matrimonial regime

109 See African Union, 'Reservations and declarations entered by member states on the protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', March 2022 (communication from the African Union Commission).

110 See Republic of Rwanda, Combined 11th to 13th Periodic Reports 2009-2016 on the African Charter on Human and Peoples' Rights, p 79.

111 See Democratic Republic of Congo, Combined 11th to 13th Periodic Reports 2005-2015 on the African Charter on Human and Peoples' Rights, para 198.

112 See Marriage, Divorce and Family Relations Act (Malawi), sec 38. Uganda has had a system for registering customary marriages since 1973 (Customary Marriage (Registration) Act).

113 For states whose punitive approach has raised concerns see CEDAW committee Concluding Observations on: Kenya (n 43) para 32; Mauritius (n 43) para 37; Senegal (n 108) para 42(b).

114 Examples of reforms to remove restrictions on women's legal capacity include Zimbabwe's enactment of the Legal Age of Majority Act in 1982, Tanzania's Age of Majority Act, 1960, Botswana's Abolition of Marital Power Act 2004, and Namibia's abolition of marital power. See African Commission Concluding Observations on: Botswana (n 83); Namibia (n 83).

115 See African Commission Concluding Observations Senegal (2015) n 82, p 8. See also CEDAW committee Concluding Observations on: 4th Periodic Report of Benin (28 October 2013) UN Doc CEDAW/C/BEN/CO/4 (2013) para 38; Burkina Faso (n 43) para 50; Combined 5th and 6th Periodic Reports of Burundi (25 November 2016) UN Doc CEDAW/C/BDI/CO/5-6 (2016) para 50-51; Cameroon (n 43) para 38; Congo (n 98) para 50; Djibouti (n 43) para 12; Democratic Republic of Congo (n 98) para 52; Gabon (n 43) para 44; Guinea (n 43) para 54; Mali (n 26) para 43; Senegal (n 108) para 42. For implications of this restriction of women's legal capacity in Francophone Africa see Kombo (n 49).

116 CEDAW Committee Concluding Observations Burkina Faso (n 43) para 50.

117 CEDAW Committee Concluding Observations Benin (n 115) para 38.

has consequences chiefly for the division of property upon dissolution of the marriage. The emerging best practice in states that have undertaken reform seems to be that the various options are presented to the parties at the time of contracting the marriage so that they may opt into a preferred regime. The DRC and Rwanda have taken this approach. Intending parties to a marriage need to elect between a separate property regime, community property with respect to property acquired during the marriage only, or a joint estate over all property. Should parties fail to elect, the second option is the default option and is the choice that gets recorded in the marriage register.¹¹⁸

Regrettably, by both states' own admission, these reformed laws do not apply to customary and religious marriages.

6.5 Implementation of the right to maiden name

This right has not been a big issue before the treaty bodies. Mauritania's 2020 report to CEDAW flags the granting of this right in reporting on advances made under its Civil Status Act.

CEDAW took issue with Benin's Persons and Family Code 2004 which automatically confers upon a married woman the name of her husband. Upon dissolution of the marriage, she can only continue to use his name with his consent or with a judge's authorisation.¹¹⁹ A woman is, therefore, never seized of the right to decide on her surname.

In monitoring the implementation of this right, the important thing to pay attention to is ensuring that a woman's choice to retain or drop her maiden name is not used against her. It is not uncommon in disputes at the dissolution of a marriage for a woman's retention of her maiden name to be held up as evidence that she was never really married, or that she was not loyal or does not regard herself as fully belonging to her husband's lineage or clan. The flip side is also a plausible scenario: in a succession dispute, a daughter's use of her husband's name bolsters the argument for her exclusion from her parents' estate distribution.

6.6 Implementation of equal rights as to nationality

Overall, African states have made remarkable progress in departing from restrictive colonial-era nationality and citizenship laws that employ the concept of dependent nationality.¹²⁰ However, the picture is mixed. There are still states whose laws restrict a woman's right to acquire and transmit nationality on the same terms as a man.¹²¹ Then there are states that have recently changed their laws

118 Democratic Republic of Congo, Combined 11th to 13th Periodic Reports 2005-2015 on the African Charter on Human and Peoples' Rights, para 185. See also Republic of Rwanda, Combined 11th to 13th Periodic Reports on the African Charter on Human and Peoples' Rights, 80.

119 Articles 12 & 261(3) of Benin Persons and Family Code. See CEDAW Committee Concluding Observations Benin (n 115) para 38.

120 See, eg, African Commission Concluding Observations on: Algeria (n 83); 1st Periodic Report of Botswana 1996-2007, adopted at the 47th ordinary session (12-26 May 2010); Democratic Republic of Congo (n 83); Combined 2nd to 8th Periodic Report of the Kingdom of Lesotho 2001-2017, adopted at the 64th ordinary session (24 April-19 May 2019) – but only with respect to transmission to children, not husband. Senegal was commended by the African Committee of Experts in 2019. See African Committee of Experts Concluding Observations on the Periodic Report of Senegal, adopted at the 33rd ordinary session (18-28 March 2019) para 22.

121 See African Commission Concluding Observations on: Eswatini (n 79) and Lesotho (n 120). See also African Committee of Experts Concluding Observations on the initial report of Eswatini, adopted at the 33rd ordinary session, (18-28 March 2019) para 25. See also CEDAW Committee Concluding Observations on: 5th Periodic Report of Benin, (16 May 2022) UN Doc CEDAW/C/BEN/CO/5 (2022) paras 74-78; Burundi (n 115) para 12; Cameroon (n 43) para 24(a); Central African Republic (n 43) para 33; Congo (n 98) paras 38-39; Guinea (n 43) para 40; Lesotho (n 79) para 26; Combined initial to 6th Periodic Report of Liberia (7 August 2009) UN Doc CEDAW/C/LBR/CO/6 (2009) para 30; Madagascar (n 43) para 26; Combined 7th and 8th Periodic Report of Nigeria (24 July 2017) UN Doc (2017) para 31; Combined initial

to grant women equal rights as to nationality, but the actual realisation of those rights encounters challenges on account of ambiguities and delay in the harmonisation of laws. For instance, although Togo's Code of Persons and Family (2012) allows women to retain nationality following divorce, the Code of Nationality continued in operation with gender-based restrictions.¹²² In other states, implementation of the newly enacted or amended nationality laws is beset by administrative hurdles or compromised by weaknesses and a punitive approach in related services such as birth registration. Treaty bodies have urged the removal of administrative hurdles such as tight deadlines and steep penalties for late birth registration, and requirements for both parents to appear at birth registration (which prejudice single mothers). They have also recommended decentralised services to better serve marginalised communities, such as in rural areas and among migrants.¹²³

Despite the recent reforms in nationality laws, the assumption that the father is the legal guardian to the exclusion of the mother still continues to inform administrative procedures, such as the processing of passport applications for children.¹²⁴

6.7 Implementation of equal parental rights and responsibilities

Both the African Commission and the African Children's Committee have flagged state practices that fall short of recognition of equality in parental rights and responsibilities. For instance, while Algeria was commended for amending its Family Code to remove restrictions on a mother's custody rights, the law still regarded the father as the legal guardian. The mother only becomes a legal guardian following the death of the father. Furthermore, a divorced mother surrenders her rights to child custody upon remarriage, which a father is not required to do.¹²⁵

Both regional treaty bodies, as well as the CEDAW Committee and the CRC Committee, have also expressed concern over family codes (mostly from a Francophone background) that designate the father as the legal head of the family, thus skewing parental rights against the mother.¹²⁶

to 2nd Periodic Reports of Swaziland (Eswatini) (24 July 2014) UN Doc CEDAW/C/SWZ/CO/1-2 (2014) para 28; Combined 7th and 8th Periodic Reports of Tanzania (9 March 2016) UN Doc CEDAW/C/TZA/CO/7-8 (2016) para 28; and Tunisia (n 98) para 14.

122 CEDAW Committee Concluding Observations Togo (n 43) para 28. Similarly, a 2010 amendment to Tunisia's Nationality Code allowed women to transmit nationality to their children, regardless of the father's identity. However, another provision in the same law provides that children born in Tunisia receive Tunisian nationality if the father or grandfather are born in Tunisia. See Tunisia (n 98) para 14. See also African Committee of Experts Concluding Observations on the initial report of Sierra Leone, adopted at the 30th ordinary session (6-16 December 2017) para 18.

123 See, eg, African Committee of Experts Concluding Observations on: Algeria (n 35); Initial report of Angola, adopted at the 30th ordinary session (6-16 December 2017); Initial report of Benin, adopted at the 33rd ordinary session (18-28 March 2019); Initial report of Eritrea, adopted at the 28th ordinary session (21 October-1 November 2016); 1st Periodic Report of Ethiopia, adopted at the 38th ordinary session (15-26 November 2021); Initial report of Ghana, adopted at the 28th ordinary session (21 October-1 November 2016); 1st Periodic Report of Kenya adopted at the 1st extraordinary session (6-11 October 2014); 2nd and 3rd Periodic Report of Rwanda, adopted at the 25th ordinary session (20-24 April 2015); Senegal (n 120); Sierra Leone (n 122); 1st Periodic Report of South Africa, adopted at the 32nd ordinary session (12-22 November 2018); Initial report of Sudan, adopted at the 20th ordinary session (12-16 November 2012); Initial report of Zimbabwe, adopted at the 25th ordinary session (20-24 April 2015).

124 In Kenya, for instance, the application form for a passport for a person under 16 years of age states: 'The mother or any other person claiming, during the lifetime of the father, to be the legal guardian must produce the Court Order committing the child to her or that person's custody.' See Form 19, <https://www.kenyaembassyaddis.org/wp-content/uploads/forms/passport-application-form-19.pdf>.

125 See African Commission Concluding Observations Algeria (2015); and African Committee of Experts Concluding Observations Algeria (2015). Egypt has similar provisions, terminating a mother's custody rights with respect to children over 15 years of age. See CEDAW committee Concluding Observations on the combined 8th to 10th Periodic Reports of Egypt (26 November 2021) UN Doc CEDAW/C/EGY/CO/8-10 (2021) para 49.

126 See eg African Committee of Experts Concluding Observations on the initial report of Congo, adopted at the 26th ordinary session (16-19 November 2015); CRC Committee Concluding Observations on the Combined 3rd and 4th Periodic Report of Burkina Faso (9 February 2010), UN Doc CRC/C/BFA/CO/3-4 (2010) para 44; CEDAW committee

Some states do report recent legislative enactments recognising the supremacy of the principle of the best interests of the child, thus ruling out the automatic preference of either parent.¹²⁷ However, it is often the case that these positive enactments do not govern customary marriages and *de facto* unions, yet these tend to be the most common forms of marriage on the continent. As with all the issues discussed, formal enactments are, therefore, a necessary but not sufficient indicator of compliance with a state's obligations under article 6.

As this chapter earlier highlighted, inequality in parental rights and responsibilities does manifest in other areas of law, such as employment. It is difficult to track the progress of states in implementing policies such as shared parental leave or paternity leave, which are designed to encourage fathers' participation in raising their children, thus spreading out care work and availing options for mothers who wish to have more economic engagement outside the home, or simply enabling greater family stability. The commission will hopefully engage the states more along these lines, especially if it takes an approach that brings out synergy among related provisions of the Maputo Protocol, for instance, with regard to this matter, the synergy between article 6(i) and article 13(l) (on recognition of equal parental responsibility in the context of employment).

Finally, in spite of language restricting the Maputo Protocol's scope in article 6(i) to co-parenting in a marital context, the commission can extend its dialogue with states to cover unmarried parents and ensure that both parents bear responsibility for safeguarding the welfare of their children. Some states' constitutions and legislation reflect the principle of shared parental responsibility irrespective of marital status. Kenya's Constitution, for instance, provides that a child's right to parental care and protection 'includes responsibility of the mother and father to provide for their child, whether they are married to each other or not'.¹²⁸ The African Commission needs to reinforce the CRC Committee's call on states to adopt such legislation.¹²⁹

6.8 Implementation of equal marital property rights

The post-colonial laws of a number of Southern African states influenced by Roman-Dutch law, namely Botswana, Lesotho, South Africa, Swaziland and Zimbabwe retained the automatic operation of marital power unless couples opted out of it through a prenuptial agreement.¹³⁰ Some states, such as South Africa and Zimbabwe, abolished marital power by statute long before the Maputo Protocol, while others in the Southern and West Africa region still retain or only recently abolished marital power or otherwise restrict a married woman's legal capacity to administer and transact in property.¹³¹ The African Commission has commended the states that have taken positive legislative measures.¹³²

Concluding Observations on: Cameroon (n 43) para 39; Central African Republic (n 43) para 45(d); Djibouti (n 98) para 36; Democratic Republic of Congo (n 98) para 52; Gabon (n 43) para 44(b); Guinea (n 43) para 54; Mali (n 26) para 43; Senegal (n 108) para 42(e); Togo (n 43) para 40; Tunisia (n 98) para 23.

127 Examples of legislation that encodes the principle of the best interests of the child include: Algeria's amended Family Code (2005); Kenya's Marriage Act 2014 and Children Act 2022; Malawi's Marriage, Divorce and Family Relations Act (2015), Mauritania's Personal Status Code (2001), Namibia's Married Persons Equality Act (1996), Zimbabwe's Marriages Act (2022), which extends equal spousal rights to all marriages, including customary ones.

128 Constitution of Kenya (2010), art 53(1)(e).

129 See Concluding Observations on the 2nd Periodic Report of Zimbabwe, CRC Committee (7 March 2016), UN Doc CRC/C/ZWE/CO/2 (2016) para 49.

130 Armstrong et al (n 33) 343-344.

131 Armstrong et al (n 33) 344; Cameroon (n 43) para 38; Chad (n 43) para 42; Gabon (n 43) para 44.

132 Botswana was commended for amending the Deeds Registry Act to allow women married in community of property to transact in their own right and hold separate property. See African Commission Concluding Observations Botswana (2010) n 119, para 17; Kenya was commended for enacting its Matrimonial Property Act of 2013. African Commission Concluding Observations on the Combined 8th to 11th Periodic Report of Kenya 2008-2014, adopted at the 19th extraordinary session 16-25 February 2016). Malawi was commended for its enactment of the Marriage, Divorce and Family Relations Act. African Commission Concluding Observations Malawi (n 83). The commission also commended

Others maintain fault-based divorce laws with negative property consequences for women found to be at fault and therefore risk losing all or part of the property they acquired or contributed to in the course of the marriage.¹³³

In some states, overt restrictions still remain either in the laws or in the practice of institutions such as banks. In Madagascar, for instance, the CEDAW Committee raised concern over the requirement of a male family member's endorsement of financial transactions, which limits women's access to credit and the acquisition and transfer of property.¹³⁴

Some states have undertaken legal reforms to remove restrictions on married women's contractual and proprietary capacity, but the benefit of such laws is out of reach for women married under customary law. The CEDAW Committee made this observation with respect to Botswana's Abolition of Marital Power Act 2004 and an amendment to the Deeds Registry Act, as well as Lesotho's Legal Capacity of Married Persons Act 2006. These statutes do not apply to customary and religious marriages on account of personal law exemption clauses in these countries' constitutions.¹³⁵ A similar concern was expressed over Rwanda's and Mauritius' laws which only recognise civil monogamous marriages, therefore leaving the property rights of women in *de facto* unions or polygamous marriages unprotected.¹³⁶

A woman's right to have a say over her spouse's transactions over marital property is, on the whole, not adequately safeguarded. In Kenya, for instance, a 2016 revision of the Land Registration Act of 2012 dispensed with a general mandatory requirement of spousal consent to all transactions involving land that falls within the category of marital property. What remains is a narrower option for a spouse under the Matrimonial Property Act to enter a caveat and thereby put on hold transactions by the other spouse that threaten marital property. The broader framing would have put the onus on the transacting parties to ensure that consent, where it is needed, has been obtained.¹³⁷ This flags a broader concern regarding harmonisation of laws.

It is also ideal that the law should provide for a spouse's right to seek a judicial declaration of the extent of his/her interests in property (not the division of property) during the subsistence of the marriage, where there is a need for clarity. Other safeguards that the law ought to provide for include a spouse's right not to be evicted from the matrimonial home by or at the instance of the other spouse except by court order, right to consent to any mortgage or lease of matrimonial property, and right

Lesotho for passing the Legal Capacity of Married Persons Act 2006. African Commission Concluding Observations Lesotho (n 83).

133 See eg African Commission Concluding Observations Eswatini (n 121) para 42.

134 CEDAW raised this concern with Madagascar in 2008 and reiterated it when seven years later there was no change. See CEDAW Committee Concluding Observations on: 5th Periodic Report of Madagascar (7 November 2008), UN Doc CEDAW/C/MDG/CO/5 (2008) para 32 (2008); Combined 6th and 7th Periodic Report of Madagascar (24 November 2015), UN Doc CEDAW/C/MDG/CO/6-7 (2015) para 42. Similar concern was raised with respect to Benin and Mauritania. See CEDAW Committee Concluding Observations on: 4th Periodic Report of Benin (28 October 2013), UN Doc CEDAW/C/BEN/CO/4 (2013) para 34; Combined 2nd and 3rd Periodic Report of Mauritania (24 July 2014) UN Doc CEDAW/C/MRT/CO/2-3 (2014) para 42. Mauritania's subsequent state report (2020) admits that 56% of its women cannot transact in property without a male guarantor; no reason is given for this limitation. (See Mauritania, 4th Periodic Report, submitted 14 August 2020, UN Doc CEDAW/C/MRT/4, p 39).

135 CEDAW Committee Concluding Observations Botswana (n 79) para 41. At its next reporting cycle in 2019, Botswana still had the exemption clause in its constitution. See CEDAW Committee Concluding Observations on the 4th Periodic Report of Botswana (14 March 2019) UN Doc CEDAW/C/BWA/CO/4, (2019) paras 47, 48.

136 CEDAW committee Concluding Observations on the combined 7th to 9th Periodic Report of Rwanda (9 March 2017) UN Doc CEDAW/C/RWA/CO/7-9 (2017) para 50; Mauritius (n 43) para 38.

137 CEDAW/C/KEN/CO/8 (2017) para 51(b).

to register a caveat or secure an injunction to stop a spouse from transacting in marital property in a manner that jeopardises a spouse's interests.¹³⁸

7 Conclusion

There is evidence that no doubt the Maputo Protocol's approach to marriage has had some impact on laws, policies and practices on the continent. This is most discernible with respect to the issue of the minimum age for marriage. Progress is less discernible with respect to issues such as marital property and the regulation of polygamy, which are less amenable to the stipulation of minimum standards.

It is quite worrying that the one phrase that comes through as a universal helpless refrain in the reports of States Parties is that 'deep rooted customs' or 'deep rooted prejudices' or 'practices in the hinterland' present a barrier to attempts at marriage law reform. The impression conveyed is that there is an enduring incompatibility with the Maputo Protocol's objectives. The African Commission's response to this is invariably one of urging the states to invest more in sensitisation, yet lack of awareness is not the issue. What the reforms are up against is essentially an absence of social legitimacy for the notion of equal legal and moral worth between spouses. Thus, change will inevitably rely more on external nudging than on internal momentum. The external nudge would guide customary norms in the direction of full human dignity and equality, as the South African Constitutional Court did in the *Mayelane* case (2013).¹³⁹ Presented with evidence of varied practice on whether custom mandated the first wife's consent to the marriage of subsequent wives, the court took the view that her constitutional right to equality and dignity demanded that customary law be definitely developed in that direction. While the case did not cite the Maputo Protocol at all, the undergirding principle – equality of rights between men and women in marriage – is present.

This approach, which treats customary norms as dynamic and responsive rather than static, provides a way out of the apparent helplessness with regard to reforms in the area of marriage. Without this approach, states will feel exonerated in taking steps that can only be generously described as hesitant in complying with article 6 of the Maputo Protocol.

Finally, there is much to be said for the role that civil society engagement has played, both at the regional level and in national contexts.¹⁴⁰ It has been indispensable in the developments that have taken place. It is thanks to civil society that the litigation initiatives discussed in this chapter were undertaken at all.

138 Kenyan law provides for all these safeguards under the Matrimonial Property Act of 2013. See secs 12 & 17.

139 *Mayelane* (n 105).

140 The protocol has been popularised through the work of SOAWR (Solidarity for African Women's Rights), a coalition of 63 civil society groups working in 32 African countries. The coalition keeps up pressure on governments that have not ratified the protocol, and advocates for more effective implementation among the state parties. See soawr.org/protocol-watch/ The coalition also produces material to equip civil society engagement relevant to the protocol. See for instance, KK Mwikya et al *Litigating the Maputo Protocol: a compendium of strategies and approaches for defending the rights of women and girls in Africa* (Equality Now 2020), available at https://soawr-test.org/wp-content/uploads/Compendium_of_Papers_on_the_Maputo_Protocol_Equality_Now_2020_Final.pdf The SADC Model Law on ending child marriage also resulted from a collaborative civil society initiative which brought together several organizations to form the 18+ Campaign steered by Plan International. See <https://plan-international.org/srhr/child-marriage-early-forced/>.

Article 7

Separation, divorce and annulment of marriage

Celestine Nyamu Musembi

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:

- (a) separation, divorce or annulment of a marriage shall be effected by judicial order;
- (b) women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
- (c) in case of separation, divorce or annulment of

marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;

- (d) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

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1 Introduction

That a woman should leave a marriage empty-handed and homeless, meets with much sympathy, some disapproval, but little surprise. It is a taken-for-granted facet of marriage, particularly marriage under various African customary laws, religious laws and the increasingly prevalent, fluidly defined cohabitation relationships.¹ Dissolution of relationships may also come with enforced separation from her children. In most cases, the divorce will have been effected without much ado, devoid of any defined adjudication process, let alone a formal judicial one.² Uncertainty, therefore, is the defining feature of women's entitlements when the relationship breaks down.³

1 The high prevalence of cohabitation unions is not unique to Africa; it reflects a global trend. See UN Women, *Families in a changing world* (Progress of the World's Women 2019-2020) (2019) 54.

2 A Armstrong et al, 'Uncovering reality: excavating women's rights in African family law' (1993) 7 *International Journal of Law and the Family* 350-357; A An-Na'im 'Shari'a and Islamic family law: transition and transformation' in A An-Na'im (ed) *Islamic family law in a changing world: a global resource book* (2002) 1-22; UN Women (n 1) 97.

3 See, for instance, Human Rights Watch and Federation of Women Lawyers (FIDA-Kenya) "'Once you get out, you lose everything": Women and Matrimonial Property Rights in Kenya' (2020) https://www.hrw.org/sites/default/files/media_2020/06/kenya0620_web.pdf (accessed 20 April 2023).

Worldwide trends indicate an increase in separation and divorce rates, with more divorced men likely to remarry than women.⁴ The adverse economic consequences of divorce fall disproportionately on women relative to men, even in high-income countries.⁵ Survey data from 91 low- and middle-income countries show that the rate of extreme poverty among those who are divorced or separated is twice as high for women compared to men.⁶ In countries with weak state-funded social protection mechanisms, which is the case in most of Africa, the adverse economic consequence of the dissolution of marriage goes unmitigated. That women are more likely than men to have invested their time in unpaid care work in the course of the marriage makes it likely that they will be disadvantaged by marital property regimes that base entitlement on proof of contribution to asset acquisition.

This complex interaction of fast-changing and vastly varied socio-economic realities, with a history of unfavourable laws and customs, maps the scope of the ambitious mission that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) seeks to accomplish through article 7. Article 7 seeks to chart a more secure course for women's rights in the life-defining moment of the dissolution of marriage. It seeks to do this by requiring that dissolution of marriage should be by means of a lawfully recognised process that is available to women and men on an equal basis and that parental rights and responsibilities, as well as sharing of assets accumulated during marriage, are subjected to fair adjudication.

This chapter provides a commentary on the normative content of article 7, elaborates on the nature and scope of state obligations, and assesses the status of its implementation. The chapter is organised into seven sections. Following this introduction, the second section discusses the drafting history of article 7. The third section highlights linkages between article 7 and other provisions within the Protocol and in other treaties. Section 4 discusses the key concepts that define the subject matter of article 7. Section 5 analyses the nature and scope of state obligation. Section 6 evaluates state practice in the implementation of article 7, relying mainly on the Concluding Observations of the African Commission on Human and Peoples' Rights (African Commission or Commission), the United Nations Committee on Elimination of All Forms of Discrimination against Women (CEDAW Committee), the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), and the United Nations Committee on the Rights of the Child (CRC Committee). Section 7 is the conclusion, which reflects on the state of emerging jurisprudence around article 7 and evaluates the prospects for the article's full implementation.

2 Drafting history

In the first draft of the protocol, discussed at Nouakchott in 1997, article 7 addressed both dissolution of marriage by divorce or annulment, and dissolution by death, widowhood taking up most of the article's attention.⁷ With regard to divorce, the draft article addressed two issues: first, it provided that divorce or annulment should be effected only by judicial order. Second, it granted the same rights to men and women to initiate proceedings for divorce or annulment of marriage and the same rights with respect to 'children and property of the marriage' following divorce or annulment.

4 UN Women (n 1) 55.

5 UN Women (n 1) 127.

6 8% for women, compared to 3.9% for men. UN Women (n 1) 127.

7 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

The Kigali Draft separated divorce from widowhood, designating article 8 to address the '[s]eparation and termination of marriage'.⁸ The article was made up of four clauses, addressing in substance the same issues as in the Nouakchott Draft. Like the Nouakchott Draft, the third and fourth clauses of the Kigali Draft's article 8 lumped together 'children and property of the marriage.' The merger of the Kigali Draft and the OAU Convention on Harmful Practices⁹ resulted in the Final Draft.¹⁰

Several changes were made when the Final Draft was discussed at the first meeting of experts held in Addis Ababa in 2001.¹¹ The article's heading was amended to read 'separation, divorce, and annulment of marriage', which heading remained in the final text of the protocol as it now stands. The clause stipulating that separation, divorce or annulment of marriage be effected only by judicial order drew objection from Egypt, Libya and Sudan, who sought deletion of the word 'divorce'.¹² In effect, what the objectors sought was accommodation of the male prerogative of divorce by oral pronouncement (*talaq*) under Islamic law of marriage.¹³ The only compromise made appears to be the dropping of the word 'only', which arguably left room for extra-judicial separation, divorce and annulment of marriage. The clause granting the same right to men and women to initiate proceedings was retained without amendment.

The report that resulted from the first meeting of experts in Addis Ababa in November 2001 finally effected a separation between children and property. The draft article 8(c) stipulated that in the event of separation, divorce or annulment, 'men and women shall have the same reciprocal rights and responsibilities towards their children'. It further read that, '[i]n any case, the interests of the children shall be given paramount importance'. Property matters were addressed in draft article 8(d), which stated that 'men and women shall have the same rights to an equitable sharing of the joint property deriving from the marriage'. The use of the word 'same' invited reservations from the delegations of Algeria, Egypt, Libya, and Sudan. They proposed that it be replaced with 'complementary', but that proposal was not adopted.¹⁴

As discussed in the introduction to this Commentary, an NGO forum convened in January 2003 made extensive comments on the Final Draft, including the amendments suggested by the meeting of experts.¹⁵ Foremost among them was an emphasis on the use of the word 'equal' in place of other

8 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

9 Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

10 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

11 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

12 Report of the Meeting of Expert (n 11) under draft art 8(a).

13 The trends in Islamic family law reform have been moving in the opposite direction, away from oral pronouncement, toward documentation of divorce for more effective protection of the rights of women and children. See An-Na'im (n 2).

14 The reason for objection by these states that apply Islamic family law can be deduced from the reservations and declarations of these and similarly situated states to art 16(1)(h) of CEDAW, which addresses the subject of property rights in marriage. They invariably cite contradictions with the stipulated property rights of spouses in family codes which are based on Islamic Sharia. See, eg, reservations and declarations by Algeria, Egypt, Kuwait, Libya, Maldives, Morocco, Saudi Arabia, Tunisia, available in CEDAW Committee, 'Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women', CEDAW/SP/2006/2.

15 See A Rudman 'Introduction' sec 2.5.2 in this volume.

formulations such as ‘same’ or ‘reciprocal’.¹⁶ The NGO push toward equality as the frame of reference was clearly rejected, as the Addis Ababa Draft, adopted by the Meeting of Ministers in Addis Ababa in March 2003, employed the word ‘reciprocal’ with regard to parental rights and responsibility, and the word ‘equitable sharing’ with regard to marital property.¹⁷ This is the current wording contained in article 7 of the Maputo Protocol. This terminological discussion is revisited under section 4 below.

Overall, the drafting process of article 7 is to be commended for the painstaking clarification of the rights issues that arise at the termination of a marriage, rather than having widowhood, matrimonial property and children all tangled up into one.

3 Linkage to related treaty provisions

Logically, article 7 builds onto article 6 of the Protocol, which deals with marriage, especially article 6(d) on the registration of marriages, as this has implications for proving one’s rights when a relationship breaks down. Of further relevance is article 6(j), which accords women equal rights to acquire, administer and manage their own property during the marriage, which has a bearing on the resolution of marital property disputes at the dissolution of marriage. Articles 2 and 8(f) on the elimination of discrimination in all spheres frame all the rights in the Protocol. Article 8(a) on effective access by women to ‘judicial and legal services’ bears relation to article 7(b), which seeks to ensure that women have, on an equal basis with men, the right to initiate proceedings for separation, divorce and annulment of marriage.¹⁸

Article 4, specifically the clauses on violence against women, has relevance in legal systems that have a fault-based approach to divorce. How violence is conceptualised in the Maputo Protocol ought to have a bearing in assessing whether the threshold for cruelty as a ground for divorce has been met and whether the definition of violence is comprehensive enough to go beyond the narrow confines of physical assault.

Also relevant is article 5 on the elimination of harmful practices, which includes legal and social norms and practices that justify the destitution of women or estrangement from their children upon separation or dissolution of marriage. This is shored up by article 16, guaranteeing women the right to adequate housing irrespective of marital status,¹⁹ and article 19(c), which mandates states to promote women’s access to and control of productive resources. Articles 20 and 21 on widowhood and inheritance, respectively, are also relevant in so far as they offer guidance on the conceptualisation and implementation of women’s rights with regard to property and custody of children at all stages of marriage and family life. These articles are the subject of subsequent chapters in this *Commentary*.²⁰

Beyond the Maputo Protocol, article 7 bears relation to the African Charter’s guarantee of property rights under articles 2 and 14. It further relates to article 16(1)(c) of CEDAW, which obligates states to ensure for both women and men ‘the same rights and responsibilities during marriage and at its dissolution’. CEDAW does not go into much detail beyond this statement, so the Maputo Protocol’s

16 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003.

17 See art 7, of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

18 For the broader discussion on women’s access to justice see A Rudman ‘Article 8’ in this volume.

19 The guarantee of a right to adequate housing is relevant in contexts of dissolution of marriage because it addresses the issue of replacing use of the family home, a concern that was by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) in General Recommendation 29 on art 16 of the Convention on the Elimination of All Forms of Discrimination against Women, Economic consequences of marriage, family relations and their dissolution, 26 February 2013, CEDAW/C/GC/29 (CEDAW Committee General Recommendation 29) para 47.

20 See UC Mokoena ‘Article 20’ and Z Nampewo ‘Article 21’ in this volume.

provisions relating to the dissolution of marriage are more elaborate. In its General Recommendation 21 of 1994, in which the CEDAW Committee expounded on the articles relating to equality in marriage and family relations, the comment on article 16(1)(c) focused on extending equal protection to women in *de facto* unions but remained silent on the issue of dissolution of marriage.²¹ In 2013, the CEDAW Committee issued General Recommendation 29, which addressed the dissolution of marriage more directly.²²

Articulation of the principle of the best interests of the child under article 4 of the African Charter on Rights and Welfare of the Child (African Children's Charter) is also relevant to article 7(c) of the Maputo Protocol.

4 Concepts and definitions

The substance of article 7 embodies three key concepts: equal and effective access to justice in the dissolution of marriage, reciprocal rights and responsibilities of parents in the context of the paramouncy of the best interests of the child, and equitable sharing of joint property.

4.1 Equal and effective access to justice

Article 7(a) requires states to ensure that separation, divorce and annulment of marriage 'shall be effected by judicial order'. Article 7(b) requires states to assure women and men 'the same rights to seek separation, divorce or annulment'. Taken together, these clauses are clearly concerned that women have equal and effective access to processes that are ascertainable and applied evenly to avail tangible justice. Read together with article 8 of the protocol, which, as mentioned above, deals with equal access to justice and equal protection and benefit of the law,²³ the Protocol's concern under article 7(a) and (b) can be said to be three-pronged: equal access to adjudicatory bodies, non-discriminatory administration of justice, and equal benefit of the law.²⁴

Regarding equal access, women and men must have equal standing to initiate proceedings for separation, divorce or annulment of marriage. Most marital disputes are settled outside of the formal court system, and this fact is not unique to the African context. Customary and religious norms play a predominant role in regulating marriage and family relations.²⁵ While these systems provide an affordable and flexible avenue for resolving disputes, equality of access is largely deficient, with husbands accorded many more options for initiating the termination of marriage than wives.²⁶ It is not without reason that the early framing of this article insisted that the dissolution of marriage be effected *only* by judicial decree. Some systems recognise methods of initiating marriage dissolution that are only open to husbands and not to wives. For instance, Islamic family law grants a husband the prerogative to repudiate a marriage by oral pronouncement of divorce.²⁷

21 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 21: Equality in Marriage and Family Relations (adopted at 13th session, 1994), A/49/38, para 18 (CEDAW General Recommendation 21).

22 CEDAW Committee General Recommendation 29 (n 19).

23 See A Rudman 'Article 8' in this volume.

24 The CEDAW committee has elaborated access to justice under a six-pronged criterion: justiciability, availability, accessibility, good quality, accountability and availing an effective remedy. UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 33: on women's access to justice, 23 July 2015, CEDAW/C/GC/33 (CEDAW Committee General Recommendation 33) para 14.

25 This is in spite of most states having incorporated equality principles in their constitutions. See CEDAW General Recommendation 21 (n 21) para 17.

26 UN Women (n 1) 97.

27 Some countries, such as Tunisia, outlawed verbal divorce (*talaq*). Others, such as Tanzania, have attempted to mitigate the adverse consequences of *talaq* by providing safeguards such as a requirement that the divorce will only be regarded as final if it is followed up by a judicial or quasi-judicial procedure, resulting in a decree of divorce. See An-Na'im (n 2) 47, 159.

In some religious and customary systems, dissolution of marriage is made conditional upon a refund of the bride price or dowry paid to the bride and/or her family or upon a wife's waiver of maintenance or child custody.²⁸ A further complication is added in contexts where the wife is only allowed to initiate proceedings through a male guardian, often the same male kin who becomes liable to refund the bride price and therefore has little incentive to see her exit the marriage.²⁹ Thus, women and men have unequal standing to initiate dissolution because the choice for such a woman is burdened in a way that a man's choice is not.³⁰

Access is also impeded in jurisdictions where no provision has been made for the registration of marriages under customary and religious law or of *de facto* unions, which is the case in most African countries.³¹ In those circumstances, women seeking judicial remedies such as maintenance confront the preliminary hurdle of having to prove the existence and establish the legal status of the relationship in the first place.³²

Regarding the non-discriminatory administration of justice, there must be a clear threshold for discharging the burden of proof and establishing entitlement to an order for separation, divorce or annulment or such related remedy. Where formal process either under civil or religious law involves making a finding of fault, this should not be skewed to favour one spouse by placing a heavier burden of proof on the other, or indeed by exempting one spouse (often the husband) from the requirement to specify any ground at all.³³ With regard to proving cruelty, for instance, historically, the threshold has been set so high that only extreme abuse suffices or so as to disregard psychological abuse.³⁴ Some jurisdictions set a broader definition of adultery for women compared to men.³⁵

Discrimination in the administration of justice is exacerbated by the overall lack of documentation in customary and religious processes. This results in inconsistent and uneven application of criteria for proof. Dissolution of marriage under customary and (some) religious systems invariably relies on undocumented standards of behaviour and criteria for assigning fault.³⁶ Their undocumented nature makes it difficult, if not impossible, to subject the process to scrutiny under a constitutional standard. Yet their determinations often carry financial and other consequences. It is often the case that

28 Armstrong et al (n 2) 351-2; E Cotran *Kenya: the law of marriage and divorce* (Restatement of African Law series; Antony Allot, Series Editor) (1968); An-Na'im (n 2).

29 Armstrong et al (n 2) 352.

30 For instance, Egypt's Personal Status Law of 2000 granted women the right to initiate divorce on condition that they waived their claim to maintenance and *mahr* (dowry). See An-Na'im (n 2) 159. See also CEDAW Committee General Recommendation 29 (n 19) para 41.

31 For discussion on implementation of the Maputo Protocol's requirement of the establishment of a system for universal registration of marriages see C Musembi 'Article 6' in this volume.

32 CN Musembi et al *Promoting the human rights of women in Kenya: a comparative review of the domestic laws* (UNIFEM Regional Office for East and Horn of Africa, 2010) 31.

33 While trends in the West have moved toward no-fault divorce, on the African continent though, the picture is mixed. While some states such as Malawi (see secs 63 & 64 of Marriage, Divorce and Family Relations Act, 2015) have embraced no-fault divorce, when Kenya had opportunity to enact a new marriage and divorce law in 2014, it opted to retain fault-based divorce, despite a long history of recommendations by various commissions and task forces to move in the opposite direction. See, for instance, Government of Kenya, *Report of the Presidential Commission on the Law of Marriage and Divorce* (1968); Kenya Law Reform Commission, *Draft Marriage Bill* (2007).

34 M Freeman, C, Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary* (2012) 'Article 16' 426. On the global phenomenon of trivialising or normalising violence in intimate relationships see SE Merry *Human rights and gender violence: translating international law into local justice* (2006) 181-184.

35 Cameroon is one such jurisdiction. See Concluding Observations on the combined 4th and 5th reports of Cameroon, Committee on the Elimination of all Forms of Discrimination against Women (9 March 2014) UN Doc CEDAW/C/CMR/CO/4-5 (2014) para 38(b). See also Women and Law in Southern Africa Research and Educational Trust Swaziland, *Charting the maze: Women in pursuit of justice in Swaziland* (2000) (WLSA Swaziland, *Charting the maze*) 185.

36 M Freeman 'Article 16' in M Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary* (2012) 426.

establishment of fault for divorce results in punitive consequences, such as forfeiting spousal support or a share of the property, or indeed restriction of custody rights over children. In some jurisdictions, penal sanctions are applied to women for adultery but not to men.³⁷ This would no doubt deter women – especially those who are economically dependent – from seeking the judicial remedy altogether, rendering nugatory any provision that guarantees equal access to the judicial process for men and women.³⁸ Even women who have economic means would be deterred by the social cost, for instance, of losing custody of their children or simply strained relationships with their in-laws. A similar deterrent effect flows from customary and religious laws that make a wife's initiation of divorce proceedings conditional upon her family's refund of marriage payments (bridewealth or dowry) received.³⁹ Her access to justice is thus burdened in a way that a man's not.

On the third prong, the Maputo Protocol does not stop at simply requiring equal access to justice or equal protection of the law in a formalistic sense. It goes further to require that states ensure 'equal benefit of the law'. Thus, the process that results in a judicial decree of separation, divorce or annulment of marriage must fulfil this three-pronged criterion under the Maputo Protocol resulting in substantive equality.⁴⁰

Equal benefit of the law must mean that whatever remedy is availed must be effective and available on an equal basis. Thus, in the context of article 7, outcomes from the dissolution of marriage – such as division of property – must benefit women on an equal basis with men.⁴¹ As the CEDAW Committee puts it, '(t)he guiding principle should be that the economic advantages and disadvantages related to the relationship and its dissolution should be borne equally by both parties'.⁴²

On the face of it, the protocol is concerned that women are treated no worse than men in matters of access to justice in the context of family relations. However, the spirit of the protocol in general, as well as the specific wording of article 8(a) – 'effective access' – suggests that the protocol goes beyond simply formalistic concern about how women are treated in relation to men. The access referred to must amount to tangible transformation in the circumstances, both of the specific woman seeking justice as well as the overall structural context in which justice is sought.⁴³

4.2 'Reciprocal' parental rights and responsibilities

Matters of child custody and maintenance in the context of dissolution of marriage in most African countries are marked by tension between rigid customary and religious rules assigning rights to one parent or the other and the principle of the paramountcy of the best interests of the child, which most states have encoded into their constitutions and/or statutory laws.⁴⁴ The African Committee of Experts has emphasised that a proper interpretation of the paramountcy of the principle of the best interests of

37 Gabon applies penal sanctions for adultery against women but not against men. See Concluding Observations on the 6th Periodic Report of Gabon, Committee on the Elimination of all Forms of Discrimination against Women (11 March 2015) UN Doc CEDAW/C/GAB/CO/6 (2015) para 44(c).

38 M Freeman 'Article 16' in Freeman et al (n 36) 425-426.

39 CEDAW Committee General Recommendation 29 (n 19) observes that women face a steeper decline in income following divorce compared to men (hereinafter CEDAW/C/GC/29) para 41. See also An-Na'im (n 2) 43-49; Armstrong et al (n 2) 352.

40 See A Rudman 'Article 8' sec 3.1.1 in this volume for a discussion of the concept of substantive equality.

41 CEDAW Committee General Recommendation 29 (n 19) para 4.

42 CEDAW Committee General Recommendation 29 (n 19) para 45.

43 The Protocol's emphasis on substantive equality in access to justice is elaborated on in greater detail in A Rudman 'Article 8' in this volume.

44 African Child Policy Forum (ACPF), *In the best interests of the child: harmonising laws on children in West and Central Africa* (2011); African Child Policy Forum (ACPF), *Harmonisation of children's laws in Eastern and Southern Africa: Country Briefs* (2012) <https://africanchildforum.org/index.php/en> (accessed 20 April 2023).

the child means that the interests of the child must be ranked above all other competing interests, in all settings, including family.⁴⁵ Yet customary and religious principles tend to automatically vest custody and guardianship in the father, with the narrow exception of matrilineal systems, which vest custody and guardianship in a male maternal relative. In most societies, whether patrilineal or matrilineal, if the man has paid bridewealth, he acquires unchallengeable rights to the children.⁴⁶

Statutory laws, too, influenced by English common law and civil law doctrines, reflect the assumption that the father is the sole legal guardian.⁴⁷ Several family codes on the continent still retain the concept of the father as the legal head of the family, thus privileging his position with respect to disputes over custody and maintenance following the dissolution of the marriage. This privileging of the father's authority in matters of custody has not always been commensurate with the apportionment of responsibilities for the care and maintenance of children, despite the fact that fathers are more likely to be economically secure compared to mothers.⁴⁸

Arguably, it is against the background of this uneven gendered apportionment of parental rights and responsibilities that article 7(c) employs the term 'reciprocal', reflecting a concern for balance between rights and responsibilities with respect to children, but not so as to override the principle of the paramountcy of the best interests of the child.

4.3 Equitable sharing of joint property

Article 7(d) deals with the issue of division of marital property upon dissolution of marriage. The clause employs the term 'equitable' rather than 'equal' sharing of the joint property deriving from the marriage. These two terms – 'equal' and 'equitable' – have generated no small amount of discussion in the field of women's human rights.⁴⁹ As discussed in section 2 above, during the drafting process, various states led by Egypt objected to the language of 'equal rights to property'.⁵⁰

In contrast, the text of CEDAW's article 16 features the phrase 'the same rights' throughout in addressing various aspects of equality in marriage. The CEDAW Committee in General Recommendation 29 employs the term 'equal', in calling for equal access by both spouses to marital property, equal legal capacity to manage property, and women's right to acquire and manage separate or non-marital property.⁵¹ The CEDAW Committee in General Recommendation 28 has taken the position that 'equal' and 'equitable' are not synonymous and made it clear that the first term is what should apply because 'equitable' may not translate to fair outcomes for women.⁵² CEDAW reiterated this position in its engagement with The Gambia in 2015, taking issue with the fact that Gambia's

45 African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), General Comment 5 on State Party Obligations under the Africa Charter on the Rights and Welfare of the Child (art 1) and Systems Strengthening for Child Protection (2018) 11-12, https://www.acerwc.africa/sites/default/files/2022-09/GENERAL_COMMENT_ON_STATE_PARTY_OBLIGATIONS_UNDER_ACRWC_%28ARTICLE%201%29_%26_SYSTEMS_STRENGTHENING_FOR_CHILD_PROTECTION_0.pdf (accessed 20 April 2023).

46 Armstrong et al (n 2) 340. See also A Kent 'Custody, maintenance and succession: the internalization of women's and children's rights under customary law in Africa' (2007) 28 *Michigan Journal of International Law* 507-538.

47 Armstrong et al (n 2) 346; B Kombo, 'Napoleonic legacies, postcolonial state legitimation, and the perpetual myth of non-intervention: Family Code reform and gender equality in Mali' (2020) XX(X) *Social and Legal Studies* 1-22.

48 M Freeman 'Article 16' in Freeman et al (n 36) 427.

49 See Freeman et al, CEDAW Commentary, 2012:17-18; F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50(1) *Journal of African Law* 72.

50 Banda (n 49) 77.

51 CEDAW Committee General Recommendation 29 (n 19) para 38.

52 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28 (CEDAW Committee General Recommendation 28) para 22.

Women's Act 'provides only for women's "equitable" access to property, which is not compliant with the Committee's standard of equality.'⁵³

Following the pattern set in article 16 of CEDAW, the UN Human Rights Council (HRC), in a 2015 resolution on the elimination of discrimination against women, called on states to guarantee 'the *same rights* for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property'.⁵⁴

The drafters of the Maputo Protocol were no doubt aware of the intense debate that has taken place at the global level concerning this usage of terminology. The choice of the term 'equitable' in article 7(d) must therefore be seen as deliberate. One plausible (and generous) explanation for this deliberate choice of terminology is that the protocol is signalling that what matters is not adherence to rigidly defined rules under either separate property or community of property regimes but rather achieving just outcomes that reflect substantive equality in adjudicating marital property claims. This reading is borne out by the African Commission General Comment 6, issued in March 2020 to aid the interpretation of article 7(d). The Commission states the purpose of the General Comment as providing 'guidance on how marital property should be shared fairly and, in a manner, consistent with the notion of substantive equality between women and men'.⁵⁵ The Commission underlines that article 7(d) must be read together with the opening statement of the article, which calls upon states to ensure that women and men enjoy the same rights in case of separation, divorce and annulment of marriage. The clause must therefore be interpreted not in isolation but in a manner consistent with the general spirit of the article. General Comment 6 then goes on to define equitable distribution as

[t]he apportionment of marital property in excess of half of the property on the basis of awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family.⁵⁶

The General Comment further defines 'joint property deriving from the marriage' as having the same meaning as 'marital assets', which 'includes all property acquired during the course of the marriage, regardless of who holds the title to it'.⁵⁷

Regrettably, the General Comment fails to accomplish the task of clarifying the textual meaning of 'equitable' in article 7(d). Notwithstanding its textual ambiguity, it is possible to draw out various

53 See Concluding Observations on the combined 4th and 5th Periodic Reports of Gambia, Committee on the Elimination of Discrimination against Women (28 July 2015) UN Doc CEDAW/C/GMB/CO/4-5 (2015) para 48(b). Malawi's Marriage, Divorce and Family Relations Act of 2015 similarly employs the term 'equitable' (sec 74), and the African Commission commends Malawi for enactment of this provision. See Concluding Observations on the initial and combined reports of Malawi on Implementation of the African Charter on Human and Peoples' Rights, 1995-2013, African Commission on Human and Peoples' Rights, adopted at the 57th ordinary session (4-18 November 2015) Banjul, The Gambia.

54 My emphasis. See UN Human Rights Council Resolution 29/4 of 2015, para 6(d), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/161/67/PDF/G1516167.pdf?OpenElement> (accessed 21 April 2023). The resolution followed the report of the UN Human Rights Council's Working Group on discrimination against women in law and practice. See A/HRC/29/40, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/070/03/PDF/G1507003.pdf?OpenElement> (accessed 21 April 2023).

55 General Comment 6 on the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (art 7(d)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia in February 2020 para 11.

56 African Commission General Comment 6 (n 55) para 14.

57 African Commission General Comment 6 (n 55) para 14. In para 45 the Commission expresses the view that marital assets should include property inherited by a spouse in the course of the marriage, unless this is expressly excluded by state law or by contract between the parties. Inheritance and gifts acquired prior to marriage, however, are to be excluded, unless the spouses have treated it as joint property in the course of the marriage para 46.

conceptual threads from the Commission's General Comment. First, the Commission appears to be setting a threshold to be applied in determining what falls within the category of 'joint property deriving from the marriage'. The Commission takes the view that, at the very least, this must amount to something '*in excess of half*'⁵⁸ of the total assets acquired in the course of the marriage. Since the majority of matrimonial regimes operating on the continent are neither purely separate property nor purely community of property regimes, many disputes revolve around where to draw the line in classifying some assets as 'marital assets.' The General Comment usefully provides a minimum guideline of at least half of the property.

Second, the General Comment signals that an equitable approach to defining and sharing marital assets must be one that takes context into account, which signals a focus on substantive equality:⁵⁹

that women invariably endure unequal enjoyment of property rights during the subsistence of the marriage, and that in many cases, their contribution tends to be non-monetary and is often overlooked and therefore does not congeal into tangible, registrable interests in property. These contextual factors are elaborated in the background paragraphs of the General Comment, which cite continent-wide trends such as women's limited or absolute lack of economic decision-making power in the household, restrictive practices in registration of land and land-based assets, traditional and statutory property rights institutions that vest control of family property exclusively in husbands as the holders of 'marital power' or as 'heads of households', as well as 'gendered responsibilities dictating that women use their resources for the upkeep of the family and maintaining the home while men use theirs for the acquisition of properties'.⁶⁰

Third, although the text of the Protocol does not dictate the choice of one over the other, the African Commission's General Comment 6 appears to express a preference for the community of property regimes over separate property regimes, seeing them as more consistent with an equitable approach. After defining 'joint property deriving from the marriage', the Commission adds that it 'should be viewed through the lens of marriage in community of property'.⁶¹

The CEDAW Committee, similarly, appears to take the view that equality ought to translate into a community of property regime. By way of illustration, the CEDAW Committee took issue with Togo's 2012 Code of Persons and Family for designating separate property as the default regime where couples omit to specify, terming it potentially discriminatory against women and recommending a community of property regime as the default instead.⁶²

A less generous reading of article 7(d) is that perhaps the use of 'equitable' rather than 'equal' bends the clause too far in the direction of making concessions to systems of personal law based on religion and custom that are far from equal. 'Equitable' implies the notion that these personal law systems will not be required to do too much to adjust their rigid gender-defined rules so as to attain equality with respect to control and distribution of property at crucial moments such as divorce and death. It is no coincidence that article 21, which deals with inheritance rights, also employs the term 'equitable'.⁶³ Arguably, while many states have moved some way toward tolerating the language of

58 African Commission General Comment 6 (n 55) para 14. My emphasis.

59 African Commission General Comment 6 (n 55) para 40.

60 African Commission General Comment 6 (n 55) paras 2, 3 & 5. See also elaboration of context in Armstrong et al (n 2) 346-347. The CEDAW Committee has also expressed concern that decisions on division of roles during the marriage should not be used to bring about adverse economic consequences for any party to the marriage, see CEDAW Committee General Recommendation 29 (n 19) para 45.

61 African Commission General Comment 6 (n 55) paras 14 & 40.

62 Concluding Observations on the combined 6th and 7th Periodic Reports of Togo, Committee on Elimination of all Forms of Discrimination against Women (8 November 2012) UN Doc CEDAW/C/TGO/CO/6-7 (2012), para 40-41.

63 See Z Nampevo 'Article 21' in this volume.

equality in matters such as the transmission of nationality, child custody and guardianship, matters of family property are seen as core to religious injunction and customary kinship systems, and therefore ‘stickier’ to legislate equality in.⁶⁴

5 Nature and scope of state obligation

Set against the background of a constitutional and legal framework founded on non-discrimination, article 7 expects states to establish ‘judicial, quasi-judicial, administrative, traditional and other processes’ that guarantee women’s effective access to justice in the context of separation, divorce and annulment of marriage.⁶⁵

Clearly, the drafters of the Protocol were aware of the reality of the prevalence of customary and religious (personal law) systems in settlement of family disputes. It is, therefore, unlikely that they might have envisioned that the requirement of non-discriminatory treatment in marital dissolution disputes would only apply to formal judicial institutions. Therefore, the requirement under article 7(b) that women and men must have the same rights to seek separation, divorce or annulment of marriage is as important in the Family Division of the High Court as it is in a kinship-based forum convened to arbitrate a customary divorce. Even in contexts of legal pluralism, the state is not absolved of its obligation to ensure that the application of all domestic laws operate so as to yield substantive equality in the sphere of family relations. The state’s obligation to harmonise standards in a plural legal context is underlined in the African Commission General Comment 6.⁶⁶

The state has an obligation to subject all dispute settlement procedures to the principles of equality and non-discrimination. There should be no enclaves that are out of reach of constitutional scrutiny, as is the case with the continued operation of personal law exemption clauses in some African constitutions. These are clauses that exempt customary and religious norms regulating matters such as marriage, divorce and succession from the application of the constitution’s non-discrimination provisions.⁶⁷ Robust application of the constitution would require that its human rights standards govern all ‘public officers’ broadly defined to include those implementing customary and religious law, as well as the actions of private parties. Constitutions that make the bill of rights binding on all persons offer even greater scope. Examples of constitutions that already permit broad application of the bill of rights include Kenya and South Africa.⁶⁸ Backed by a legal framework that enables broad access to the constitutional court, avenues such as the seeking of declaratory judgments on the constitutionality of restrictive alternative justice procedures will potentially afford opportunities to improve compliance with human rights standards in family-related proceedings.

64 See similar observations in C Musembi “‘We agree ... on condition no one asks why’”: evaluating the Global Mandate for Equal Security of Women’s Property Rights’ in R Patel (ed) *Gender and land rights in changing global contexts* (2022) 21-47; World Bank, *World Development Report 2012: Gender Equality and Development* (2012) 13 & 72.

65 African Commission General Comment 6 (n 55) para 56.

66 African Commission General Comment 6 (n 55) paras 48-51.

67 African states whose constitutions still contain personal law exemption clauses include: Botswana, Lesotho, Eswatini and Mauritius. See Concluding Observations on the combined initial to 3rd Periodic Report of Botswana, Committee on the Elimination of all Forms of Discrimination against Women (26 March 2010) UN Doc CEDAW/C/BOT/CO/3, paras 11-12; Concluding Observations on the combined initial to 4th Periodic Reports of Lesotho, Committee on the Elimination of all Forms of Discrimination against Women (8 November 2011) UN Doc CEDAW/C/LSO/CO/1-4, paras 12-13; Concluding Observations on the 1st to 9th Periodic Reports of Eswatini on the Implementation of the African Charter on Human and Peoples’ Rights 2001-2020, African Commission on Human and Peoples’ Rights, adopted at the 70th ordinary session 23 February-9 March 2022; and Concluding Observations on the combined 6th to 8th Periodic Reports of Mauritius on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 60th ordinary session (8-22 May 2017) para 62.

68 See art 20(1) of the Constitution of Kenya; art 8(1) & (2) of the Constitution of the Republic of South Africa, 1996.

Beyond simply extending constitutional scrutiny to informal disputing processes, the state has an obligation to create institutional mechanisms for actual exercise of oversight by the formal courts, thus allowing routine judicial review as well as appeals from customary and religious forums.⁶⁹ State-funded legal aid and decentralisation of justice institutions will be indispensable in facilitating such appeals and ensuring effective access to justice. The Commission could certainly offer more guidance and standard-setting in the area of interfacing customary and religious forums for accessing justice with formal institutions.

Giving concrete effect to marital property rights, according to General Comment 6, includes enacting and implementing legislation that is clear, accessible, enforceable and justiciable, one that makes the threat of dispossession in the event of separation or divorce punishable.⁷⁰ The CEDAW Committee sets out the scope of issues that a substantive law on marital property rights upon dissolution of marriage must address. In summary, it must go beyond immovable property and household goods to include considerations such as future earning capacity, interest in pensions and insurance schemes, and lost economic opportunity (as a result of putting one's career advancement on hold, for instance).⁷¹

The African Commission's General Comment 6 underlines that legislation must pay special attention to the categories of women most vulnerable to dispossession and discounting of their contributions, for instance, childless women, women with disabilities, and older women.⁷² It must be accompanied by the necessary investment in the training of officers and adequate financing of the implementing institutions, as well as awareness raising.⁷³ The General Comment calls upon states to engage in awareness raising toward the transformation of discriminatory practices relating to marriage and divorce, particularly those that justify dispossessing women of their marital property.⁷⁴ Some governments are commended by the Commission for awareness-raising campaigns in the area of marriage and divorce, most of them undertaken jointly with civil society groups.⁷⁵

6 State practice/implementation

This section evaluates jurisprudence and state practice in relation to article 7. The section reviews state practice with respect to the implementation of equal and effective access to justice, reciprocal parental rights and responsibilities, and 'equitable sharing' of marital property rights.

6.1 Implementation of equal and effective access to justice

The African Commission expressed the idea that the state should make provision for women to access remedies connected with the dissolution of marriage, whether these be through judicial, quasi-judicial,

69 See CEDAW Committee General Recommendation 33 (n 24) para 46; C Nyamu-Musembi, 'Review of experience in engaging with non-state justice systems in East Africa', (Commissioned by Governance Division, UK Department for International Development- DFID, 2003), available at <http://gsdrc.org/docs/open/ds37.pdf>; UN-Women, UNICEF, UNDP, *Informal justice: Charting a course for human rights-based engagement* (nd), available at <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2013/1/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf> (accessed 20 April 2023).

70 African Commission General Comment 6 (n 55) paras 51 & 52.

71 CEDAW Committee General Recommendation 29 (n 19) para 47. In *Ellen Tewesa v Chimwemwe S. Tewesa* (Matrimonial Cause 9 of 2012, High Court of Malawi) Malawi's High Court broke new ground in 2012 when it ruled that a spouse's contribution to enhancing the other spouse's future earning potential arising from an academic or professional qualification could be taken into account in adjudicating marital property disputes.

72 African Commission General Comment 6 (n 55) para 54.

73 African Commission General Comment 6 (n 55) paras 56-61.

74 African Commission General Comment 6 (n 55) para 58.

75 See, eg, African Commission Concluding Observations on the Democratic Republic of Congo (2015) 43.

traditional or other forums, regardless of what system of law they are married under.⁷⁶ The Commission, through General Comment 6, also called upon states to pay particular attention to categories of women encountering particular hardship in accessing justice.⁷⁷ Besides the General Comment, though, there is scant evidence of engagement with states parties on the issue of equal and effective access to justice, particularly with reference to the context of legal pluralism. While both the Commission and states decry the constraints imposed variously by customs, ‘deeply entrenched practices’ or ‘deep rooted cultural and religious practices’, there is no specific discussion of these in terms of how they might pose barriers to women’s access to justice, specifically in the adjudication of family disputes, or indeed how those barriers might be overcome.⁷⁸ The CEDAW Committee, by contrast, has engaged African states on the matter of fair adjudication in marital disputes and recommended that judicial safeguards should extend beyond civil marriages to cover traditional and religious marriages as well.⁷⁹

Ideally, decisions of customary and religious forums should be subjected to constitutional standards through appeal and routine judicial review or some process that allows coordination and collaboration with formal institutions to permit scrutiny of the former’s compliance with constitutional principles. The process must be well-resourced and complemented by legal aid so that it does not end up with a very thin presence on the ground, as has been observed in Sierra Leone, or unevenly applied as was observed in Mozambique, or marginalised within the judicial system.⁸⁰

Women encounter multiple barriers to effective access to justice on account of factors such as illiteracy, cost, and inadequate decentralisation of structures for the delivery of justice.⁸¹ These barriers disadvantage citizens in general, but more so women and rural women in particular. There is also the additional layer of stigmatisation of women who bring to court matters such as family disputes and

76 African Commission General Comment 6 (n 55) para 56.

77 As above.

78 See, eg, Concluding Observations on the 3rd Periodic Report of Togo on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 50th ordinary session (24 October-5 November 2011); Concluding Observations on the combined 11th to 15th Periodic Reports of Zimbabwe on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 65th ordinary session (21 October-10 November 2019); Concluding Observations on the 2nd Periodic Report of The Gambia 1994-2018 on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 64th ordinary session (24 April-19 May 2019); Concluding Observations on the combined 12th and 13th Periodic Report of Kenya on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 71st ordinary session (21 April-13 May 2022); Concluding Observations on the combined 2nd to 8th Periodic Report of the Kingdom of Lesotho 2001-2017 on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 64th ordinary session (24 April-19 May 2019); Concluding Observations on the combined 15th to 17th Periodic Report of the Islamic Republic of Mauritania 2018-2021 on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 73rd ordinary session (21 October-10 November 2022).

79 See eg, Concluding observations on the 6th Periodic Report of Equatorial Guinea, Committee on Elimination of all Forms of Discrimination against Women, (9 November 2012) UN Doc CEDAW/C/GNQ/CO/6 (2012) para 43; CEDAW Committee Concluding Observations Gabon (2015) para 45(b).

80 See A Kent ‘Custody, maintenance and succession’ 524; Women and Law in Southern Africa Research Trust Mozambique *The justice delivery system and the illusion of the transparency* (2000) 93-95; Women and Law in Southern Africa Research Trust Botswana, *Chasing the mirage: women and the administration of justice* (1999) (WLSA Botswana, *Chasing the mirage*) 153,163; Women and Law in Southern Africa Research and Educational Trust Swaziland, *Charting the maze: women in pursuit of justice in Swaziland* (2000) (WLSA Swaziland, *Charting the maze*); Women and Law in Southern Africa Research Trust Lesotho, *In search of justice: where do women in Lesotho go?* (2000).

81 CEDAW Committee General Recommendation 33 (n 24) paras 3, 13.

gender-based violence.⁸² States have not done enough to overcome these barriers.⁸³ Some traditional and religious dispute resolution forums forbid women to appear before them unaccompanied by their husbands or other male representatives.⁸⁴

6.2 Implementation of reciprocal parental rights and responsibilities

There is still a long way to go in implementing the principle of reciprocal parental rights and responsibilities. As mentioned above, several African jurisdictions have family codes that privilege a father's claim to custody by legally designating him as head of the family.⁸⁵ In some jurisdictions, a divorced mother surrenders her rights to child custody upon remarriage, which a father is not required to do.⁸⁶

82 See eg, Concluding Observations on the 4th Periodic Report of Benin, Committee on the Elimination of all Forms of Discrimination against Women (28 October 2013) UN Doc CEDAW/C/BEN/CO/4 (2013) para10; CEDAW Committee Concluding Observations Gabon (2015) para.14; Concluding Observations on the 6th and 7th Periodic Reports of Ghana, Committee on Elimination of all Forms of Discrimination against Women (14 November 2014) UN Doc CEDAW/C/GHA/CO/6-7 (2014) para. 14; Concluding Observations on the combined initial to 6th Periodic Report of Liberia, Committee on Elimination of all Forms of Discrimination against Women (7 August 2009) UN Doc CEDAW/C/LBR/CO/6 (2009) para. 38; Concluding Observations on the combined 6th and 7th Periodic Reports of Mali, Committee on the Elimination of all Forms of Discrimination against Women (25 July 2016) UN Doc CEDAW/C/MLI/CO/6-7 (2016) para. 13; Concluding Observations on the combined 7th to9th Periodic Reports of Rwanda (9 March 2017) UN Doc CEDAW/C/RWA/CO/7-9 (2017) para 12. See also Women and Law in Southern Africa Research Trust Botswana, *Chasing the mirage: women and the administration of justice* (1999) (WLSA Botswana, *Chasing the mirage*); Women and Law in Southern Africa Research Trust Zimbabwe, *In the shadow of the law: women and justice delivery in Zimbabwe* (2000); WLSA Swaziland, *Charting the maze*; SF Hirsch *Pronouncing and persevering: gender and the discourses of disputing in an African Islamic Court* (1998); SE Merry *Human rights and gender violence: translating international law into local justice* (2006).

83 See recent evaluations, such as Human Rights Watch & International Federation of Women Lawyers (FIDA-Kenya), 'Once you get out you lose everything: Women and matrimonial property rights in Kenya' (2020), available at https://www.hrw.org/sites/default/files/media_2020/06/kenya0620_web.pdf (HRW/FIDA, 'Once you get out'; International Justice Mission (2019), *Justice Review: a Journal on Protection and Justice for the Poor* available at <https://www.ijm.org/documents/studies/IJM-JusticeReview2019-compressed.pdf>.

84 Examples of such restricted forums include Liberia's traditional courts under the Revised Rules and Regulations Governing the Hinterland of Liberia. See CEDAW Committee Concluding Observations Liberia (2009) paras 38, 40. See also WLSA Botswana, *Chasing the mirage*, 161-162.

85 See, Concluding Observations on the initial report of the Republic of Congo on the Status of Implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts, adopted at the 26th ordinary session (16-19 November 2015) para 28; CEDAW Committee Concluding Observations Cameroon (2014) paras 38-39; Concluding Observations on the initial and 2nd to 5th Periodic Reports of the Central African Republic, Committee on Elimination of all Forms of Discrimination against Women (24 July 2014) UN Doc CEDAW/C/CAF/CO/1-5 (2014) para 45(d); Concluding Observations on the initial, 2nd and 3rd Periodic Reports of the Djibouti, Committee on Elimination of all Forms of Discrimination against Women (2 August 2011) UN Doc CEDAW/C/DJI/CO/1-3 (2011) para 36; Concluding Observations on the 7th Periodic Report of the Congo, Committee on Elimination of all Forms of Discrimination against Women (14 November 2018) UN Doc CEDAW/C/COG/CO/7 (2018) para 52; CEDAW Committee Concluding Observations Gabon (2015) para 44(b); Concluding Observations on the combined 7th and 8th Periodic Reports of Guinea, Committee on Elimination of all Forms of Discrimination against Women (14 November 2014) UN Doc CEDAW/C/CO/GIN/7-8) para 54; Concluding Observations on the combined 6th and 7th Periodic Reports of Mali, Committee on Elimination of all Forms of Discrimination against Women (25 July 2016) UN Doc CEDAW/C/MLI/CO/6-7 (2016) para 43; Concluding Observations on the 8th Periodic Report of Senegal, Committee on Elimination of all Forms of Discrimination against Women (1 March 2022), UN Doc CEDAW/C/SEN/CO/8 (2022) para 42(e); CEDAW Concluding Observations Togo (2012) para 40; List of issues and questions prior to the submission of the 7th Periodic Report of Tunisia (19 August 2019) UN Doc CEDAW/C/TUN/QPR/7 (2019) para 23.

86 See Concluding Observations on the 5th and 6th Periodic Reports of Algeria 2010-2014 on the implementation of the African Charter on Human and Peoples' Rights, adopted at the 57th ordinary session (4-18 November 2015); Concluding Observations on the initial report of Algeria on the implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 26th ordinary session (16-19 November 2015). Egypt has similar provisions, with a mother's custody rights ceasing when the child turns 15. See Concluding Observations on the combined 8th to 10th Periodic Reports of Egypt, Committee on Elimination of all Forms of Discrimination against Women (26 November 2021) UN Doc CEDAW/C/EGY/CO/8-10 (2021) para 49.

Even where the principle has been codified into law, there are disconnects and gaps, with some areas of law operating without any regard for the principle. Laws on immigration and on registration of births and deaths have been slow to move away from the presumption of a father's sole guardianship. In Kenya, for instance, a mother requires the written consent of the child's father or a court order granting her custody in order to apply for a passport for a child under 16 years of age. The mother will only be regarded as the legal guardian if the father is no longer alive.⁸⁷ The application form does not specify whether this requirement applies only to parents who are married to each other, potentially imposing a burden on single and divorced mothers.

Zimbabwe was reprimanded by the African Children's Committee in 2015 concerning the unequal treatment of men and women in its Guardianship of Infants Act and its Births and Deaths Registration Act.⁸⁸ By 2019 Zimbabwe had addressed this issue, as it was commended by the African Commission for giving legal recognition to joint parental responsibility.⁸⁹

Reciprocal parental rights and responsibilities in the case of unmarried parents are far from legal reality. In most jurisdictions, while legal responsibility attaches to the birth mother automatically, a biological father only assumes legal parental responsibility either through voluntary acknowledgement of paternity and assumption of child support duties or through a court order based on proof of paternity, proof of cohabitation for a designated period with the mother of the child, or a parental responsibility agreement with the mother of the child.⁹⁰ Some states' constitutions recognise every child's right to parental care and protection from both parents, and the parents' equal rights and responsibilities, whether married to each other or not.⁹¹ Fewer still have backed up this constitutional right with laws and regulations to implement automatic joint parental responsibility.⁹²

A pattern of weak enforcement of court orders for child maintenance, described in the early 1990s as 'a general crisis'⁹³ is still an issue. In 2014 the African Children's Committee took Kenya to task over the high rate of default on child maintenance and urged the government to take measures to ensure that both parents equally bear parental responsibility. The CRC Committee echoed this concern two years later.⁹⁴ Lesotho was similarly urged to ensure that non-custodial parents (read unwed or divorced fathers) pay maintenance and that the government takes measures to transform societal attitudes concerning children born out of wedlock.⁹⁵ The African Children's Committee also expressed concern

87 See Form 19, <https://www.kenyaembassyaddis.org/wp-content/uploads/forms/passport-application-form-19.pdf> (accessed 20 April 2023).

88 See Concluding Observations on the report of Zimbabwe on implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 25th ordinary session (20-24 April 2015).

89 See African Commission Concluding Observations Zimbabwe (2019).

90 See, eg, South Africa's Children's Act (2005) sec 21; Malawi's Child Care, Protection and Justice Act (2010) sec 6; Kenya's 2001 Children Act (only repealed in 2022).

91 See, eg, Constitutions of Kenya (2010) art 53(1)(e); Malawi (2017) art 23(4); Côte d'Ivoire (2016) art 31; Eritrea (1997) art 22(2) generally assigns men and women 'equal rights and duties as to all family affairs'; Eswatini (2005) art 29(4); Ghana (1996) art 28(1)(b); Zimbabwe (2013) art 80(2) states: 'Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.'

92 See, eg, Children Act 2022 (Kenya), secs 32 & 110; Namibia's Maintenance Act (2003), Child Status Act (2006), and Child Care and Protection Act (2015).

93 Armstrong et al (n 2) 360.

94 See Concluding Observations on the first Periodic Report of Kenya, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 1st extraordinary session (6-11 October 2014). See also Concluding Observations on the combined 3rd to 5th Periodic Report of Kenya, Children's Rights Committee (21 March 2016) UN Doc CRC/C/KEN/CO/3-5 (2016) para 39(c).

95 See Concluding Observations on the initial report of Lesotho on implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 26th ordinary session (16-19 November 2015).

over high numbers of disowned children receiving no support from fathers in Liberia.⁹⁶ CEDAW, too, has taken issue with the trend of laxity in enforcing child support obligations, directing the government of Zambia to undertake awareness raising on the shared responsibility of both parents to ensure the well-being and care of children.⁹⁷

6.3 Implementation of ‘equitable sharing’ of joint property

The African Commission’s engagement with states suggests that the picture is mixed on the issue of marital property rights upon dissolution of marriage. There are states who are commended for taking positive legislative measures, for instance, to set out clear options at the time of entering into marriage⁹⁸ or to remove restrictions to married women’s capacity to transact in property. There are those that have not adopted any laws on the matter at all.⁹⁹ Some states still retain the husband’s ‘marital power’ to administer property belonging to the wife or restrict a married woman’s legal capacity to administer and transact in property.¹⁰⁰ Others maintain fault-based divorce laws with negative property consequences for women found to be at fault in a context where many are ignorant of these economic consequences.¹⁰¹

Some states have enacted laws, but those laws have only partial application.¹⁰² The perennial sticky issue of non-application of marital property law to customary and religious marriages and *de facto*

96 See Concluding Observations on the initial report of Liberia on implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 23rd ordinary session (9-16 April 2014).

97 Concluding Observations on the combined 5th and 6th Periodic Reports of Zambia, Committee on Elimination of all Forms of Discrimination against Women (19 September 2011) UN Doc CEDAW/C/ZMB/CO/5-6 (2011) para 42(b).

98 See, eg Concluding Observations on the 11th to 13th Periodic Reports of the Democratic Republic of Congo 2005-2015 on implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 61st ordinary session (1-15 November 2017), p 41. See also Concluding Observations on the Combined 11th to 13th Periodic Reports of Rwanda on implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 61st ordinary session (1-15 November 2017), p 80.

99 See eg African Commission Concluding Observations Gabon (2013). Eswatini was cited by the African Commission in 2022 for lacking a law that addresses property rights of women married under customary law. See African Commission Concluding Observations Eswatini (2022). Botswana (not a party to the Maputo Protocol), only removed the restriction on married women’s capacity to transact and hold separate property when it amended the Deeds Registry Act and enacted the Abolition of Marital Power Act in 2004. See CEDAW Committee Concluding Observations on Botswana, CEDAW/C/BOT/CO/3, para 41 (2010). It is not unusual that some African states have no laws governing marital property. Kenya’s parliament only enacted a law on marital property for the first time at the end of 2013 (Matrimonial Property Act 49 of 2013). Malawi only codified its marital property regime through enactment of its Marriage, Divorce and Family Relations Act No.4 of 2015. Prior to these statutes, courts applied an English statute, the Married Women’s Property Act, 1882, whose application was extended into former British colonies. See C Nyamu-Musembi ‘“Sitting on her husband’s back with her hands in his pockets”: trends in judicial decision-making on marital property in Kenya’, in A Bainham (ed) *The International Survey of Family Law* (2002) 229-241.

100 CEDAW Committee Concluding Observations Cameroon (2014) para 38; Concluding Observations on the combined first to 4th Periodic Reports of Chad (4 November 2011) UN Doc CEDAW/C/TCD/CO/1-4 (2011) para 42; CEDAW Committee Concluding Observations Gabon (2015) para 44.

101 Concluding Observations on the combined initial to 2nd Periodic Reports of Swaziland (Eswatini), Committee on Elimination of all Forms of Discrimination against Women (24 July 2014) UN Doc CEDAW/C/SWZ/CO/1-2 (2014) para 42. See general concern raised about linking fault in divorce to marital property: CEDAW Committee General Recommendation 29 (n 19) paras 39 & 40.

102 Namibia, for instance, introduced a simplified system of registering ownership, mostly in informal settlements. The law permits joint registration only in the case of persons married in community of property. However, this option is open only to those married under civil law (sec 9(8) Flexible Land Tenure Act of 2012). See Concluding Observations on the combined 4th and 5th Periodic Report of Namibia, Committee on Elimination of all Forms of Discrimination against Women (28 July 2015) UN Doc CEDAW/C/NAM/CO/4-5 (2015) para 40. The CEDAW Committee had raised the concern about neglect of the property rights of women in *de facto* unions as far back as 1994. See CEDAW General Recommendation 21 (n 19) para 33.

unions further limits the reach of marital property laws. In 2014 the CEDAW Committee urged Ghana to sensitise traditional authorities to understand and accept that women seeking divorce outside of the formal court system must still be accorded property rights.¹⁰³ The CEDAW Committee has also expressed concern over the laws of countries such as Rwanda and Mauritius, which only recognise civil monogamous marriages, leaving women's property rights in *de facto* unions or polygamous marriages unprotected.¹⁰⁴ This is linked to the issue of inadequate legal and institutional frameworks for the registration of all marriages. The lack of registration and documentation leaves women's claims to property precarious, a matter that both the African Commission and CEDAW Committee have raised.¹⁰⁵

Some states have produced draft legislation or tried to codify customary law and align it with the constitution, but these law reform efforts have been pending for an inordinately long time.¹⁰⁶

While the Commission in General Comment 6 is keen on ensuring that women's indirect and non-financial contribution is considered in determining marital property rights,¹⁰⁷ it is also concerned that a narrow mathematical focus on computing contribution is likely to result in inequitable outcomes. It was this concern that motivated a constitutional petition in 2016 by the Kenya chapter of the International Federation of Women Lawyers (FIDA-Kenya), assisted by the Initiative for Strategic Litigation in Africa. FIDA-Kenya challenged section 7 of the Matrimonial Property Act. The section states that unless the parties to a marriage have an agreement to the contrary, the division of matrimonial property upon divorce shall be based on each party's contribution.¹⁰⁸

103 CEDAW Committee Concluding Observations Ghana (2014) para 41(e).

104 CEDAW Committee Concluding Observations Rwanda (2017) para 50; Concluding Observations on the 8th Periodic Report of Mauritius, Committee on Elimination of all Forms of Discrimination against Women (14 November 2018) UN Doc CEDAW/C/MUS/CO/8 (2018) para 38.

105 The issue of weak systems for universal registration of marriage is discussed in C Musembi 'Article 6' in this volume. See Concluding Observations on the 2nd and 3rd Periodic Reports of Botswana 2011-2015 on implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 63rd ordinary session (24 October- 13 November 2018); African Commission Concluding Observations Eswatini (2022). See also CEDAW Committee General Recommendation 29 (n 19) paras 25, 26 & 30; CEDAW Committee Concluding Observations Gabon (2015) para 44(d); Concluding Observations on the 4th Periodic Report of Côte d'Ivoire, Committee on Elimination of all Forms of Discrimination against Women (30 July 2019) UN Doc CEDAW/C/CIV/CO/4 (2019) para 51; CEDAW Committee Concluding Observations Gambia (2015) para 49; CEDAW Committee Concluding Observations Ghana (2014) para 40; Concluding Observations on the 6th Periodic Report of Zimbabwe, Committee on Elimination of all Forms of Discrimination against Women (10 March 2020), UN Doc CEDAW/C/ZWE/CO/6 (2020) para 50.

106 Examples include Botswana (See African Commission Concluding Observations Botswana (2015)); Central African Republic (See CEDAW Committee Concluding Observations Central African Republic (2014) para 45(a)); Uganda, whose Marriage and Divorce Bill had been pending for 15 years as of 2015 (See Concluding Observations on the 5th Periodic Report of Uganda 2010-2012 on implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 56th ordinary session (21 April-7 May 2015); Burundi, whose draft legislation had been pending since 2009 (See Concluding Observations on the combined 5th and 6th Periodic Reports of Burundi, Committee on Elimination of all Forms of Discrimination against Women (25 November 2016) UN Doc CEDAW/C/BDI/CO/5-6 (2016) para 50. CEDAW castigated Ghana in 2014 over its Property Rights of Spouses Bill, pending since 2009 on account of disagreements as to whether it should apply to cohabitation unions (See Concluding Observations on the combined 6th and 7th Periodic Reports of Ghana, Committee on Elimination of all Forms of Discrimination against Women (14 November 2014) UN Doc CEDAW/C/GHA/CO/6-7 (2014) para 40. Tanzania indicated in its report to the CEDAW Committee in 2008 that it had proposed reforms to the Law of Marriage Act. This is indicated again in the 2016 report (See Concluding Observations on the combined 7th and 8th Periodic Reports of Tanzania, Committee on Elimination of all Forms of Discrimination against Women (9 March 2016) UN Doc CEDAW/C/TZA/CO/7-8 (2016) paras 48-50; Chad's long-delayed efforts to codify over 200 customary laws, harmonise them with civil law and align them with the constitution (See CEDAW Committee Concluding Observations Chad (2011) para 12); Gabon's revisions to its Civil Code have been pending since 1997 (See CEDAW Committee Concluding Observations Gabon (2015) para 44.

107 The CEDAW Committee raised this concern in General Recommendation 21 (n 21) para 32.

108 See *Federation of Women Lawyers (Kenya) v Attorney General*, Petition.164B of 2016, High Court, Constitutional and Human Rights Division, eKLR 2018 (*FIDA Matrimonial Property Petition*).

Citing prior cases that showed that courts tend to place greater weight on financial contribution than contribution in kind, FIDA argued that a marital property regime that assigned rights based on strict proof of contribution would disadvantage wives and contravene the constitutional principle of equality. In addition, it fell short of the constitutional obligation to eliminate gender discrimination in the laws, customs and practices relating to land and property, which also offended the Maputo Protocol.¹⁰⁹ FIDA lost the petition. The court concluded that since the statute laid out clearly what counts as non-monetary contribution, there was significant mitigation of any bias that might operate to disadvantage wives. According to the Court, the demands of equality were met by treating monetary and non-monetary contributions equally.¹¹⁰ As Kenyan law now stands, contribution, whether monetary or non-monetary, must be proven. A rebuttable presumption of equal entitlement only applies to property jointly registered.¹¹¹

Uganda has adopted a similar approach, namely, one that bases marital property rights on assessment of contribution, even citing Kenyan Court of Appeal cases in support of this position.¹¹²

The Gambian case of *Matty Faye*¹¹³ does not cite the Maputo Protocol, but it offers insight into the ‘equity v equality’ debate. A wife quantified her investment in developing an unfinished building built on land purchased by her husband, registered in his name and serving as the matrimonial home. The court did not have before it a full valuation of the property since the husband did not provide the purchase price of the land.¹¹⁴ Her quantified contribution established her beneficial interest in the property. Based on that, the appeal court applied the English maxim that ‘equity is equality’. The result was that the court awarded the parties 50 per cent each of the (undetermined) total value of the property, reversing the judgment of the lower court that had awarded the wife half the value of her proven improvements on the land rather than half of the total value of the property.¹¹⁵

Essentially, the Gambian appeal court took the position that FIDA would have preferred, namely, rather than base the division on strict proof of contribution only, where property is registered in the name of one spouse, as long as there is established a beneficial interest in favour of the other spouse on the basis of contribution (monetary or non-monetary), then a rebuttable presumption of equal shares kicks in. The evidentiary burden, therefore, shifts to the title-holding spouse and can only be discharged by specific proof of contrary intention. This would make it easier for women whose claims invariably are unregistered.

Malawi’s Marriage, Divorce and Family Relations Act of 2015 takes a different approach. Contribution is simply one of a wide range of factors that a court will take into account so as to ‘equitably divide and re-allocate property’ among the parties. Other factors include the parties’ income, assets, financial needs and obligations, age, health, and the standard of living that the family had during the subsistence of the marriage.¹¹⁶

109 *FIDA Matrimonial Property Petition* (n 108), the petition cited art 7 of the Maputo Protocol, as well as arts 15 & 16 of CEDAW, art 22 of the International Covenant on Civil and Political Rights (ICCPR), and art 3 of the African Charter.

110 *FIDA Matrimonial Property Petition* paras 45 & 61. At the CEDAW Committee’s consideration of Kenya’s Periodic Report in 2017, it expressed concern about the requirement to prove contribution and quantify non-monetary contribution. See Concluding Observations on the 8th Periodic Report of Kenya, Committee on Elimination of all Forms of Discrimination against Women (22 November 2017) UN Doc CEDAW/C/KEN/CO/8 (2017) para 50(b).

111 Section 14(b) Matrimonial Property Act 2013. This position was confirmed in the case of *Joseph Ombogi Ogentoto v Martha Ogentoto*, Supreme Court of Kenya Petition 11/2020 (decided 27 January 2023).

112 See *Ambayou Joseph Waigo v Aserua Jackline*, Civil Appeal 0100 of 2015 (decided 15 November 2022) available at <https://ulii.org/ug/judgment/court-appeal-uganda/2022/272> (accessed 21 April 2023).

113 *Matty Faye v Dawda Jawara*, Civil Appeal No. GCA 27/2013 (*Matty Faye*).

114 *Matty Faye* (n 113) p 12.

115 *Matty Faye* (n 113) p 16, 19-21.

116 Section 74, Marriage, Divorce and Family Relations Act of 2015 (Malawi).

7 Conclusion

Destitution and estrangement from one's children should not be accepted as an inevitable (even deserved) consequence of divorce for women. Article 7 of the Maputo Protocol, read with article 6, is intended to mitigate the uncertainty around relationships and entitlements at the point of relationship breakdown so as to change this fatalistic attitude.

This chapter has shown that states could do more to ease access to adjudicative forums, whether judicial, quasi-judicial or traditional, subjecting the processes and outcomes to constitutional standards of equality and non-discrimination. The area of marital and family dispute resolution is addressed largely through customary, religious and other alternative dispute resolution forums. The African Commission could offer guidance through deeper engagement with states and a general comment on interfacing these forums with judicial institutions to ensure effective and accountable integration of human rights principles. Sub-regional bodies such as the Southern African Development Community Parliamentary Forum and the Economic Community of West African States (ECOWAS) Parliament could propose a model law in this area, as the former has so expertly done on the eradication of child marriage.¹¹⁷

How the Protocol's provisions on 'equitable sharing' and 'reciprocal parental rights and responsibilities' are to sit in relation to national constitutional standards that refer explicitly to equality is a matter that has not been subjected to interpretation by the African Court, the African Commission or other regional forums such as the ECOWAS Community Court of Justice. The regional human rights forums need to move the jurisprudence in the clear and unequivocal direction of substantive equality. More opportunities are needed in order for the jurisprudence of the treaty to develop coherently and take concrete form in the laws and judicial decisions of state parties. Although some landmark cases on marital property in national courts refer to the Protocol and help to advance its jurisprudence,¹¹⁸ there are also missed opportunities.¹¹⁹ This underlines the crucial role of civil society mobilisation, bringing together researchers who generate the necessary data and public interest litigators who advocate for interpretation and implantation of the Protocol's jurisprudence through national courts.

117 See SADC Parliamentary Forum, *SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage* (2018), <https://www.girlsnotbrides.org/documents/484/MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf> (accessed 20 April 2023).

118 See eg FIDA *Matrimonial Property Petition* (n 108).

119 See eg, marital property cases which made no reference to the Protocol: *Matty Faye, Makhosazane Eunice Sacolo (nee Dlamini) and Another v Jukhi Justice Sacolo and 2 Others* (1403/16) [2019] SZHC (166), decided 30 August 2019 (*Sacolo*). *Sacolo* resulted in the abolition of marital power in Eswatini.

Article 8

Access to justice and equal protection before the law

Annika Rudman

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- (a) effective access by women to judicial and legal services, including legal aid;
- (b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- (c) the establishment of adequate educational and other appropriate structures with particular

attention to women and to sensitise everyone to the rights of women;

- (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- (e) that women are represented equally in the judiciary and law enforcement organs;
- (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

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1 Introduction

Women's access to justice, their equal standing before the law and their right to equal protection of the law are critical parts of safeguarding any and all of their human rights.¹ When judicial institutions and the law they apply are gender responsive, they encourage women to claim their economic, social, cultural, civil and political rights.² However, when they are not gender responsive, they may further

1 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 33: on women's access to justice, 23 July 2015, CEDAW/C/GC/33 (CEDAW Committee General Recommendation 33) para 1.

2 UN Women Fact Sheet on the importance of women's access to justice and family law, <https://www.unssc.org/sites/default/files/UNWomenFactSheet.pdf> (accessed 23 June 2023).

marginalise those already vulnerable.³ As is highlighted throughout this chapter, although laws are essential in setting normative standards, such reform in isolation is often not enough to bring about social change. To be able to rely on the law, women need access to justice institutions which they often lack due to cost, location, and stigma.⁴ Moreover, justice actors, such as the police, prosecutors, and judges, more often than not reflect the gender stereotypes and biases of their societies at large.

Article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) combines three interrelated rights: 'equality before the law', 'equal protection and benefit of the law' and 'women's access to justice'. These rights underpin the entire Protocol and form an essential part of the principle of the rule of law and good governance.⁵

Article 8 reinforces the obligation of each member state to guarantee that a suitable system is in place to ensure every woman all their rights. It equally reinforces the obligation to guarantee that an appropriate system is in place to enable each woman to challenge violations of their rights.⁶ Article 8 furthermore refers to the many elements that make up an enabling environment that is the *sine qua non* condition for women to access justice and effectively experience equal protection of the law. In this regard, article 8 features inter-linked, distinct, and diverse issues such as aspects of fair trial rights, educational and sensitisation measures, equal representation, and obligations to reform the law.

The aim of this chapter is to provide a holistic analysis of article 8. To attend to the many facets of this article this chapter is divided into six sections. After this introduction, the chapter explores the rich drafting history of article 8. Section 3 then proceeds to analyse the different legal concepts brought together under article 8 and highlights the linkages between article 8 and other treaty provisions in the Protocol and in other human rights instruments. Section 4 examines the nature and scope of the obligations imposed on states under article 8, after which the discussion shifts to the measures that states have employed to varying degrees to implement the article. In the conclusion, the discussion assesses the challenges to implementing article 8, the development of regional jurisprudence related to article 8 and provides some recommendations to state and non-state actors.

2 Drafting history

The origin of article 8 is found in the Nouakchott Draft, which drew from article 7 of the African Charter on Human and Peoples' Rights (African Charter).⁷ Article 9 of the Nouakchott Draft stipulates that state parties must 'take all appropriate measures to facilitate the access of women to judicial services' and 'put in place adequate structures to inform women and make them aware of their rights'.

In the following draft, the Kigali Draft, a reference to article 25 of the African Charter was inserted alongside the reference to article 7.⁸ A heading was also introduced, referring to 'Information and Legal Aid'. In terms of the 'access' right, the reference to 'judicial' was dropped, and a right to legal aid was inserted. The latter reference is arguably related to the adoption of the Beijing Platform for Action

3 UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, para 35.

4 UN Women 'Families in a changing world' Progress of the World's Women 2019-2020 <https://www.unwomen.org/en/digital-library/progress-of-the-worlds-women> (accessed 23 June 2023) 80.

5 CEDAW Committee General Recommendation 33 (n 1) para 1.

6 F Banda 'Blazing a trail: the African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 84.

7 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

8 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft). The numbering of the art changed from 9 to 10.

(Beijing Platform), four years prior, stipulating that states must '[e]nsure access to free or low-cost legal services, including legal literacy, especially designed to reach women living in poverty'.⁹

In the process that followed, the African Commission on Human and Peoples' Rights (African Commission) was tasked to consider a parallel development that was underway, the drafting of the Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls.¹⁰ The OAU Convention on Harmful Practices was later incorporated into the Maputo Protocol. In the merger, it made an important contribution to the 'educational and sensitisation' aspects of article 8 by specifically referring to education campaigns involving those who administer and enforce the law.¹¹

The Final Draft formed the basis for the further development of the Maputo Protocol.¹² It received input from the Meeting of Experts in 2001, comments by the Office of the Legal Counsel in 2002 and the NGO Forum in 2003. In the Final Draft, the title was kept, while a first paragraph was added, closely resembling the right set out in article 7(1) of the African Charter, which refers to the right of women to 'have their cause heard'. Sub-section (a) was revised to refer to 'legal aid services' while a new sub-section (b) was inserted to support 'local, national, regional and continental initiatives directed at providing women access to legal aid'.

At the Meeting of Experts in 2001, the reference to 'women having their cause heard' and the new sub-section (b) were adopted without changes.¹³ Sub-section (a) was amended to include 'equal access' to legal aid and sub-section (c) was amended to widen the scope of the structures involved in sensitisation.¹⁴ The most important change, however, was the addition of a new sub-section (d) as a direct result of the alignment of the Maputo Protocol with the OAU Convention on Harmful Practices, as mentioned above. This section set out that states must 'ensure that law enforcement organs at all levels are aware of gender equality and women's human rights and shall enforce the law in a gender responsive manner'.¹⁵ Although this addition did not elaborate on the different law enforcement organs, it did, as a first step, acknowledge the essential principle of the Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women.¹⁶ It stipulates that '[t]here is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws'.¹⁷

9 Article 61(a).

10 Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices). See also R Murray 'Women's rights and the organisation of African Unity and African Union: the Protocol on the Rights of Women in Africa' in D Buss & A Manji (eds) *International law modern feminist approaches* (2005) 262.

11 Article 2(4). Art 3 furthermore referred to 'all necessary measures to create public awareness regarding harmful practices'.

12 Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

13 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts). 13.

14 Report of the Meeting of Experts (n 13) 13.

15 As above.

16 1994 (Victoria Falls Declaration), reprinted in C Heyns & M van der Linde 'Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women' in C Heyns (ed) *Human rights law in Africa 1999* (2002) 387-388.

17 Victoria Falls Declaration para 15.

In 2003, the NGO Forum provided further feedback on the Final Draft.¹⁸ Importantly, substantial revisions were proposed in the Comments by the NGO Forum to ensure that article 8 fulfilled existing human rights standards. A new heading was suggested, referring to '[a]ccess to justice and equal protection of the law'.¹⁹ This change shaped the scope of article 8 going forward as the focus shifted away from 'information and education' towards the broader 'access to justice and equality before the law'. It was furthermore suggested that the main provision be enlarged to encapsulate three interrelated concepts: 'equality under the law', 'the right of women to have their cause heard', and 'equal protection of the law'.²⁰

In light of the suggested revisions to the opening paragraph, the language of sub-sections (a) to (d) was revised.²¹ In addition, two new sub-sections were proposed. First, sub-section (e) containing a requirement that women be equally represented with men in 'judicial and law enforcement institutions'. Second, with reference to article 2(f) and (g) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), an obligation on states to 'reform ... existing discriminatory customary law to ensure respect for fundamental women's rights particularly the right to equality'.²²

The final version of the Protocol was adopted by the Ministerial meeting in March 2003.²³ In the Addis Ababa Draft the right of women to have their cause heard was removed; and a vital change was made to sub-section (f) replacing the reference to 'customary laws' with 'existing discriminatory laws and practices' substantially enlarging states' obligation to reform all domestic laws.

In summary, the various rights that eventually found their way into article 8 substantially differ from the point of origin in the Nouakchott Draft. What started out as a right to access judicial services and the right to be informed about relevant rights, transformed into a complex web of access, equality, representation, and educational rights. Importantly, this provision lost its general reference to the 'right to information' but gained a strong stance on access to judicial and legal services, including legal aid. It was, as highlighted, significantly influenced by convergence with the OAU process of developing the OAU Convention on Harmful Practices, which resulted in the comprehensive reference to the reform of discriminatory laws and practices.

3 Concepts and definitions

Article 8 consists of a main paragraph that sets out the equality standard and six sub-paragraphs referring to access to justice, the support of initiatives providing women's access to legal services, education about the law, enforcement of the law, reform of the law and representation in organs enforcing the law. The following conceptual analysis takes place under two separate headings referring to the main concepts involved under article 8, namely: 'equality before the law and equal protection

18 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003(Comments by the NGO Forum).

19 Comments by the NGO Forum (n 18) 9.

20 As above.

21 Comments by the NGO Forum (n 18) 10. Most importantly sub-sec (a) was rephrased to include 'effective access to judicial and legal services, including legal information and legal aid services'.

22 Comments by the NGO Forum (n 18) 10.

23 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

and benefit of the law' and 'access to justice'. The six sub-paragraphs (a) to (f) are then discussed under section 5 in relation to the state obligations expressed under each provision.

3.1 Equality before the law and equal protection and benefit of the law

3.1.1 Formal versus transformative substantive equality

In its generic form, equality has been referred to by Holtmaat as a 'treacherously simple concept'.²⁴ Found in articles 7 and 8 of the Universal Declaration of Human Rights (Universal Declaration), equality, together with the attendant concept of non-discrimination, found in article 2 of the Universal Declaration, forms a progressive, universal, moral, and legal principle.²⁵ However, although referred to as a progressive principle, equality in its formalistic form, arguably does very little to change the position of women in an overwhelmingly patriarchal context.

At a glance, the wording of the main paragraph of article 8 may create the impression that it protects formal, rather than substantial equality as 'equality before the law' implies an absence of special privileges that favour, in this context, men over women; while the expression 'equal protection of the law' suggests that there should be equality of treatment of women and men in the application of the law. On the face of it, both concepts draw on the 'sameness and difference' approach used to establish formal equality.²⁶ This impression is further supported by the definition provided by the African Commission under article 3 of the African Charter.²⁷ In this regard, the Commission has defined the principle of 'equality before the law' as 'the right by all to equal treatment under similar conditions' and 'equal protection of the law' as 'no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances'.²⁸ As suggested by Chekera, the jurisprudence of the African Commission has predominantly 'favoured the formal approach to equality', where several communications have consistently referred to equality as requiring sameness in treatment.²⁹

24 R Holtmaat 'The Concept of Discrimination' Academy of European Law Conference Paper, 2004 http://www.era-comm.eu/oldoku/Adiskri/02_Key_concepts/2004_Holtmaat_EN.pdf (accessed 23 June 2023).

25 CEDAW Committee General Recommendation 33 (n 1) para 6. See also arts 5 UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 2 and 14 International Covenant on Civil and Political Rights (ICCPR), 2(2) and 3 International Covenant on Economic, Social and Cultural Rights (ICESCR), 14 European Convention on Human Rights (ECHR), Protocol 12 ECHR and art 24 American Convention on Human Rights.

26 For a further discussion on the 'sameness and difference' approach see C MacKinnon 'Difference and dominance: on sex discrimination' in K Weisberg (ed) *Feminist legal theory: foundations* (1993) 276-287. See also C Littleton 'Reconstruction sexual equality' in K Weisberg (ed) *Feminist legal theory: foundations* (1993) 248-263; and J Capps 'Pragmatism, feminism, and the sameness-difference' (1996) 32 *Transactions of the Charles S. Peirce Society* 1 65-105.

27 The main provision of art 8 of the Maputo Protocol is almost a verbatim recount of the contents in art 3 of the African Charter.

28 *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009) paras 96 & 99.

29 YT Chekera-Radu 'The relevance of substantive equality in the African regional human rights system's jurisprudence to women's land and property rights' (2017) 1 *African Human Rights Yearbook* 57. In *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v the Republic of Cameroon*, Communication 290/04, African Commission on Human and Peoples' Rights 25th Annual Activity Report (2019) para 187 the African Commission, with reference to *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples' Rights 57th Annual Activity Report (2016) the African Commission reaffirmed the basis upon which a successful claim may be made in respect of allegations of discrimination. In *Equality Now*, para 147, the Commission stated that '[t]he complainant must identify the comparator and show how the treatment complained of and that of the comparator are comparable' which is indicative of a formal approach to equality. The African Commission did recognise, in both cases, that difficulties may be encountered in the identification of comparators, and that therefore, there can be exceptions to the use of comparators. However, the exceptions to the use of comparators is arguably not analogous with a substantive approach to equality.

Reaching equality by treating like alike is, however, a contentious logic.³⁰ As questioned by Fredman, ‘when can we say that one person is so “like” another that they should be treated alike?’³¹ Moreover, although we might be able to agree on whether ‘two individuals are relevantly alike, we may still have doubts as to whether they should always be treated alike’.³² With regard to the rights of women, practice implies that equal treatment of men and women may, in reality, preserve inequalities.³³ Thus, as a contrast, the substantive call for equality is predicated on and illustrated by, the lived inequalities of women.³⁴ This refers to the formulation of norms themselves (promulgating and reforming the law), their application by judicial institutions and the context within which laws are formulated and applied.³⁵

As was highlighted above, the African Charter seemingly focuses on formal equality. Thus, as article 8 borrows from, and builds on, the approach of article 3, it is not too far fetched to conclude that it views equality in the same light. However, when considering the Maputo Protocol as a whole, together with the specific provisions in for example article 8, it is clear that both provision and treaty breaks away from a formalistic notion of equality. The Maputo Protocol neither treats women as if they are all in the same position in society to then proceed to outlaw all sex- and gender-based differentiation; nor does it translate existing interests into rights, risking the entrenchment of an unequal *status quo*.³⁶ Instead, the Maputo Protocol, including article 8, expressly seeks to address and overcome structural, social and economic, public and private inequalities of gender inherited from our patriarchal past. By dismantling the public and private divide in articles 1(j) and 4, by prescribing economic and welfare rights in article 13 and by applying an intersectional lens, throughout, recognising the implication of, for example, refugee status, age and disability, the Maputo Protocol consistently refers to a substantive approach to equality, not a formalist approach.

The African Commission, in General Comment 6, furthermore defines substantive equality, within the context of the Maputo Protocol as a form of equality that

requires the adoption of measures that go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and sociocultural impediments for equal enjoyment of rights; tackle stigma, prejudice and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law.³⁷

Although this definition was provided in relation to article 7(d) of the Maputo Protocol it is clear that this aptly describes the overall approach of the Maputo Protocol to achieve a transformed society for all.

Moreover, as can be deduced from the definition provided by the African Commission, the objective of the Maputo Protocol is arguably to transform women’s position in society; making transformation

30 S Fredman *Discrimination law* (2011) 1.

31 Fredman (n 30) 1.

32 Fredman (n 30) 2.

33 Fredman (n 30) 2.

34 C MacKinnon ‘Substantive equality revisited: a reply to Sandra Fredman’ (2016) 14 *International Journal of Constitutional Law* 739.

35 T Loenen ‘Towards a common standard of achievement? Developments in international equality law’ (2001) *Acta Juridica* 197.

36 C Albertyn ‘Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice’ (2018) 34 *South African Journal on Human Rights* 442.

37 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples’ Right on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (art 7(d)), adopted during the 27th extra ordinary session of the African Commission held in Banjul, The Gambia 4 March 2020, para 14.

an inherent part of the strive towards substantive equality. Goldblatt and Albertyn refer to the concept of ‘transformative, substantive equality’, which, although developed in the context of the South African Constitution, well describes the drive of the Maputo Protocol to change women’s lived realities. They understand ‘transformative, substantive equality’ to mean,

a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities [that] allow people to realise their full human potential within positive social relationships.³⁸

Transformative substantive equality thus requires a concern with ‘recognition, redistribution and redress, and an eradication of actual, “real-life” inequalities’.³⁹ By referring to, for example, ‘effective’ access to justice – contemplating the eradication of gendered stereotypes, resource allocation towards legal aid assistance and the sensitisation of ‘everyone’ to the rights of women article 8, in line with the approach of the Protocol at large, evidently addresses inequality in a transformative, substantive manner to target systemic forms of discrimination.

3.1.2 ‘Equality before the law’ and ‘equal protection and benefit of the law’

As alluded to above, various international human rights instruments incorporate and combine the terminology of ‘equality before the law’ and ‘equal protection of the law’.⁴⁰ Although distinct in their application, these two phrases have been combined over time to define the legal guarantees of equality in domestic and international law.⁴¹ These phrases are arguably closely related, yet different in their application.

‘Equality before the law’ signifies that every person must be subject to one system of laws, have equal access to the same adjudicatory bodies and have the right to non-discriminatory administration of justice.⁴² As alluded to above, this concept is intimately connected to the principle of non-discrimination which in the context of article 8 especially refers to the judiciary and all related law enforcement organs. To capture the meaning of ‘equality before the law’, it is important, as Goonesekere notes, to understand this concept in the context of its evolving meaning.⁴³ In the context of article 8, this refers to the state’s obligation to achieve substantive equality by equipping law enforcement officials with skills to efficiently interpret and enforce women’s rights.⁴⁴

The ‘equal protection of the law’ is arguably a further expansion of the concept of ‘equality before the law’ as the scope of the former terminology is wider. ‘Equal protection of the law’ views the substantive content of law from the perspectives of the principles of equality and non-discrimination. It is the obligation of all member states, as is further discussed under section 5 below, to guarantee that all laws abide by the principles of equality, non-discrimination, and non-arbitrariness; thus, affording equal protection to everyone through the relevant legal system.

38 C Albertyn & B Goldblatt ‘Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality’ (1998) 14 *South African Journal on Human Rights* 249.

39 Albertyn & Goldblatt (n 38) 442.

40 See also arts 5 CERD, 2 and 14 ICCPR, 2(2) and 3 ICESCR, 14 ECHR, Protocol 12 ECHR and art 24 ACHR.

41 For a discussion on the constitutional protection of these rights see 5.1.

42 S Goonesekere ‘Article 15’ in M Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* 388.

43 S Goonesekere ‘Article 15’ in Freeman et al (n 42) 388.

44 See 5.3.

Furthermore, the addition of ‘equal benefit of the law’ in article 8 closely resembles the construction of the equality clauses in the South African and Canadian Constitutions.⁴⁵ The outcome of this addition is not only that law which prohibits, protects, or regulates activities must be equal in their application, those that confer benefits must do so equally.

3.1.3 ‘Women’ and ‘men’

The reference to ‘women’ and ‘men’, in the main provision of article 8 identifies the position and treatment of men and women as the relative points of comparison in determining equal treatment. With reference to article 3 of the African Charter, the Commission has determined that the ‘principle of “equal protection” ... places all men and women on an equal footing before the law’, and that ‘all men and women are entitled to equal protection against any discrimination and against any incitement to such discrimination’.⁴⁶ However, the reference to ‘women’ and ‘men’ gives little guidance regarding the far more complex aspects of determining maleness and femaleness. The reference to ‘persons of the female gender’ not ‘persons of the female sex’ in article 1(k) of the Maputo Protocol further highlights these complexities. Considering the fact that not all persons of the female gender carry biological female sex markers and the fact that the term ‘men’ is left undefined in the Maputo Protocol makes the comparison between the position of ‘women’ and ‘men’ complex.⁴⁷

Furthermore, article 8 does not account for intersectional discrimination based on, for example, sexuality, gender identity, race, or class. In this regard, it is helpful to scrutinise the equality continuum: ‘women’ and ‘men’ with reference to for example, the prohibited grounds in the African Charter, the ICCPR and the intersecting grounds that are pointed out in the Maputo Protocol itself such as age, refugee status, disability, widowhood, pregnancy, being a nursing mother, among others.

3.2 Access to justice

Article 8 of the Maputo Protocol refers to ‘access to justice’ in its title and in sub-sections (a) and (b). It refers to ‘effective access’ to ‘judicial and legal services, including legal aid’ as well as to support any local, regional, or continental initiatives that provide women with access to such services. In this regard, it is closely related to article 25 of the Maputo Protocol which provides for the right to a remedy.⁴⁸

The UNDP defines ‘access to justice’ as, [t]he ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’.⁴⁹ As a legal concept, access to justice comprises legal protection, legal awareness, legal aid and counsel, appropriate adjudication, enforcement of the law and relevant judgments, reparation and oversight

45 Section 9(1) of the Constitution of the Republic of South Africa, 1996; sec 15(1) of the Constitution of Canada, 1867 with amendment through 2011.

46 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* Communication 323/06 African Commission on Human and Peoples’ Rights, Combined 32nd and 33rd Annual Activity Report (2013) para 176.

47 T Snyman & A Rudman ‘Protecting transgender women within the African human rights system’ (2022) *Special Edition Stellenbosch Law Review* 67.

48 Art 25 covers both the aspects of a procedural and substantial remedy alongside the right to access information about the remedies guaranteed. Access to justice can be viewed as a procedural aspect of the right to an effective remedy, see United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law, Resolution adopted by the General Assembly on 16 December 2005, UN Doc A/RES/60/14, principle 12.

49 United Nations Development Programme (UNDP), Programming for Justice: Access for All – A Practitioner’s Guide to Human Rights-Based Approach to Access to Justice, <https://www.undp.org/asia-pacific/publications/programming-justice-access-all> (accessed 23 June 2023). The reference to ‘remedy’ in this definition also assists in relating this aspect of art 8 to art 25 of the Maputo Protocol proscribing the right to a remedy both as a procedural and material right.

by civil society organisations (CSOs).⁵⁰ As is further addressed in relation to the state obligations regarding access to justice, there is no such access when women fear the system; or where the system is far removed from women's lived realities, costly, weak, or corrupt.

A cornerstone of international human rights law, access to justice is one of the main components of the rule of law, a target of SDG 16⁵¹ and a principle set to guide all functions and processes of the African Union (AU).⁵² Women's access to justice is consequently promoted in the AU Agenda 2063: The Africa we want.⁵³ It moreover forms part of customary international law and can be characterised as a *jus cogens* norm.⁵⁴ As noted by Lawson et al, what distinguishes access to justice from any other human right is its 'transversal and interdependent character in relation to other rights, especially socio-economic rights, linked to the reduction and alleviation of poverty, gender inequality and other deprivations'.⁵⁵

As expressed by the CEDAW Committee, access to justice is 'indispensable to the realisation of [all] women's rights'.⁵⁶ As further stated by the CEDAW Committee in General Recommendation 21, 'when countries limit a woman's legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women's ability to provide for themselves and their dependants'.⁵⁷

Women's access to justice is furthermore specifically mentioned in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,⁵⁸ where the African Commission establishes that the equality of access by women and men to judicial institutions and equality before the law in any legal proceedings is a vital part of a fair hearing.⁵⁹

4 Nature and scope of state obligations

While the core concepts included under article 8 are set out in the main provision, as discussed in detail under section 3, the subsequent paragraphs (a) to (f) emphasise the many obligations resting on states in effecting access to justice, equality before the law and equal protection and benefit of the law. For ease of reference, the following sub-sections discuss these obligations together with references to related provisions in the Maputo Protocol and other international treaties under the headings of 'equality before the law and equal protection and benefit of the law', 'access to justice', 'education and sensitisation' and 'representation'. The discussion on state obligations related to 'access to justice'

50 UNDP Programming for Justice (n 49) 115.

51 Target 16.3: 'Promote the rule of law at the national and international levels and ensure equal access to justice for all'.

52 Article 4(m) of the Constitutive Act of the African Union.

53 Aspirations 3 and 6, see further the AU Strategy for Gender Equality and Women's Empowerment 2018-2028. For further discussion see N Ntlama-Makhanya & N Lubisi-Bizani 'The "Africa we want" in the African Union's Agenda 2063 on the realisation of women's human rights to access to justice' (2021) 21 *African Human Rights Law Journal* 292-293.

54 D Lawson, A Dubin, L Mwambene & B Woldemichael 'Engendering access to justice for the poorest and most vulnerable in Sub-Saharan Africa' in D Lawson, A Dubin, & L Mwambene (eds) *Gender, poverty and access to justice: policy implementation for sub-Saharan Africa* (2019) 5; F Francioni 'The rights to access to justice under customary international law' in F Francioni (ed) *Access to justice as a human right* (2007).

55 Lawson et al (n 54) 3. See also *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* Communication 155/96 African Commission on Human and Peoples' Rights, Fifteenth Annual Activity Report (2001) para 61.

56 CEDAW Committee General Recommendation 33 (n 1) para 1.

57 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 21 on Equality in marriage and family relations, 1994, A/49/38.

58 African Commission DOC/OS(XXX)247 (Principles and Guidelines on the Right to a Fair Trial).

59 Principles and Guidelines on the Right to a Fair Trial (n 58) para 2(c). As further supported by African Commission Resolution 283 on the Situation of Women and Children in Armed Conflict, ACHPR/Res.283(LV)2014 (Resolution 283).

specifically highlights the impact of judicial stereotyping on access to justice and presents some specific state obligations that refer to access to justice in cases of sexual and gender-based violence (SGBV), an aspect of the right to access to justice that has been repeatedly singled out by the international community as key to women's equality.

4.1 Equality before the law and equal protection and benefit of the law

In terms of state obligations article 8 bears strong resemblance to articles 3 of the African Charter, 15(1) of CEDAW, 26 of the ICCPR and the main provision of article 7 of the SADC Protocol on Gender and Development.⁶⁰ As noted by the African Court on Human and Peoples' Rights (African Court) in *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire*,⁶¹ article 26 of the ICCPR contains the same obligations as those stipulated in article 3 of the Charter, but it is 'much more detailed'.⁶² In contrast to articles 3 of the Charter, 15(1) of CEDAW and 8 of the Maputo Protocol, article 26 of the ICCPR adds the obligation that, 'the law [must] prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. In this regard, article 26 much resembles the language used in the Maputo Protocol, which routinely refers to the obligation to ensure 'effective' protection against discrimination.⁶³ Read in this context, article 8 requires all domestic law, including customary and religious law, to be applied equally and have an equal outcome in relation to men and women, supporting substantive equality, as addressed above.⁶⁴

An important aspect of the 'equal protection and benefit of the law' provision is the obligation to reform or repeal laws that are discriminatory against women. As an example, the African Commission has called on all state parties to reform legislation to ensure that 'histories of abuse are considered as a mitigating factor, including by codifying gender specific defences and mitigating factors' with regard to women facing the death penalty.⁶⁵

Article 8(f) of the Maputo Protocol specifically refers to the obligation to 'reform ... existing discriminatory laws and practices'. The reference to 'existing' is redundant, but the reference to 'reform' [a change to improve] both discriminatory law and practices is of interest. On the one hand, it supports the obligation to 'modify' harmful social and cultural patterns.⁶⁶ On the other, it does not go as far as the obligation under article 5 to 'prohibit' and 'condemn' harmful practices and to 'take all necessary legislative and other measures to eliminate such practices'.⁶⁷ In this regard, it is of interest to note, in comparison, the language of article 2(f) of CEDAW, which arguably fulfils the combined obligations to 'modify', 'prohibit' and 'condemn', as equally part of the obligations under CEDAW.

60 For a comparison between arts 7 of the SADC Protocol on Gender and Development and 8 of the Maputo Protocol see further F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 26-27.

61 (merits) 2016, 1 AfCLR 668.

62 Para 145.

63 See eg arts 2(1)(b), 8 (a) & (d) (2). It could also be said that its practical application has the same effects as combining arts 2 & 3 of the African Charter.

64 See sec 3 I 1.

65 African Commission Resolution 483 on the need for better protection of women sentenced to death in Africa, ACHPR/Res.483 (EXT.OS/XXXIII) 2021 (Resolution 483).

66 Article 2(2) of the Maputo Protocol.

67 See also arts 21 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) and 5(a) of CEDAW.

In *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali (APDF)*⁶⁸ the African Court provided further insights into women's right to equal protection of the law. The litigants, in this case, approached the African Court, claiming that sections of Mali's revised Family Code violated the Maputo Protocol and CEDAW.⁶⁹ Article 8 was not specifically referenced in *APDF*. However, the Court presented three conclusions relevant to the analysis of the obligations in article 8. First, the African Court was prepared to analyse the Code from an equality perspective even in the absence of a specific complainant injured by specific application of the code. The applicants, in this case, did not bring the case on behalf of a specific victim or victims; but rather put forward an argument based on the content of the law and the probable discriminatory outcomes. Second, the African Court, with respect to the law, found that the provisions on age, consent and inheritance were discriminatory as the law maintained 'discriminatory practices which undermine the rights of women'.⁷⁰ Finally, the Court prescribed re-socialisation through education as a remedy to the violations it found, similar to the obligation in article 8(c).⁷¹

4.2 Access to justice

As mentioned above, the Principles and Guidelines on the Rights to a Fair Trial indicate that states are required to take special measures to guarantee that women have access to judicial facilities.⁷² The Commentary to the Bangalore Principles of Judicial Conduct in addition points out the role of the judge in ensuring that all courts offer equal access to men and women by avoiding the use of judicial stereotypes.⁷³ In formulating its views on the definition of women's access to justice, the CEDAW Committee refers to articles 2(c), 3, 5(a) and 15 of CEDAW, with a further reference to the obligation to guarantee that women have access to information about their rights and the available remedies.⁷⁴ It also includes access to 'competent, gender sensitive dispute resolution systems' together with 'equal access to effective and timely remedies'.⁷⁵ As spelt out by the African Commission, in relation to SGBV,

fair and effective procedures and mechanisms must be established and be accessible to women who have been subjected to violence to enable them to file criminal complaints and to obtain other redress for the proper investigation of the violence suffered, to obtain restitution or reparation and to prevent further violence.⁷⁶

It is clear from the statements by the CEDAW Committee and the African Commission that the concept of women's access to justice is a complex, multidimensional legal concept that not only guarantees all other rights of women, but also places unique and comprehensive obligations on state parties. As concisely described by the CEDAW Committee, the right to access to justice consists of the obligation to ensure 'justiciability', 'availability', 'accessibility', 'good quality', 'the provision of remedies for victims' and the 'accountability of justice systems'.⁷⁷ Access to justice is furthermore dependent on 'the independence, impartiality, integrity and credibility of the judiciary, the fight against impunity and

68 (merits) (2018) 2 AfCLR 380.

69 *APDF* (n 68) para 9.

70 *APDF* (n 68) para 124. See also *E.S. and S.C. v United Republic of Tanzania*, CEDAW Committee, Communication No 48/2013, CEDAW/C/60/D/48/2013, paras 3.5 and 7.9.

71 See further sec 3.3.

72 Principles and Guidelines on the Rights to a Fair Trial (n 58) para K(b).

73 United Nations Office on Drugs and Crime, 'Commentary on the Bangalore Principles of Judicial Conduct' (Bangalore Commentary) (2007) para 185. See also 4.2.1.

74 CEDAW Committee General Recommendation 33 (n 1) para 11.

75 CEDAW Committee General Recommendation 33 (n 1) para 11.

76 Principles and Guidelines on the Right to a Fair Trial (n 58) para P: Victims of Crime and Abuse of Power I; in terms of SGBV during conflict see Resolution 283 (n 59) para 1.

77 CEDAW Committee General Recommendation 33 (n 1) para 14.

corruption, and the equal participation of women in the judiciary'.⁷⁸ The latter is specifically referred to in sub-paragraph 8(e).⁷⁹

Moreover, resources are key to accessing justice. As concluded by the CEDAW Committee, '[a] crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law'.⁸⁰ Thus, legal aid and initiatives directed at supporting the provision of legal aid as stipulated in sub-sections (a) and (b) are critical to the overall access of women to justice.⁸¹

Moreover, access to justice also includes what the CEDAW Committee refers to as the '[g]ood quality of justice systems', which requires that 'all components of the system adhere to international standards of competence, efficiency, independence and impartiality'.⁸² It also, arguably, requires that women and men be equal before courts and tribunals, a provision which is not specifically provided for in the Maputo Protocol but which can be understood as part and parcel of the concept of 'equality before the law'.⁸³

Finally, the obligation to guarantee the right to access to justice extends to plural legal systems.⁸⁴ As plural legal systems include compounded sources of law, women are sometimes met with contradictory laws and procedures as they try to access justice.⁸⁵ As pointed out in *APDF*, one of the obstacles to women's equality before the law was that the Family Code enshrined religious and customary law as the applicable regime, by default, in matters of inheritance.⁸⁶ The Family Code stipulated that its provisions would only apply when

religion or custom ha[d] not been established in writing, by testimony, experience or by common knowledge or where the deceased, in his life time, ha[d] not manifested in writing or before witnesses his wish that his inheritance should be distributed otherwise.⁸⁷

Thus, in order for the Family Code to apply, a will must be drawn up in writing confirming the deviation from religious or customary rules on inheritance. Such a document would then have to be authenticated by a notary. However, as argued by the applicants, the majority of women in Mali lacked the capacity to use the services of a notary, and in addition there were only 40 notaries countrywide servicing a population of 15 million people.⁸⁸ Thus, as suggested by the applicants, a suitable remedy in this situation would be the obligation to develop a programme that would ensure that women in rural areas have access to a notary as a means to access justice.⁸⁹

78 CEDAW Committee General Recommendation 33 (n 1) para 1.

79 See further sec 4.4.

80 CEDAW Committee General Recommendation 33 (n 1) para 36.

81 See also art 7(1)(c) of the Charter, 14(3)(d) ICCPR and 17(2)(iii) of the African Children's Charter.

82 CEDAW Committee General Recommendation 33 (n 1) para 14(d).

83 See art 14(1) of the ICCPR. See also sec 3.1.2.

84 CEDAW Committee General Recommendation 33 (n 1) para 5.

85 As above.

86 *APDF* (n 68) para 96.

87 As above.

88 *APDF* (n 68) para 97.

89 *APDF* (n 68) para 16xii.

4.2.1 *Judicial stereotyping*

Patriarchal socio-legal contexts influence all societal systems, including the judiciary. As expressed by Pillay, notwithstanding the continuous struggle for women's right to equality, 'judicial processes worldwide are often shot through with harmful gender stereotypes', which results in the denial of access to justice for many women.⁹⁰ The effect of such judicial stereotyping is especially acute in cases of SGBV. As further stated by Pillay, '[j]udicial stereotyping is a common and pernicious barrier to [access to] justice, particularly for women victims and survivors of violence'.⁹¹

These stereotypes appear inside our courts, where gender biases by judges towards lawyers, as an example, include demeaning speech and gestures. For example, addressing woman lawyers as 'sweetie', 'honey', 'little girl', 'little sister' or point out their physical appearance or dress, which constitutes sexual harassment.⁹² Belittling conduct by a judge, with statements such as 'this pleading must have been prepared by a woman' undercuts the credibility of women as lawyers.⁹³ As further noted in the Bangalore Commentary, insensitive treatment of a woman litigant referring to her, for instance, as a 'stupid woman' affects her access to justice as well as all her other rights.

Similar to the Maputo Protocol, CEDAW contains state obligations to modify harmful social practices and stereotypes.⁹⁴ According to the CEDAW Committee, these obligations apply to all arms of government, including the judicial branch.⁹⁵ Cusack considers that the effect of this obligation is that judges must, 'refrain from stereotyping (obligation to respect)', 'ensure stereotyping does not infringe human rights (obligation to protect)' and 'ensure women can exercise and enjoy the right to be free from wrongful gender stereotyping (obligation to fulfil)'.⁹⁶ Moreover, in combatting judicial stereotypes, the CEDAW Committee has acknowledged that there is a tacit obligation in every substantive provision of CEDAW, including article 15(1), to address gender stereotyping.⁹⁷ Considering the close resemblance between the provisions in article 2(c), 5 and 15 of CEDAW and 2(2) and 8 of the Maputo Protocol, the same obligation would arguably rest on the state parties to the Maputo Protocol.

4.2.2 *Lack of access to justice in sexual and gender-based violence cases*

As acknowledged by Pillay, women subjected to SGBV face unique challenges in accessing justice.⁹⁸ As expressed by the Commission in its concluding observation on The Gambia, '[t]he huge under-reporting of gender-based violence cases including rape, trafficking and Female Genital Mutilation despite numerous sensitisation activities conducted', in combination with 'snail pace of prosecution and completion of the few reported cases due to insufficient evidence or non-cooperation by the victim and her family' is a cause of concern.⁹⁹ Moreover, as mentioned by Makunya, in the DRC, before

90 N Pillay 'Equality and justice in the courtroom', *Huffington Post*, 3 March 2014, https://www.huffpost.com/entry/equality-and-justice-in-t_b_4892624 (accessed 26 June 2023).

91 Pillay (n 90) as referenced in S Cusack 'Eliminating judicial stereotyping: equal access to justice for women in gender-based violence cases' OHCHR, 9 June 2014, <https://www.ohchr.org/Documents/Issues/Women/WRGS/StudyGenderStereotyping.doc> (accessed 26 June 2023) Preface ii.

92 Bangalore Commentary (n 73) para 185.

93 As above.

94 See arts 2(2), 4(d), 5 & 12(b) of the Maputo Protocol and 5(a) and 10(c) of CEDAW.

95 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28 (CEDAW Committee General Recommendation 28) para 39.

96 Cusack (n 91) 6.

97 CEDAW Committee General Recommendation 28 (n 95) para 7.

98 Pillay (n 90).

99 Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of The Gambia on

any court can enforce a judgment, including judgments related to SGBV cases, victims are required to pay 10 per cent of the total amount of compensation they have been awarded.¹⁰⁰ Therefore, laws that protect women against SGBV, appropriate and swift investigations, access to an appropriate, non-biased remedy, and the actual payment of fair compensation are key to achieving justice and reducing trauma in SGBV cases.¹⁰¹

On the regional level, the Economic Community of West African States Community Court of Justice (ECOWAS Court) has led the way in defining women's access to justice in matters relating to SGBV, detailing the relevant state obligations. Some of these obligations are arguably unique to the SGBV context. Others, however, are essential with regard to the general right of access to justice for women. In *Mary Sunday v The Federal Government of Nigeria*,¹⁰² the applicant specifically referenced article 8 of the Maputo Protocol, claiming that her right to an effective remedy had been violated because the state did not order an independent investigation into the acts of domestic violence she had suffered.¹⁰³ In its judgment, the ECOWAS Court held that there were major flaws in the investigation, as the suspect was never confronted nor questioned. The ECOWAS Court also stressed that the negligence experienced by Ms Sunday, where her docket was 'misplaced' on several occasions, impacted her rights under article 8. The court concluded that, on the part of the state, this was a gross misunderstanding of the right of access to a judge and thus a breach of the Maputo Protocol.¹⁰⁴

In *EI v The Federal Government of Nigeria*,¹⁰⁵ the Applicant had been raped. When the ECOWAS Court received the application in 2019, eight years after the assault, the accused was still in custody, but the trial had not been concluded.¹⁰⁶ The Applicant in this case, relied on articles 7 of the African Charter and 25 of the Maputo Protocol to argue her right to have her matter tried in a domestic court without delay. The state defended the long delay by arguing that 'court[s] are sometimes affected by either the transfer, retirement, elevation, removal or death of a trial judge of the particular case involved, with the attendant consequences of commencing the case afresh'.¹⁰⁷ In response to this defence, the ECOWAS Court concluded that the 'practice of delaying dispensation of justice for many years by national courts of member states on flimsy excuses fall short of acceptable international standards in the dispensation of justice'. The court went on to state that, 'to hold a case in perpetuity before a competent court of law without recourse to giving the victim a quick closure poses unnecessary anxiety on the victim as to whether they will get a fair trial and just remedy at the lengthy end of the trial'.¹⁰⁸

the Implementation of the African Charter on Human and Peoples' Rights (1994-2018) and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) (2005-2014) African Commission on Human and Peoples' Rights, adopted at its 31st extraordinary session held virtually 9-25 February 2021 (Concluding Observations The Gambia (2021).

100 TM Makunya 'Beyond legal measures: a review of the Democratic Republic of Congo's initial report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2023) 67(2) *Journal of African Law* 232.

101 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 35 on gender-based violence against women, updating General Recommendation 19, 26 July 2017, CEDAW/C/GC/35 (CEDAW Committee General Recommendation 35) paras 26(b) & 34(f).

102 *Mary Sunday v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/18 (17 May 2018).

103 Para 1. See also *Aminata Diantou Diane v Mali* Judgment No ECW/CCJ/JUD/14/18 (21 May 2018) for a reference to art 8 and the conclusion that the litigant had been denied access to justice, paras 37-45. Access to justice for women were further discussed by the ECOWAS Court in *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/CCJ/JUD/06/08 (27 October 2008); *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017).

104 *Mary Sunday* (n 102) para IV.

105 *EI v Nigeria* Judgment No ECW/CCJ/JUD/09/22 (25 April 2022) (*EI*).

106 *EI* (n 105) paras 17 & 76.

107 *EI* (n 105) para 26.

108 *EI* (n 105) para 89.

The regional jurisprudence contributes to the understanding, meaning, nature and scope of article 8 by providing insight into some of the major challenges women face in seeking justice; such as the loss or misplacement of critical evidence and undue and prolonged delays in the administration of justice.

4.3 Education and sensitisation

Closely related to articles 2(2) and 5 of the Maputo Protocol, 25 of the African Charter, 7(e) of the SADC Protocol on Gender and Development and 2(f) and 5(a) of CEDAW, article 8(c) and (d) embrace the legal concept of re-socialisation. In *APDF*, the African Court referred to this concept as a measure to teach, educate and sensitise a population to ensure that society understands that the rights and freedoms in the Maputo Protocol and the corresponding obligations are not to be trumped by cultural or traditional practices that contradict the protection.¹⁰⁹ In *APDF*, the African Court specifically referred to article 25 of the African Charter, to set out this obligation. However, this obligation is clearly spelt out under article 8(c), concerning ‘everyone’ indicating the broader society, a populace, or a large group, and in sub-section (d) with regard to key actors, such as the police, judges and prosecutors. The latter provision goes beyond mere sensitisation and resocialisations to ‘equipping’ relevant actors to effectively interpret and enforce gender equality rights.

In Resolution 483, the African Commission explains that states must reform legislation, referring to sub-section (f), but also ‘train judicial actors to ensure histories of abuse are considered as a mitigating factor in relevant cases, including by codifying gender specific defences and mitigating factors’.¹¹⁰ In the same vein, the Principles and Guidelines on the Right to a Fair Trial elaborates that states must ‘ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with the special needs and requirements of women’.¹¹¹

Access to justice in situations of conflict or in the aftermath of conflict is furthermore particularly precarious for women. In this regard, the Commission, in Resolution 283, interprets access to justice to embrace the provision of adequate training on ‘investigating and prosecuting crimes of sexual and gender-based violence to personnel in the criminal justice system’.¹¹² The Commission specifically details that this refers to the police, forensic examiners, prosecutors, lawyers, and judges.¹¹³ Moreover, different transitional justice mechanisms such as war crime tribunals, truth commissions and commissions of inquiries have been applied across Africa in the last 30 years.¹¹⁴ For women, these mechanisms present two main obstacles to accessing justice: the application of blanket amnesty provisions; and the disregard of gender-related concerns during the formulation and implementation of transitional justice mechanisms.¹¹⁵ In terms of the application of blanket amnesty provisions both the African Commission and the African Court have concluded that such amnesty laws violate the general right of the victim to access to justice under article 7 of the African Charter.¹¹⁶ In addition, the UN Security Council Resolution 1325 stipulates that it is the responsibility of all states to ‘prosecute those responsible for ... war crimes including those relating to sexual and other violence against women and

109 *APDF* (n 68) paras 131 & 135(xii).

110 Resolution 483 (n 65) para 3.

111 Principles and Guidelines on the Rights to a Fair Trial (n 58) para K: Access to Judicial Services (b).

112 Resolution 283 (n 59) para 1.

113 Resolution 283 (n 59) para 1.

114 Since 1992, such mechanisms have been created in Rwanda, Burundi, South Africa, Nigeria, Sierra Leone, Ghana and Liberia among others.

115 See also art 10(2)(b) of the Maputo Protocol as discussed in A Budoo-Scholtz ‘Article 10’ in this volume.

116 *Thomas Kwoyelo v Uganda* Communication 431/12 African Commission on Human and Peoples’ Rights, 44th Annual Activity Report (2018); *Ajavon v Benin* (merits) (2019) 3 AfCLR 130 para 239.

girls', in this regard, the UN Security Council stresses the need to exclude these crimes, 'where feasible' from amnesty provisions'.¹¹⁷

Moreover, the Special Rapporteur on Rights of Women in Africa insists that states undertake training of law enforcement agents on identifying and prosecuting cases of violence against women and specifically online violence against women.¹¹⁸ This, she further indicates, 'includes sensitisation on the gravity of the cases' and '[a]wareness raising and information dissemination [as] the majority of cases are not reported because women are unaware that online violence is as much a serious issue as offline violence'.¹¹⁹ In Resolution 522 the African Commission goes even further to indicate that states have an obligation to 'undertake awareness-raising programmes which target boys and men, as well as campaigns involving all relevant stakeholders'. These programmes must, the Commission explains,

address the root causes of digital violence against women within the general context of gender-based violence in order to bring about changes in social and cultural attitudes and remove gender norms and stereotypes, while promoting the respect of fundamental rights in the online space, with special regard to social media platforms.¹²⁰

The Commission has further identified other areas where sensitisation is necessary. In Resolution 336, it specifically points to the importance of 'training the judiciary and public security and other relevant authorities on the specific risks and protections for human rights defenders and in particular women human rights defenders'.¹²¹

4.4 Equal representation in the judiciary and in law enforcement

As earlier discussed, the close relationship between women's access to justice and the rule of law as a core principle of a democratic government puts emphasis on the empowerment of women to advance gender equality.¹²² Women's representation in all aspects of the domestic legal system is therefore essential.¹²³ However, equal levels of women's representation are far from achieved.¹²⁴ As

117 United Nations Security Council Resolution 1325 on Women, Peace and Security, S/RES/1325 (2000) adopted by the Security Council at its 43th meeting, on 31 October 2000 (UN Security Council Resolution 1325).

118 Intersession Activity Report by Janet Ramatoulie Sallah-Njie Special Rapporteur on Rights of Women in Africa, 71st ordinary session of the African Commission on Human and Peoples' Rights (21 April-13 May 2022) p 15.

119 Intersession Activity Report (n 118) p 15.

120 522 Resolution on the Protection of Women Against Digital Violence in Africa - ACHPR/Res. 522 (LXXII) 2022 para 3.

121 African Commission Resolution 336 on Measures to Protect and Promote the Work of Women Human Rights Defenders - ACHPR/Res.336(EXT.OS/XIX)2016.

122 N Ntlama-Makhanya & N Lubisi-Bizani 'The "Africa we want" in the African Union's Agenda 2063 on the realisation of women's human rights to access to justice' (2021) 21 *African Human Rights Law Journal* 300.

123 Ntlama-Makhanya & Lubisi-Bizani (n 122) 300.

124 See eg Republic of Seychelles Country Report 2019 Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, para 8.2, Table 1 'Proportion of women in legal offices'; Concluding Observations and Recommendations on the Periodic and Combined Report of the Islamic Republic of Mauritania on the Implementation of the African Charter on Human and Peoples' Rights (2006-2014) and the Initial Report on the Maputo Protocol African Commission on Human and Peoples' Rights, adopted at its 23rd ordinary session 12-22 February 2018 Banjul, Gambia paras 38(iv), and 49(iv); Democratic Republic of Congo Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005 to 2015 (initial report and 1st, 2nd and 3rd Periodic Reports) para 129; Eswatini Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005 to 2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports), Table 5 'Number of Men and Women in the Judiciary'; see also in contrast the Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of The Gambia on the Implementation of the African Charter on Human and Peoples' Rights (1994 -2018) and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the

noted in the Concluding Observations on Mauritania the ‘low rate of training and integration of women judges in the judicial system’, is concerning; and the state should ‘[d]evelop a training and integration policy for women in the justice system’.¹²⁵ Closely related to articles 2(1)(d) and 9(2) of the Maputo Protocol, article 8(e) stipulates the obligation on state parties to ensure that ‘women are represented equally [with men] in the judiciary and law enforcement organs’. The CEDAW Committee furthermore interprets justiciability to guarantee ‘the unhindered access by women to justice’ which includes confronting and removing ‘barriers to women’s participation as professionals within all bodies and levels of judicial and quasi-judicial systems and providers in justice related services’.¹²⁶ It further includes applying temporary special measures under article 4(1) of CEDAW, to ensure that women are ‘equally represented in the judiciary and other law implementation mechanisms as magistrates, judges, prosecutors, public defenders, lawyers, administrators, mediators, law enforcement officials, judicial and penal’.¹²⁷ The SADC Protocol on Gender and Development adds the aspect of the nature of courts in a plural legal system by referring to women’s equal representation in ‘all courts’ which importantly includes traditional courts, alternative dispute resolution mechanisms and local community courts.¹²⁸

5 Implementation

Initial or periodic reports detailing states’ approaches to implementing the bundle of rights under article 8 can largely be divided into two groups.¹²⁹ The first group of states refers to a general right of access to justice and equality before the law;¹³⁰ while the second group of states presents their findings with specific reference to the relevant sub-articles of article 8.¹³¹ In their initial or periodic reports, states have largely focused on the provision of ‘access to justice’ and ‘legal aid’ under article 8(a) and providing

Rights of Women in Africa (the Maputo Protocol) (2005-2014), African Commission on Human and Peoples’ Rights, adopted at its 31st extraordinary session held virtually, 9-25 February 2021, para 28(viii), indicating the ‘[a]ppointment of 50% of female Judges in the Superior Courts and 52% of female Magistrates in the Lower Courts’.

125 African Commission Concluding Observations Mauritania (2018) n 124, paras 38(iv) & 49(iv).

126 CEDAW Committee General Recommendation 33 (n 1) para 15(f).

127 CEDAW Committee General Recommendation 33 (n 1) paras 14(a) and 15(f).

128 Article 7(f).

129 What most of these state reports have in common is that they depart from a provision, in the relevant constitution, which refers to the right of ‘everyone’ to equality before the law.

130 Periodic Report of Burkina Faso within the framework of the implementation of art 62 of the African Charter on Human and Peoples’ Rights, January 2015; Cameroon Single Report comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples’ Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention, 2019; The Gambia Combined Report on the African Charter on Human and Peoples’ Rights for the period 1994 And 2018 and Initial Report Under the Protocol to the African Charter on the Rights of Women In Africa, August 2018; Republic of Kenya combined 12th and 13th Periodic Reports 2015-2020 on the African Charter on human and Peoples’ Rights and Initial Report on the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, April 2020.

131 Angola 6th and 7th Report on the Implementation of the African Charter on Human And Peoples’ Rights and Initial Report on the Protocol on the Rights Of Women in Africa 2011-2016, January 2017; Combined Report of the DRC 2015 (n 124); Combined Report of Eswatini 2015 (n 124); Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, April 2018; Malawi Periodic Report on the African Charter on Human and Peoples’ Rights and the Maputo Protocol May 2015 to March 2019, 2020; 7th Periodic Report (2015-2019) on the African Charter on Human and Peoples’ Rights and the Second Report under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women In Africa, 2020; 10th, 11th, 12th, 13th and 14th Periodic Reports of the Islamic Republic of Mauritania on the implementation of the provisions of the African Charter on Human and Peoples’ Rights, July 2016; the 11th, 12th and 13th Periodic Reports of Rwanda on the Implementation Status of the African Charter on Human and Peoples’ Rights & The Initial Report on the Implementation Status of the Protocol to the African Charter on Human and Peoples’ Rights and the Rights of Women in Africa 2009-2016, 2017; Seychelles Country Report 2019 (n 124); Togo 6th, 7th and 8th Periodic Reports of Togo on the Implementation of the African Charter on Human and Peoples’ Rights, August 2017; Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Report under the African Charter on Human And Peoples’ Rights and 1st, 2nd, 3rd and 4th Combined Report under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women; South Africa Combined Second Periodic Report under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa August 2015.

‘education and sensitisation’ campaigns under 8(c). Therefore, the following discussion proceeds under these headings. As a prelude to this discussion, a brief engagement with the constitutional protection of rights related to article 8 and the reform of discriminatory laws are provided as background.

5.1 The gender responsiveness of domestic laws

Article 8 requires all law, including constitutional, statutory, and customary law to be gender responsive. When analysing the gender responsiveness of any constitution, UN Women suggests the consideration of a number of related constitutional provisions or indicators, two of which are equality and non-discrimination clauses and clauses referring to custom and religion.¹³² Equality before the law and equal protection by the law, in its broader sense, are common core constitutional concepts, especially important in African post-colonial contexts.¹³³ From the perspectives of women’s equality before the law and equal protection and benefit of the law, such rights are guaranteed by states by including specific constitutional provisions creating a hierarchy of rights and values, where ‘equal protection’ prevails over, for example, discriminatory customary laws.¹³⁴ However, customary and religious laws have been left constitutionally unchallenged in some state parties to the Maputo Protocol, such as Comoros, Mauritius, and Tanzania.¹³⁵

From the perspective of article 8, another approach that raises concern is the creation of constitutional caveats where customary law, in one way or another, trumps the right to equality. Even though much-needed reform in this area has taken place, in, for example, Zambia¹³⁶ and Zimbabwe,¹³⁷ these caveats still exist in, for example, Lesotho and Mauritius. In this regard, it is interesting to note the almost identical language and provisions in these clauses. Section 16 of the 1968 Constitution of Mauritius and section 18 of the 1993 Constitution of Lesotho specifically outlaw discrimination based on sex.¹³⁸ However, sections 16(4) and 18(4) in these respective constitutions indicate that the principle of non-discrimination does not apply to any law (including customary and religious law) so far as such laws make provision with respect to ‘adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law’. In Mauritius, without a reference that stipulates constitutional

132 UN-Women, Policy Brief No. 8: Why and how constitutions matter for advancing gender equality: gains, gaps and policy implications (2017) www.unwomen.org/en/digital-library/publications/2017/2/why-and-how-constitutions-matter-for-advancing-gender-equality (accessed 23 June 2023). The other indicators mentioned are: specific protection from violence, access to education, access to other social services, affirmative action, standalone provisions on women’s rights, national level quotas, local level quotas, national gender machineries (political) and the reference to unpaid care work.

133 See eg the Constitution of the Democratic Republic of the Congo (DRC) 2005 art 12; the Constitution of the Republic of South Africa, 1996 sec 9; the Constitution of Kenya, 2010 sec 27; the Constitution of Lesotho, 1993 sec 19; the Constitution of Malawi 1994, secs 4, 12(v) & 20; the Constitution of Namibia, 1990 art 10.

134 See eg the Constitution of Angola 2010 secs 223-224; the Constitution of Zambia 2016 sec 1(1); the Constitution of the DRC 2005 arts 153 & 207; the Constitution of Eswatini 2005 sec 252(2); the Constitution of Lesotho 1993 sec 2; the Constitution of Malawi 1994 sec 10(2); the Constitution of Mozambique 2004 sec 2(4) the Constitution of Namibia 1990 art 66; the Constitution of Seychelles 1993 sec 39(1); the Constitution of the Republic of South Africa 1996 secs 39(3) & 211(3); Constitution of Zimbabwe 2013 secs 46(2) & 176. For further reference see also C Heyns & W Kaguongo ‘Constitutional human rights law in Africa: current developments’ (2006) 22 *South African Journal on Human Rights* 676.

135 In the case of Tanzania, customary and Islamic law are in effect only when they do not conflict with statutory law as is established under sec 9 of the Judicature and Application of Laws Act.

136 The Constitution (Amendment) Act 2 of 2016, art 1, provides for the affirmation of the principle of constitutional supremacy and invalidates law or conduct that is inconsistent with the Constitution to the extent of the inconsistency. This provides that no law shall make any provision that is discriminatory either in itself or in its application to members of a particular race, tribe or system of customary law.

137 The Constitution of Zimbabwe 2013 provides that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. Under the previous constitution, the Constitution of Zimbabwe 1980, matters of personal law and the application of African customary law fell outside the purview of the discrimination clause, see sec 23(1)-(3).

138 Section 16 of the Constitution of Mauritius was amended in 1995, before it became a state party to the Maputo Protocol. In this regard ‘sex’ was added to the list of grounds based upon which an act can be deemed discriminatory.

supremacy of the non-discrimination clause, this caveat clause may contradict women's equality before the law and the equal protection and benefit of the law. In contrast, the 1993 Constitution of Lesotho spells out the general idea that the Constitution is the supreme law of Lesotho.¹³⁹ However, this is then contradicted by withdrawing customary law from the purview of the non-discrimination clause.

Related to the constitutional protection, putting in place domestic legislation, and specifically referring to sub-article (f), reforming discriminatory legislation also plays an important role in protecting, promoting, and fulfilling the rights set out in article 8. In terms of the former providing for specific legislation such as, for example, legislation concerned with domestic violence¹⁴⁰ and human trafficking¹⁴¹ are examples of states' attempts to implement article 8. In terms of the latter, reforming the law, for example, to specifically prohibit marital rape, promotes and protects the rights of women.¹⁴²

5.2 Access to justice

It is common cause that effective implementation is key to the protection of women's rights; but as expressed by Burkina Faso, the 'persistence of certain phenomena like illiteracy and inadequacy of information on judicial procedures' hamper the implementation of rights relevant to achieving gender equality.¹⁴³ As pointed out by the DRC, in its initial report, the main challenges to women's access to justice include the 'non-popularization of laws and mechanisms established to promote access by women to justice'.¹⁴⁴ They also include inadequate legal representation for indigent persons including women.¹⁴⁵ The same difficulties were revealed in *APDF* where Mali, after facing religious mobilisation against a new Family Code¹⁴⁶ that sought to align national laws with Mali's obligations under the Maputo Protocol, pleaded with the African Court to view a revised version, limiting women's rights, as 'adapting [its] obligations to social realities'.¹⁴⁷ However, such 'social realities', as indicated in the Periodic Report by Lesotho, will not realise women's access to justice, because '[c]ustomary law does not embrace equality between men and women and therefore does not guarantee women the right of equality before the law'.¹⁴⁸ These statements point to the continued existence and reinforcement of negative stereotypes about women and women's relationship with the law as referred to in articles 2(2) and 5 of the Maputo Protocol and 5(a) of CEDAW, severely limiting women's access to justice.¹⁴⁹

5.3 Legal aid

The centrality of legal aid to women's access to justice is well captured in the Periodic Report by Togo, indicating that, '[i]n terms of access to justice, there is no discrimination between men and women ... [b]ut the real problem lies in the acquisition of the means to be able to have access to it easily'.¹⁵⁰ As captured in Togo's report, the feminisation of poverty makes it difficult for women to benefit adequately

139 Section 2.

140 See eg Malawi the Prevention of Domestic Violence Act 5 of 2006; Zimbabwe Domestic Violence Act 14 of 2006; South Africa Domestic Violence Act 116 of 1998.

141 See eg Zimbabwe Trafficking in Persons Act 4 of 2014; South Africa Prevention and Combating of Trafficking in Persons Act 7 of 2013; Lesotho Anti-Trafficking in Persons Act 1 of 2011.

142 See eg South Africa's Criminal Law (Sexual Offences and Other Related Matters) Act of 2007, secs 3 and 56(1).

143 Burkina Faso (n 130) para 31.

144 DRC (n 124) para 126.

145 Makunya (n 100) 232-233.

146 Adopted 2 December 2011, promulgated 30 December 2011.

147 *APDF* (n 68) para 67.

148 Lesotho (n 131) para 382.

149 See also arts 4(2)(d) & 12(1)(b) of the Maputo Protocol.

150 Togo (n 131) para 508.

from judicial services.¹⁵¹ In this regard, many state reports decry the lack of funds and the expertise needed and are therefore by necessity relying on civil society and university initiatives.¹⁵²

Most states approach the provision of legal aid in terms of making it available to the ‘disadvantaged’ or ‘indigent’, which is presumed to include women, but not specifically earmarking a portion for women or making specific reference to women.¹⁵³ As noted by the Commission in its Concluding Observations on Eswatini, ‘the Legal Aid Bill, which provides for the establishment of an office of the Registrar ... may strengthen access to justice and protection before the law for vulnerable women’.¹⁵⁴

There are, however, some important exceptions to this general approach that can serve as good practice. In The Gambia, for example, the Women’s Act 12 of 2010 provides that ‘every woman is entitled to equality and justice before the law and to equal protection of the law’.¹⁵⁵ In the implementation of this right, the Act provides for legal aid to safeguard the protection and promotion of women’s rights.¹⁵⁶ Further, with specific reference to the provision of legal aid in cases of SGBV, Togo has launched a partnership initiative between national authorities, civil society and the private sector for a pilot project for legal assistance to victims of SGBV.¹⁵⁷ In the same vein, in the DRC, access to justice by SGBV survivors is, according to the state, free, and victims enjoy legal assistance.¹⁵⁸ Its Ministry of Justice and Human Rights has implemented an exemption from legal fees for female rape victims.¹⁵⁹ However, if the historical marginalisation of women and the unequal distribution of resources and power between men and women in the DRC is considered, as suggested by Makunya, it becomes clear that the absence of a constitutional guarantee on legal assistance and its discretionary nature in the DRC will likely deprive women of an effective right of access to justice more than men.¹⁶⁰ In addition, in Eswatini a legal aid clinic was set up through support from the UN Joint Gender Programme, the Ministry of Justice and the Faculty of Law at the University of Eswatini to provide legal aid services predominantly to women.¹⁶¹

5.4 Education and sensitisation

As detailed above, a multi-sectoral approach to awareness raising, training and sensitisation is critical.¹⁶² Under article 8, state parties have approached this both from the aspect of article 8(c) in terms of mass

151 Togo (n 131) para 508. To overcome this difficulty, Togo adopted Law No 2013-010 of 27 May 2013 on legal assistance, which offers vulnerable groups, most of whom are women, the opportunity to assert their rights in court.

152 Burkina Faso (n 130) para 30; Cameroon (n 130) para 731; DRC (n 124) para 119; Togo (n 131) para 509; Zimbabwe (n 131) para 3.3; Eswatini (n 124) paras 442 & 444.

153 Burkina Faso (n 130) para 23; Cameroon (n 130) para 729, Eswatini (n 124) [Draft bill], Lesotho (n 131) para 381; Namibia 6th Periodic Report on the African Charter on Human and Peoples’ Rights, 2015 para 10.1; Mauritania (n 131) para 2; Rwanda (n 131) para 47, Seychelles (n 124) para 8.1; Zimbabwe (n 131) para 3.0; South Africa (n 131) para 235.

154 Para 51. My emphasis.

155 Section 7, domesticating arts 8 of the Maputo Protocol and 15 of CEDAW.

156 Section 7(4)(a).

157 Togo (n 131) para 509.

158 DRC (n 124) para 118.

159 DRC (n 124) para 119.

160 Makunya (n 100) 232.

161 Eswatini (n 124) para 442.

162 For domestic incorporation of this principle see the Constitution of the DRC 2005 art 45(6); Constitution of Benin 1990 art 40).

educational campaigns¹⁶³ and under article 8(d) the targeting and training specifically of members of law enforcement organs.¹⁶⁴

In this regard, it is important to acknowledge the central role of civil society and universities in awareness raising on different levels. For instance, the Faculty of Law at the University of Namibia has an arrangement with national radio in which the Faculty has a slot where they give lectures and provide advice on women's rights.¹⁶⁵ In Eswatini the police service, state lawyers, private practitioners, and the judiciary received university-level training on legal instruments promoting gender equality. Moreover, workshops were convened in partnership with the country's development partners. In terms of these interventions, it is clear that civil society at large has played a central role in mass education and in training staff in law-related sectors.¹⁶⁶

6 Conclusion

Worldwide, the level of protection offered by the law and a person's ability to access justice are influenced by, amongst other factors, a person's sex and gender.¹⁶⁷ Thus, realising substantially equal outcomes in access to justice and in the application of the law for women requires considerable efforts and reforms in all societal arenas.

With its origins in articles 2, 3, 7 and 25 of the African Charter, article 8 specifically focuses on the law and related justice systems as mechanisms to accomplish equality between women and men. It offers a common standard of equality that requires member states to acknowledge gender-biased and discriminatory assumptions ingrained in their legal systems, in the law, and through judicial stereotypes. It also requires member states to address the manner in which these systems, laws and stereotypes restrict women's equal protection of the law and access to justice.

As highlighted in the discussion about its drafting history, what started out as a right of access to judicial services and the right to be informed about relevant rights, transformed into a complex web of access, equality, representation, and educational rights. As detailed throughout this chapter, article 8 is therefore key to the operation of the Maputo Protocol as a whole, and essential in guaranteeing both the socio-economic and civil and political rights stipulated.

Similar to article 15 of CEDAW, article 8 does not specify precise legal reforms since the details of implementation will vary within each domestic system. The multifaceted approach by state parties in this regard was highlighted in the analysis of state practice under 6. Here it was pointed out that some of the greatest threats to the rights in article 8 exist on the constitutional level either as an unchecked application of customary law that is, without the creation of a hierarchy of sources, or as constitutional caveats that shield matters of personal law from the purview of the non-discrimination clause.

Moreover, although gender-discriminatory legislation has been repealed and revised in most member states, the impact of customary and religious laws, especially in some aspects of the law, still persist.¹⁶⁸ In this regard CEDAW¹⁶⁹ and the SADC Protocol on Gender and Development¹⁷⁰

163 Burkina Faso (n 130) para 31, Cameroon (n 130) para 731; DRC (n 124) para 121; Namibia (n 153) para 10.2; Zimbabwe (n 131) para 3.6, Table 8 'The number of sensitization programmes undertaken from 2008 to 2019'.

164 Eswatini (n 124) para 446; Togo (n 131) para 510.

165 Namibia (n 153) para 10.2.

166 Cameroon (n 130) para 731; DRC (n 124) paras 121-122; Kenya (n 130) para 12.

167 CEDAW Committee General Recommendation 33 (n 1) paras 8-9 & 14(c).

168 See eg S Nabaneh 'Article 5'; C Musembi 'Article 6' and 'Article 7'; and C Mokoena 'Article 20' in this volume.

169 Article 15(2) & (3).

170 Article 7(b).

point out the importance of specifying state obligations. In relation to this, it is important to note that although women's equal capacity in civil matters is not covered in detail in article 8, articles 6, 7, and 21 specifically set out such obligations in relation to marriage, divorce, and inheritance. Therefore, as a recommendation, article 8 must be read in conjunction with these articles.¹⁷¹ The empowerment aspects of article 8(e) must moreover be understood from the perspective of article 9, which is detailed in the following chapter.

The jurisprudence of the African and ECOWAS Courts, discussed in this chapter, points, on the one hand, to the importance of scrutinising matters relating to legal capacity, inheritance, and marriage against the provisions of article 8. On the other hand, it highlights the fact that lack of access to justice for women, especially in cases of SGBV, calls for further effort from the state parties to the Maputo Protocol. However, the limited reference to article 8 by litigants and courts is a cause of concern. This could partially be explained by reliance on other articles in the Maputo Protocol that deal with specific aspects of the law, such as equality in inheritance in article 21, as referred to in *APDF*; or reliance on the provisions of the African Charter referring to a fair trial and sensitisation efforts. However, the non-reliance on article 8 concerning issues that directly refer to access to justice, equality before the law and equal protection and benefit of the law amounts to a missed opportunity to trigger a deeper analysis of the multifaceted obligations stipulated in article 8. In this regard, there is much scope for litigants and courts alike to use the detailed provisions in article 8, apply it in combination with other rights, and take judicial notice of the resolutions and guidelines issued by the Commission in this regard.

In conclusion, a systematic review of State Reports and Concluding Observations has shown that although the primary responsibility of fulfilling, promoting, and protecting the rights in article 8 rests on the state parties, some of the key obligations, such as the running of educational and sensitisation programmes and providing legal aid are regularly fulfilled by CSOs. Other actors, such as the African Commission, also play a vital role, as indicated above, in providing interpretations of the key elements of article 8. In this regard, the Commission has provided essential input in contextualising the rights with reference to specific circumstances, such as in situations of armed conflict, in relation to domestic violence or in relation to technology assisted violence against women.¹⁷² Thus, to fully guarantee the rights set out in article 8, state parties must support CSOs as they take on critical roles in the fulfilment of article 8. They should also take note of the specific instructions issued by the Commission providing much-needed detail on the state obligations involved.

171 See arts 15(2)-(4) of CEDAW and 7(b) of the SADC Protocol on Gender and Development.

172 See n 59, n 65 & n 120.

Article 9

Right to participation in the political and decision-making process

Theodora Talumba Mkali and Annika Rudman

1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:
 - (a) women participate without any discrimination in all elections;
 - (b) women are represented equally at all levels with men in all electoral processes;
 - (c) women are equal partners with men at all levels of development and implementation of State policies and development programmes.
2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

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1 Introduction

The right to participate in political and decision-making processes is significant, as it confirms the status of women as equal and important participants in society. Historically, however, men worldwide have dominated the public and political sphere, while women take care of the family and household.¹ This dichotomy is based on persistent gendered stereotypes of women's lesser capabilities in public and political life. Nevertheless, the participation of women in this regard is a requirement for the

¹ S Wittkopp 'Article 7' in M Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* 198.

realisation of democracy.² Women's political participation is also critical to guaranteeing the right to development.³

As is the case globally, African women are seldom accorded a place of prominence in the political, governance and decision-making structures of their countries. Historically, African women have been disadvantaged in their political participation and representation flowing from a colonial past and cultural preconceptions.⁴ Most African countries are far from achieving 50 per cent female representation in politics that undergirds equal participation. Overall, women's representation in parliament on the African continent stood at 24 per cent in 2021.⁵ This arguably negatively impacts African women's ability to influence national decision-making and the design and implementation of legislation and policy.⁶ Behind the low figure of female representation is a lack of political will, restrictive electoral frameworks and deeply entrenched patriarchal stereotypes and ideals.

Article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) makes provision for the right to equal participation and representation in political and decision-making processes. Thus, this provision importantly covers both the political sphere and any other sphere where decision-making takes place – making this provision substantially broad. The right to participation in political and public affairs is primarily concerned with enhancing human agency to ensure that women have a right to influence their future and take on the corresponding responsibilities.⁷

International treaties, such as the Convention on the Elimination of Discrimination Against Women (CEDAW), similarly set the standards for the protection of women's political rights. Article 7 of CEDAW guarantees women's right to be elected to public office, their participation in public functions and service of their countries and their right to vote. Predating CEDAW, this right is also recognised in articles 1, 2 and 21 of the Universal Declaration of Human Rights (Universal Declaration) and articles 2 and 25 of the International Covenant on Civil and Political Rights (ICCPR). In addition, the Vienna Declaration and Programme of Action,⁸ the Beijing Platform,⁹ Security Council Resolution 1325 on Women, Peace and Security,¹⁰ the Commission on the Status of Women Agreed Conclusions 2006¹¹ and the General Assembly Resolution 66/130 on women and political participation¹² all emphasise the importance of combating all forms of discrimination against women in the political sphere. Through

2 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation 23: Political and Public Life, 1997 (General Recommendation 23) A/52/38, para 14; United Nations General Assembly (UNGA) Resolution 'Women and Political Participation' (10 February 2004) UN Doc A/RES/58/142.

3 UNGA Res, 'Declaration in the Right to Development' (4 December 1986) UN Doc A/RES/41/128 2nd recital.

4 G Geisler 'Women and the remaking of politics in Southern Africa negotiating autonomy, incorporation and representation' (2004) *Nordiska Africa Insitutet* 18 & 36.

5 International Institute for Democracy and Electoral Assistance <https://www.idea.int/news-media/news/enhancing-womens-political-participation-africa#:~:text=Women%20have%20historically%20been%20disadvantaged,cent%20women's%20representation%20in%20parliament> (accessed 23 June 2023).

6 N Abdulmelik & T Belay 'Advancing women's political rights in Africa: the promise and potential of ACDEG' (2019) 54 *Africa Spectrum* 149.

7 C Heyns 'Study on the Right to Equal Participation in Political and Public Affairs in Africa' 5 September 2017 <https://www.ohchr.org/sites/default/files/Documents/Issues/PublicAffairs/ChristofHeyns.docx> (accessed 25 May 25, 2022).

8 Report of the World Conference on Human Rights, Vienna, 14-25 June 1993 (A/CONF.157/24 (Part I)), chap. III.

9 Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1) (Beijing Platform) chap I, resolution 1 para 13.

10 United Nations Security Council Resolution 1325 on Women, Peace and Security (2000).

11 United Nations, Commission on the Status of Women Agreed Conclusions (2006), <https://daccess-ods.un.org/TMP/5577464.10369873.html> (accessed 23 June 2023).

12 United Nations General Assembly Resolution 66/130 on Women and Political Participation (2011), http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/130&Lang=E (accessed 23 June 2023).

these resolutions and declarations, states are urged to ensure that they apply positive actions to raise the number of women in public positions and functions to achieve equal representation of women and men.

However, as argued by Abdulmelik and Belay, even with CEDAW in place, there was still a need to address issues of women's participation that are unique to African women.¹³ This resulted in a call for a treaty which could account for the African context to expand the scope of women's participatory rights.¹⁴ In essence, the right to 'participate' is shaped by the possibility of taking part in decision-making processes that directly or indirectly impact a person's interests. Thus, to participate in elections without discrimination, to be equally represented and involved in all aspects of social, political, and economic life are the major political expressions of such participation as provided in article 9. Article 9 has been framed to illustrate that the concept of participation goes beyond women's right to vote; it emphasises their ability to shape and assume responsibility for their benefit and that of others. Interestingly, while CEDAW and ICCPR refer specifically to the right to vote, neither the African Charter on Human and Peoples' Rights (African Charter) nor the Maputo Protocol reference this right, but rather the broader right to participation. The objective is to enhance the presence as well as the representation of women in public and political life, but the mere presence of women in decision-making positions is not the aim of article 9. The emphasis is rather on meaningful presence; that is, a presence where women can effectively make their voices heard.

While highlighting the slow progress of women's political participation in Africa, this chapter seeks to unpack the right to such participation and representation as provided for in the Maputo Protocol. To this end, this chapter is divided into seven sections. Section 2 presents a discussion on the drafting history of article 9. The discussion then proceeds in section 3 by setting out the linkages between article 9 and other provisions in the Maputo Protocol, as well as with other provisions in relevant international, regional, and sub-regional human rights instruments. Section 4 discusses the concepts and definitions relevant to article 9. Section 5 considers the scope of state obligations within article 9, followed by section 6, which analyses state practice through a review of domestic legislation, state reports submitted to the African Commission on Human and Peoples' Rights (African Commission) under article 26(1) of the Maputo Protocol alongside the related Concluding Observations by the African Commission. This chapter concludes, in section 7, by addressing the challenges that arise in the implementation of the rights to participation and representation in the political and decision-making processes.

2 Drafting history

In the first draft of the Maputo Protocol, the Nouakchott Draft, the right to women's political participation was provided under article 10.¹⁵ Referring specifically to article 13 of the African Charter, this provision set out the main tenets of the right to participate in political and decision-making processes. It stipulates that state parties are obligated to 'promote by means of specific positive actions the equal participation of women in the political life of their countries'. Specifically, states must ensure that women can participate in all elections without discrimination. In addition, article 10 obligates states to ensure that 'women are represented equally with men in all electoral and candidate lists'. Furthermore, this draft importantly pointed to the fact that this provision is not only about the political process, but states must also 'include women equally with men at all levels of development and execution of state policy'.

13 Abdulmelik & Belay (n 6) 149.

14 As above.

15 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

Following this draft, article 11 of the Kigali Draft provided for the right to participate in the political process.¹⁶ In this draft, some changes to the provision's wording were made. It provided that states have an obligation to ensure that 'women are represented equally *at all levels* with men in all electoral and candidate lists'.¹⁷ Thus, the Kigali Draft retained the earlier draft's emphasis on women's equal representation on electoral lists but importantly added a reference to the different levels of governance, for example, to be represented locally, on a provincial and national level. In addition, it acknowledged that states must ensure that 'women are included with men at all levels of the development and implementation of state policy'. Thus, as observed by Nsibirwa, the Kigali Draft was cognisant of women's exclusion from decision-making positions, especially within government.¹⁸

The Final Draft of the Maputo Protocol was produced in 2000 and was later presented to the Meetings of Experts, Ministers, and the NGO Forum from 2001 to 2003 for commentary and revisions.¹⁹ The Final Draft, similar to other provisions, dropped the reference to the African Charter. Article 10 (as it was then numbered) was formulated within two main paragraphs where three sub-paragraphs are connected to the first, labelled 10(1)(a-c). With regard to women's political rights, the wording in article 10(1)(a) was changed from ensuring that women 'can' participate without any discrimination in all elections to ensuring that women 'do' participate without any discrimination in all elections. This is arguably an important change as it signals not merely ensuring an opportunity but ensuring actual participation. The reference to either 'do' or 'can' does not appear in the Maputo Protocol. However, it is clear that the text refers to actual participation to achieve substantive equality. Article 10(1)(c) also sets out a small but important change. The Kigali Draft required that women be 'included' with men at all levels of the development and implementation of state policy, while the Final Draft refers to women as 'partners' with men at all levels of development and implementation of state policy. This change was arguably put in place to avoid an 'add women and stir' scenario where women would be included without agency. As discussed in the following paragraph, in the final version of the Maputo Protocol, 'equal' appears before 'partners' to emphasise this point further. In addition, the Final Draft added a second main paragraph, as indicated above. Article 10(2) arguably substantially enlarged the scope of article 10, as is further discussed under section 4, by adding a reference to effective representation and participation at 'all levels of decision making', thus going beyond the scope of political and state policy processes.

In November 2001, 44 member states of the then Organisation of African Unity (OAU) met in Addis Ababa to discuss the Final Draft. The French version of article 10(1) was amended to delete the word '*plus grande*', while the English version was left without revisions.²⁰ Sub-articles (a) and (b) were adopted in totality.²¹ Sub-article 10(1)(c) was amended to add 'equal' before 'partners', while 'increased' and 'significant' was added before 'effective representation and participation' in article 10(2).²²

In December 2002, the African Union Office of the Legal Counsel (AUOLC) provided further comments on the revisions that the Meeting of Experts in 2001 had decided. As the Meeting of Experts had decided to merge articles 4 and 5, the right to 'Participate in the Political Process and

16 Draft Protocol to the African Charter on Women's Rights, Kigali, Rwanda November 1999 (Kigali Draft).

17 Our emphasis.

18 M Nsibirwa 'A brief analysis of draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 48.

19 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

20 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 74.

21 Report of the Meeting of Experts (n 20) paras 75 & 76.

22 Report of the Meeting of Experts (n 20) paras 77 & 78.

Decision making' now appeared as article 9. The AUOLC suggested that 'do' in article 9(2) (as it was numbered in its representation) referring to article 10(1)(a) of the Final Draft be deleted. The AUOLC also suggested that the 'equal representation of women in all electoral and candidates list may not be feasible'. Therefore, the AUOLC suggested, without success, that the word 'equally' should be deleted. Alternatively, it was suggested that the provision should state that 'women have a right to stand for public office and if elected, hold office'.²³

In 2003, a meeting was convened by the Africa Regional Office and the Law Project of Equality Now. This resulted in some important suggestions, including the recommendation to include the concept of affirmative action under article 9(1) and (2). This was informed by references to CEDAW and the Beijing Platform. Article 3 of CEDAW requires state parties to take,

in all fields, in particular in the political ... all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Furthermore, under strategic objective G, the Beijing Platform stipulates that states must

[c]ommit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities... including, *inter alia*, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions.²⁴

Moreover, an additional provision, article 9(3), was suggested, which provided for a state obligation to 'undertake equal distribution of power and decision making at all levels and to undertake statistical gender analysis and mainstreaming of a gender perspective in policy development and the implementation of such programmes in national and local governments'. Neither the references to affirmative action nor the addition of paragraph 9(3) made it into the Addis Ababa Draft, adopted in March 2003.²⁵

The final framing of article 9 explicitly states that 'women are represented equally at all levels with men in all electoral processes'.²⁶ In its entirety, the right to political participation provided in article 9 ensures that women are not excluded from decision-making bodies within the public sphere. In view of the journey leading to its framing, it is a true reflection of an intentional effort towards the inclusion of women in political and decision-making processes on the African continent.

3 Linkages within the Maputo Protocol and with other instruments and treaty provisions

This section provides an overview of the many provisions on women's representation and participation relevant to article 9 existing in the Maputo Protocol itself, in other international and regional instruments from outside the continent, African regional instruments and African sub-regional instruments. Conceptualising article 9 within this broader context not only points to the development of women's rights to representation and participation, but it also shows the transformative nature of the Maputo Protocol.

23 Comments by the AUOLC, CAB/LEG/66.6/Rev.1, 2002.

24 Paragraph 190(a).

25 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003.

26 Article 9(1)(b).

3.1 Other provisions in the Maputo Protocol

The Preamble to the Maputo Protocol confirms the commitment of African states to ensure the full participation of African women as equal partners in Africa's development. Articles 10, 17, 18, 19 and 23 furthermore refer to the 'participation' of women in different forms of policy and decision-making, signalling the centrality of article 9. Moreover, 'equal representation' is referred to in article 8(e), denoting women's equal representation in the judiciary and law enforcement organs, as discussed in the previous chapter.²⁷

3.2 International and regional instruments from outside the continent

As briefly mentioned in the introduction, several international human rights treaties place great importance on the right to vote, to participate and the standards of equality that state parties must meet. Adopted in February 1948, the Inter-American Convention on the Granting of Political Rights to Women is the oldest regional instrument granting political rights to women. Consisting of only two articles, article 1 sets out that the state parties agree that 'the right to vote and to be elected to national office shall not be denied or abridged by reason of sex'. Shortly after that, in December 1948, the Universal Declaration was adopted, providing 'universal and equal suffrage' under the non-discrimination clause referencing the prohibited ground of 'sex'.²⁸

The United Nations Convention on the Political Rights of Women (Convention on the Political Rights of Women) was adopted by the United Nations (UN) General Assembly in December 1952. When it came into force in July 1954, it became the first international instrument protecting political rights. The UN Convention on the Political Rights of Women is based on the acknowledgement that every person has the right to take part in the government of their country. Thus, article 1 of the UN Convention on the Political Rights of Women stipulates that '[w]omen shall be entitled to vote in all elections on equal terms with men, without any discrimination'. Being almost as short as the Inter-American Convention on the Granting of Political Rights to Women, the UN Convention on the Political Rights of Women offers an additional two articles setting out the rights of women to be eligible for election to all publicly elected bodies on equal terms with men and to hold public office and to exercise all public functions without discrimination.²⁹

Following these developments, article 25 of the ICCPR became the second internationally binding convention to provide every citizen with political rights based on article 2.³⁰ These rights include the right to participate in the conduct of public affairs, directly or through freely chosen representatives; to vote and be elected at genuine periodic elections by universal and equal suffrage; and to have access, on general terms of equality, to public service.³¹ Many of these rights were put forward, in the context of the marginalisation of women, in the Declaration on the Elimination of Discrimination against Women (DEDAW) as adopted by the UN General Assembly in 1967.³²

Building on DEDAW, article 7 of CEDAW encapsulates the rights to representation and participation. Under article 7, member states must, at the domestic level, strive to realise 'formal, substantive, and transformative equality'.³³ In this regard, it is worth noting that CEDAW provides

27 See A Rudman 'Article 8' sec 3.2 in this volume.

28 Articles 2 & 21.

29 Articles 2 & 3.

30 See further General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (art 25): 12/07/96. CCPR/C/21/Rev.1/Add.7.

31 Article 25.

32 Article 4 of the Declaration on the Elimination of Discrimination against Women.

33 S Wittkopp 'Article 7' in Freeman et al (n 1) 198.

for temporary special measures. Article 4(1) of CEDAW provides that ‘adoption by state parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination’. Article 7 stipulates that,

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.

In this regard, ‘appropriate measures’ could include temporary measures such as quotas which are further discussed under 6.2 below.³⁴ Article 7 further refers to the right to vote; the right to participate in the formulation of government policy and the implementation thereof; to hold public office and perform all public functions at all levels of government; and to participate in non-governmental organisations and associations concerned with the public and political life of the country. This latter reference has arguably been broadened in article 9(1)(c) referring to the ‘participation of women at all levels of decision-making’. Article 8 of CEDAW further refers to representation and participation on the international level, namely the women’s rights to represent their governments at the international level and to participate in the work of international organisations.³⁵

In the European human rights system, article 3 of Protocol No 1 to the European Convention on Human Rights (European Convention) sets out the right to free elections. It stipulates that member states ‘undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. Thus, under article 3, read together with article 14 of the European Convention and Protocol 12 thereto, all European citizens are guaranteed free and democratic elections. The political rights set out within the European Convention are limited in scope to the election of the ‘legislature’ and do not afford an unlimited right. Importantly the European Court of Human rights (European Court) has distinguished between ‘active’ and ‘passive’ electoral rights. An active right is a right to participate in an election as a voter, while a passive right is a right to stand as a candidate for election. According to the European Court, passive electoral rights enjoy a lesser degree of protection than active rights.³⁶

3.3 African regional instruments

On a regional level, the right to political participation is set out in article 13(1) of the African Charter. Using the male possessive pronoun, this provision stipulates that ‘[e]very citizen shall have the right to participate freely in the government of *his* country, either directly or through freely chosen representatives in accordance with the provisions of the law’.³⁷ However, this provision must be read and implemented alongside the state obligations provided for in articles 1 and 2. Read together with articles 1 and 2, article 13(1) ensures that all individuals are able to enjoy the right to political participation without discrimination and obligates state parties to give legal effect to this right.³⁸

34 See further UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation 5: Temporary Special Measures 1988 (General Recommendation 5).

35 See further General Recommendation 8 Implementation of Article 8 of the Convention (Seventh session, 1988), UN Doc A/43/38 111 (1988), reprinted in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 234 (2003).

36 *Riza and Others v Bulgaria* - 48377/10 and 48555/10 Judgment 13 October 2015.

37 Emphasis added.

38 For a further discussion on this see Rudman & Mkali ‘A gender perspective on electoral processes in Malawi: the right of Malawian women to participate in the political process under the Maputo Protocol’ (2020) 35 *Southern African Public Law* 16.

The Treaty Establishing the African Economic Community (Abuja Treaty) includes some references to women's political rights. Article 75 of the Abuja Treaty supports the general idea in article 9 by stipulating that state parties must ensure the full participation of women in the development and activities of the African Economic Community.³⁹ Constitutive Act of the African Union (AU Constitutive Act) moreover recognises, as one of its main objectives, the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.⁴⁰ It further emphasises the importance of gender mainstreaming in its various organs.⁴¹ Notably, article 4(l) and (m) of the AU Constitutive Act stipulates that the AU must promote gender equality and ensure the 'respect for democratic principles, human rights, the rule of law and good governance'. In view of women's right to political participation, this commitment has been integrated into both the Maputo Protocol and the African Charter on Democracy, Elections and Governance (African Democracy Charter).

The African Democracy Charter was adopted in 2007. Drafted after the Maputo Protocol, the provisions of the African Democracy Charter largely mirror Article 9 of the Maputo Protocol. It promotes gender equality and gender balance in governance and development processes. One of its main objectives is to increase democracy through equal participation in elections and equal eligibility to participate in political life. Article 29 of the African Democracy Charter emphasises the critical role of women's participation for democracy to exist. Thus, state parties are obligated to 'create the necessary conditions for full and active participation of women in the decision-making processes' and to 'encourage the full and active participation of women in the electoral process and ensure gender parity in representation at all levels, including legislatures'.⁴² Article 8 of the African Democracy Charter further encapsulates the principle of non-discrimination based on gender. It establishes the legal obligation to put in place legislative and administrative measures which ensure that women's rights are protected.⁴³ In addition, article 43 importantly emphasises women's right to education as a prerequisite for equal participation.⁴⁴

3.4 African sub-regional instruments

In terms of the sub-regional domain, the East African Gender Policy,⁴⁵ relevant within the East Africa Community, confirms that one of its objectives is to 'promote women's participation in political and decision-making at all levels'.⁴⁶

With regard to the Southern African Development Community (SADC), a similar, more detailed objective is set out in the SADC Protocol on Gender and Development. Articles 12 and 13 of the SADC Protocol on Gender and Development refer to 'representation' and 'participation', respectively. Article 12(1) stipulates that member states 'shall endeavour' by 2015 to achieve at least 50 per cent representation of women in decision-making positions in the public and private sectors. To this end,

39 50 of the AU member states have ratified the Abuja Treaty. Djibouti, Eritrea, Madagascar, Somalia and South Sudan have not ratified the Abuja Treaty; of these states only Djibouti has ratified the Maputo Protocol.

40 Article 3(h).

41 K Stefiszyn 'The African Union: challenges and opportunities for women' (2005) 5 *African Human Rights Law Journal* 359.

42 Articles 29(2) & (3).

43 G Niyungeko 'The African Charter on Democracy, Elections and Governance as a human rights instrument' (2019) 63 *Journal of African Law* 71.

44 Niyungeko (n 43) 72.

45 EAC Secretariat, Arusha, Tanzania May 2018.

46 4.5(c).

states are to apply affirmative action measures, as provided for in the policy.⁴⁷ Article 13(1) confirms that member states must ensure that women have ‘equal opportunities with men to participate in all electoral processes including the administration of elections and voting’.

Within the context of the Economic Community of West African States (ECOWAS), article 63 of the ECOWAS Revised Treaty sets out the rights related to women and development. Closely related to this provision, the Supplementary Act Relating to Equality of Rights Between Women and Men for Sustainable Development in the ECOWAS Region (ECOWAS Supplementary Act) refers to ‘[g]overnance and decision-making’.⁴⁸ Article 11(1) of the ECOWAS Supplementary Act specifically refers to representation, indicating that member states must apply affirmative action to ensure effective gender equality in decision-making positions in public and private sectors, while sub-section (2) enjoins states to establish the critical link between gender-balanced representation, good governance, democracy, and sustainable development. Article 12 refers to participation in electoral processes, while sub-section (1) requires states to ensure equal participation of women and men in all electoral processes, including the administration of elections and voting and to ensure equal participation of women and men in the appointment of political representatives and decision-making.

As the above discussion shows, women’s right to political participation and representation has been developing over the past 75 years. In this regard, it is notable that the rights to vote and to be elected to public office have, over time, been developed and enlarged to include other aspects of participation and representation, such as participation in policy making and representation in the private sector. As is further discussed under the following section, article 9 captures these developments and constitutes a solid contribution to the variation of rights that already existed under international, regional, and sub-regional law.

4 Concepts and definitions

A key indicator of gender equality and women’s ability to fully enjoy their human rights is the balanced participation of women and men in political life and at all levels of decision-making. Article 9 thus covers many different aspects of women’s lives and women’s participation, from political participation and voting, through policy and development structures, to private decision-making in corporate boards, school governing mechanisms and even at household level. Article 9 deals with two different, yet equally important, contexts: the political/governance environment, which mainly refers to the public domain, and the more general decision-making environment, which refers to both the public and the private domain.

This section of the chapter sets out the different concepts involved under each of the components of article 9. Importantly, these discussions point to the fact that different thresholds apply in the political/governance environment *vis-à-vis* the decision-making environment, where the latter refers to ‘increased and effective representation and participation’ of women at all levels of decision-making, while the former refers to ‘equal participation’.

4.1 Political processes: political and electoral systems

Similar to article 7 of CEDAW, article 9 of the Maputo Protocol does not require any specific political system to be followed. As noted by Wittkopp, in relation to article 7 of CEDAW, the political system of a state is but ‘one factor amongst many which determine the degree of integration of women

⁴⁷ Article 5 stipulates that ‘States Parties shall put in place affirmative action measures with particular reference to women in order to eliminate all barriers which prevent them from participating meaningfully in all spheres of life and create a conducive environment for such participation’.

⁴⁸ Chapter 3.

into political and public life and, as yet, no political system has realized full integration of women'.⁴⁹ However, the implementation of article 9, similarly to the implementation of article 7 of CEDAW, presupposes an approach to governance that accounts for the will of the people and where the will of the people plays a significant role in defining laws and policies.⁵⁰ In General Recommendation 23 the CEDAW Committee defines such an approach as one in which 'each citizen enjoys the right to vote and be elected at genuine periodic elections held on the basis of universal suffrage and by secret ballot, in such a way as to guarantee the free expression of the will of the electorate'.⁵¹

Article 9, moreover, does not stipulate any specific form of the electoral system. However, in General Recommendation 23, the CEDAW Committee notes that '[t]he system of balloting, the distribution of seats in Parliament, the choice of district, all have a significant impact on the proportion of women elected to Parliament ... [p]olitical parties must embrace the principles of equal opportunity and democracy and endeavour to balance the number of male and female candidates'.⁵² As discussed under 6.3 below, proportional representation systems with multi-member districts generally better support women's representation than plurality/majority systems.⁵³ This relates to the fact that in proportional representation systems with multi-member districts political parties tend to nominate several candidates, thus increasing the likelihood of nominating women. Majoritarian systems, by contrast, typically only allow for single-member districts, and therefore political parties are inclined to nominate the single candidate most likely to win, more often than not, a male candidate.⁵⁴ Moreover, other aspects of electoral system design that influence the participation and representation of women are electoral thresholds (the minimum percentage of the total votes cast that a party must garner in order to qualify for a seat in Parliament), district magnitude (number of seats divided by the number of districts), and open versus closed lists in proportional representation systems (the former affording voters greater influence than the latter in the selection of candidates within a party list).⁵⁵

4.1.1 *Participation*

'Participation' is generally defined as the act of taking part in something.⁵⁶ The African Commission in the *Endorois* case contextualised and defined this general right to participation. Citing article 2(3) of the UN Declaration on the Right to Development the African Commission notes that participation must be 'active, free and meaningful'.⁵⁷ This indicates that participation is an active, not a passive, position. Thus, for women to participate, active engagement must be possible.

Gender-balanced participation entails equal representation (50-50), as is further discussed in the following section. This is often referred to as the 'parity of participation' of women and men. However, parity of participation is not just about the numbers. Fraser defines the principle of 'parity of participation' as a situation where social arrangements 'permit all (adult) members of society to

49 S Wittkopp 'Article 7' in Freeman et al (n 1) 202.

50 S Wittkopp 'Article 7' in Freeman et al (n 1) 202.

51 General Recommendation 23 (n 2) para 6.

52 General Recommendation 23 (n 2) para 22.

53 Council of Europe Balanced Participation of Women and Men in Decision-Making Analytical report - 2016 data Gender Equality Commission (GEC) <https://rm.coe.int/analytical-report-data-2016-/1680751a3e> (accessed 21 June 2023) 9.

54 S Wittkopp 'Article 7' in Freeman et al (n 1) 203.

55 United Nations Division for the Advancement of Women (DAW), Department of Economic and Social Affairs (DESA), Economic Commission for Africa (ECA) Inter-Parliamentary Union (IPU), Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership Report of the Expert Group Meeting Addis-Ababa, Ethiopia 24-27 October 2005, para 42.

56 Oxford English Dictionary Online, November 2022.

57 *Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya (Endorois)* (2009) AHRLR 75 (ACHPR 2009) para 283.

interact with one another as peers'.⁵⁸ This means that everyone must have the resources to take an active and equal part in social interaction with others in society, that everyone must have equal social status among others, and that everyone must have equal access to political decision-making.⁵⁹ Parity of participation, as an important component of social justice, thus requires an enabling environment, free of negative stereotypes and gendered biases, where women can move from passive spectators to active participants. Therefore, to increase women's participation in politics, structural barriers that prevent women from participating fully must be addressed.

4.1.2 Equal participation/representation

Article 9 of the Maputo Protocol is specific in requiring not simply increased participation but 'equal participation' of women in political life. However, patriarchal political culture remains an important determinant of women's equal participation. The earlier conceptions of equality contended that 'like should be treated as alike and unlike cases differently'.⁶⁰ This is known as formal equality, based on fairness, calling for laws and policies to be applied to everyone in the same way.⁶¹ It has been argued extensively that the concept of formal equality, which values neutrality, is merely an illusion considering that it is questionable whether the law can claim to be truly neutral.⁶²

As established in the foregoing chapter, the Maputo Protocol supports substantive and transformative equality.⁶³ Equality *in fact* occurs when women are afforded equal opportunities and are empowered to seize such opportunities to transform their lives. In this context, it essentially means that men and women should be able to participate equally in public and political life as it suits them.⁶⁴ Under article 9(1)(a), this requires that women's participation in the electoral process without discrimination is not only *in law* but, in essence, women and men's equal participation as voters and candidates in the electoral processes. This may require differential treatment of men and women to respond to historically determined under-representation.⁶⁵ In view of this, meeting the 'equality' standard under article 9(1) (a) involves ensuring meaningful use of the right to political participation and states' obligations to encourage and create enabling conditions which support participation.⁶⁶

The concept of substantive equality is reflected under article 9(1)(b), referring to women being 'represented equally at all levels with men in all electoral processes'. According to Wittkopp, the threshold for achieving substantive equality is unclear.⁶⁷ Achieving substantive equality through affirmative action is arguably crucial for meaningful political participation of women.⁶⁸ This may take the form of various measures such as reserved seats for women and a certain percentage of female

58 N Fraser 'Social justice in the age of identity politics: redistribution, recognition and participation' in N Fraser & A Honneth (eds) *Redistribution or recognition? A political-philosophical exchange* (2003) 36.

59 N Fraser 'Distorted beyond all recognition: a rejoinder to Axel Honneth' in N Fraser & A Honneth (eds) *Redistribution or recognition? A political-philosophical exchange* (2003) 231.

60 YT Chekera-Radu 'The relevance of substantive equality in the African regional human rights system's jurisprudence to women's land and property rights' (2017) 1 *African Human Rights Yearbook* 48.

61 Chekera-Radu (n 60) 48.

62 MA Fineman 'Gender and law: feminist legal theory's role in new legal realism' (2005) *Wisconsin Law Review* 407; KH Rothenberg 'Feminism, law, and bioethics' (1996) 6 *Kennedy Institute of Ethics Journal* 69.

63 A Rudman 'Article 8' sec 3.1.1. in this volume.

64 S Wittkopp 'Article 7' in Freeman et al (n 1) 210.

65 See eg the discussion on *Molefi Tse'pe v the IEC* under 6.2.

66 S Wittkopp 'Article 7' in Freeman et al (n 1) 210.

67 As above.

68 NR Kanyongolo & B Malunga 'Legal empowerment: laws promoting women participation in politics' in I Amundsen & H Kayuni (eds) *Women in politics in Malawi* <https://www.cmi.no/publications/file/5923-women-in-politics-in-malawi.pdf> (accessed 21 June 2023).

candidates on party lists.⁶⁹ The Beijing Platform⁷⁰ and General Recommendation 23⁷¹ both refer to the concept of creating a ‘critical mass’ which arguably allows for gender-sensitive and women-friendly outcomes.⁷² In this regard, the Beijing Platform recommends that states, for example, establish a target reserving 30 per cent of seats in Parliament for women as a minimum threshold.⁷³ In General Recommendation 23, the CEDAW Committee further suggests that once women’s rate of participation is at 30-35 per cent, there will be a significant impact on the political style and content of decisions.⁷⁴

The Beijing Platform moreover sets out that the ‘goals of equality, development, and peace will not be achieved without the active participation of women and the incorporation of women’s perspective at all levels of decision-making’.⁷⁵ Achieving the objective of equal participation of men and women on all levels of decision-making will provide a ‘balance that more accurately reflects the composition of society’, and such a balance is needed in order to ‘strengthen democracy and promote its proper functioning’.⁷⁶ Women’s equal participation in political life plays a decisive role in the overall process of advancing women and is thus a prerequisite for upholding other rights.

The AU Strategy for Gender Equality and Women’s Empowerment for 2018-2028 (AU Strategy) presents a plan to realise Aspiration 6 of the Agenda 2063: The Africa We Want (Agenda 2063) and the principle enshrined in article 4(l) of the AU’s Constitutive Act to promote gender equality. The AU Strategy sets as a target ‘equal participation and demonstrated influence of women and girls in all leadership and decision-making positions’. In contrast to ‘equal’ participation, the members of the Council of Europe (CoE) have committed themselves to achieving a ‘balanced participation of women and men in political and public life’. A ‘balanced participation’ has been defined by the CoE to mean that ‘representation of either women or men in any decision-making body in political or public life should not fall below 40 per cent’.⁷⁷

According to Heyns, even if, at a formal level, the opportunity to participate is provided to all citizens, those who are marginalised may find themselves in such an imbalance of power that positive measures may be necessary before they have a meaningful hold over their fate.⁷⁸ Thus, with reference to the definition provided in article 1(f) of the Maputo Protocol, achieving equality in the political sphere must consider the eradication of stereotypes and harmful social and cultural practices, a wide scope of state obligations and the need to make provision for gender budgeting for the effective implementation of women’s rights.⁷⁹ Thus, it is justified to consider exclusion from political participation as a form of discrimination which evokes the use of the remedies provided in article 2 on the elimination of discrimination against women. In particular, article 2(2) recognises the negative impact arising from harmful stereotypes and thus calls on states to meet their obligations by modifying social and cultural

69 As above.

70 Beijing Platform (n 9) Strategic objective G.1 para 194(a).

71 Para 16.

72 S Wittkopp ‘Article 7’ in Freeman et al (n 1) 210.

73 Beijing Platform (n 9) Strategic objective G.1 para 194(a).

74 General Recommendation 23 (n 2) para 16.

75 Beijing Platform (n 9) para 181.

76 As above.

77 Recommendation Rec(2003)3 of the Committee of Ministers to member states on balanced participation of women and men in political and public decision making (Adopted by the Committee of Ministers on 12 March 2003 at the 831st meeting of the Ministers’ Deputies). Appendix.

78 C Heyns ‘Study on the Right to Equal Participation in Political and Public Affairs in Africa’ 5 September 2017 <https://www.ohchr.org/sites/default/files/Documents/Issues/PublicAffairs/ChristofHeyns.docx> (accessed 23 June 2023). See also CH Heyns ‘The right to political participation in Sub-Saharan Africa’ (2019) 8 *Global Journal of Comparative Law*.

79 Rudman & Mkali (n 38) 20.

patterns of conduct and harmful cultural and traditional practices based on the idea of stereotyped patriarchal roles for women and men.

4.2 Decision-making processes

The persistence of masculine politics pinpoints the otherness of women to the extent that women are significantly excluded from decision-making in all public spheres.⁸⁰ The Preamble of CEDAW reiterates the importance of women's participation in decision-making, indicating that 'the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields'.⁸¹

The under-representation of women in political decision-making reflects a basic democratic deficit.⁸² However, article 9(2) refers to 'all levels of decision-making', which substantially broadens the scope of decision-making well beyond the political sphere. The concept referred to in article 9(2) resembles the concept of 'political and public life of the country' referred to in the main provision of article 7 of CEDAW and the concept of 'public affairs' referred to in article 25 of the ICCPR. This covers all aspects of public administration and the formulation and implementation of policy at the local, national, regional and international levels.⁸³ Accordingly, this extends women's representation to civil society and includes 'public boards and local councils and the activities of organisations such as political parties, trade unions, professional or industry associations, women's organisations, community-based organisations or other organisations concerned with public and political life'.⁸⁴ Importantly, article 12 of the SADC Protocol refers to 'public and private sectors' bringing the lens of equality into the domain of, for example, private corporations, governing bodies of private schools and trusts. The same, broader scope would arguably follow from the reference in article 9(2) to 'all levels of decision-making'.

4.2.1 'Increased' and 'effective'

Article 9(2) has a different character than the provisions under article 9(1). While the latter refers to 'equal' participation and representation, the former refers to 'increased' and 'effective' participation and representation. The reference to 'increased' under article 9(2) was, as mentioned in section 2 above, added by the Expert Meeting in 2001 to the reference to 'effective participation and representation' as stipulated in the Final Draft. There is a similar reference in article 10(2) of the Maputo Protocol referring to the right to peace.

When something increases, it becomes greater in size, amount, degree or importance.⁸⁵ However, the reference to 'increased' arguably imposes a lesser obligation on states as compared to 'equal' as adding a few women to a low number of women would arguably fulfil the requisite of 'increasing' while not coming close to equal representation. In the same vein increasing numbers of women in an institution of low impact, for example, in an advisory function, would suffice to fulfil the requirements of 'increased' participation while not reaching 'equal' participation. Importantly, however, the reference to 'increased' refers to a progressive realisation placing an obligation on the state not to regress its commitments.

80 O Eni 'The right to participate in political and decision-making process under the Maputo Protocol: normative masculinity and Nigerian Women' (2022) 18 *The Age of Human Rights Journal* 398.

81 General Recommendation 23 (n 2) para 2.

82 Resolution 489 (2006) on mechanisms to ensure women's participation in decision-making.

83 S Wittkopp 'Article 7' in Freeman et al (n 1) 201.

84 S Wittkopp 'Article 7' in Freeman et al (n 1) 201 as provided in General Recommendation 23 (n 2) para 5.

85 Oxford English Dictionary Online, November 2022.

Under article 9(2), each member state must moreover ensure ‘effective’ representation and participation. This is an interesting reference as it arguably cures the deficiency of only ‘increasing’ participation and representation. When something is effective, it is successful in producing a desired or intended result. The desired or intended result of the Maputo Protocol is arguably substantive, transformative equality. Thus, for representation and participation in all decision-making to be ‘effective’ under the Maputo Protocol, it arguably needs to be equal. This indicates that such representation and participation must be made available and possible through positive measures.⁸⁶

5 Nature and scope of state obligations

Article 9 includes two main state obligations: (i) to *take specific positive action* to promote participative governance and the equal participation of women in political life through affirmative action, enabling national legislation and other measures; and (ii) to *ensure* increased and effective representation and participation of women at all levels of decision-making. The following sections present the nature of the different state obligations involved thereunder.

5.1 Obligation to respect, protect and fulfil the right of equal participation and representation

As a point of departure and with the understanding that all human rights contain the four-fold obligation to *respect, protect, promote, and fulfil*, the African Commission has provided context to each layer of obligations. First, in view of the right to *respect*, this entails that state parties should refrain from interfering in the enjoyment of all fundamental rights by respecting rights holders, their freedoms, autonomy, resources, and liberty of their action.⁸⁷ Thus, with regard to the right to political participation, the state must, as a basic requirement, ensure that all political systems are free from state interference and that basic civil rights such as freedom of expression and assembly and the right to information are upheld.

Second, according to the African Commission, states have an obligation to ‘*protect* rights-holders against other subjects by legislation and provisions of effective remedies’.⁸⁸ In essence, this obligation requires that the state should take measures to protect beneficiaries against, for instance, political, social and economic interferences or the impact of stereotypes and biases.⁸⁹ The obligation to protect commonly involves developing and enforcing legal frameworks where laws and regulations interact to allow individuals to realise their rights freely.⁹⁰ Thus, in terms of the representation and participation of women in political affairs and in decision-making processes, relevant laws and regulations must be in place.

Third, the obligation to *promote* is intimately linked with the obligation to protect. In this regard, states must ensure that individuals can exercise their rights and freedoms. In the context of article 9, this includes, for example, awareness-raising and public education campaigns to address deep-rooted stereotypes and patriarchal attitudes regarding the role of men and women in public life.⁹¹

Finally, state parties are to *fulfil* the rights and freedoms under article 9 of the Maputo Protocol. According to the African Commission, there is a positive expectation placed on the state to move its

86 M Lasseko-Phooko ‘The challenges to gender equality in the legal profession in South Africa: a case for substantive equality as a means for achieving gender transformation’ (2021) 21 *African Human Rights Law Journal* 500.

87 *Social and Economic Rights Action Centre (SERAC) v Nigeria (SERAC)* (2001) AHRLR 60 (ACHPR 2001) para 45.

88 *SERAC* (n 87) para 46. Our emphasis.

89 *SERAC* (n 87) para 46.

90 As above.

91 S Wittkopp ‘Article 7’ in Freeman et al (n 1) 216.

machinery towards the actual realisation of the rights in article 9.⁹² For example, states should ensure that the requirements for entering public service and functions are designed to work with the realities of female and male lifestyles.⁹³ This is an example of how to ensure the *de facto* realisation of the right to political participation and decision-making process. States should moreover support the ‘equal sharing of family responsibilities by adopting measures to enhance the work-life balance for both women and men in the public sector’.⁹⁴

5.2 Specific positive action, affirmative action and other measures

Article 9 requires states to take measures to ensure women’s right to political participation and participation in all decision-making processes. In order to ensure this right, the measures to be implemented range from administrative and other policy measures, including special temporary measures as discussed below.⁹⁵ The CEDAW Committee recommends that such measures should include ‘recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions’.⁹⁶ As is further discussed in 6.2 below, quotas are one form of temporary special measures that state parties have employed.

Article 9 stipulates that member states must take ‘specific positive action to promote participative governance and the equal participation of women in the political life ... through affirmative action’. In this context, positive action can broadly be referred to as ‘temporary special measures’.⁹⁷ States are urged to set up temporary measures to increase the representation of women where they have traditionally been underrepresented, as reflected in article 9(1). In view of the CEDAW Committee, the terms ‘affirmative action’, ‘positive action’, ‘positive measures’, ‘reverse discrimination’ and ‘positive discrimination’ all equate to temporary special measures.⁹⁸ Specifically, the term ‘positive action’ is used to describe positive state action, which refers to the obligation of a state to initiate action as opposed to a state’s obligation to abstain from action.⁹⁹

In addition, the CEDAW Committee has specified that in view of article 7 of CEDAW, state parties are to make use of temporary special measures such as positive action, preferential treatment or quota systems to advance women’s integration into, for example, electoral politics.¹⁰⁰ The CEDAW Committee has also defined the term ‘measures’ as encompassing a ‘wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes, allocation and/or reallocation of resources, preferential treatment, targeted recruitment, hiring and promotion; numerical goals connected with time frames, and quota systems’.¹⁰¹

As stated by Durojaye, affirmative action favours the adoption of temporary positive measures, in this case, opportunities for the advancement of women’s political participation.¹⁰² Increasing women’s

92 *SERAC* (n 99) para 47.

93 S Wittkopp ‘Article 7’ in Freeman et al (n 1) 216.

94 S Wittkopp ‘Article 7’ in Freeman et al (n 1) 217.

95 S Wittkopp ‘Article 7’ in Freeman et al (n 1) 214. See 4.3.

96 CEDAW General Recommendation 23 (n 2) para 15.

97 General Recommendation 25, on Article 4(1) of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (General Recommendation 25) para B 17.

98 As above.

99 General Recommendation 25 para B 17 footnote 4.

100 General Recommendation 5 (n 34).

101 General Recommendation 5 (n 34).

102 E Durojaye ‘Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa’ (2006) *African Human Rights Law Journal* 192.

representation through electoral systems can take different forms. In a bid to make equal participation of women and men in political life and in decision-making in all spheres a reality, the Parliamentary Assembly of the CoE has, for example, made a number of important suggestions as to measures that, in its view, are included under the obligation of ‘equal representation’ and ‘equal participation’. For instance, in countries with proportional representation, this entails list systems establishing compulsory quotas, which provide for a high proportion of female candidates, preferably at least 40 per cent, to ensure equal representation.¹⁰³ Other measures include invoking a strict rank-order rule, for example, a ‘zipper’ system (or a ‘zebra’ system as it is often referred to in the African context) of alternating male/female candidates on the party list.¹⁰⁴ In addition, effective sanctions for non-compliance, for instance, the non-acceptance of candidatures/candidate lists, are important, preferably combined with closed lists in larger constituencies and/or a nationwide district, to mitigate prejudice.¹⁰⁵

For countries with majority or plurality systems, reaching equal representation could, for example, entail introducing a method where each party chooses a candidate between at least one female and one male nominee in every party district. It could also involve ‘applying innovative mandatory gender quotas within political parties, or “all-women shortlists”, ... accompanied by effective sanctions for non-compliance’.¹⁰⁶

Article 9 recognises that while removing legal obstacles is a necessity, there is a need to have positive measures in place. Failure to prioritise women’s equal participation in political life results in continued gender imbalance in all spheres. As confirmed by the Inter-American Commission on Human Rights, positive measures of affirmative action with the obligation of state parties to ensure non-discrimination and equality involve ‘recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions’.¹⁰⁷ In principle, such positive measures essentially ensure parity in view of the opportunities available to women seeking to participate in political life. For instance, article 9(1)(b) provides that women must be ‘equally’ represented with men, which arguably calls for parity. Similarly, Agenda 2063 provides that gender equality in political participation involves ensuring that women occupy at least 50 per cent of elected public offices.¹⁰⁸

Notably, article 9(2) specifically refers to the ‘increased and effective representation and participation of women at all levels of decision-making’. This closely resembles article 7(a)-(b) of CEDAW, which is broad in its formulation and covers the exercise of legislative, judicial, executive and administrative powers.

6 State practice

6.1 Constitutional measures

Although constitutional guarantees of equality and non-discrimination do not assure that the rights to representation and participation in the political and decision-making process are available in practice, constitutional measures constitute the foundation upon which the rights set out in article 9 can be implemented. For example, article 9 of the 2019 Guinean Constitution stipulates that male/female

103 Parliamentary Assembly of the Council of Europe Recommendation 1899 (2010) on increasing women’s representation in politics through the electoral system (Council of Europe Recommendation) para 2.1.1. See also 4.1.

104 Council of Europe Recommendation (n 103) para 2.1.1.

105 As above.

106 Council of Europe Recommendation (n 103) para 2.1.2.

107 General Recommendation 23 (n 2) para 15.

108 Agenda 2063, para 52.

parity is a political and social objective and that the government and the assemblies of the deliberative bodies cannot be composed of members of more than two-thirds of the same gender. Under article 55 of the 1980 Constitution of Cape Verde, the state is obligated to ‘encourage balanced participation of citizens of both sexes in political life’.

In the same vein, the 2010 Constitution of Kenya provides that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. According to Owiso and Sefah, the Kenyan Constitution secures the two-thirds gender principle from political tinkering by providing rigid procedures for its amendment.¹⁰⁹ According to Chiweza et al, although equality and non-discrimination is the basic principle for ensuring female participation, the principle has not been consistently applied through state practice in Kenya.¹¹⁰ As is evident from these examples, the constitutional requirements highlight the importance of gender equality and non-discrimination. However, they do not stipulate gender parity.

Many state parties have reported on the implementation of article 13 of the African Charter and article 9 of the Maputo Protocol through constitutional provisions. Burkina Faso, as one example, reported that it had initiated a number of quotas and initiatives to further the participation of women in public and political life.¹¹¹ However, as much as it has made efforts to put constitutional provisions to this effect in place, it confirmed that there is still a need to eradicate socio-cultural bottlenecks to enforce its laws relevant to quotas effectively.¹¹²

In reporting on article 9, Eswatini furthermore referred to section 84(2) of its 2005 Constitution, protecting the right to representation which stipulates that ‘the women of [Eswatini] ... have a right to equitable representation in Parliament and other public structures’.¹¹³ Section 86 correspondingly refers to a quota indicating that ‘[w]here at the first meeting of the House after any general election it appears that female members of Parliament will not constitute at least thirty per cent of the total membership of Parliament ... the House shall form itself into an electoral college and elect not more than four women on a regional basis to the House’. Eswatini also referred to legislative measures such as the Election of Women Members to the House of Assembly Act¹¹⁴ that give effect to these constitutional provisions.¹¹⁵ This Act provides for a process and mode of nomination of women members in the House of Assembly. It furthermore referred to the Elections Act,¹¹⁶ which prohibits discrimination in terms of political participation for voters.¹¹⁷ In addition, the Senate Elections Act¹¹⁸ incorporates section 94(2) of the Constitution, which provides that out of the 10 Senators, half should be women.¹¹⁹

109 O Owiso & B Sefah ‘Actualising women’s participation in politics and governance in Africa: the case of Kenya and Ghana’ (2017) 1 *African Human Rights Yearbook* 272. The first is through parliamentary initiative. The second procedure is through a popular initiative by not less than one million registered voters, which must be approved by a majority of Kenya’s 47 country assemblies and then by the people in a referendum.

110 AL Chiweza et al ‘The women’s parliamentary caucus: promoting cross-party substantive representation’ in Amundsen & Kayuni (n 68) 34.

111 Periodic Report of Burkina Faso within the framework of the implementation of article 62 of the African Charter on Human and Peoples’ Rights, January 2015, para 334.

112 Periodic Report of Burkina Faso (n 111) para 335.

113 Combined Periodic Report 2010-2021 of Eswatini on the African Charter on Human and Peoples’ Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa, paras 451-453.

114 Act 9 of 2018.

115 Combined Periodic Report of Eswatini (n 113) para 454.

116 Elections Act 10 of 2013.

117 Combined Periodic Report of Eswatini (n 113) para 455.

118 Act 7 of 2013.

119 Combined Periodic Report of Eswatini (n 113) para 455.

6.2 Quotas

Similar to the approach by Eswatini, discussed with reference to the constitutional protection of women's representation and participation in the previous section, other states have implemented quotas and gender-sensitive laws in order to advance women's political representation and participation. As a point of departure, it is important to note that although quota systems have been used to ensure the representation of women at all levels of political decision-making, such measures alone do not necessarily result in women's effective political participation.¹²⁰ This is so because, without a transformation of socio-cultural, political and institutional systems, which remain male-dominated, the promotion of gender equality is severely hampered.¹²¹

In Uganda, a system of quotas was adopted in 1986.¹²² This led to a significant increase in women's public presence through the creation and reservation of seats at national and local government levels.¹²³ Tamale suggests that the positive action to increase the proportion of women in the National Assembly intended to form descriptive representatives who 'stood for' women in society.¹²⁴ She states that a descriptive nature of women representatives creates '*status quo*' representatives as opposed to 'emancipationists,' as women are neither positioned as representing a particular interest group nor do they carry a special responsibility for their peers.¹²⁵ Thus, attaining equality through quotas depends on the type of electoral system, the dedication of party leaders and governments to encourage women in politics, and the overall influence wielded by women's movements and women's groups.¹²⁶ As an example, in the state report presented by Burkina Faso, it is evident that since the adoption of the Law on Quotas for Legislative and Municipal Elections,¹²⁷ the state has taken positive steps towards increasing women's participation, such as engaging with political leaders to better the positioning of women on the electoral lists and organising workshops for women candidates.¹²⁸

In Cameroon, a law relating to the Electoral Code¹²⁹ introduced a gender approach to managing elections.¹³⁰ Specifically, sections 151 and 171 provide that 'each list shall take into consideration ... gender aspects'.¹³¹ In response, some political parties adopted good practices of demanding female representation of at least 30 per cent on their lists.¹³² Nonetheless, it is evident that there are still

120 R Kandawasvika-Nhundu 'The role of political parties on women's participation and representation' International IDEA Technical Paper (2001) <https://www.idea.int/sites/default/files/publications/the-role-of-political-parties-on-womens-participation-and-representaion-en.pdf> (accessed 21 June 2023).

121 As above.

122 Article 32(1) stipulates that, '[n]otwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition. Article 180 (2)(b) provides that 'one third of the membership of each local government council shall be reserved for women'.

123 A Goetz 'No shortcuts to power: constraints on women's political effectiveness in Uganda' (2002) 40 *Journal of Modern African Studies* 40 550.

124 S Tamale *When hens begin to crow: gender parliamentary politics in Uganda* (2000) 74.

125 Tamale (n 124) 74.

126 IKnow politics 'Consolidated Response, Gender Quotas in African Countries' <https://iknowpolitics.org/sites/default/files/cr20gender20quotas20in20african20countries20en.pdf> (accessed 21 June 2023).

127 Law 010-2009/AN of 16 April 2009.

128 Periodic Report of Burkina Faso (n 111) para 334.

129 Law 2012/1 of 19 April 2012.

130 Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and Initial Reports relating to the Maputo Protocol and the Kampala Convention 2020.

131 Periodic Reports of Cameroon (n 130) para 745.

132 Periodic Reports of Cameroon (n 130) para 751.

challenges with regard to the full participation of women in politics in Cameroon, as, according to the state report, many women continue to lack interest in politics.¹³³

Essentially, quotas have provided an important stepping stone for women to access positions of power in politics, which, in Africa, is still largely a male-dominated space. As observed by Bosha, if women continue to be deprived of the necessary support to enter politics successfully, this will result in reinforcing the socialised perspectives of women as not being suited for public life but belonging in the private sphere.¹³⁴

In its Initial Report under the Maputo Protocol, The Gambia reports that *de facto* equality is yet to be achieved, especially in politics. This is due to 'deep seated social and cultural beliefs'.¹³⁵ For example, in the 2017 National Assembly and Local Government elections, political parties were encouraged to present more women candidates but only 22 women contested in the National Assembly elections out of a total of 239 candidates, which is less than 10 per cent. In the 2018 local government elections, 49 women contested out of a total of 409 candidates, which amounts to 12 per cent of the candidates.¹³⁶ This notwithstanding that Gambian women constitute 58 per cent of the electorate.¹³⁷ Only 10 per cent of the representation in the National Assembly was female. As of 2016, there were four female National Assembly members, out of which two were elected, and the President nominated two.¹³⁸ Following the elections in 2018, there were five female National Assembly members; two were elected, and the President nominated three.¹³⁹ Accordingly, the proportion of female parliamentarians is well below the objective of achieving 30 per cent female representation.¹⁴⁰ To quell this, The Gambia's Women's Act provides temporary special measures to accelerate *de facto* equality between men and women to be implemented at all public institutions and private enterprises.¹⁴¹ The implementation of such measures, as is evident in the figures presented above, becomes highly relevant in the 'political arena and decision-making at all levels, where women are not legally barred from participating effectively on an equal footing with men, but may not be able to do so due to cultural bias in favour of men, and stereotypical perception of the role of women'.¹⁴² Thus, there is a need to continuously encourage women to assume decision-making positions and to change the mindset of people through sensitisation and awareness of the importance of women's effective participation.

Similarly, Lesotho reported that the National Assembly Elections Act was amended to require that for proportional representation seats, all political parties must submit a list of candidates which reflects an order mixed by gender, also referred to as a 'zebra list'.¹⁴³

Lesotho introduced a gender-based quota system at the local level in 2004, where a third of the seats in electoral councils are reserved for women. The Local Government Election (Amendment)

133 Periodic Reports of Cameroon (n 130) para 754.

134 S L Bosha 'Quota systems and women political leadership development in Africa' (2014) 3 *Journal of African Union Studies* 103 & 112.

135 The Gambia Combined Report on the African Charter on Human and Peoples' Rights for the Period 1994 and 2018 and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa p 156.

136 The Gambia Combined Report (n 135) p 156.

137 As above.

138 As above.

139 As above.

140 As above.

141 The Woman's Act 12 of 2010 sec 15.

142 The Gambia Combined Report (n 135) p 59.

143 The Kingdom of Lesotho Combined Periodic Report Under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa 2018 para 386.

Act¹⁴⁴ (Lesotho Electoral Act) reserves one-third of seats in every council for women candidates.¹⁴⁵ This means that men are not allowed to stand as candidates in such designated electoral divisions. The remainder of the seats in every council are open to both male and female *candidates*. The Lesotho Electoral Act makes provision for this system to rotate to different constituencies for at least three elections, at which time it will be evaluated and assessed.¹⁴⁶

The amendment introduced in 2004 was challenged in *Molefi Tse'pe v the IEC*,¹⁴⁷ where the applicant claimed that the amendments infringed his constitutional rights. Molefi Tse'pe wanted to stand as an independent candidate in the elections but was informed by the returning officer of the division in question that he could not do so because the division was reserved exclusively for women candidates.¹⁴⁸ In light of this, Mr Tse'pe filed a constitutional suit arguing that he was being discriminated against on the basis of his sex with reference to Section 18 of the Constitution of Lesotho.¹⁴⁹ However, section 18(4)(e) contains a limitation clause stipulating that such a right can be limited if it is 'reasonably justifiable in a democratic society'.

As pointed out by Viljoen and Nsibirwa, this case was fundamentally about 'two notions of equality – formal and substantive equality'.¹⁵⁰ As noted by the Lesotho Court of Appeal, the formal test of equality, as suggested by the complainant in this case, 'evokes an approach to equality ... which subordinates substantive to formal equality'. This, in the court's opinion, would be detrimental to 'any form of handicap (positive or negative) and to quotas'. Thus, the Lesotho Court of Appeal found that the affirmative action, introduced by the 2004 amendment, both upheld Lesotho's international obligations and constituted a justifiable limitation to Mr Tse'pe's constitutional rights.¹⁵¹ In terms of Lesotho's obligations under international law, it was a member to the Maputo Protocol before this case was heard, but the Maputo Protocol only entered into force on 25 November 2005 after the ratification by 15 African states. Therefore the Protocol was mentioned in the case but not applied.¹⁵² However, as suggested by Viljoen and Nsibirwa, the Maputo Protocol not only supports the decision in *Molefi Tse'pe v the IEC* but 'strengthens arguments for the extension of "specific positive action" designed to promote women's representation in politics at the national level'.¹⁵³

It is worth noting that the idea of enforcing legal measures to further women's political participation is still controversial in public and legal spheres. Quotas have been criticised for providing the incorrect idea that 'only women can represent women, while men can represent both men and women'.¹⁵⁴ Such critiques have referenced country examples where women have failed to represent women's issues, as seen in Rwanda. It has been argued that female members of the Rwandan Parliament had failed to advocate for women's rights when a new land policy was debated. As a result, rural women were disappointed and felt that the women MPs had not represented their issues adequately.¹⁵⁵

144 Act 6 of 2004.

145 Sec 26(1A)(a) and (b) of the Local Government Election Act as amended.

146 Lesotho Combined Periodic Report (n 143) para 399.

147 *Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LeCA 2005) (*Molefi Tse'pe v the IEC*).

148 *Molefi Tse'pe v the IEC* (n 147) para 2.

149 Section 18 provides that 'no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'.

150 F Viljoen & M Nsibirwa 'Political participation of women in Lesotho: the case of *Molefi Ts'epe v The Independent Electoral Commission and Others*, judgment of 30 June 2005' (2006) 39 *Comparative and International Law Journal of Southern Africa* 358.

151 *Molefi Tse'pe v the IEC* (n 147) para 40.

152 Viljoen & Nsibirwa (n 150) 359.

153 Viljoen & Nsibirwa (n 150) 360.

154 Boshia (n 134) 103 & 109.

155 Boshia (n 134) 109.

6.3 Electoral systems

Electoral systems are commonly divided into proportional representation, majority/plurality, and mixed representation systems. Furthermore, there are different forms of arrangements within the majority system, such as the First Past the Post (FPTP), also referred to as the ‘winner-takes-all’ system.¹⁵⁶ The FPTP electoral system is applied in a limited form in nearly half of African countries: Botswana, Cameroon, Chad, Congo (Brazzaville), Côte d’Ivoire, Gabon, Gambia, Ghana, Ethiopia, Kenya, Liberia, Malawi, Mali, Mauritius, Mozambique, Nigeria, Sudan, Swaziland, Tanzania, Uganda and Zimbabwe.¹⁵⁷ As seen in Malawi, the ‘winner-takes-all’ system means that political parties will try to maximise their odds of winning by promoting the ‘safest’ candidate.¹⁵⁸ Thus, this arguably dissuades political parties from choosing ‘non-traditional’ aspirants such as women as they are often not considered to be the winning ticket.¹⁵⁹

In a proportional electoral system, every electoral district has more than one member, each party presents a list of candidates for multi-member districts, and there is proportional representation. As an example, in Namibia, the ruling South-West Africa People’s Organisation has a 50 per cent one woman, one man or ‘zebra’ quota.¹⁶⁰ This played an important role in electing 46 per cent of women to the House of Assembly in the 2019 elections. The 2019 elections also paved the way for young women to take up leadership positions in Namibia.¹⁶¹

It is worth noting that although the proportional representation system is considered to be women-friendly, it has been criticised for containing discriminatory elements unless women are intentionally placed at the top of the list in order to maximise their chances. In view of the same, Lesotho reported, in 2018, that of the 80 constituencies around the country, only nine of them elected women against the 71 constituencies (89 per cent) that elected men.¹⁶² The other 18 women went to Parliament through the zebra-listing of the proportional representation policy, and they made up 40 per cent of the 40 proportional representation seats.¹⁶³ In its Concluding Observations, the African Commission expressed its concern over the overall low representation of women in decision-making positions in Lesotho.¹⁶⁴

In view of state practice, there are several concluding observations that pinpoint an ongoing struggle regarding accounting for women’s political participation and involvement in decision-making processes. As explained by the Commission in its Concluding Observation on Algeria, ‘the [r]eport does not highlight specific cases of women in Algeria and notably, the provisions put in place to guarantee the active participation of women at all decision-making levels, including cases where women have been subjected to violence’.¹⁶⁵ In addition, with regard to Nigeria, the Commission raised

156 See 4.1.

157 IKnow politics (n 126) 4.

158 Rudman & Mkali (n 38) 12.

159 As above.

160 Gender Links for Equality and Justice, 50/50 Policy Brief Namibia May 2020 <https://genderlinks.org.za/wp-content/uploads/2020/10/50-50-PB-NAMIB-MAY20rev.pdf> (accessed 21 June 2023).

161 Gender Links for Equality and Justice (n 160) 1.

162 Lesotho Combined Periodic Report (n 143) para 390.

163 As above.

164 Concluding Observations and Recommendations on the Kingdom of Lesotho’s Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples’ Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, para 50.

165 Concluding observations on the 3rd and 4th combined Periodic Reports of the Peoples’ Democratic Republic of Algeria, presented at the 42nd ordinary session of the African Commission para 15.

concern over the low representation of women in positions of power and authority.¹⁶⁶ The Commission recommended that Nigeria '[e]nact a legislative framework that provides for affirmative action for women including the stipulation of specific female representation quotas in decision-making positions, to increase women's representation'.¹⁶⁷ These concluding observations point to a lack of compliance in view of article 9 of the Maputo Protocol.

7 Conclusion

Gender-balanced political representation and participation and power-sharing between women and men in decision-making is an internationally agreed target dating back to the Beijing Platform. However, the reality for most African women is that they have limited or no access to the corridors of power. The effective realisation of the rights to representation and participation in political and decision-making processes is essential for women's emancipation and for the overall legitimacy of democracy in Africa. Achieving parity on the rights set out in article 9 requires the removal of the practical and structural obstacles that hinder women's effective involvement in all decision-making. Simply adding women to existing social and political structures, using, for example, quotas, will, as discussed in this chapter, have limited effect on eradicating the discrimination and inequities which women continually suffer from.

Article 9 sets out rights and obligations that enable women to assume responsibility for the benefit of themselves, their families, their communities, and their countries. As the analysis in this chapter has shown, article 9 moves well beyond a narrow focus on the sphere of formal politics to decision-making more broadly. It is thus a vanguard of the transformation that must take place for women to achieve overall substantive equality.

The stereotypes that women are less interested in politics or less suited to participate in politics and decision-making is deeply rooted in the patriarchal and hierarchical design of the political systems. This also includes various forms of gender-based violence that women often experience in the political sphere. Thus, to achieve parity of participation and representation, women must be afforded actual opportunities to actively join in community life and be allowed to be creative in an environment marked by dignity and freedom. However, although state practice, as discussed in the previous section, shows some innovative ways of fulfilling the obligations in article 9, the fact remains that without effecting substantial change in the social, political, economic, cultural, and religious contexts in which women are expected to claim their rights to equal representation and participation such rights will remain unfulfilled. Thus, the conceptual richness of article 9 has not been fully matched by the state parties' efforts towards implementation.

The rights to political representation and participation, along with active participation on all levels of decision-making within the Maputo Protocol, is part of a broader quest to achieve substantive female leadership in Africa to transform the way women are viewed in society at large. In this regard, all stakeholders must join hands to enable women to make their voices heard as politicians and as leaders.

166 Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011-2014) 57th ordinary session 4-18 November 2015, Banjul, The Gambia para 75.

167 Concluding Observations Nigeria (n 166) para 115.

Article 10

Right to peace

Ashwanee Budoo-Scholtz

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.
2. States Parties shall take all appropriate measures to ensure the increased participation of women:
 - (a) In programmes of education for peace and a culture of peace;
 - (b) In the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;
 - (c) In the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women;
 - (d) In all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women;
 - (e) In all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation.
3. States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

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1 Introduction

Article 10 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), guaranteeing women's right to peace, is a reminder of the many conflicts in Africa that have deprived women of peace.¹ In 2019, there were 25 state-based conflicts on

1 F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 81.

the African continent;² while in 2021, Africa saw the highest number of armed conflicts compared to the other continents.³ These statistics demonstrate that article 10 is still an aspiration for many African women.

While conflicts have an impact on everyone, they disproportionately affect women.⁴ Women in conflicts are often subjected to sexual assault, abuse and exploitation.⁵ They are often victimised which leads ‘to isolation, alienation, prolonged emotional trauma, and unwanted pregnancies’.⁶ Furthermore, as women traditionally are the primary caregivers, they ‘struggle to support their families’ during conflict while their husbands and sons participate in the conflict.⁷ Conflicts also lead to interruptions in social services on which many women depend.⁸ Some women are also directly involved in the conflict, thereby compromising their own safety and security. Thus, the right to peace is essential to promote and protect women’s rights.

On the international level, the right to peace does not form part of any legally binding treaty. As an example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) only recognises women’s participation as essential for peacebuilding in its Preamble. Only soft law provides for the right to peace for everyone, including women.⁹ This is despite the fact that establishing peace is one of the main objectives of the United Nations (UN).

The inclusion of article 10 in the Maputo Protocol was inspired by article 23 of the African Charter on Human and Peoples’ Rights (African Charter), which provides for the right to ‘promote and maintain peace and to live in peace’.¹⁰ Article 23 of the African Charter is, in turn, a ‘reaffirmation of certain principles of international law’.¹¹ As indicated above, the UN Charter stipulates that one of the purposes of the UN is the maintenance of peace.¹² Thus, it contains several provisions concerning the steps that the organs of the UN must take to promote peace. Moreover, the Preamble to the Universal Declaration of Human Rights (Universal Declaration) provides for the realisation of the rights of everyone as the foundation of peace; while article 26 provides for education that is directed to the ‘maintenance of peace’.

2 Reliefweb ‘Conflict trends in Africa, 1989-2019’ (14 October 2020) <https://reliefweb.int/report/world/conflict-trends-africa-1989-2019> (accessed 23 June 2023).

3 Reliefweb ‘Alert 2022! Report on conflicts, human rights and peacebuilding’ <https://reliefweb.int/report/world/alert-2022-report-conflicts-human-rights-and-peacebuilding> (accessed 29 July 2022). In 2021 there were 15 armed conflicts on the African continent.

4 USAID ‘Women and conflict’ (2007) 1 [toolkit_women_and_conflict_an_introduutory_guide_for_programming.pdf](https://www.usaid.gov/sites/default/files/asset_document/2007/01/toolkit_women_and_conflict_an_introduutory_guide_for_programming.pdf) (usaid.gov) (accessed 23 June 2023).

5 See generally L Mushoriwa et al ‘Accountability for sexual exploitation and abuse by United Nations peacekeepers: case studies of the Democratic Republic of Congo and Central African Republic’ in A Budoo-Scholtz & EC Lubaale (eds) *Violence against women and criminal justice in Africa: sexual violence and vulnerability* (2022) 139; I Ogunniran ‘Conflict-related sexual violence in the North-East Nigeria: strengthening legal response’ in A Budoo-Scholtz & EC Lubaale (eds) *Violence against women and criminal justice in Africa: sexual violence and vulnerability* (2022) 171; and J Ndagire ‘Prospects for reparations for victims of conflict-related sexual violence in Uganda’ in A Budoo-Scholtz & EC Lubaale (eds) *Violence against women and criminal justice in Africa: sexual violence and vulnerability* (2022) 201.

6 USAID (n 4) 1.

7 USAID (n 4) 1.

8 USAID (n 4) 1.

9 UN Declaration on the Right to Peace in 1984, updated in 2017.

10 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples’ Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft) 5.

11 F Ouguerouz *The African Charter on Human and Peoples’ Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 338.

12 UN Charter art 1.

This chapter elaborates on article 10 of the Maputo Protocol, and is divided into six sections. Section 2 focuses on the drafting history of Article 10. Section 3 elaborates on the different concepts under article 10 while section 4 examines the article's relationship with other relevant international law provisions. Section 5 analyses the extent to which states have implemented article 10 and section 6 provides for conclusions and recommendations.

2 Drafting history

The right to peace was included in article 11 of the Nouakchott Draft¹³ by way of reference to article 23 of the African Charter. This demonstrates that the right to peace was central to the realisation of women's rights in Africa from the very beginning. The inclusion of the right to peace was arguably related to the many ongoing conflicts on the continent. Between the 1960s and the 1990s there were several coup d'états.¹⁴ At the time the Maputo Protocol was being drafted there were armed rebellions in 18 countries and 11 'severe political crises' in the continent.¹⁵ Hence, it is unsurprising that women's right to peace was a concern at the time.

Article 11 of the Nouakchott Draft spells out that states parties commit themselves to 'reduce military expenditure significantly in favour of spending on social development, while guaranteeing the effective participation of women in the distribution of these resources'. The provision on the reduction of military expenditure for social development might seem out of place given that, at face value, it is not related to the right to peace, but rather to economic and social welfare rights in general. However, this reference was arguably placed under the right to peace as it was presumed that a reduction in military expenditure would lead to a culture of less conflict and hence promote the right to peace for all, including women. Article 11 of the Nouakchott Draft also envisaged women's participation in the re-distribution of these resources. This is in line with the right to equal participation in women's decision-making processes.¹⁶

Article 12 of the Kigali Draft¹⁷ included the right to peace. While most of the provisions remained similar to the Nouakchott Draft, there were some changes. The phrase 'on an equal basis' was removed concerning the state's obligations 'to take all appropriate measures to involve women' in the different steps. Reference to 'sub-regional levels' was included, whereas the Nouakchott Draft only mentioned the Organisation of African Unity (OAU) and international level. The reference to the 'distribution of food' was replaced with 'humanitarian aid and assistance'. The sub-section on protecting women against rape and sexual assault was removed. The latter was related to the fact that article 13 of the Kigali Draft already protected women from all forms of violence 'in peace time and during situations of conflict'. Removing 'on an equal basis' might be considered as being retrogressive since it removed the burden from states to ensure that women are involved 'on an equal basis' as men in issues concerning peace. As for the addition of sub-regional levels and humanitarian aid and assistance, these were welcome amendments as they broadened the scope of the article.

In 2000, the Final Draft of the Maputo Protocol was presented, with the right to peace being under article 11.¹⁸ Sub-section 4 of this article provided for conflict under emergency and conflict

13 Nouakchott Draft (n 10).

14 Reliefweb 'Conflict trends in Africa, 1989-2017' <https://reliefweb.int/report/world/conflict-trends-africa-1989-2017> (accessed 29 July 2022).

15 A Bujra 'African conflicts: A discussion of their causes and their political and social environment' (2000) 1 <https://repository.uneca.org/ds2/stream/?#/documents/4bbf1616-0c5d-5e50-9a96-79baf1e0db39/page/1> (accessed 9 May 2023).

16 Maputo Protocol art 9.

17 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

18 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6;

situations. In 2001, a meeting of experts was convened that proposed amendments to the Final Draft.¹⁹ The Report of the Meeting of Experts included the following in article 11(1), '[w]omen shall have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace'. The second paragraph was amended to provide that '[s]tates parties shall take all appropriate measures to ensure the increased participation of women'. It also amended section 11(2)(c) to remove humanitarian aid and assistance and formulated the provision as: 'structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees, displaced persons, in particular women'. Including this category of women implies that the Maputo Protocol recognises that women in these situations require additional support to reintegrate into society. It also imposes specific obligations on states in terms of providing protection to these women. Concerning the aspect of military expenditure, the Report on Final Draft with proposals for amendments removed 'effective participation of women in the distribution of these resources' and provided for 'spending on social development in general, and the promotion of women in particular'. Removing effective participation of women is a lost opportunity since in many instances women do not have a say in how resources affecting them are distributed.

Moreover, there was a fourth paragraph that required states to take measures for the 'effective protection of women and children in emergency and conflict situations' and 'of asylum seekers, refugees, returnees and displaced persons, particularly women and girls'. It further required states to ensure the 'full and equal participation' of women in all aspects of 'post conflict reconstruction and rehabilitation'. This article was included in the Final Draft in an amended version.

At the end of the meeting, the Report on Final Draft with proposals for amendments had the right to peace under its article 10. The Office of the Legal Counsel also provided input on the Final Draft and recommended, amongst others, the removal of the word 'significantly' and 'girls'.²⁰

From 4 to 5 January 2003, there was an NGO Forum convened by the Africa Regional Office and the Law Project of Equality Now, with different stakeholders and experts. This meeting presented a mark-up draft of the Maputo Protocol.²¹ The mark-up draft had the right to peace in its article 10 and had four sub-sections, following the Report on the Final Drafts with proposals for amendments. There was a second meeting of experts on the draft Maputo Protocol from 24 to 26 March 2003 and that meeting further amended article 10 (Addis Ababa draft).²² After implementing these amendments, the Maputo Protocol was adopted.

Comparing article 10 of the Maputo Protocol with the origins of this article, it is noted that while the right to peace was always an integral part of the Maputo Protocol, the wording and provisions changed quite drastically throughout the drafting process.

Similar to the other articles of the Maputo Protocol, article 10 no longer references the African Charter. Including the latter in the initial drafts was just to lay the foundation for a provision on women's right to peace. There was also the addition of article 10(1) to emphasise that women 'have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace'. This paragraph is important since it presents the right to peace as integral to women's rights.

final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

19 Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001.

20 Comments by African Union Office of the Legal Counsel (AUOLC), CAB/LEG/66.6/Rev.1, 2002 6.

21 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003.

22 Summary of the proceedings of the 2nd Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the rights of Women in Africa, Expt/Prot.Women/Rpt(II), Addis Ababa, Ethiopia, March 2003, para 13.

Moreover, while the initial draft aimed for the involvement of women ‘on an equal basis’, article 10(2) of the Maputo Protocol provides for the ‘increased participation of women’. This is arguably a retrogression from the initial wordings since it imposes a lesser obligation on states as compared to if it were on an equal basis and the discretion of states in determining means through which women may participate is wider than the initial draft. For instance, women could be participating very scarcely in the different steps but as long as the number is increasing states could be seen as implementing this article. In its original wording, states could have been held accountable for not ensuring that women’s participation is at par with that of men. This would have been in line with the Solemn Declaration on Gender Equality in Africa which provides for the ‘full and effective participation and representation of women’, which is also reflected in article 9 of Maputo Protocol.²³

Article 10(2)(c) further requires states to ensure ‘physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women’. This article initially provided for only refugees and displaced persons and the provision of food. Therefore, article 10(2)(c) ensures better protection since it includes more groups of women and a holistic approach to their protection instead of just the provision of food. Article 10(2)(d) also includes women in ‘the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons’. This is a step further than the original text as the latter did not consider management of camps and settlements.

Concerning article 10(3) on military expenditure, the current article excludes ‘the effective participation of women in the distribution of these resources’ and leaves the state to take the necessary measures. Moreover, the last part of the initial article (then article 10(4)), which recognised rape and sexual assault during conflict as war crimes, was excluded from article 10 of the Maputo Protocol. This is because article 11 of the Maputo Protocol focuses on the protection of women in armed conflict, where it protects women from ‘all forms of violence rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity’.²⁴ Hence, the provisions under the then article 10(4) were moved to article 11 of the Maputo Protocol. Article 11 also englobes paragraph 4 of the Report on Final Draft with proposals for amendments, which is to protect women, including ‘asylum seeking women, refugees, returnees, and internally displaced persons’ during armed conflict. This division shows that article 10 is unique in that it protects women’s right to peace, and this is exclusive of conflicts.

3 Linkages to other treaty provisions

3.1 International instruments

At the UN level, the Preamble of CEDAW recognises that the ‘cause of peace require the maximum participation of women on equal terms with men in all fields’. The Preamble further acknowledges that ‘that the strengthening of international peace and security ... will contribute to the attainment of full equality between men and women’. While this is relevant to article 10(2) of the Maputo Protocol, it is not worded as a right. Hence, the Maputo Protocol exceeded CEDAW’s standards and formalised women’s right to peace.

Article 10(3) can be linked to many human rights instruments. One of them is Resolution 1325 adopted by the UN Security Council in 2000 (Resolution 1325)²⁵ the Preamble of which stresses the

23 Solemn Declaration on Gender Equality in Africa 2004, para 2.

24 See TM Makunya & JM Abelungu ‘Article 11’ in this volume.

25 UN Security Council ‘Resolution 1325’ adopted during its 4213th meeting on 31 October 2000 S/RES/1325 (2000).

importance of women's equal participation in peace programmes.²⁶ Resolution 1325 and article 10(2) of the Maputo Protocol are reflective of each other since they both provide for the 'increased participation' of women in peacekeeping activities.

Furthermore, the UN Declaration on the Right to Peace in 1984, which was updated in 2017,²⁷ recognises that for peace to prosper, there is a need for 'maximum participation of women, on equal terms with men in all fields'. Goal 16 of the UN Sustainable Development Goal furthermore promotes 'just, peaceful and inclusive societies'.²⁸

3.2 Article 10 and other Maputo Protocol provisions

Article 10 of the Maputo Protocol should be read together with article 9, which provides for women's right to participate in the political and decision-making processes of a country. Article 9 covers all aspects of a country's policy, therefore, it includes women's participation in the promotion and maintenance of peace, thereby leading to implementation of article 10. Article 2 on the elimination of discrimination against women is a pillar provision to ensure the equal participation of women in all spheres, including in the promotion and maintenance of peace. Article 4 that protects the right to life, integrity and security of the person, is linked to article 10 since articles 4(d) and 4(k) provide for 'peace education through curricula' and the rights of refugee women respectively. Article 11 is closely related to article 10 since it requires the protection of women in armed conflict, and this can be a starting point in pushing for peace negotiations.

3.3 Article 10 and provisions in other regional instruments

While peace is not articulated as a right in any of the UN treaties, the African Charter, as mentioned above, included the same as a right. Following the African Charter, there were several developments at the international level concerning the right to peace.

At the regional level, article 23 of the African Charter and article 10 of the Maputo Protocol reflect several objectives of the OAU and later the African Union (AU). For instance, the Preamble to the Charter of the OAU of 1963 provided that for human progress, 'conditions for peace and security must be established and maintained'. It also required states to settle disputes peacefully.²⁹ The Constitutive Act of the AU (AU Constitutive Act), which replaced the OAU Charter in 2002, provides that one of the objectives of the AU is to 'promote peace, security and stability on the continent'.³⁰ It also establishes gender equality as one of its principles,³¹ along with several other principles relating to peace and security.

While article 23 of the African Charter mentions peace and security, article 10 of the Maputo Protocol focuses only on peace. From the preparatory work of the Maputo Protocol, as discussed above, it is not clear why the security aspect was left out. Moreover, article 10 of the Maputo Protocol

26 Preamble of Resolution 1325: '1. Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict ... 6. Requests the Secretary-General to provide to Member States training guidelines and materials on the protection, rights and the particular needs of women, as well as on the importance of involving women in all peacekeeping and peace-building measures'.

27 United Nations Security Council Resolution 1325 on Women, Peace and Security, S/RES/1325 (2000) Adopted by the Security Council at its 4213th meeting, on 31 October 2000.

28 United Nations <https://www.un.org/sustainabledevelopment/peace-justice/> (accessed 23 June 2023).

29 Articles 3(4) and 19 of the Charter of the Organisation of African Unity.

30 Article 3(f) of the AU Constitutive Act.

31 Article 4(l) of the AU Constitutive Act.

added a reduction of military expenditure, while the African Charter does not mention this as part of the right to peace. The only time the ‘military’ is mentioned in the African Charter is in its Preamble concerning the dismantling of ‘aggressive foreign military bases’. Hence article 10 of the Maputo Protocol goes a step further by addressing military expenditure as a key concern in ensuring the right to peace.

This provision is similar to article 22 of the African Charter on the Rights and Welfare of the Child³² (African Children’s Charter). It is aimed at responding to the African context, which may not be the same in other regions. Under article 22 of the African Children’s Charter, state parties have the obligation to ensure that children do not take part in hostilities. They further have to ensure that children who are affected by conflicts are protected and cared for. This is similar to articles 10(2)(c) and 10(2)(d) of the Maputo Protocol, which requires states to protect refugees, asylum seekers and returnees and displaced persons.

3.4 Policy frameworks

To ensure that there is ‘peace, security and stability in Africa’, the Peace and Security Council was operationalised in 2004 following the Protocol Relating to the Establishment of the Peace and Security Council adopted on 9 July 2002.³³ Additionally, there have been many policy developments concerning the right to peace, either in general terms or while focusing on women since the adoption of the Maputo Protocol. The main one is Agenda 2063, which is considered the ‘blue print for Africa’s development’.³⁴ Aspiration 4 of Agenda 2063 provides for a ‘peaceful and secure Africa’. While this aspiration does not mention women, aspiration 6 envisages an Africa that is ‘people-driven’, relying among others, on women. Aspiration 4, read together with aspiration 6 reflect the provisions of article 10 of the Maputo Protocol. Moreover, the 2020 campaign of the African Union focused on ‘Silencing the guns: Creative conducive conditions for Africa’s development’.³⁵ This campaign followed the African Union Master Roadmap of Practical Steps to Silence the Guns in Africa by Year 2020 (Lusaka Roadmap). While the Lusaka Roadmap provides several steps related to articles 10 of the Maputo Protocol and 23 of the African Charter, it does not expressly mention these documents. For instance, it provides for ‘training of mediators (including women) for immediate deployment in preventive diplomacy’.³⁶ This provision is directly related to article 10(2) of the Maputo Protocol, while the other provisions concern the right to peace generally. However, the drafters failed to refer to these binding obligations, which could have ensured better accountability.

32 Article 22 of the African Children’s Charter: 1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child. 2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child. 3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

33 African Union ‘Peace and Security Council’ <https://au.int/en/psc> (accessed 23 June 2023).

34 African Union Commission *Agenda 2063: the Africa we want* (2015) 14.

35 African Union <https://au.int/en/flagships/silencing-guns-2020> (accessed 23 June 2023).

36 African Union *Master roadmap of practical steps to silence the guns in Africa by year 2020* (2016) 9.

4 Concepts and definitions

4.1 Right to peace

No treaty monitoring body at the African Union level has provided a definition of the right to peace; these bodies have rather focused on peace as an absence of conflict.³⁷ For instance, in *XYZ v Benin*,³⁸ the African Court on Human and Peoples' Rights (African Court) provided the following in relation to article 23(1) of the African Charter:

[P]eace symbolizes the absence of worry, turmoil, conflict or violence. Its symbiosis with security contributes to social well-being. Indeed, the assurance of living without danger, without the risk of being affected in its physical integrity and its heritage gives citizens the confidence of national stability.

Moreover, in *Democratic Republic of Congo v Burundi, Rwanda and Uganda*,³⁹ the African Commission on Human and Peoples' Rights (African Commission) held that 'armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements' violate the right to peace.

These two cases demonstrate that peace is linked to the absence of interference or even the threats of it. It is characterised as a situation where there is national stability and where citizens do not live in danger.

The 2017 UN Declaration on the Right to Peace (2017 Declaration) recognises 'the promotion of peace as a vital requirement for the full enjoyment of all human rights by all'. Its article 1 provides that '[e]veryone has the right to enjoy peace such that all human rights are promoted'. Article 2 of the 2017 Declaration requires states to ensure 'equality and non-discrimination' as 'a means to build peace within and between societies'. Thus, it can be deduced that peace is a prerequisite for the enjoyment of all other human rights. The right to peace is also defined as a collective right because it is to be enjoyed by all globally.⁴⁰ It is one of the supreme values 'cherished by international law', if not its most supreme value.⁴¹ This, as mentioned in the introduction, is because the UN Charter points to the maintenance of peace as one of its foundational values.

4.2 Right of women to participate in peace programmes

Article 10(2) requires states to take 'all appropriate measures' for the 'increased participation of women' in peace-related programmes. Appropriate measures, in this case, include affirmative action and positive discrimination that ensure that more women are included in peace-related programmes. Moreover, if read within the overall spirit of the Maputo Protocol, it also includes a holistic approach to measures, including steps such as legislation, policies, programmes and budgetary allocations. It has also been suggested that states work with the media to ensure that women participate fully in

37 There are now discussions on a draft general comment on art 23 of the African Charter that can have a bearing on the interpretation of art 10 of the Maputo Protocol if adopted. See <https://ishr.ch/latest-updates/achpr68-right-to-peace-general-comment-on-article-23-of-the-african-charter/> (accessed 22 May 2022).

38 *XYZ v Benin* (judgment) (27 November 2020) 4 AfCLR 83 para 133.

39 *Democratic Republic of Congo v Burundi, Rwanda and Uganda* Communication 227/99, ACHPR para 68.

40 RK Singh 'Right to peace as a human right' <https://ujala.uk.gov.in/files/Ch5.pdf> (22 May 2022).

41 K Tomasevski 'The right to peace' (1982) 1 *Current Research on Peace and Violence* 44.

peace initiatives.⁴² As mentioned above, the phrase ‘increased participation of women’ is arguably a regression from ‘participation on equal basis’, the phrase that was used in the initial draft. However, if interpreted within the spirit of the Maputo Protocol, and in line with its article 9, the goal of equality is met.

4.3 Programmes of education for peace and a culture of peace

A culture of peace is a ‘very wide scope phenomenon that encompasses many different elements’.⁴³ Article 1 of the UN Declaration and Programme of Action on a Culture of Peace⁴⁴ provides that ‘[a] culture of peace is a set of values, attitudes, traditions and modes of behaviour and ways of life based on’ several factors such as the ‘respect for life, ending of violence and promotion and practice of non-violence through education, dialogue and cooperation’. Hence, states need to adopt a way of life that reflects a peaceful existence.

Article 10 of the Maputo Protocol requires states to ensure the increased participation of women in programmes of education for peace and a culture of peace. This implies that states adopt programmes of education for peace and a culture of peace with the participation of women. There is a need to change mindsets through education and sensitisation programmes to ensure that there is a culture of peace. Such initiatives must be long-term, community oriented, incorporated into programmes and the curriculum, and must begin at an early stage.⁴⁵

4.4 Structures and processes for conflict prevention, management and resolution

Conflict prevention involves ‘diplomatic measures to keep intra-state or inter-state tensions and disputes from escalating into violent conflict’.⁴⁶ Conflict prevention and conflict management are ‘different sides of the same coin’ since ‘[p]reventative measures are designed to resolve, contain and manage, so conflicts do not crystallise’.⁴⁷ Conflict management, therefore, requires conflict prevention measures. Conflict prevention and management structures include mechanisms for ‘early warning, information gathering and a careful analysis of the factors driving the conflict’.⁴⁸

Under article 10 of the Maputo Protocol, states have the obligation to ensure that women increasingly participate in mechanisms set up to prevent and manage conflict. To ensure that more women are included in these structures and processes, the African Commission has identified engagement in the form of consultations with women and other relevant groups during promotion and fact-finding missions.⁴⁹ It has further suggested that the Peace and Security Council must ensure

42 A Joof-Colé ‘The role of women in the regulation of information during conflict situations’ in Solidarity for African Women’s Network ‘The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa: from ratification to realisation of African women’s rights’ (2005) 222 *Pambazuka News* 15.

43 D Bar-Tal ‘Challenges for constructing peace culture and peace education’ in E Matthews et al (eds) *The Israeli-Palestinian conflict: parallel discourses* (2011) 216.

44 UN Declaration and Programme of Action on a Culture of Peace 1999.

45 Bar-Tal (n 43) 220.

46 UN Peacekeeping ‘Terminology’ <https://peacekeeping.un.org/en/terminology> (accessed 23 June 2023).

47 N Swanström & M Weissmann ‘Conflict, conflict prevention and conflict management and beyond: a conceptual exploration’ (2005) <https://gsdrc.org/document-library/conflict-conflict-prevention-and-conflict-management-and-beyond-a-conceptual-exploration/> (accessed 23 June 2023).

48 UN Peacekeeping (n 46).

49 African Commission *Addressing human rights issues in conflict situations: towards a more systematic and effective role for the African Commission on Human and Peoples’ Rights* (2019) 78.

'greater representation of women in such processes, as mediators and experts'.⁵⁰ Transitional justice processes should also include more gender experts.⁵¹

4.5 Physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women

The inclusion of 'physical, psychological, social and legal protection' demonstrates that the Maputo Protocol adopts a holistic approach to realising rights. It recognises that there is a need for comprehensive interventions for rights to be realised. Moreover, women need to have increased participation in providing such protection measures to realise women's right to peace.

Article 10(2)(c) is an interesting provision since it applies to all asylum seekers, refugees, returnees and displaced persons. This sub-section also mentions 'in particular women'. Being a document that focuses on women's rights, this inclusion raises the question of whether the Maputo Protocol imposes an obligation to realise the rights of everyone and then to focus on women. This defeats the purpose of the Maputo Protocol as a document that recognises women's vulnerabilities.

4.6 Management of camps and settlements

Article 10(2)(d) is applicable during or post-conflict situations that create asylum seekers, refugees, returnees and displaced persons. In most instances, women and girls constitute the majority of the displaced population,⁵² with 50 per cent of refugees, internally displaced, or stateless populations being women and girls.⁵³ Refugee women are at risk of sexual violence, with one in five women refugees experiencing sexual violence.⁵⁴ Therefore camps and settlements need to be cognisant of the vulnerabilities that women face and set up measures to protect them. There is a need for an increased participation of women in the management of these camps and settlements since the survivors might not feel comfortable talking to men.⁵⁵ Moreover, in some instances, men might not be sensitive to the challenges that women face in these camps and settlements.

4.7 Military expenditure and budgetary allocation

Article 10(3) is indisputably innovative since it marks the first time that an international human rights instrument provided for 'a hierarchy of budgetary priorities'.⁵⁶ In no prior binding human rights instrument have states been directed to 'reduce expenditure on one budgetary item for the purposes of allocating it to human rights items'.⁵⁷ This article requires states to 'reorient their budget priorities towards socio-economic development and promotion of women'.⁵⁸ This is due to the fact that 'social

50 African Commission (n 49) 89.

51 African Commission *Study on transitional justice and human and peoples' rights in Africa* (2019) 19.

52 UN Refugee <https://www.unhcr.org/en-us/women.html> (accessed 23 June 2023).

53 Women for Women International '5 facts about what refugee women face' (9 June 2022) <https://www.womenforwomen.org/blogs/5-facts-about-what-refugee-women-face> (accessed 23 June 2023).

54 As above.

55 Website of Emergency Live <https://www.emergency-live.com/civil-protection/role-women-emergency-situations-refugee-camps-relief-environments/#:~:text=In%20addition%2C%20they%20transmit%20safety%20and%20confidence.%20to,in%20emergency%20situations%3A%20the%20Disaster%20Management%20Training%20Programme> (accessed 30 June 2022).

56 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 11 *Washington and Lee Journal of Civil Rights and Social Justice* 31.

57 A Budoo-Scholtz 'Silencing the guns to end gender-based violence in Africa: an analysis of art 10(3) of the Maputo Protocol' (2020) 4 *African Human Rights Yearbook* 332.

58 A Birhanu 'Reflections on Ethiopia's reservations and interpretative declarations to the Maputo Protocol' (2019) 31 *Journal of Ethiopian Law* 143.

development and the promotion of the human rights of women affect all articles provided by the Maputo Protocol'.⁵⁹ Article 10(3), if implemented, can assist in realising socio-economic rights on the continent.⁶⁰

While article 10(3) is in a document providing for women's rights, it first provides for a re-allocation to social development first, and then particularly to women. This is similar to article 10(2)(c) which provides for the protection of everyone, and then to women in particular. This could be because social development leads to gender equality.⁶¹ However, being a document that focuses on women, this article should have provided for the social development of women specifically, instead of being general.

Article 10(3) requires states to take 'necessary measures'. It has been proposed that the term 'necessary measures' has a 'two-fold interpretation'.⁶² On the one hand, states have to reduce their budgetary allocation to the military, and on the other hand, they have to engage in strategies that will end conflicts, which will lead to a reduction of military expenditure.

Article 10(3) of the Maputo Protocol may be viewed as overly prescriptive and as impinging upon national sovereignty by directing states on how to allocate their resources, a function that is seen as vesting exclusively in the executive arm of government.⁶³ However, by ratifying the treaty without reservations to article 10(3), states have given consent to the African Commission or the African Court to monitor and review their budgetary allocations and trends to ascertain whether they are in line with the Maputo Protocol.⁶⁴

5 Implementation

Generally, article 23 of the African Charter has been considered as an 'unusual provision' with the human rights bodies of the AU rarely relying on it.⁶⁵ The only communication in which the African Commission found a violation of article 23 of the African Charter is *Democratic Republic of Congo v Burundi, Rwanda and Uganda*.⁶⁶ Thus, article 10 of the Maputo Protocol, which is an extension of article 23 of the African Charter, has also received little attention. To begin with, many African countries were reluctant to ratify the Maputo Protocol because of article 10. For instance, Kenya's Minister in charge of gender affairs noted that 'the government was uncomfortable with this provision and especially the exact meaning and impact of the term "significant" as used in the Protocol'.⁶⁷ However, in 2010, the country ratified the Maputo Protocol following pressure from lobby groups,⁶⁸ and made a reservation to article 10(3) of the Maputo Protocol, amongst others.⁶⁹ Ethiopia also made a reservation to article 10(3), citing national interests.⁷⁰ Moreover, Mauritius made a reservation to article 10(2)(d) concerning

59 A Budoo 'Gender budgeting as a means to implement the Maputo Protocol's obligation to provide budgetary resources to realise women's rights in Africa' (2016) 9 *African Journal of Legal Studies* 206.

60 G Giacca *Economic, social and cultural rights in armed conflict* (2014) 50.

61 African Union *Social policy framework for Africa* (2008).

62 Budoo (n 59) 333.

63 SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights systems* (2013) 262-263.

64 Viljoen (n 56) 31.

65 R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2019) 538.

66 *DRC v Burundi* (n 39).

67 ST Griffith & P Ogendi 'The impact of the African Charter and the Maputo Protocol in Kenya' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African countries* (2016) 116-117.

68 As above.

69 Equality Now 'The Maputo Protocol turns 18 today. But what does this mean for women and girls in Africa?' 11 July 2021 https://www.equalitynow.org/news_and_insights/maputo_protocol_turns_18/ (accessed 23 June 2023).

70 Birhanu (n 58) 122.

refugee and asylum-seeking women because it considers these provisions to be irrelevant in Mauritius.⁷¹ Apart from these reservations, the rest of the countries that have ratified the Maputo Protocol⁷² have an obligation to implement all of the provisions in article 10. Overall, however, implementation of the Maputo Protocol in itself is ‘slow and patchy’, and this has an effect on the implementation of article 10.⁷³

One avenue for the African Commission to review the implementation of an article is through the state reporting procedure under articles 62 of the African Charter and 26(1) of the Maputo Protocol.⁷⁴ States, upon presenting their reports to the African Commission, indicate the ways in which they have implemented the provisions of the African Charter and the Maputo Protocol. Concerning article 10 of the Maputo Protocol, many state reports mention that the country has adopted a National Plan of Action and its corresponding committee for the implementation of the UN Resolution 1325,⁷⁵ with Namibia still in the stages of drafting its National Plan of Action on Women, Peace and Security.⁷⁶ Countries such as the Democratic Republic of Congo (DRC), Eswatini, Mali, Mozambique, Nigeria and Sierra Leone have included the right to peace in their domestic laws, including in their constitutions.⁷⁷

71 Equality Now (n 69).

72 African Union: Saharawi Republic becomes the 43rd African Union member state to ratify the Protocol on Women's Rights <https://au.int/en/pressreleases/20220504/saharawi-arab-democratic-republic-becomes-43rd-african-union-member-state> (accessed 23 May 2022): 43 out of 55 African countries have ratified the Maputo Protocol, with Saharawi Arab Democratic Republic being the last country to ratify the document in May 2022.

73 R Sigsworth & L Kumalo ‘Women, peace and security: implementing the Maputo Protocol in Africa’ (2016) 295 *Institute for Security Studies Papers* (unpaged).

74 Article 26(1) of the Maputo Protocol: ‘States Parties shall ensure the implementation of this Protocol at national level, and in their Periodic Reports submitted in accordance with art 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised’.

75 Republic of Angola 6th and 7th report on the implementation of the African Charter on Human and Peoples' Rights and initial report on the Protocol on the Rights of Women in Africa 2011-2016 (2017) para 58; Burkina Faso Periodic Report of Burkina Faso within the framework of the implementation of art 62 of the African Charter on Human and Peoples' Rights' (2015) para 361; Republic of Cameroon Single report comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st reports relating to the Maputo Protocol and the Kampala Convention (2020) para 905; Republic of Côte d'Ivoire Periodic report of the Republic of Côte d'Ivoire 2016-2019 (2021) para 187; Democratic Republic of Congo Report to the African Commission on Human and Peoples' Rights on the implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th, and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa from 2005 to 2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports) (2017) para 312; The Gambia Combined report of the African Charter on Human and Peoples' Rights for the period 1994 and 2018 and initial report under the Protocol to the African Charter on the Rights of Women in Africa (2018) 163; Republic of Kenya Combined report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the initial report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2020) para 287; Nigeria 6th periodic country report 2015-2016 on the implementation of the African Charter on Human and Peoples' Rights (2017) 128; Republic of Rwanda The 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the implementation status of the African Charter on Human and Peoples' Rights and the initial report on the implementation status of the Protocol to the African Charter on Human and Peoples' Rights and the rights of women in Africa (2017) para 61.

76 Republic of Namibia 7th Periodic Report on the African Charter on Human and Peoples' Rights and the 2nd Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) 96.

77 DRC Combined Periodic Report (n 75) para 310; Republic of Mali Periodic report to the African Commission on Human and Peoples' Rights relating to the implementation of the African Charter on Human and Peoples' Rights (2011) para 79; Republic of Mozambique Report from the government of the Republic of Mozambique submitted in terms of art 62 of the African Charter on Human and Peoples' Rights (2012) para 350; Nigeria Periodic Report (n 75) 128; Sierra Leone African Charter on Human and Peoples' Rights: Initial to date following article of the Charter report (2015) 24; Kingdom of Eswatini Combined 1st to 9th Periodic Report on the African Charter on Human and Peoples' Rights and initial report to the Protocol to the African Charter on the Rights of Women in Africa' (2021) para 276.

The reports further indicate that some states have capacitated women to take part in peace-keeping initiatives,⁷⁸ and have adopted or participated in peace education programmes.⁷⁹ Some reports also mention that they have undertaken awareness raising and sensitisation campaigns on the importance of including women in conflict prevention and management⁸⁰ and the extent to which they have included women in such processes.⁸¹ For instance, in Cameroon, more than 500 women participated in public lamentations concerning the crisis in the North-West and South-West regions⁸² and in Kenya, the Ministry of Defence has a 2017 Gender Policy that considers the gender perspective and Resolution 275 in military operations.⁸³ Nigeria deploys women in peacekeeping missions both in the country and abroad,⁸⁴ and Rwandan women have ‘played a significant role in UN peacekeeping missions, as keepers and as police and military observers’.⁸⁵ South Africa has also increased the number of women it deploys ‘at operational levels in the UN and AU-sponsored peacekeeping missions’.⁸⁶

The reporting under article 10 of the Maputo Protocol shows that most countries link article 10 with UN Resolution 1325. Countries such as Angola, Burkina Faso, Cameroon, Ivory Coast, DRC, The Gambia, Kenya, Nigeria and Rwanda have adopted a national plan of action to implement UN Resolution 1325 and as a result, are implementing article 10 of the Maputo Protocol. This was the most reported aspect of article 10 of the Maputo Protocol, with the other sub-sections receiving little to no attention.

The African Commission, after reviewing the report, issues concluding observations to the different states. The concluding observations have mostly mentioned article 10(3) in relation to health.⁸⁷ The

78 Angola Combined Report (n 75) para 61; Burkina Faso Periodic Report (n 75) para 275.

79 Burkina Faso Periodic Report (n 75) para 362; The Gambia Combined Report (n 76) 164; Republic of Seychelles Country report: Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2019) 24-26.

80 DRC Combined Periodic Report (n 77) para 313; Kenya Combined Report (n 75) para 290; Republic of Togo 6th, 7th and 8th Periodic Reports of the state of Togo on the implementation of the African Charter on Human and Peoples’ Rights (2017) 178.

81 Cameroon Single Report (n 75) 906; DRC Combined Periodic Report (n 75) paras 314 to 317; The Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples’ Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa’ (2018) paras 408-409; Togo Combined Periodic Reports (n 80) 146.

82 Cameroon Single Report (n 75) 907.

83 Kenya Combined Report (n 75) para 291.

84 Nigeria Periodic Report (n 75) 70.

85 Rwanda Combined Periodic Reports (n 75) 60.

86 Republic of South Africa Combined 2nd Periodic Report under the African Charter on Human and Peoples’ Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa (2015) para 281.

87 African Commission Concluding Observations on the Cumulative Periodic Reports (2nd, 3rd, 4th and 5th) of the Republic of Angola adopted during its 12th extraordinary session 30 July to 4 August 2012 para 41(XIV); African Commission Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples’ Rights adopted during its 21st extraordinary session 23 February to 4 March 2017 para 11(iii); African Commission ‘Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the State of Eritrea on the Implementation of the African Charter on Human and Peoples’ Rights’ adopted during its 63rd ordinary session 24 November to 13 December 2018 para 120(xlvi); African Commission ‘Concluding observations and recommendations on the combined Periodic Report of the Republic of the Gambia on the implementation of the African Charter on Human and Peoples’ Rights (1994-2018) and the initial report on the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2005-2014) adopted during its 31st extraordinary session 19 to 25 February 2021 paras 56(ii) and 56(vi); African Commission ‘Concluding Observations and Recommendations on the Periodic and Combined Report of the Islamic Republic of Mauritania on the Implementation of the African Charter on Human and Peoples’ Rights (2006-2014) and the Initial Report on the Maputo Protocol’ adopted during its 23rd ordinary session 12 to 22 February 2018 para 54; African Commission ‘Concluding Observations and Recommendations on the Second and Combined Periodic Report of the Republic of Mozambique on the Implementation of the African Charter on Human and Peoples’ Rights (1999-2010)’ adopted during its 17th extraordinary session 19 to 28 February 2015 para 79(xxix); African Commission ‘Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples’

African Commission has also mentioned budgetary allocation in relation to education,⁸⁸ creation and maintenance of gender units within ministries or departments on women,⁸⁹ combatting violence against women,⁹⁰ justice,⁹¹ gender budgeting⁹² and programmes for women.⁹³ While the Concluding Observations for Côte d'Ivoire mentioned the allocation of budgetary resources to implement Resolution 1325,⁹⁴ it does not make reference to article 10 of the Maputo Protocol. Therefore, the African Commission has not seized every opportunity to interpret article 10 of the Maputo Protocol.

6 Conclusion

Article 10 of the Maputo Protocol contains innovative provisions, which if implemented can lead to women's right to peace and reduced military expenditure which can be channelled towards development. Article 10 of the Maputo Protocol codifies several international principles concerning the right to peace. However, most of the focus at the AU level is on women who are living in context of conflict. Therefore, article 10, which seeks to prevent conflict, does not receive enough focus from relevant stakeholders. To ensure better implementation of article 10 the different human rights monitoring bodies at the AU need to 'find innovative ways of working with national governments, civil society and grassroots organisations to realise the full potential of this crucial instrument'.⁹⁵

To ensure a better implementation of article 10 of the Maputo Protocol, the African Commission must furthermore adopt a general comment on article 10 to expound on the scope of the article. This

Rights' adopted during its 57th ordinary session 4 to 18 November 2015 para 117; African Commission 'Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Sierra Leone on the Implementation of the African Charter on Human and Peoples' Rights adopted during its 19th extraordinary session 16 to 25 February 2016 para 87(xx); African Commission 'Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda' adopted during its 57th ordinary session 4 to 18 November 2015 para 114; and African Commission 'Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of Zimbabwe on the Implementation of the African Charter on Human and Peoples' Rights (2007-2019) and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' adopted during its 69th ordinary session 15 November to 5 December 2021 para 60(iii).

- 88 African Commission 'Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Botswana on the Implementation of the African Charter on Human and Peoples' Rights' adopted during its 63rd ordinary session 24 October to 13 November 2018 para 20(ii); 2018 Concluding Observations of Eritrea (n 87) para 120(xlvi).
- 89 2017 Concluding observations of Burkina Faso (n above) para 39(xi); African Commission 'Concluding Observations and Recommendations on the Kingdom of Eswatini's Combined 1st to 9th Periodic Report on the implementation of the African Charter on Human and Peoples' Rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa' adopted during its 70th ordinary session 23 February to 9 March 2022 para 80(ii).
- 90 2021 Concluding observations of The Gambia (n 87) para 62(iii).
- 91 African Commission 'Concluding Observations and Recommendations on the Kingdom of Lesotho's Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples' Rights and its initial report under the Protocol to the African Charter on the Rights of Women in Africa' adopted during its 68th ordinary session 14 April to 4 May 2021 para 63(viii); African Commission 'Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of the Republic of South Africa' adopted during its 20th extraordinary session 9 to 18 June 2016 para 48(i); and African Commission 'Concluding Observations and Recommendations on the Combined 3rd, 4th and 5th Periodic Report of the Republic of Togo' adopted during its 51st ordinary session 18 April to 2 May 2012 para 73(xx).
- 92 African Commission 'Concluding Observations and Recommendations on Sixth Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011-2013)' adopted during its 58th ordinary session 6 to 20 April 2016 para 29(iii).
- 93 African Commission 'Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of Senegal on implementation of the African Charter on Human and Peoples' Rights' adopted during its 18th extraordinary session 29 July to 7 August 2015 para 65.
- 94 African Commission 'Observations finales sur le rapport périodique initial et cummul de la République de Côte d'Ivoire' adopted during its 52nd ordinary session 9 to 22 October 2022 Recommendation XVI.
- 95 Sigsworth et al (n 73).

general comment should clarify the concepts in article 10 so that states are clear about their obligations. The African Commission must also give attention to article 10 of the Maputo Protocol in concluding observations and provide recommendations for its implementation. This also includes requesting states for budgetary information to assess whether they are reducing military expenditure in favour of social development. Furthermore, it must engage in sensitisation campaigns on article 10 of the Maputo Protocol through its Special Rapporteur on Women in Africa.

States parties that have not adopted national action plans for implementing the Maputo Protocol generally, and the right to peace more specifically, should do so. They should include information on the extent to which they are implementing the provisions of the Maputo Protocol, including article 10, in their state reports. States can also adopt affirmative measures to ensure women's participation in peace structures. They must make deliberate efforts, without jeopardising national security, to reduce military expenditure in favour of social development and promoting women's rights.

As for civil society organisations, they should focus on article 10 of the Maputo Protocol in their advocacy initiatives and train women so that they can take part in peace structures and processes. They could importantly also bring cases to the African Commission or the African Court on the implementation of article 10 of the Maputo Protocol.

Article 11

Protection of women in armed conflicts

Trésor Muhindo Makunya and Junior Mumbala Abelungu

1. States parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.
2. States parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
3. States parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.
4. States parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

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1 Introduction

Africa has witnessed numerous armed conflicts, claiming the lives of countless civilians and forcing millions of people to flee within or outside their countries.¹ These conflicts have taken various forms: international or non-international armed conflicts, foreign military occupation, violent tensions and disturbances and terrorist attacks. While no segment of the civilian population has been spared, women

1 SA Rustad *Conflict trends in Africa, 1989-2018: an update* (2019) 5-19.

and children have been hardest hit.² Globally, 90 per cent of the victims of armed conflicts are civilians, and 80 per cent of these victims are women and children.³ At the time of writing, there were 110 international armed conflicts worldwide, 35 of which are taking place on the African continent.⁴ In addition, there were another four African countries experiencing non-international armed conflicts.⁵

Despite the existence of treaty and customary law rules protecting women and girls, their lived realities in armed conflict zones paint a bleak picture.⁶ As one example, Africa has the largest number of internally displaced women, 8.2 million, or 40 per cent of the global figure.⁷ Moreover, displaced women and girls are particularly affected by sexual and gender-based violence and chronic poverty and are less likely to access humanitarian assistance due to poor or non-existent roads and lack of security.⁸

Article 11 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) protects women in armed conflicts. The provision was preceded by the UN Security Council Resolution 1325,⁹ which deplores the plight of women and girls as the primary victims of armed conflict and calls on parties to armed conflict to protect and save women and girls, as civilian populations, from the adverse effects of war.¹⁰ Article 11 stipulates that its primary objective is the respect of the existing rules of international humanitarian law (IHL) applicable in armed conflict. These rules include custom, international treaties, general principles and resolutions related to women.¹¹ Article 11 is not the first treaty provision to refer to the obligation to respect and ensure IHL. Article 38(1) of the UN Convention on the Rights of the Child (CRC) and article 22(1) of the African Charter on the Rights and Welfare of the Child (African Children's Charter), respectively, impose similar obligations. Comparably, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), although referring to conflicts in its Preamble, does not include any specific protection of women in armed conflict.¹²

2 They account for more than 71% of victims of conflict in the DRC. See Democratic Republic of Congo Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights From 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005 to 2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports) (2017) para 332.

3 A Escorial et al *La violation et la protection internationale des droits de l'enfant* (2008) 6; 'Les femmes dans les conflits armés' <https://www.un.org/french/womenwatch/followup/beijing5/session/fiche5.html> (accessed 23 June 2023).

4 In Burkina Faso, Cameroon, the Central African Republic (CAR), the Democratic Republic of Congo (DRC), Ethiopia, Mali, Mozambique, Nigeria, Senegal, Somalia, South Sudan and Sudan.

5 Egypt, Libya, Morocco and Western Sahara. Section 4.1 below unpacks the notion of 'armed conflict' and distinguishes it from other conflict situations.

6 See also African Commission Resolution on the fact-finding mission to the Tigray region of the Federal Democratic Republic of Ethiopia, ACHPR/Res.482 (EXT.OS/XXXII) 2021; Report of the Ethiopian Human Rights Commission (EHRC)/Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human Rights, Humanitarian and Refugee Law Committed by all Parties to the Conflict in the Tigray Region of the Federal Democratic Republic of Ethiopia (2021) 3 <https://www.ohchr.org/sites/default/files/2021-11/OHCHR-EHRC-Tigray-Report.pdf> (accessed 27 February 2023); see African Union Commission of Inquiry on South Sudan, 'Final Report of the African Union Commission of Inquiry on South Sudan' (15 October 2014) para 380, <http://www.peaceau.org/uploads/auciss.final.report.pdf> (accessed 27 February 2023).

7 Union africaine et al *La situation des droits des femmes dans les camps de réfugiés et les camps pour personnes déplacées dans leur propre pays en Afrique: Le contexte de l'AAG et de l'AAPS* (December 2020) 20.

8 Union africaine (n 7) 19.

9 United Nations Security Council Resolution 1325 on Women, Peace and Security, S/RES/1325 (2000) Adopted by the Security Council at its 4213th meeting, on 31 October 2000 (UN Security Council Resolution 1325).

10 UN Security Council Resolution 1325 (n 9) para 9.

11 JM Abelungu 'Le système africain de protection des droits de l'homme et la question des enfants soldats' (2019) 3 *Annuaire africain des droits de l'homme* 5.

12 M Verdussen & N Cambier 'Préambule' in MH Randall et al *CEDEF – La Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes et son protocole facultatif. Commentaire* (2019) 13-14.

To engage with the different aspects of article 11, this chapter is divided into seven sections. Section 2 reviews the drafting history of article 11 from 1997 to 2003, while section 3 analyses the link between the article and other relevant treaty provisions. Section 4 defines relevant concepts under the provision, including armed conflict situations, rape and other forms of sexual exploitation and child participation in hostilities. Section 5 looks at obligations deriving from article 11, while section 6 reviews its implementation status. Section 7 concludes by highlighting the normative and institutional significance of article 11 and the need for synergy among various judicial and quasi-judicial institutions to enforce it.

2 Drafting history

The provision protecting women in situations of armed conflict was included at the last stage of the drafting of the Maputo Protocol. Neither the Nouakchott Draft¹³ nor the Kigali Draft¹⁴ specifically mentioned the protection of women's rights during armed conflict. Yet, these two drafts, and the Protocol in general, were developed during a time when conflicts were ravaging many parts of the continent. However, article 11 of the Nouakchott Draft set out one important conflict-related obligation: to 'protect women from rape and other sexual assaults' by ensuring that these are considered war crimes for which perpetrators must be held accountable.¹⁵

The Maputo Protocol was drafted at a time when the recognition of gross violations against women during armed conflicts had begun to gain momentum within the international community. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created in 1993 and 1994, respectively.¹⁶ Three months before the adoption of the Nouakchott Draft, the ICTR began proceedings in the case where the court subsequently, in 1998, for the first time, defined rape as a crime against humanity.¹⁷ Moreover, the 1995 Beijing Platform for Action, to which the Preamble to the Nouakchott Draft, and ultimately the Maputo Protocol, refer contains an entire section on the protection of women's rights during armed conflict.¹⁸ In addition, the Rome Statute of the International Criminal Court (Rome Statute) and the ICTR Statute both criminalise rape and other forms of sexual violence.¹⁹

The reference to protection against 'rape and other sexual assaults' and the obligation to criminalise such acts as war crimes and punish perpetrators in article 11 of the Nouakchott Draft was a novel approach. It was the first time that such an obligation was included in a human rights treaty. The Nouakchott Draft illustrates the need to protect women in armed conflict, given that war crimes by their very nature are committed during 'armed conflict' and that 'rape' is the most common crime committed against women, particularly as a strategy or weapon of war. However, article 11 of the

13 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

14 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights, 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

15 Nouakchott Draft (n 13) art 11(2).

16 The ICTY was established by the United Nations Security Council Resolution 827 (1993) on the establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993 UN Doc S/RES/827(1993) and the ICTR by the UN Security Council, Security Council resolution 955 (1994) on the establishment of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc S/RES/955 (1994).

17 *The Prosecutor v Jean-Paul Akayesu* (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para 744(13).

18 Section E.

19 Statute of the International Criminal Tribunal for Rwanda (1994), arts 3(g) & 4(e); Rome Statute of the ICC (1998), art 7(g); art 8(2)(b)(xxii); art 8(2)(e)(vi).

Nouakchott Draft was limited in scope since rape and other sexual assaults are the main but not the only violations suffered by women during armed conflict.

The reference to ‘rape and other sexual assaults’ was not included in the following Kigali Draft and Final Draft.²⁰ It should be noted that the Kigali Draft was adopted by the African Commission on Human and Peoples’ Rights (African Commission) in the very city where, five years prior, thousands of women were raped and subjected to various forms of atrocities during the Rwandan genocide. However, article 13(1) of the Kigali Draft contained a provision which protected women against violence ‘in peace time and during situation of conflict’.²¹ Under article 11 on the right to peace, the Final Draft recognised the need to protect women and children in ‘emergency and conflict situations’.²² It also provided for the protection of refugee, returnee and displaced women and children. The notion of ‘conflict situations’ used in both drafts is inclusive of armed conflicts and calls for the application of IHL rules.

Article 10(4) of the Revised Final Draft makes the first reference to IHL.²³ The proposal to refer to IHL was made at the Meeting of Experts that took place in November 2001 to consider the Final Draft.²⁴ The Revised Final Draft imposed under article 10(4)(a), dealing with the right to peace, the obligation to ‘take special measures’ in accordance with IHL for the protection of women and children in emergency and conflict situations, to protect women and girls’ asylum seekers, refugees, returnees and displaced persons as well as to ensure their participation in post-conflict reconstruction and rehabilitation. These measures are provided for under article 10(4)(b) and article 10(4)(c) respectively as was the case with article 11(2) of the Nouakchott Draft and not under ‘violence against women’ as in the Kigali Draft.

Article 10(4) of the Revised Final Draft has technical and conceptual problems, at least at three levels. First, not any ‘emergency’ – understood as exceptional circumstances threatening the survival of a nation and leading to the adoption of derogative human rights measures – or ‘conflict’ situations qualify as ‘armed conflict’ or ‘war’ to warrant the application of IHL.²⁵ Emergency situations are regulated by human rights law, and not the humanitarian law regime, unless a state of emergency is declared as part of an armed conflict, in which case, both IHL and international human rights law (IHRL) apply. Secondly, the distinction the provision makes between women and girls is presumably intended to emphasise intersectionality. The needs of and violations experienced by women broadly (persons of the female gender as defined under article 1(i)) may significantly differ from those of or against girls (female child or adolescent). However, the African Union Office of the Legal Counsel (AUOLC) and a coalition of women’s rights organisations that gathered to comment on the Revised Final Draft in January 2003 successfully advocated for the removal of the concept of ‘girl’.²⁶ Thirdly, aspects of women’s participation in peacebuilding processes are beyond the scope of IHL as they fall under the ambit of IHRL and domestic laws.²⁷

20 Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa ‘A brief analysis of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women’ (2001) 1 *African Human Rights Law Journal* 53-63.

21 Kigali Draft (n 14) art 13.

22 Final Draft (n 20) art 11(4)(a).

23 Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001.

24 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 86.

25 See clarifications under sec 4.1 below.

26 See the mark-up draft and the commentary by the Legal Counsel. On file with the author.

27 TM Makunya ‘Fostering a gendered approach to peacebuilding in the African Great Lakes Region: perspectives from the Democratic Republic of Congo’ (*Kujenga Amani*, 13 October 2021) <https://kujenga-amani.ssrc.org/2021/10/13/fostering-a-gendered-approach-to-peacebuilding-in-the-african-great-lakes-region-perspectives-from-the-democratic-republic-of-congo/> (accessed 28 February 2023).

On 28 March 2003, Ministers in charge of human rights adopted the Addis Ababa Draft, which considered comments made by the AUOLC and reservations by member states.²⁸ They separated concerns on women's rights during armed conflicts from those in peacetime and instituted a separate article 11 to cover the former aspects. Most importantly, the Addis Ababa Draft uses the concept of 'armed conflicts' and broadly extends the protection to women and children, specifically asylum seekers, refugees, returnees and internally displaced persons (IDPs).

The content of article 11 is a culmination of debates on the relevance of a women's rights protocol which started during a seminar in Lomé in 1995 all the way through to the adoption of the Maputo Protocol.²⁹ Article 11 systematises overt and covert attempts in earlier drafts to protect women during armed conflict. The final wording of the provision was influenced by normative, jurisprudential and political events at the continental and global levels, which had given much consideration to the plight of women during armed conflicts and reiterated humanity's quest to sanction those responsible for committing these crimes.³⁰

3 Linkages to other treaty provisions

The wording of article 11 builds on several existing IHRL and IHL treaties which aim to 'humanise' armed conflicts. As a provision in a 'Protocol to the African Charter' article 11 of the Maputo Protocol extends to armed conflicts the protection the African Charter already confers on women.³¹ Article 11 intersects with several articles of the Protocol and the Charter, which protect women's dignity, personal security, integrity, security, life, movement, participation and livelihoods during armed conflicts and enable them to access justice for war-related violations perpetrated against them. Any treatment of women during armed conflict should not undermine their dignity (article 3), life, integrity and security (article 4), which are essential in the realisation of many other rights during armed conflict situations. The African Commission and the African Court have adopted an approach protecting women's access to justice, including for violations committed during armed conflicts.³² They emphasise that amnesty laws – which tend to guarantee impunity for mass atrocities – should not impede victims of human rights violations' access to justice.³³ The African Commission further clarified in General Comment 5 the obligation not to deprive civilian populations of their right to movement unless for military necessity, not to forcibly displace people, and the obligation to allow IDPs to return to their homes.³⁴ The same applies to article 4 on the right to life. According to the African Commission,

28 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

29 Report of the Meeting of Experts (n 24) para 11.

30 See broadly C O'Rourke *Women's rights in armed conflict under international law* (2020) 6-7; C Eboe-Osuji *International law and sexual violence in armed conflicts* (2012) 145-149; A Barrow 'UN Security Council Resolutions 1325 and 1820: Constructing gender in armed conflict and international humanitarian law' (2010) 92(877) *International Review of the Red Cross* 228-232.

31 Article 18(3). For a review, see F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 18-21.

32 *Thomas Kwoyelo v Uganda*, Communication 431/12, African Commission on Human and Peoples' Rights, para 293; *Sébastien Germain Marie Aikoué Ajavon v Benin* (merits and reparation) (4 December 2020) 4 AfCLR 133, para 239.

33 *Kwoyelo* (n 32) para 293; *Ajavon* (n 32) para 239. See broadly SA Dersso 'Interrogating the status of amnesty provisions in situations of transition under the Banjul Charter: review of the recent jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 3 *African Human Rights Yearbook* 383; TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen et al (eds) *A life interrupted: essays in honour of the lives and legacies of Christof Heyns* (2022) 483-484.

34 African Commission General Comment 5 on the African Charter on Human and Peoples' Rights: The right to freedom of movement and residence (art 12(1)), adopted during the 64th ordinary session of the African Commission on Human and Peoples' Rights (24 April-14 May 2019) para 20-23.

where military necessity does not require parties to an armed conflict to use lethal force in achieving a legitimate military objective against otherwise lawful targets, but allows the target for example to be captured rather than killed, the respect for the right to life can be best ensured by pursuing this option.³⁵

As technological advancements are prompting parties to conflicts to use autonomous weapons,³⁶ the link between article 4 of the African Charter and article 11 of the Protocol becomes clear, given that these weapons cannot be used to violate women's rights.

Beyond the normative link between article 11 and provisions of the African Charter, institutional quasi-judicial mechanisms that monitor the implementation of the Charter (article 62) and the Protocol (article 26)³⁷ and the African Court on Human and Peoples' Rights can ensure the enforcement of article 11.³⁸ In other words, and pending the entry into force of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), which institutes an international criminal law section within the to-be-established African Court of Justice and Human and Peoples' Rights,³⁹ behaviours of states and their agents during armed conflict in Africa can also be scrutinised and sanctioned by African human rights mechanisms.⁴⁰

The combination of article 11 with other provisions of the Protocol strengthens the protection of women during armed conflict.⁴¹ Four specific provisions need to be highlighted due, on the one hand, to their historical tie with article 11 and, on the other, to the need for considering intersectionality when protecting women during armed conflict. The observance of article 10 can shield women against most harms occurring to them during armed conflicts if they are allowed to partake in 'processes for conflict prevention, management and resolution' at all levels and can allow states to swiftly respond to those harms after the conflict.⁴² Measures adopted under article 10(2)(c) and 10(2)(d) can facilitate the implementation of article 11(3) as the participation of refugees and asylum-seeking women can help the state to understand how they can be better protected. The vulnerability of women in armed conflict is reinforced on account of being elderly, with disabilities or in distress, but states can minimise adverse effects by implementing their obligations under articles 22, 23 and 24 of the Protocol in times of peace.

The African Children's Charter, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) and the OAU Convention Governing the

35 African Commission General Comment 3 on the African Charter on Human and Peoples' Rights: the right to life (art 4), adopted during the 57th ordinary session of the African Commission held in Banjul, The Gambia from 4-18 November 2015, para 34.

36 C Heyns 'Autonomous weapons in armed conflict and the right to a dignified life: an African perspective' (2017) 33(1) *South African Journal on Human Rights* 48. Autonomous weapons are weapons that do not require human intervention to attack the targets for which they have been programmed.

37 On reporting, see A Johnson 'Barriers to fulfilling reporting obligations in Africa under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2021) 21 *African Human Rights Law Journal* 176.

38 On an evaluative review of the application of the Protocol by the African Court see BK Kombo 'Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389-413.

39 A Sylla 'Les réformes du système judiciaire de l'Union africaine: enjeux juridico-institutionnels sur la Cour africaine des droits de l'homme et des peuples' (2022) 6 *Annuaire africain des droits de l'homme* 219-225.

40 See eg *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) paras 86-87. For a commentary, JM Abelungu & EA Cirimwami 'Le système africain de protection des droits de l'homme et le droit international humanitaire' (2018) 2 *Annuaire africain des droits de l'homme* 9-10.

41 Article 2 (elimination of discrimination against women), art 3 (right to dignity), art 4 (the rights to life, integrity and security of person), art 5 (elimination of harmful practices), art 8 (access to justice and equal protection before the law), art 10 (right to peace), art 15 (right to food security), art 18 (right to a healthy and sustainable environment), art 19 (right to sustainable development) and art 25 (right to remedies).

42 See also Concluding Observations on the 6th Periodic Report of Namibia of the Committee on the Elimination of Discrimination against Women CEDAW/C/NAM/CO/6 (12 July 2022) para 34.

Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) all augment the protection provided for under article 11(4) and 11(3) respectively. Article 22(2) of the African Children's Charter and article 11(4) of the Protocol prohibit participation of the girl-child in hostilities and obligate states to adopt appropriate measures to prevent such participation. The African Children's Charter adopts a broader approach by covering children, including girls, 'affected by armed conflicts' – which are individuals not participating in hostilities – and tension and strife situations.⁴³ Interestingly, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) explains that a child rights-based approach should guide the understanding and application of article 22, which dictates that child rights considerations trump military necessities and objectives, so that 'children benefit from the highest protection possible'.⁴⁴ Some international human rights treaties do not offer such a high standard of protection.

Indeed, the CRC offers a lower protection to women and children during armed conflicts in comparison to article 11(4) of the Protocol and article 22(2) of the African Children's Charter. First, article 38(2) of the CRC obligates states to take 'feasible measures,' which denotes an obligation of means and not an obligation of result, evidenced by the wording 'necessary measures' under the Protocol and the Children's Charter. Second, the age is raised to 18 as compared to the 15-year age threshold under the CRC. While the age threshold seems to have been corrected under the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict,⁴⁵ it permits 'voluntary recruitment',⁴⁶ thus clawing back the semblance of progress it is meant to bring. Third, the Committee has clarified that article 22 prohibits any forms of participation of children (direct and indirect) in armed conflicts.⁴⁷ An interpretation that the wording 'direct part in hostilities' under the Charter and the Protocol permits indirect participation is therefore absurd.

A unique feature of article 11 is that it refers specifically to IHL while its substance remains closely linked to other branches of public international law, namely: international refugee law (IRL) and international criminal law (ICL). A number of provisions of the four Geneva Conventions on the laws of war and their additional protocols, as well as rules of customary IHL apply alongside IHRL to protect women during armed conflicts.⁴⁸ In line with article 11(1), the following categories of women are protected: wounded and sick,⁴⁹ pregnant women,⁵⁰ women deprived of liberty,⁵¹ prisoners of war⁵² and mothers with children under seven years.⁵³ This protection raises the age-old debate over

43 Article 22.

44 General Comment 6 on Article 22 of the African Charter on the Rights and Welfare of the Child on Children in Situations of Conflict adopted by the African Committee of Experts on the Rights and Welfare of the Child during the 35th ordinary session (September 2020) para 13.

45 Article 18 of the 2000/2002 Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (Optional Protocol on Children in Armed Conflict).

46 Optional Protocol on Children in Armed Conflict (n 45) art 3.

47 General Comment 6 (n 44) para 47.

48 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, arts 27(2), 76, 124 & 132.

49 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of War of 12 August 1949, art 12(4); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, art 12(4).

50 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, art 6(4).

51 Geneva Convention IV (n 48) art 85(4); art 75(5) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977; art 5(2)(a) of Protocol Additional II.

52 Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, art 14(2).

53 Geneva Convention IV (n 48) art 38(5). See M Sassòli *International humanitarian law: rules, controversies, and solutions to problems arising in welfare* (2019) 281-283.

the application of IHL and IHRL during armed conflict.⁵⁴ Human rights special mechanisms have generally adopted a complementarity approach by giving pre-eminence to rules that better protect women or children, given that, as highlighted above, IHL may permit violations which are justified by military necessities and objectives.⁵⁵ Article 11(3) raises questions of accountability for women's rights violations during armed conflict. As such, ICL, as a branch of public international law which defines serious crimes and procedures applicable before international criminal courts and tribunals is relevant for the understanding of article 11(3). ICL attaches particular attention to the prosecution of individuals with the highest responsibility in war crimes, crimes against humanity and genocide, some of which can derive from, among others, rape and other forms of sexual exploitation provided for under article 11(3) of the Protocol. ICL also determines the modalities of criminal responsibility. The Rome Statute, ratified by 33 African states (of which 28 have also ratified the Protocol),⁵⁶ provides for three modes of criminal responsibility: individual,⁵⁷ responsibility of commanders, and responsibility of other superiors.⁵⁸ Interestingly, and unlike the Malabo Protocol,⁵⁹ the official capacity of the perpetrator of the crime is irrelevant to their prosecution by the International Criminal Court (ICC).⁶⁰ Consequently, the ICC can prosecute crimes prohibited under article 11(3).

4 Concepts and definitions

Article 11 refers to a number of different concepts such as: 'armed conflict', 'rape', 'other forms of exploitation', 'war crimes', 'crimes against humanity', 'genocide'; 'child participation in hostilities', 'asylum seekers', 'refugees', 'returnees' and 'internally displaced persons'. As discussed above, different branches of international law are relevant to the conceptualisation of the rights in article 11. In fact, some of these concepts are borrowed directly from IHL, ICL or IRL. These different fields of international law may differ in their definition of these concepts. Therefore, it is of importance to clarify how these fields of law intersect under article 11 for the optimal implementation of its provisions.⁶¹ In the following sections, a discussion of the meaning of these concepts is presented. This analysis highlights how these concepts have been interpreted by human rights monitoring bodies and international (criminal) courts and tribunals.

4.1 Armed conflict

Armed conflict means the 'resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'.⁶² This definition captures the traditional notion of 'war' – armed conflict that opposes two primary subjects

54 M Sassoli, AA Bouvier & A Quintin *How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law* (2011) (Chapter 14, 1).

55 General Comment 6 (n 44) para 10.

56 Senegal, Ghana, Mali, Lesotho, Sierra Leone, Uganda, Gabon, South Africa, Nigeria, Benin, Mauritius, DRC, Namibia, Gambia, Tanzania, Malawi, Djibouti, Zambia, Guinea, Burkina Faso, Congo, Liberia, Kenya, Comoros, Seychelles, Tunisia, Cape Verde and Côte d'Ivoire.

57 Art 25 of the Rome Statute.

58 Art 28 of the Rome Statute.

59 D Tladi 'Immunities (Article 46A*bis*)' in G Werle & M Vormbaum (eds) *The African Criminal Court: a commentary on the Malabo Protocol* (2017) 205-208.

60 Art 27 of the Rome Statute.

61 UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations, 18 October 2013, CEDAW/C/GC/30, para 12(a) (CEDAW Committee General Recommendation 30).

62 *The Prosecutor v Dusko Tadic* (Decision on the Defence Motion for interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para 70.

of public international law, or high contracting parties as per the Geneva Conventions – and civil wars, which pit state armed forces against non-state armed groups or the latter among themselves.⁶³

Armed conflicts differ from internal tension, sporadic terrorist attacks, disturbances such as riots, isolated acts of violence or mass arrests of individuals because the level of violence required in armed conflicts must be higher than in other conflicts. Moreover, an armed conflict presupposes the existence of organised armed groups.⁶⁴ These groups should be able to engage in hostilities.⁶⁵ As distinguished by the International Committee of the Red Cross (ICRC), internal disturbances and tensions are ‘situations in which there ... exists a confrontation within a country, which is characterised by a certain seriousness or duration and which involves acts of violence’.⁶⁶ They fall under domestic law enforcement operations guided by domestic law and IHRL, not IHL.⁶⁷ Demarcating violent internal disturbances from armed conflict can sometimes require close scrutiny of facts and present parties.⁶⁸

IHL distinguishes between non-international armed conflict and international armed conflict. However, article 11 of the Maputo Protocol does not distinguish between these two types of armed conflict, thus supporting an emerging scholarly movement that disregards such a distinction as far as the protection of human rights and civilian population in armed conflict is concerned.⁶⁹

International armed conflict is understood as armed hostilities between two or more states, including situations of territorial occupation of one state by another;⁷⁰ while a non-international armed conflict involves the army or national law enforcement forces against organised non-state armed groups, or the latter among themselves.⁷¹ A non-international armed conflict can evolve into or co-exist with an international armed conflict when another state directly intervenes in the conflict, or any of the parties in the internal conflict are agents of another state which exercises ‘overall control’ over them.⁷² For an intervening state to be said to exercise overall control, it must be able to participate in the organisation, coordination, planning of military operations as well as the provision of financial support, training and equipment to the armed group.⁷³ Whatever the nature of the conflict, belligerents must abide by the obligation deriving from article 11 of the Protocol and IHL instruments, including customary IHL. In situations of occupation of a territory, obligations deriving from article 11 and other human rights instruments apply extraterritorially.⁷⁴

63 Sassoli, Bouvier & Quintin (n 54) 22.

64 *Juan Carlos Abella v Argentina* (Inter-American Commission (1997) para 152.

65 E David ‘La notion de conflit en droit international’ in J Belin, S-Y Laurent & A-M Tournepeche (dirs) *La conflictualité armée: Approches interdisciplinaires* (2021) 34.

66 *Abella* (n 64) para 149.

67 CEDAW Committee General Recommendation 30 (n 61) para 4.

68 *Abella* (n 64) para 153.

69 The African Commission does not distinguish between the two conflicts. See *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

70 Situation in the Democratic Republic of the Congo, in the case of *the Prosecutor v Thomas Lubanga Dyil*, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012, para 541.

71 David (n 65) 36.

72 *Lubanga* (n 70) 541. The ‘effective control’ test applies in matters of international responsibility of states for internationally unlawful actions. See *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ, Reports 1986, para 115.

73 *Lubanga* (n 70) 541.

74 CEDAW Committee General Recommendation 30 (n 61) paras 8-9.

As the bulk of conflicts on the African continent are often of a non-international character but with armed forces of other states participating either unlawfully or by invitation⁷⁵ or as part of sub-regional organisations' collective security efforts, there is a need for the African Commission to provide conceptual clarity on and understand the nature of armed conflict in various countries. Furthermore, given that Africa harbours numerous peacekeeping operations⁷⁶ and although peacekeeping forces are not combatants (unless the UN Security Council sanctions the use of force to impose peace), the definition of the nature of their involvement is equally imperative. This is particularly important if they, too, are alleged to have committed violations of women's rights, such as rape and other forms of sexual exploitation.⁷⁷

4.2 Rape and other forms of sexual exploitation

Rape remains the most common violation against women during armed conflict and can result from or lead to other forms of sexual exploitation/enslavement like forced prostitution, pregnancy and sterilisation.⁷⁸ IHL prohibits rape irrespective of the nature of the conflict, while ICL determines individual criminal responsibility for those that commit it, whether as foot soldiers, military commanders or superiors.⁷⁹

Rape and other forms of sexual exploitation have been recognised as war crimes, crimes against humanity or genocide.⁸⁰ The prohibition of rape has acquired the status of customary IHL, thus generating an *erga omnes* obligation binding on all actors involved in armed conflicts, including non-state armed groups.⁸¹

Under IHRL, rape has also been recognised as torture, cruel and degrading treatment and a violation of a person's dignity.⁸² This recognition cements the protection already offered under IHL. Domestic criminal and international courts have provided various definitions of rape, which include a coercive, forced or threatened act of non-consensual or involuntary sexual intercourse with a victim, whether female or male. The Trial Chamber of the ICTY defined rape in *Prosecutor v Furundzija* as an act 'accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression'.⁸³ In *Akayesu*, the ICTR added that the commission of rape could include 'the insertion of objects and/or the use of bodily

75 L Visser 'Intervention by invitation and collective self-defence: two sides of the same coin?' (2020) 7(2) *Journal on the Use of Force and International Law* 292-316; E de Wet 'Modern practice of intervention by invitation in Africa and its implications for the prohibition of the use of force' (2015) 26(4) *European Journal of International Law* 979-998.

76 LM Howard 'UN peacekeeping in Africa is working better than you might think' 27 May 2022 *The Conversation* <https://theconversation.com/un-peacekeeping-in-africa-is-working-better-than-you-might-think-183748> (accessed 28 February 2023).

77 S Timmermans 'Sexual exploitation and abuse by peacekeepers in Central African Republic: applying international humanitarian law to MINUSCA' 6 September 2022 *Volkerrechtsblog* <https://voelkerrechtsblog.org/sexual-exploitation-and-abuse-by-peacekeepers-in-the-central-african-republic/> (accessed 28 February 2023).

78 CEDAW Committee General Recommendation 30 (n 61) para 23; art 7(2)(f) of the Rome Statute.

79 Geneva Convention IV (n 48) art 27; Protocol Additional I (n 51) art 76(1), Protocol Additional II (n 51) art 4(2)(e).

80 G Gaggioli 'Sexual violence in armed conflicts: a violation of international humanitarian law and human rights law' (2014) 96(894) *International Review of the Red Cross* 530-531.

81 Rule 93 of customary IHL, J-M Henckaerts & L Doswald-Beck *Customary international humanitarian law: rules* (2009) 323-327.

82 African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), adopted during the 21st extraordinary session of the African Commission, held in Banjul The Gambia, from 22 October to 5 November 2013, para 57 (African Commission General Comment 4).

83 *The Prosecutor v Anto Furundzija* (Trial judgment), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para 174.

orifices not considered to be intrinsically sexual' while adding that rape was a form of aggression, the understanding of which goes beyond a mere description of 'objects and body parts'.⁸⁴ Rape can also be perpetrated against female or male soldiers present within the same armed group as the perpetrator.⁸⁵

While genocide and crimes against humanity can be committed in times of peace and war, war crimes occur in situations of armed conflict only. When a situation does not qualify as armed conflict, rape and other forms of sexual exploitation can fall into three categories. They can be crimes against humanity when committed as part of widespread and systematic attacks against the civilian population; genocide when committed as part of 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group', or violations of national law during law enforcement operations. At first glance, therefore, the Maputo Protocol would not have included genocide and crimes against humanity in a provision protecting women during armed conflict. However, the inclusion of these two crimes in article 11 was intended to widen the scope of protection for women, as some violations committed during armed conflict may not be directly related to the said conflict.⁸⁶ The African Children's Committee is emphatic that IHL may oftentimes offer lower protection when military actions targeting certain categories of civilian populations are proportionate to the expected advantage.⁸⁷ An approach favourable to women's rights should thus trump military necessities during armed conflicts.

4.3 The participation of girls in hostilities

The participation of girls in hostilities refers to the act of recruiting girls into regular armed forces or groups, whether as active participants in hostilities or to perform other military activities. While a girl may be affected by armed conflicts in the same way as any other civilian, the specific act of recruitment is one of the worst forms of violation of their rights during armed conflicts. It exposes them to several other harms that violate their fundamental rights, such as sexual violence and enslavement, torture, inhumane and degrading treatment and acts which are against their physical and psychological well-being.⁸⁸

Recruitment covers both conscription and enlistment. Conscription refers to forced recruitment, while enlistment is voluntary.⁸⁹ The ICC has held that both forms of recruitment are prohibited under customary international law and that this violation is continuous and only ends when the recruited children reach the age of majority or leave the armed forces or groups.⁹⁰ It should be noted that the 'three alternatives' used under the Rome Statute, 'enlisting', 'conscripting' and 'use' of children are separate offences. In other words, it would still be an offence if a girl were enlisted or conscripted for tasks other than active participation in hostilities. These three alternatives are relevant to the understanding of girls' participation under the Maputo Protocol which, read together with the African Children's Charter, adopts the best interest of the child's approach.⁹¹ The main purpose of preventing all child participation in armed conflict, according to the ICC, is to protect them,

84 *Akayesu* (n 17) paras 596-597.

85 *The Prosecutor v Bosco Ntaganda* (ICC, 30 March 2021) para 332.

86 African Committee General Comment 6 (n 44) para 13.

87 African Committee General Comment 6 (n 44) paras 13 & 19.

88 *Lubanga* (n 70) para 606.

89 *Lubanga* (n 70) para 607.

90 *Lubanga* (n 70) para 618.

91 African Committee General Comment 6 (n 44) para 27. In *Lubanga*, the ICC held that 'the interpretation of the Rome Statute must take account of internationally recognised human rights norms' which can include the Committee's General Comment. See *Lubanga* (n 70) para 602.

from the risks that are associated with armed conflict, and first and foremost they are directed at securing their physical and psychological well-being. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment (including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear).⁹²

The Protocol offers greater protection than the Rome Statute because it sets the threshold age of the girl at 18 years and specifically prohibits the conscription, enlistment, and use of girls in armed conflict. This combined use of the three terms affords a higher level of protection, given the difficulty of demarcating between conscription and enlistment in practice and the near-impossible task of ascertaining informed consent when it comes to recruitment. Oftentimes, children join armed forces or groups in order to survive during conflict, to defend their ethnic group or to vindicate the death of their loved ones.⁹³ Most international criminal jurisdictions discount the ‘consent’ of the child as an element of defence, given that the purpose of the provision is to protect children due to their vulnerability ‘including when they lack information or alternatives’.⁹⁴

4.4 Asylum seekers, refugees, returnees and internally displaced persons

The OAU Refugee Convention replicates the definition of ‘refugee’ provided under the 1951 UN Convention related to the Status of Refugees (1951 Convention) and expands it to consider African specificities. The OAU Convention defines a refugee as,

every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁹⁵

It adds, under article 1(2), situations of ‘external aggression, occupation, foreign domination or events seriously disturbing public order’ as grounds for seeking refuge.

An asylum seeker is a person whose request for refugee status is being or has not been processed.⁹⁶ A returnee is a refugee who has returned to their country of origin. An IDP is one who is forced to leave their place of habitual dwelling due to armed conflict situations, violence or human rights violations, or natural catastrophes, among others, but unlike a refugee, has not ‘crossed an internationally recognised state border’.⁹⁷

There are additional categories of women who stand to benefit from the Maputo Protocol’s protection in the context of armed conflict. These women are, *inter alia*, stateless women, those whose refugee status has been rejected, women awaiting an asylum seeker’s permit or women who recently arrived in the territory of the host country. Although the wording of article 11(3) of the Protocol does not explicitly protect women unlawfully present in the territory of another country, it cannot be said that violations of their rights during armed conflict are lawful.

92 *Lubanga* (n 70) para 605.

93 *Lubanga* (n 70) paras 611-613.

94 *Lubanga* (n 70) para 617.

95 Article 1(1) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

96 Refugees Act 130 of 1998, sec 19(v).

97 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009/2012, art 1(k).

The African Commission has generally extended the protection of the Charter to persons unlawfully present in the territory of a member state to the African Charter. It has done this in order to ensure that domestic legislation does not bifurcate protection of the law on nationality grounds.⁹⁸ In General Recommendation 30, the CEDAW Committee is also emphatic that protection in conflict situations should be extended to citizens and non-citizens alike, both on the national territory and on the territory over which states exercise effective control.⁹⁹

5 Nature and scope of state obligations

Article 11 of the Protocol, related to provisions under treaty and customary IHL and the African Children's Charter, impose several obligations on states and non-state actors, including armed groups, to adequately protect women in situations of armed conflict. In this section, the nature and scope of the different obligations deriving from IHL are unpacked, given the complementarity reading that derives from article 11(1).

5.1 Obligations deriving under IHL

Article 11(1) is anchored in customary international law imposing obligations on each state, whether or not a party to the four Geneva Conventions.¹⁰⁰ The International Court of Justice (ICJ) has ruled that the obligation to 'respect' and 'ensure respect' 'does not derive only from the Geneva Conventions themselves but from the general principles of humanitarian law to which the Conventions merely give specific expression'.¹⁰¹ In the *Advisory Opinion on the Legal Consequences of the construction of a wall in the occupied Palestinian territory*, the ICJ argued that 'every state party to that Convention [Geneva], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with'.¹⁰²

Article 11(1) remains open-ended in its reference to IHL and does not indicate the measures to be taken for its implementation.¹⁰³ However, these measures must meet the criterion of legality under international law, as well as the criterion of effectiveness, to meet the victims' needs.¹⁰⁴ With regard to the obligation to 'respect' parties must ensure the application of IHL at the national level through various measures. These include awareness-raising through training of the military and other key actors, training in IHL by cooperating with IHL specialised institutions like the ICRC, adopting regulatory and legislative frameworks, and creating national IHL commissions. State may also establish national human rights commissions with the power to investigate and report on violations of human rights and IHL.¹⁰⁵ With regard to the obligation to 'ensure respect' for IHL, the widely prevailing view – as evidenced in the ICRC's commentary and by state practice within UN bodies, including the Security Council and the General Assembly – is that states must act to bring another

98 African Commission General Comment 5 (n 34) para 9.

99 CEDAW Committee General Recommendation 30 (n 45) para 5.

100 JM Abelungu 'Le droit international humanitaire et la protection des enfants en situations de conflits armés: Étude de cas de la République démocratique du Congo', Doctoral Thesis, Ghent University (2017) 136.

101 *Nicaragua* (n 72) para 220; F Shaygan *La compatibilité des sanctions économiques du Conseil de sécurité avec les droits de l'homme et le droit international humanitaire* (2008) 71.

102 *Legal Consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, ICJ (Reports 2004) para 158.

103 CICR 'Protection des victimes de la guerre' Préparation de la Réunion du Groupe d'experts intergouvernemental pour la protection des victimes de la guerre, Genève 23-27 janvier 1995, Suggestions du CICR, Genève, avril 1994, 809 CICR (septembre-octobre 1994) 478.

104 CICR (n 103) 478.

105 African Committee General Comment 6 (n 44) paras 48 and 50. See broadly, HP Gasser *Le droit international humanitaire: introduction* (1993) 88-89; M Deyra *Le droit dans la guerre* (2009) 163; R Remacle 'La conduite des opérations militaires au regard du droit des conflits armés' (2001) *Actualité du Droit international humanitaire* 34 & 36.

state to comply with its commitments under the Geneva Convention in the event of a violation.¹⁰⁶ The African Union Constitutive Act codified this obligation in the form of a responsibility to protect under article 4(h) by allowing AU intervention in a member state that is committing war crimes, genocide and crimes against humanity.¹⁰⁷ Other approaches may be adopted at the bilateral or multilateral level, regional or universal, to comply with this obligation, including through discrete steps or protests, public denunciations, diplomatic pressure, coercive measures and retaliatory measures.¹⁰⁸ In addition, states must refrain from encouraging, aiding or assisting any other party to violate IHL.¹⁰⁹ Each of the obligations to respect or ensure respect involves both positive and negative obligations.

During armed conflicts, states have an obligation to treat women ‘with all due regard for their sex’.¹¹⁰ Treating women with all due regard for their sex implies ensuring that the parties have both a defined approach and the capacity to respond to the specific needs of women when they are wounded or ill. It is difficult to provide a general definition of the term ‘due regard for their sex’. According to the ICRC’s 1960 commentary on article 14(2) of Additional Protocol 1 to the Geneva Conventions (Additional Protocol 1), three elements were noted: weakness, honour and modesty, and pregnancy and childbirth.¹¹¹ These references clearly reflect a patriarchal view of women’s protection during armed conflict.¹¹² Some authors have argued that the concept of ‘weakness’ should be replaced by ‘physiological specificity’.¹¹³ The commentary on article 14(2) of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), taking into account international social and legal developments on the issue of gender equality, stipulates that the (special) ‘consideration’ due to women must be understood as a recognition that women have a distinct set of needs and may face physical and psychological risks peculiar to the female sex.¹¹⁴ Thus, article 27(2) of the Geneva Convention IV, echoed in article 76(1) of Additional Protocol 1, states that ‘women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault’.¹¹⁵ The protection offered is general in scope, covering all women in the territory of the parties to the conflict, both those affected by the armed conflict and other women protected or not by Geneva Convention IV.¹¹⁶ In the context of a non-international armed conflict, without expressly referring to ‘women’, article 4(2)(a)-(e) of the Additional Protocol 2 to the Geneva Conventions prohibits (sexual) mutilation, outrages upon personal dignity, including rape, enforced prostitution and any form of indecent assault among others. Thus, differential or more favourable treatment of women is automatically included even where it has not been expressly stated.¹¹⁷

106 F Dubuisson ‘Les obligations internationales de l’Union européenne et de ses États membres concernant les relations économiques avec les colonies israéliennes’ (2013) 2 *Revue belge de droit international* 428-432.

107 D Kuwali ‘Article 4(h), the responsibility to protect and the protection of civilians’ in D Kuwali & F Viljoen (eds) *By all means necessary: protecting civilians and preventing mass atrocities in Africa* (2017) 22-27.

108 M Veuthey ‘L’Union européenne et l’obligation de faire respecter le droit international humanitaire’ in A-S Millet-Devalle (dir) *L’Union européenne et le droit international humanitaire* (2010) 196-197.

109 Abelungu (n 100) 51; Dubuisson (n 106) 432-433.

110 Article 12(4) of GC I, art 12(4) of GC II and art 14(2) of GC III, although not applicable in the context of Article 11, reiterate this principle.

111 Commentaire de 1960 de l’art 14 de la CG III, para 157, <https://ihl-databases.icrc.org/applic/ihl/dih.nsf/Comment.xsp?action=openDocument&documentId=15B0A210CC8FAA3DC12563BD002CB545> (accessed 23 June 2023).

112 M-L Helbert-Dolbec ‘Femmes en guerre: Les conventions de Genève de 1949 et leurs Protocoles additionnels de 1977’ in D Bernard (dir) *Codes commentés 2020: droits des femmes* (2020) 365-367.

113 F Krill ‘La protection de la femme dans le droit international humanitaire’ (1985) 756 *Revue Internationale de la Croix-Rouge* 346.

114 2020 Commentary on art 14(2) of the Convention (IV) relative to the treatment of prisoners of war. Geneva, 12 August 1949, para 1682, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=752A4FC9875177D2C12585850043E743> (accessed 28 February 2023).

115 Geneva Convention IV (n 48) art 27(2) and Protocol Additional I (n 51) art 76(1).

116 M Deyra *Le droit dans la guerre* (2009) 154.

117 Krill (n 113) 346.

States must refrain from specifically targeting women during armed attacks. Article 8 of Additional Protocol I is emphatic that women in childbirth¹¹⁸ and pregnant women¹¹⁹ are entitled to preferential or more favourable treatment. This treatment also applies to nursing mothers or mothers of children under the age of seven or infants.¹²⁰ For example, it is the responsibility of the parties to the conflict to establish in their own territories or in occupied territories, health and safety zones and localities in order to protect these categories of women from the effects of war.¹²¹ Local arrangements may be made for their evacuation from a besieged or encircled area.¹²² Each state party shall permit the free passage of all shipments of essential foodstuffs, clothing and medicine for their benefit.¹²³ Essential foodstuffs refer to basic foodstuffs necessary for the health and normal physical and psychological development of these women.¹²⁴ The right to free passage of essential foodstuffs reiterated under article 70(1) of Protocol Additional I is also enshrined in customary IHL.¹²⁵

In order to protect this category of women from the effects of war, health zones and localities must be organised sustainably outside the zone of hostilities to protect the wounded and sick (soldiers and civilians) from long-range weapons and bombings.¹²⁶ Security zones and localities are used to secure civilians whose vulnerability requires special protection, such as pregnant women.¹²⁷ These zones differ from neutral zones. The latter is of a temporary nature, created not outside the combat zone but within it to shelter a large number of people (wounded and sick soldiers and civilians, the entire civilian population outside the hostilities in this region) from military operations.¹²⁸ The provisions establishing these zones and localities are flexible enough to leave room for various possible combinations.¹²⁹ However, the establishment of health and safety zones and localities is not formally required. Article 14 of Geneva Convention IV indicates that it is optional. Clearly though, drafters of the Geneva Conventions wanted to emphasise the humanitarian importance of such a system and to advocate its practical adoption.¹³⁰ Their 'legal existence' at the international level and their 'conventional protection' depend on their recognition by the other party. Hence the importance of an agreement between the parties recognising these zones.¹³¹ Viewed from a women's rights and child rights-based perspective, establishing these zones is part of the obligation to protect civilian populations and adopt all necessary measures to prevent child participation under the Protocol and the African Children's Charter.

118 See, eg, Geneva Convention IV (n 48) arts 17, 18(1), 21(1), 22(1) and 23(1) and Protocol Additional I (n 51) art 70(1).

119 See, eg, Geneva Convention IV (n 48) secs 14(1), 16(1), 23(1), 38(5), Protocol Additional I (n 51) arts 70(1) and Additional II (n 51) arts 76(2-3) & 6(4).

120 See, eg, Geneva Convention IV (n 48) secs 14(1), 38(5); Protocol Additional I (n 51) secs 70(1), 76(2-3) and Protocol Additional II (n 51) sec 6(4).

121 See Geneva Convention IV (n 48) art 14(1). It is therefore important to extend this protection to other categories not expressly listed.

122 Geneva Convention IV (n 48) art 17. It is important not to limit ourselves only to women in childbirth, expressly mentioned.

123 Geneva Convention IV (n 48) art 23(1). This provision is not limited to pregnant women or women in childbirth.

124 J Pictet (dir) *Commentaire de la Convention de Genève relative à la protection des personnes civiles en temps de guerre* Vol IV (1956) 194.

125 Henckaerts & Doswald-Beck (n 81) 258-267 (Rule 55); S Perrakis 'Le droit international humanitaire et ses relations avec les droits de l'homme: Quelques considérations' in P Tavernier & J-M Henckaerts (dirs) *Droit international humanitaire coutumier: enjeux et défis contemporains* (2008) 135.

126 Pictet (n 124) 130.

127 Pictet (n 124) 129.

128 Pictet (n 124) 130.

129 Pictet (n 124) 135.

130 Pictet (n 124) 134. See also Y Sandoz 'La notion de protection dans le droit international humanitaire et au sein du Mouvement de la Croix-Rouge' in C Swinarski (dir) *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean* (1984) 978.

131 Pictet (n 124) 137.

5.2 Obligations deriving from IHRL

Regarding girls, articles 11 of the Protocol and 22 of the African Children's Charter, read through a 'child-rights-focused and child-centred lens' impose several obligations states must comply with. These obligations have been further developed in the Committee's General Comment on article 22 without equivocation. States have an immediate obligation to refrain from violating the rights of children. Any violations should be legal, necessary, legitimate and proportional to the aim sought pursuant to the Charter.¹³² The obligation to respect requires states and non-state armed forces to refrain from recruiting and using boys and girls under the age of 18.¹³³ Besides, they must prevent the violation of article 22 and relevant IHL norms, adopt measures to ensure individuals comply with IHL and IHRL norms, ensure accountability and offer redress for victims.¹³⁴ States that provide assistance to other states or non-state armed groups that conscript, enlist and use girls violate article 11(4) of the Protocol and 22 of the African Children's Charter. This obligation is imposed on all states, whether they are part of the conflict or not.¹³⁵

5.3 The obligation to prosecute

States must prosecute or ensure (and not impede) the prosecution of those who commit acts prohibited under article 11(3) of the Protocol. They should refrain from providing blanket amnesties as part of peacebuilding or transitional justice processes, given victims' rights to access to justice. The four Geneva Conventions reiterate the obligation to prosecute individuals who have committed violations of IHL rules¹³⁶ and have been relied on by human rights mechanisms and international courts to combat impunity of mass atrocities.¹³⁷

Individuals alleged to have committed these crimes should be prosecuted by states irrespective of their nationalities and place of origin based on universal criminal jurisdiction. It goes without saying that states must demonstrate in their reports whether they have conferred universal jurisdictions to their military and/or civil courts and tribunals to combat impunity of those atrocities which, although they were not committed on their territories, have caused harm to the entire humanity.

ICRC Rule 157 of customary IHL reiterates this obligation concerning war crimes perpetrated during international and non-international armed conflict.¹³⁸ States may add to this genocide and crimes against humanity.¹³⁹ Oftentimes, states commit to prosecuting their agents (both military and civilian) who have allegedly perpetrated egregious human rights violations.¹⁴⁰ However, for political and other legal reasons, they fail to establish mechanisms to see to it that their obligations are complied with. It thus behoves human rights monitoring bodies to go beyond mere promises and assess steps that states have taken in this regard.

132 African Committee General Comment 6 (n 44) para 46.

133 African Committee General Comment 6 (n 44) para 47.

134 African Committee General Comment 6 (n 44) para 48.

135 African Committee General Comment 6 (n 44) para 51.

136 Geneva Convention I (n 49) art 49; Geneva Convention II (n 49) art 50(2); Geneva Convention III (n 52) art 129 and Geneva Convention IV (48) art 146.

137 *DRC v Burundi* (n 69) paras 79-82.

138 Henckaerts & Doswald-Beck (n 81) 604.

139 Article 91 of Act 13/011-B of 11 April 2013 on the Organisation, Functioning and Competences of Judicial Courts & Act 024/2002 of 18 November 2002, The Military Penal Code – Title V of the Democratic Republic of Congo.

140 *Armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ (Reports 2005) para 234.

While post-conflict countries may lack the capacity to prosecute perpetrators of serious crimes or may fear that prosecution might jeopardise fragile peace processes, cooperation with the ICC is key to ensuring the accountability gap is filled. This cooperation may extend to the UN Security Council and the African Union, which can help states to set up international, mixed or hybrid criminal courts or chambers in matters pertaining to violations of rights during armed conflicts, including violations of women's rights.¹⁴¹

The obligation to prosecute extends to non-state actors, including armed groups and can be implemented by ensuring that states do not enter into peace deals which guarantee impunity for women's rights violations. They must arrest and prosecute former and current warlords found on their territory or extradite them to countries that are willing to do so.

A state need not experience armed conflict on its territory in order to be bound by article 11. It may be bound through the actions of its soldiers on the territory of another state. The obligations imposed by article 11 extend to soldiers participating in peacekeeping or peace-imposing missions or those involved in military interventions by invitation. Agreements between the host state and states contributing troops (Status of Forces Agreements) under the United Nations, the African Union or sub-regional peacekeeping missions generally exempt these soldiers from prosecution by host state courts.¹⁴² However, their state of origin must prosecute them before its own domestic courts and/or establish special courts for that purpose. Pursuant to article 26 of the Protocol, the African Commission must thus scrutinise whether states that contribute troops to military operations outside their territories have established adequate mechanisms to prevent and respond to alleged violations of women's rights by their troops.

6 Implementation

This section presents an analysis of the implementation of article 11 as it emerges from the practice of states and the African Commission. As a point of departure, although article 11 imposes obligations on all the state parties to the Protocol, their practice depends on whether they experience or are affected by conflicts directly or indirectly or whether they participate in military activities as part of continental collective security initiatives. Expressed differently, a state on whose territory armed conflicts occur or have occurred has a heavy burden to implement obligations deriving from article 11 compared to those with no armed conflict on their territories. Similarly, a state that contributes troops to military operations must demonstrate that the troops are adequately trained and that its legal framework is robust enough to safeguard against violation of IHL and IHRL during armed conflicts. Understanding this is crucial for the African Commission and actors involved in improving the lived realities of women in Africa because it can help them identify states requiring an in-depth dialogue pursuant to article 11.

Furthermore, unlike article 22 of the African Children's Charter, which has been interpreted to cover situations other than armed conflicts, measures adopted within the framework of article 11 must be limited to improving the living conditions of women during armed conflict. Measures taken under article 11 must demonstrate how they protect women during armed conflict. Such measures must further be viewed in light of states' broader obligations under international humanitarian, human rights, and criminal law, as described under 5 above.

141 Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System <https://www.jstor.org/stable/48581907?seq=3> (accessed 6 May 2023).

142 *United Nations Mission in Democratic Republic of Congo (MONUC) Status of Forces Agreement (SOFA)* (8 March 2000). See broadly M Forteau, A Miron & A Pellet *Droit international public* (2022) 721.

6.1 African Commission

Article 11 of the Protocol has been implemented by the African Commission through various resolutions, for example, Resolution 492 on Violence against Women during Armed Conflicts in Africa,¹⁴³ Resolution 283 on the Situation of Women and Children in Armed Conflict,¹⁴⁴ and Resolution 282 on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo.¹⁴⁵ In these resolutions, the Commission has reiterated the obligation of states to prosecute perpetrators of women's rights violations. Prosecution is viewed as a means to provide the right to truth, justice, and reparation, to train troops on IHL/IHRL and to develop programs to prevent violence.

In a study conducted pursuant to Resolution 332 on Human Rights in Conflict Situations,¹⁴⁶ the Commission broadened the scope of protection by interpreting the notion of 'conflict situations' to cover not only armed conflict but also 'crisis situations manifesting violent actions of various gravity short of armed conflict'.¹⁴⁷ The Commission noted that the African Charter, which also applies to its normative protocols, applies in peace time and during armed conflicts especially because it does not make provision for derogation during a state of emergency.¹⁴⁸ Therefore, no derogations from women's rights during conflicts are justifiable. The same reasoning applies to non-state armed groups that effectively control a territory.¹⁴⁹ Through its case law and general comments, the Commission has developed jurisprudence on the nature and extent of protection accorded to civilians, including women, in the context of the right to life and the right to freedom of movement. Clearly, while not being an IHL monitoring body, the Commission has developed a complementarity approach to IHL and IHRL, which shows its willingness to use the two bodies of law to buttress the protection of women's rights.¹⁵⁰ Interestingly, the Commission is of the view that the body of law which better protects the right of the victim, between IHL and IHRL, should be applied in case of doubt.¹⁵¹

6.2 Insufficient legislative and institutional measures

With the exception of the Democratic Republic of Congo (DRC), there is paucity of legislative and institutional measures adopted by states parties to comply with their obligations under article 11.¹⁵² Malawi, Nigeria, Senegal, Benin and Zimbabwe did not include in their reports measures adopted to realise article 11.¹⁵³ Given that most states are not experiencing situations of armed conflict, it can be assumed that the need to adopt such legislative or institutional measures is not as present and urgent as it is in countries affected by armed conflict, such as the DRC. This assumption may not always hold

143 ACHPR/Res.492 of 5 December 2021.

144 ACHPR/Res.283 of 2014.

145 As above.

146 ACHPR/Res.332 of 25 February 2016.

147 African Commission *Addressing human rights issues in conflict situations: towards a more systematic and effective role for the African Commission on Human and Peoples' Rights* (2019) paras 13 & 7-8.

148 African Commission (n 147) para 55; *Commission nationale des droits de l'homme et des libertés v Chad* (Communication 74/92) (1995) ACHPR, para 21.

149 African Commission (n 147) para 58.

150 See *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

151 African Commission General Comment 4 (n 82) para 64.

152 See the discussion in sec 6.3 below.

153 Malawi Periodic report on the African Charter and the Maputo Protocol (May 2015 to March 2019); 6th Periodic Country Report: 2015-2016 on the Implementation of the African Charter and the Maputo Protocol in Nigeria (August 2017); Periodic Report on the Implementation of the African Charter on Human and Peoples' Rights presented by the Republic of Senegal (April 2013), Benin Combined Periodic Report from the Sixth to the Tenth (6th-10th) Periodic Reports on the Implementation of the provisions of the African Charter (2009-2018) and the Maputo Protocol; Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Report under the African Charter and 1st, 2nd, 3rd and 4th Combined Report under the Maputo Protocol.

true. States should demonstrate the existence of a robust legislative and institutional framework that can potentially protect women's rights should armed conflicts occur within their jurisdiction. Besides, several African states are involved in military activities outside their territory, making the application of article 11 on their troops automatic even if the conflict does not take place in a jurisdiction they directly control.

In its report to the African Commission, Cameroon indicates that it has ratified the four Geneva Conventions and/or their additional protocols.¹⁵⁴ Mauritania indicates that the four Geneva Conventions can be invoked before its national courts and public authorities as they form part and parcel of domestic law.¹⁵⁵ Nonetheless, the goal of humanising IHL requires the adoption of specific human rights measures. In this regard, Togo and the DRC have conferred on their tribunals jurisdictions to try war crimes, crimes against humanity and genocide committed in the context of an armed conflict.¹⁵⁶ An interesting development from this perspective is the adoption or amendment of defence laws or child rights acts in the DRC, Kenya, South Africa, The Gambia and Togo to prevent the recruitment of persons below 18 years of age in national armed forces.¹⁵⁷ Cameroon has implemented a program aimed at addressing the root causes of children's recruitment by armed groups and rehabilitating children associated with conflict.¹⁵⁸

As a war-torn country, particularly in its eastern part, the DRC has adopted a myriad of laws and established institutions to meet its obligations under article 11 of the Protocol. The measures DRC has adopted include a national army plan to combat sexual violence in armed conflict¹⁵⁹ and the institution of a gender focal point to bring gender-based violence (GBV) issues to the attention of the army's top leadership.¹⁶⁰ The head of state also established the position of Special Adviser to the Head of State on the Fight against Sexual Violence and the Recruitment of Children into Armed Groups.¹⁶¹ There have been several disarmament, demobilisation and reintegration programmes and security sector reform efforts to dissolve armed groups, ensure the return of IDPs and strengthen state authority.¹⁶² Between 2009 and 2012, over 13,584 children, including 5,000 girls, were either freed from armed groups or reintegrated into their community.¹⁶³ These initiatives are conducted on a continuous basis.

154 Single Report Comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter and 1st Report relating to the Maputo Protocol and the Kampala Convention (2015-2019) para 940.

155 10th, 11th, 12th, 13th, and 14th Periodic reports of the Islamic Republic of Mauritania on the Implementation of the provisions of the African Charter (July 2016) 67.

156 6th, 7th and 8th Combined Periodic Reports of Togo on the Implementation of the African Charter and Initial Report on the Implementation of the Maputo Protocol (August 2017) para 642; DRC Article 91 of Act 13/011-B of 11 April 2013 on the Organisation, Functioning and Competences of Judicial Courts & Act 024/2002 of 18 November 2002, The Military Penal Code, Title V.

157 Togo Combined Periodic Reports (n 156) para 645; Gambia Combined Report on the African Charter (1994 and 2018) and Initial Report under the Maputo Protocol (August 2018) 165; *Kenya Combined Report of the 12th and 13th Combined Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (April 2020) para 304, DRC Combined Report (n 2) para 342.

158 Cameroon Single Report (n 154) para 920.

159 DRC Combined Report (n 2) para 333.

160 As above.

161 DRC Combined Report (n 2) para 334.

162 DRC Combined Report (n 2) para 335.

163 DRC Combined Report (n 2) para 352.

6.3 Poor understanding of basic obligations arising from article 11

Often, states seem not to accurately grasp the nature of measures they should adopt pursuant to article 11. First, a review of state reports suggests that states view the adoption of legislation to protect refugee and asylum-seeking women as sufficient to fulfil their obligations under article 11. Their reports show that Angola, The Gambia, Kenya, Lesotho, and South Africa follow this trend.¹⁶⁴ While such legislation protects women's rights, it does not address women's specific needs during armed conflict, which is at the heart of article 11. In addition, states rarely make the connection between the legislative measures adopted and their impact on conflict situations. The African Commission and states should always be mindful that article 11 focuses on armed conflict situations as defined under section 4.1.

Moreover, the African Commission and some states conflate measures adopted under articles 10 and 11, thus missing an opportunity to clarify measures required under articles 11.¹⁶⁵ As an example, Rwanda and Namibia conflate measures under article 10 and article 11 as they do not indicate the measures they have adopted specifically to protect women during armed conflict.¹⁶⁶ Under the sub-heading dedicated to article 11 in its report, Namibia lists efforts it is making to ensure women participate in decision-making processes 'in conflict and peacebuilding processes' and to draft the National Plan of Action on Women, Peace and Security, which hardly relate to article 11.¹⁶⁷ Namibia also mentions the adoption of laws against GBV but these laws are not tailored to armed conflict situations. The same weakness appears in the reports by Cameroon and Eswatini.¹⁶⁸

There are several other problems in state reports concerning article 11. The report of Seychelles suggests that it did not understand what is expected of it regarding the implementation of article 11. One passage of the report reads as follows:¹⁶⁹

Seychellois personnel have been dispatched to various zones either to preserve national sovereignty or to assist allies. The country has adopted the four Acts of the 1949 Geneva Protocol, which protects the Human rights of both men and women who are combatants on land and at sea. The protocol entered into force on 8 May 1985 and acceded to on 8 November that same year. Similarly, Seychelles has adopted the Optional Protocol of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on 4 April 1992.

The above passage is difficult to understand. A similar sentence can be found in the report submitted by Burkina Faso.¹⁷⁰ In its report, Kenya confuses situations of armed conflict with internal disturbance

164 Angola Sixth and Seventh Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Maputo Protocol (January 2017) paras 62-65; South Africa Combined Second Periodic Report under the African Charter and Initial Report under the Maputo Protocol (August 2015) paras 293-305; Lesotho Combined Second to Eighth Periodic Report under the African Charter and Initial Report under the Maputo Protocol, para 413; Gambia Combined Report (n 157) 164; Kenya Combined Report (n 157) paras 299 & 301.

165 African Commission, Concluding observations on the 6th and 7th Periodic Reports of the Republic of Angola on the implementation of the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on the Rights of Women in Africa (2011-2016) paras 18-19, p 27 (16 to 30 July 2019).

166 Namibia 7th Periodic Report on the African Charter (2015-2019) and the Second Report under the Maputo Protocol (2020) para 12; 11th 12th and 13th Combined Periodic Reports of the Republic of Rwanda on the Implementation of the African Charter and the Initial Report on the Implementation of the Maputo Protocol (2009-2016) paras 63-67.

167 Paragraphs 12.1 to 12.3.

168 Eswatini Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa (2001-2019) para 472 and Cameroon Single Report (n 154) para 913.

169 Seychelles Initial Report on the Maputo Protocol (2019) para 11.1.

170 Periodic Report of Burkina Faso on the Implementation of the African Charter and Initial Report on the Implementation of the Maputo Protocol (January 2015) paras 363-364.

and tension, including during elections, thus applying IHL norms where they are not relevant.¹⁷¹ This lack of clarity indicates the low quality of reporting on article 11.

6.4 Awareness-raising efforts

As part of their treaty-based and customary law obligation to respect and ensure the respect of IHL,¹⁷² some states have engaged in awareness-raising on article 11.¹⁷³ Cameroon has trained its security officers on GBV in humanitarian contexts,¹⁷⁴ while the DRC has organised trainings on protecting women and children from sexual violence.¹⁷⁵ Importantly, Kenya organised training of its military, police and civilian officials involved in peacekeeping missions in Somalia on the prevention of GBV in conflict situations.¹⁷⁶ Within its security forces, it has also furthered gender-sensitive reporting, which can possibly extend to reporting human rights violations committed by troops involved in peacekeeping missions. None of the states that have reported on the Protocol has indicated the inclusion of issues related to article 11 in their military training/operations manuals or the adoption or revision of existing military training/operations manuals to consider women's rights protection during military operations.¹⁷⁷

6.5 Prosecution and the emerging jurisprudence

Emerging practices among countries affected by armed conflicts are showing some efforts to prosecute those involved in violations of IHRL and IHL. As an example, military and civilian officials involved in rape and other forms of sexual exploitation have been convicted of war crimes or crimes against humanity in the DRC both before and after the ratification of the Protocol.¹⁷⁸ While courts and tribunals have not referred to article 11 of the Protocol, some have applied domestic law incorporating and defining international crimes, as required by article 11. They sometimes rely on the Geneva Conventions and/or their additional protocols to define the nature of armed conflict, other modalities of protection, and other ICL (general) principles.¹⁷⁹ This is a progressive step in the fight against impunity for crimes indicated under article 11, and it shows that institutional judicial capacity and jurisprudence are in place to implement article 11.¹⁸⁰

In the DRC, a judicial cooperation agreement has strengthened the prosecution of crimes related to article 11. This agreement was signed in 2004 between the DRC and the ICC pursuant to article 54(3)(c) of the Rome Statute.¹⁸¹ The ICC's involvement in cases implicating gross violations of human

171 Kenya Combined Report (n 157) para 300.

172 Rule 142 of Customary IHL.

173 It is a constitutional obligation in the DRC and South Africa to raise awareness through education over matters concerning international human rights and humanitarian law, art 45; sec 199(5) of the Constitution of South Africa.

174 Cameroon Single Report (154) para 916.

175 DRC Combined Report (n 2) para 333.

176 Kenya Combined Report (n 157) para 303.

177 See the South African Law of Armed Conflict Manual for indication <https://ihl-databases.icrc.org/fr/customary-ihl/v2/rule142?country=za>.

178 See broadly JB Mbokani *La jurisprudence congolaise en matière de crimes de droit international: une analyse des décisions des juridictions militaires congolaises en application du Statut de Rome* (2016) vi-viii.

179 As above.

180 D Perissi & K Naimer 'Achieving justice for child survivors of conflict-related sexual violence in the Democratic Republic of the Congo: the *Kavumu* case' (2020) 18 *Journal of International Criminal Justice* 293-306.

181 SP Tunamsifu 'Twelve years of judicial cooperation between the Democratic Republic of the Congo and the International Criminal Court: have expectations been met?' (2019) 19 *African Human Rights Law Journal* 109.

rights committed in the DRC has led to landmark judgments on questions relevant to article 11, such as the recruitment and use of children in hostilities and rape.¹⁸²

7 Conclusion

Article 11 is a response to the gross violations that women have endured for generations on a continent plagued by conflicts. In particular it speaks to a context where rape and sexual violence is frequently used as a weapon of war. It is a significant normative step toward the realisation of women's rights during armed conflicts. It is, moreover, an important move towards ensuring accountability for mass atrocities committed against women and girls. Article 11, therefore, fills the gap left by CEDAW.

Article 11 protects women irrespective of their ethnic, political, social, cultural, or national status. This protects women against abuses by all parties to the conflict, and against the effects of hostilities, whether direct or indirect. While embedded in a human (women's) rights treaty, the link the Maputo Protocol makes with IHL and ICL, among others, widens the scope of protection accorded to women during armed conflict, both normatively and institutionally.

The normative and institutional complementarity deriving from the linkages between article 11 and other relevant treaties should be leveraged to enhance women's rights protection during armed conflicts and to avoid competing interpretations of article 11. The African Commission and the African Court, in their monitoring and/or interpretive mandates, should take cognisance of the humanitarian role which the ICRC exercises pursuant to the Geneva Conventions and the normative developments of IHL it has prompted.¹⁸³ The content of article 11 begs for institutional collaboration between the Commission and the ICRC when the latter develops soft law instruments related to IHL or is seized of human rights issues related to IHL where the ICRC's expertise can help clarify legal questions.¹⁸⁴ The jurisprudence of international criminal tribunals and courts should also be mobilised by the African Commission and the African Court when dealing with IHL matters, as the former are more acquainted with war crimes, crimes against humanity and genocide-related questions. The findings of African human rights bodies on article 11-related questions should be consistent with regional and global good practices.

In addition to the African Commission and the African Court, international institutions, the ICRC and the ICC in particular, and broadly the ICJ and the CEDAW Committee could rely on article 11 or use it as an interpretive source to humanise the conduct of hostilities in Africa. The provision also provides an opportunity to develop new jurisprudence by national and international (criminal) courts and foster judicial dialogue and complementarity among these courts. Constructive dialogue through state reporting should also be furthered so that various stakeholders, including the African Commission, are able to understand and evaluate the quality of measures instituted to comply with article 11. Finally, more training should arguably be provided to the military involved in armed conflicts, including those involved in peacekeeping forces.

182 See *Lubanga* (n 70) and *Ntaganda* (n 85).

183 See the various studies including those on customary international humanitarian law.

184 Based on Rule 104 of the Commission's Rules of Procedure, the Commission may invite the ICRC to intervene as an *amicus curiae*. The ICRC has also participated in the development of soft-law instruments such as the African Commission General Comment 5 (n 34). See R Adeola, F Viljoen & TM Makunya 'A commentary on the African Commission's General Comment on the Right to Freedom of Movement and Residence under art 12(1) of the African Charter on Human and Peoples' Rights' (2021) 65 *Journal of African Law* 140.

Article 12

The right to education

*Sheila Parvyn Wamahiu and Celestine Nyamu Musembi**

1. States Parties shall take all appropriate measures to:
 - (a) eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;
 - (b) eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;
 - (c) protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;
 - (d) provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;
 - (e) integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.
2. States Parties shall take specific positive action to:
 - (a) promote literacy among women;
 - (b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology;
 - (c) promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

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1 Introduction

Ending multiple exclusions including discrimination against women in the field of education is the chief concern that frames article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). This concern has been on the global agenda for several decades. Since the adoption of the Universal Declaration of Human Rights (Universal Declaration) in 1948, education has been recognised as an inalienable right of every human being.¹ Three quarters of a century later, this right is yet to be realised equally for the world's populations. Inequities in education remain wide, with an estimated 244 million children and young people aged between six and 18 excluded from their countries' education systems in 2021.² The United Nations Educational, Scientific and Cultural Organization (UNESCO) has estimated the annual cost of this failure to be USD129 billion.³ Article 17(1) of the African Charter on Human and Peoples' Rights (African Charter) enshrines the right of every individual to education. The Maputo Protocol elaborates on this right, reflecting the commitment by member states to ensure gender equality in education for all women and girls.

In sub-Saharan Africa, this exclusion is most pronounced relative to other regions of the world.⁴ Socio-economic status, (dis)ability, race, ethnicity, religion, and gender intersect to create overlapping and self-reinforcing layers of disadvantage, limiting opportunity and social mobility for children from disadvantaged and marginalised groups.⁵ It is these children who suffer the highest levels of exclusion from formal education, 'exacerbated by poverty and economic crises, gender stereotyping in curricula, textbooks and teaching processes, violence against girls and women in and out of school and structural and ideological restrictions to their engagement in male-dominated academic and vocational fields'.⁶ These, in turn, reproduce multiple, often intergenerational inequities at individual and societal levels.⁷ Poverty, malnutrition, natural and human-made disasters (inclusive of armed conflict, violent extremism, and instability) aggravated by historical injustices, widespread corruption and neoliberal policies and practices (which invariably result in funding cuts to public services) also affect children's learning conditions by increasing anxiety and stress and making the learning environment unfriendly, unsafe and insecure.⁸ Conversion of education facilities to military use in conflict situations moreover

1 Article 26 of the Universal Declaration.

2 Global Education Monitoring Report Team & UNESCO Institute for Statistics 'New estimation confirms out-of-school population is growing in sub-Saharan Africa' Policy Paper 48, ED/GEMR/MRT/2022/PP/48 <https://unesdoc.unesco.org/ark:/48223/pf0000382577> (accessed 11 May 2023).

3 UNESCO 'Teaching and Learning: achieving quality for all – EFA global monitoring report 2013-2014' <https://www.unesco.org/gem-report/en/teaching-and-learning-achieving-quality-all> (accessed 11 May 2023).

4 UNESCO Institute of Statistics Global Monitoring Report Team 'Meeting commitments: are countries on track to achieve SDG 4?' (2019) <https://unesdoc.unesco.org/ark:/48223/pf0000369009> (accessed 11 May 2023).

5 Jaslika Support Team, Strengthening Girls' Education in Emergencies: Leveraging Data & Partnerships (contribution to Equal Measures 2030 <https://www.equalmeasures2030.org/> (2022) (accessed 11 May 2023). See also L Antonowicz 'Too often in silence: a report on school-based violence in West and Central Africa' (2010) UNICEF, Plan West Africa, Save the Children Sweden, ActionAid <https://resourcecentre.savethechildren.net/document/too-often-silence-report-school-based-violence-west-and-central-africa/> (accessed 11 May 2023); Plan International & Save the Children 'Learn without fear: the global campaign to end violence in schools' <https://resourcecentre.savethechildren.net/document/learn-without-fear-global-campaign-end-violence-schools/> (2008) (accessed 11 May 2023).

6 Committee on the Elimination of Discrimination against Women, General Recommendation 36 on the right of girls and women to education (2017) CEDAW/C/GC/36 para 4.

7 UNICEF 'The investment case for education and equity' <https://www.unicef.org/reports/investment-case-education-and-equity> (2015) (accessed 11 May 2023).

8 Jaslika Support Team, "'Strengthening Girls'" Education in Emergencies: Leveraging Data & Partnerships' (contribution to *Equal Measures 2030* <https://www.equalmeasures2030.org/> (2022) (accessed 11 May 2023). See also, UNESCO Global Education Monitoring Report Team 'Gender Report: a new generation: 25 years of efforts for gender equality in education' <https://www.unesco.org/gem-report/en/2020-gender-report> (2020) (accessed 11 May 2023).

exposes learners to heightened security risks. Available data indicates that between 2015 and 2019, most countries where at least one incident of military use of schools or universities was experienced were in Africa.⁹

This chapter provides a commentary on article 12 of the Maputo Protocol to clarify its provisions and implications for realising the rights of women and girls to education in Africa. The chapter is organised into seven sections. Section 2 traces the drafting history of article 12, while section 3 reviews the linkages between article 12 and other relevant treaties. Section 4 clarifies and offers definitions of concepts central to the chapter. Section 5 examines the nature and scope of state obligation under article 12 while section 6 assesses progress in implementation. Section 7 concludes by reiterating the centrality of education to the overall attainment of rights for women in Africa and calling attention to issues that have seen almost no progress since the adoption of the protocol, such as the elimination of stereotypes in textbooks and syllabuses.

2 Drafting history

There were several iterations of what eventually became article 12 of the Maputo Protocol. A review of the various drafts reveals differences between them in terms of the numbering, naming of the article, structure, and substantive content. It was variously numbered as articles 13,¹⁰ 14,¹¹ and 11.¹² The Nouakchott Draft read as follows:¹³

Elimination of all discrimination towards women in education:

- Elimination of all reference to stereotypes, which perpetuate such discrimination in textbooks and syllabuses;
- Promotion of an increased literacy rate among citizens, especially women;
- Ensuring that primary education is free and compulsory for all; and
- Making secondary education free and compulsory for girls.

In November 1999, the African Commission on Human and Peoples' Rights (African Commission) examined and adopted a revised draft protocol, the Kigali Draft.¹⁴ There were significant differences in structure and content between this draft and the Nouakchott Draft. The article on education and training was now organised into two clauses, each with several sub-clauses. The first clause obliged states parties to take measures for the elimination 'of all forms of discrimination against girls and women in the spheres of education and training' as well as the elimination of 'all references in text books and syllabuses to the stereotypes which perpetuate such discrimination'.¹⁵ The second clause further obliged states parties to take 'positive action' to promote 'increased literacy rate among women', 'vocational training for women and girls', and the retention of girls in school 'by providing free secondary education through grants and bursary'.¹⁶ This draft was more intentional and bolder

9 UNESCO 'Spotlight Report on Basic Education Completion and Foundational Learning in Africa' <https://www.unesco.org/gem-report/en/2022-spotlight-africa> (2022) 2 (accessed 11 May 2023).

10 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

11 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

12 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

13 Nouakchott Draft (n 10).

14 Kigali Draft (n 11).

15 Kigali Draft (n 11) art 14(1).

16 Kigali Draft (n 11) art 14(1)(b).

in tone, with its exclusive focus on women and girls, as opposed to the generic 'all'. It was also more specific about the types of actions to be taken to ensure the retention of girls in secondary school. Unlike the earlier iteration, the Kigali Draft dropped the reference to primary education, emphasising women's literacy, secondary education, and vocational training.

The third draft of the Protocol, the Final Draft,¹⁷ underwent substantive amendments and inclusions at the 2001 Meeting of Experts.¹⁸ Two additional obligations were set out under article 12(1). First, the protection of the girl-child from all forms of abuse, including sexual harassment in schools, was underscored.¹⁹ Linked to it, the second focused on integrating gender sensitisation and human rights education at all levels of education, including teacher training institutions,²⁰ drawing attention to the critical role that teachers can play in breaking the cycle of violence against women and girls.²¹

At the same time, article 12(1)(a) was amended to include the words 'and guarantee equal opportunity and access'. This conformed with article 10 of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which provides for equal 'opportunity' and 'access' in the educational context, thereby setting the international standard. Though not explicitly stated, article 10(c) of CEDAW, which provides for the adaptation of textbooks, programmes and teaching methods to eliminate discrimination against women in education, presented the anchor for article 12(1)(a) on the elimination of stereotypes in textbooks and syllabuses that perpetuate discrimination in spaces where girls and women are educated and trained. The Beijing Platform for Action (Beijing Platform) further underscored the critical need for developing non-discriminatory education and training to address the inequalities and inadequacies in and unequal access to education and training for women and girls.²² It also called for the elimination of discrimination against girls in education, skills development, and training.²³

The language had changed significantly by the time the Meeting of Ministers adopted the draft text in 2003. This is largely attributable to a forum held in Addis Ababa in January 2003 convened jointly by the Africa Regional Office of the Organisation of African Unity (OAU) and the Law Project of Equality Now, bringing together a cross-section of NGOs.²⁴ The draft article on education was at that time numbered 11. While in draft article 11 (2)(a), the word 'increase' was replaced with 'promote' (literacy among women), draft article 11 (2)(b) was expanded to include the words, particularly in the 'fields of science and technology'.²⁵ This amendment was in alignment with paragraph 75 of the Beijing Platform. In a footnote to this clause, it is noted that the Beijing Platform recognises gender bias in the science curricula and that 'girls are often deprived of basic education in mathematics and science and technical training'. It further highlights paragraph 82, which calls on states to 'provide information to women and girls on the availability and benefits of training in science and technology' and 'to take

17 Final Draft (n 12).

18 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

19 Final Draft (n 12) art 12(1)(c).

20 Final Draft (n 12) art 12(1)(d).

21 In a footnote to draft art 12 (1)(d), reference is made to para 9 of the Bangalore Principles on the Domestic Application of International Human Rights Norms (1988) which expresses the view that it is desirable to integrate international human rights norms into all levels of education.

22 Beijing Declaration and Platform for Action Strategic area of concern B4 (Beijing Platform).

23 Beijing Platform Strategic area of concern L4.

24 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003.

25 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft) 10.

positive measures to promote training in science and mathematics, and to ensure women better access to and participation in technical and scientific fields, especially where they are underrepresented’.

Finally, draft article 11(2)(c) was not only refined but completely overhauled: ‘retention of girls in schools and training institutions’ was augmented by adding ‘and the organisation of programmes for women and girls who leave school prematurely’.²⁶ This underlined the acknowledgement that gender parity in enrolment had not been fully achieved and that states had obligations beyond simply providing incentives such as bursaries to keep girls in school.

3 Linkages to other treaty provisions

As mentioned in the introduction, the recognition of education as a universal human right may be traced back to article 26 of the Universal Declaration. However, the first international legal instrument dedicated exclusively to education was the 1960 Convention against Discrimination in Education (CADE), which explicitly bans discrimination in education on the basis of sex, among other grounds.²⁷ Overall, at least 48 international and regional legal instruments guarantee the right to education. In addition, 23 soft law instruments also embed education as a fundamental right.²⁸ Of the international treaties preceding it, article 10 of CEDAW and articles 28 and 29 of the UN Convention on the Rights of the Child (CRC) were the most influential in relation to the education provision of the Maputo Protocol. The Beijing Platform also set out detailed provisions on education, as referenced under the drafting history above.

At the regional level, article 17 of the African Charter enshrines education as the right of every individual but states it in broad terms without elaboration. Article 11(3) of the African Charter on the Rights and Welfare of the Child (African Children’s Charter) expounds on the right of children to education. Two provisions of the African Children’s Charter stand out, especially concerning increased access to and inclusion of girls in education. Article 11(3)(e) singles out education for female, gifted and disadvantaged children, while article 11(6) guarantees the right of girls who fall pregnant in school to return and continue with their education when they are ready.

Moreover, article 12 is related to other articles in the Maputo Protocol in two ways. First, there is acknowledgement in the different articles that education is a strategy for the achievement of other human rights guaranteed by the Protocol. Second, the Protocol commits itself to the elimination of violence against women and girls, including female genital mutilation and child marriage, which act as barriers to the realisation of their education rights. The explicit mention of education and training or related issues in more than a third of the 24 substantive articles of the Maputo Protocol is linked to either one of these two perspectives.²⁹ For example, article 2, which focuses on the elimination of discrimination against women, recognises education as a vehicle for positive changes at the individual and societal levels. It includes the provision of ‘*public education, information, education and communication strategies*’ to eliminate ‘harmful cultural and traditional practices, and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for women and men’.³⁰ On the flip side, eliminating harmful practices is critical to realising women’s and girls’ right to education.³¹ Key barriers to girls’ education in Africa include child marriage, girls’

26 As above.

27 The Convention against Discrimination in Education (CADE) was adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) on 14 December 1960 and entered into force on 22 May 1962.

28 UNESCO & Right to Education Initiative (UK) ‘Right to Education Handbook’ (2019).

29 The articles that explicitly mention education are arts 2, 4, 5, 8, 10, 14, 19 & 23.

30 Our emphasis.

31 Article 2(2).

participation in armed conflict as combatants, employment as child labourers and the exploitation of children. Articles 6 and 11 protect girls from child marriage, direct participation in hostilities, and recruitment as soldiers.³² Article 13 sets the minimum age for employment and prohibits 'all forms of exploitation of children, especially the girl child'.³³ This bidirectional link is also reflected in article 5, which seeks to eliminate harmful practices through the creation of widespread public awareness and make victims of such practices self-reliant through the provision of vocational training.³⁴ Article 4 provides for the active promotion of '*peace education through curricula and social communication* in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women'.³⁵

Article 10 on the right to peace emphasises the importance of increased participation of women in education programmes to create a culture of peace.³⁶ Similarly, article 8 underscores the need to establish adequate educational and other appropriate structures for women and men to ensure equal access to justice and protection by the law.³⁷ Article 14 guarantees the right to family planning education and considers education programmes to be integral to the achievement of women's right to health, including their right to sexual and reproductive health.³⁸ In article 19, the provision of training, skills development and extension services is singled out as a strategy for women to realise their right to sustainable development.³⁹ Finally, article 23 guarantees the right to professional training for women with disabilities.⁴⁰

In addition, articles 6 and 7 protect the best interest of the child, assigning responsibility to both parents for the education of their children (girls and boys) within marriage and in situations where a marriage is annulled and parents are separated or divorced.⁴¹

4 Concepts and definitions

Concepts central to the understanding of article 12 are education, training and literacy; discrimination against women in education; gender stereotypes; all forms of abuse, including sexual harassment; gender sensitisation and human rights education. This section unpacks these concepts.

4.1 Education, training and literacy

Three interrelated perspectives on education emerge from a reading of the Maputo Protocol. First, it guarantees women and girls' right to education as an inalienable human right. Second, it reminds us that the realisation of education as a right is intrinsically linked to the achievement of other human rights, including the right of women and girls to live in dignity in an environment that is free from all forms of discrimination and violence. Third, the achievement of other human rights of women and girls contributes to the achievement of their right to education.

32 Articles 6(b) & 11(4).

33 Article 13(g).

34 Articles 5(a) & 5(c).

35 Article 4(2)(d). Our emphasis.

36 Article 10(2)(a).

37 Article 8(c).

38 Articles 14(1)(g) & 14(2)(a).

39 Article 9(d).

40 Article 23(a).

41 Articles 6(i) & 7(c).

These perspectives have their antecedents in a host of international and regional legal instruments, all of which affirm the right of all to education.⁴² CADE defines the scope and offers an elaborate definition of education as ‘all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given’.⁴³ Article 10 of CEDAW further unpacks the scope of education to include preschool, general, technical, professional and higher technical education, as well as functional literacy programmes. This is reiterated in article 12(2) of the Maputo Protocol. Article 29(1)(a) of the CRC and article 11(2)(a) of the African Children’s Charter articulate the aim of education as holistic development of the child. It should be noted that article 10 of CEDAW uses the term women to include girls, apart from once in article 10(f), where it specifically mentions both girls and women ‘who have left school prematurely’ implying that their needs may be different and therefore may require different responses.⁴⁴ Girls are not singled out in either articles 28 and 29 of the CRC or article 11 of the African Children’s Charter. In both instruments, the omnibus term ‘child’ is used to refer to both girls and boys.⁴⁵

CADE is recognised as the cornerstone of the Education 2030 Agenda,⁴⁶ which is an essential part of the 2030 Agenda for Sustainable Development, part of the global commitment to basic education for all under Sustainable Development Goal (SDG) 4.⁴⁷

Taking it for granted that equal access to education means substantive equality, CADE calls for the building and upgrading of education facilities that are child, disability and gender sensitive and provide safe, non-violent, inclusive and effective learning environments for all. The scope of education is also envisioned as lifelong, encompassing diversified technical and vocational education and training for women and men, youth and adults by 2030, to enable the acquisition of ‘relevant knowledge, skills and competencies for decent work and life’.⁴⁸

4.2 Discrimination against women in education

The definition of discrimination in the Maputo Protocol is essentially a shorter version of what is contained in article 1 of CEDAW. Discrimination as a concept is discussed comprehensively in Chapter 4 of this Commentary.⁴⁹ This subsection focuses specifically on discrimination in education.

SDG 4 Target 4.5 commits UN member states to the elimination of all discrimination, including gender disparities at all levels of education. CADE describes the scope of discrimination in education to apply to all levels.⁵⁰ It defines discrimination in education as conduct that limits ‘any person or

42 Universal Declaration art 26; CADE (n 27) art 10; CEDAW art 10; African Charter art 17; African Children’s Charter art 11; CRC arts 28 & 29; International Covenant on Economic, Social and Cultural Rights (CESCR) art 13.

43 CADE (n 27) art 1(2).

44 CEDAW art 10(f).

45 CRC art 21(2) is an exception. This article mentions both girls and boys in offering protection against child marriage and betrothal.

46 UNESCO ‘Key facts about the Convention against Discrimination in Education’ <https://www.unesco.org/en/education/right-education/convention-against-discrimination#key-facts-about-the-convention-against-discrimination-in-education> (accessed 23 June 2023).

47 SDG 4 calls on UN member states to ensure inclusive and equitable quality education, and promote lifelong learning opportunities for all, embracing early childhood development, pre-primary, primary, secondary and tertiary levels, as well as technical and vocational education. Gender equality and inclusion is one among its seven outcome targets. It refocuses attention on all learners everywhere irrespective of gender, ability, ethnicity, race, nationality, socio-economic status, faith or belief, ensuring respect for their diverse needs, abilities, and characteristics, free of all forms of discrimination UNESCO ‘Inclusion in education’ <http://www.iiep.unesco.org/en/inclusive-education> (accessed 11 May 2023).

48 SDG 4 Target 4.4.

49 See E Lubaale ‘Article 2’ in this volume.

50 CADE (n 27) art 1(1)(a).

group of persons to education of an inferior standard'⁵¹ and inflicts 'on any person or group of persons conditions which are incompatible with the dignity of man'.⁵² Discrimination against women and girls in education – as in all spheres of life – may be direct or indirect.⁵³ The Maputo Protocol's framework of substantive equality is designed to address both direct and indirect discrimination.

4.3 Gender stereotyping

It is curious that neither CEDAW nor the Maputo Protocol defines gender stereotypes, yet their elimination is core to the fulfilment of states' obligations under both treaties. Stereotypes, in general, operate so as to attribute generalised behaviours, abilities, interests, values, and roles to a person or group of persons on the basis, in whole or in part, of their sex, gender, ethnicity, religion, social class, (dis)ability, or the intersection of these, or roles to people based on their membership in an identified group.⁵⁴ They are 'often unfair and untrue beliefs that many people have about all people or things with a particular characteristic',⁵⁵ which 'may cause hurt and offence' and may be used to deny individuals respect or legitimacy.⁵⁶

Within the school environment, stereotypes manifest themselves in gender-biased textbooks, supplementary teaching-learning materials, and the language teachers use in their interactions with learners in and out of the classroom, attributing certain qualities and capabilities to girls and others to boys based on their gender.⁵⁷ There is evidence pointing to the harmful effects of stereotyping on girls. For example, by promoting images of girls and women as the "weaker" sex, they 'contradict values of gender equality and non-discrimination, and dampen girls' career aspirations and self-esteem'.⁵⁸ Further, research has drawn a connection between early socialisation into gender stereotypical roles and careers and 'girls' interest, engagement and achievement in STEM'.⁵⁹

The Maputo Protocol, CEDAW and the CADE, among other human rights instruments, consider gender stereotyping as constituting indirect discrimination against women and girls, based on sex, gender or some other marker of marginalised status, within and outside the school setting, contributing to their psychological exclusion from effective participation in formal education.

4.4 All forms of abuse, including sexual harassment

The Maputo Protocol recognises all forms of abuse, including sexual harassment, as factors contributing to the premature exit of vulnerable girls from the education system.

51 CADE (n 27) art 1(1)(b). The ECOWAS Community Court of Justice took this substantive equality approach in finding that Sierra Leone had treated pregnant and parenting school girls in a discriminatory manner by readmitting them only to designated schools that offered education of a lower quality, offering a much narrower range of subjects. See *Women Against Violence & Exploitation in Society (WAVES) & Child Welfare Society Sierra Leone (CWS-SL) (On behalf of pregnant adolescent schoolgirls in Sierra Leone) v Sierra Leone* Judgment No ECW/CCJ/JUD/37/19 (12 December 2019) (WAVES) 28.

52 CADE (n 27) art 1(1)(d). 'Man' in this 1960 convention is used in the generic sense to include women and men.

53 United Nations Committee on Economic, Social and Cultural Rights (ESCR committee) General Comment 20 on Non-discrimination in economic, social and cultural rights (2 July 2009) E/C.12/GC/20 para 10.

54 S Cusack 'The CEDAW as a legal framework for transnational discourses on gender stereotyping' in A Hellum & H Sinding Aasen (eds) *Women's human rights: CEDAW in international, regional and national law* (2013) 124, 127.

55 *Britannica Dictionary* <https://www.britannica.com/dictionary/stereotype> (accessed 12 May 2023).

56 *Oxford Learner's Dictionaries* https://www.oxfordlearnersdictionaries.com/definition/english/stereotype_1#:~:text=stereotype,-noun,may%20cause%20hurt%20and%20offence (accessed 12 May 2023).

57 SP Wamahiu 'Value-based Education in Kenya: an exploration of meanings and practices' (Women Educational Researchers of Kenya (WERK) (2015) 17, 104, 141-142 & 145.

58 Wamahiu (n 57) 17.

59 UNESCO 'Cracking the code: girls' and women's education in science, technology, engineering and mathematics' <https://unesdoc.unesco.org/ark:/48223/pf0000253479> (accessed 12 May 2023) (2017) 43.

Within the education context, forms of abuse and sexual harassment include any act or threat of sexual, physical or psychological violence that occurs in or around schools and other educational institutions, perpetrated as a result of gender norms and stereotypes and enforced by unequal power dynamics.⁶⁰ These acts range from verbal abuse, bullying, corporal punishment, sexual abuse and harassment, coercion and assault, and rape.⁶¹ State reports and Concluding Observations of the African Commission, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the CEDAW Committee specifically mention female genital mutilation, child and forced marriage, abduction of young women and corrective rape as violence that are grounded in the community but impact negatively on girls' right to education.⁶²

That article 12(c) singles out and highlights 'sexual harassment' despite the clause's reference to 'all forms of abuse' is not random. It is the deliberate highlighting of a pervasive problem. CEDAW Committee General Recommendation 19 defines sexual harassment to include 'unwelcome sexually determined behaviour as physical contact or advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions'.⁶³ The Maputo Protocol defines neither abuse nor sexual harassment. However, it defines and expounds on the broader concept of 'violence against women' in articles 1(j), and 4.⁶⁴ The first part of article 1(j) defines violence against women as: 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological and economic harm, including the threat to take such acts'.

The International Labour Organization (ILO)'s Convention 190, adopted in 2019, defines sexual harassment in terms similar to article 1(j) of the Maputo Protocol as part of the combined phrase 'violence and harassment':

a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.⁶⁵

It then goes on to define 'gender-based violence and harassment' as: 'violence and harassment directed at persons because of their sex or gender or affecting persons of a particular sex or gender disproportionately and includes sexual harassment'.⁶⁶

60 UNESCO and UN Women 'Global guidance on school-related gender-based violence <https://www.unicef.org/documents/global-guidance-addressing-school-related-gender-based-violence> (accessed 11 May 2023) (2016).

61 The CEDAW Committee points out reported cases of corporal punishment and gender-based violence, discrimination and bullying in schools, particularly against indigenous girls in Namibia. See Concluding Observations on the 6th Periodic Report of Namibia (12 July 2022) UN Doc CEDAW/C/NAM/CO/6 (2022) para 37. The African Committee of Experts on the Rights and Welfare of the Child observes the prevalence of corporal punishment in schools in countries like Nigeria, where it is not fully banned as well as those countries like Rwanda and South Africa where corporal punishment has been outlawed. See African Children's Committee Concluding Observations on: First Periodic Report of Nigeria, adopted at the 33rd ordinary session (18-28 March 2019) para. 26; First Periodic Report of South Africa, adopted at the 32nd ordinary session (12-22 November 2018) para 16; Second Periodic Report of Rwanda, adopted at the 33rd ordinary session (18-28 March 2019) paras 23-24.

62 See, eg, African Children's Committee Concluding Observations South Africa (2019) (n 62) para 36. In South Africa, abduction of young women, known as *Ukuthwala*, is entrenched in traditional cultures. The African Children's Committee expressed concern that it continued despite its criminalisation. It also noted the inadequacy of laws governing child marriages. See also Concluding Observations on the first and 2nd Periodic Reports of Eswatini, Committee on Elimination of Discrimination against Women (24 July 2014) UN Doc CEDAW/C/SWZ/CO/1-2 (2014) para 18, where the CEDAW Committee singled out abduction of young girls as being prevalent in Eswatini.

63 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, A/47/38 para 18.

64 See M Kamunyu 'Article 1' and R Nekura 'Article 4' in this volume.

65 ILO Convention 190 art 1(a).

66 ILO Convention 190 art 1(b).

The ILO definition moved away from listing specific isolated acts that might constitute sexual harassment, as is done in CEDAW Committee General Recommendation 19. Rather, the emphasis is now on locating sexual harassment within the broad scope of gender-based violence. Sexual harassment is therefore thought of as going beyond demands for sexual favours in exchange for favourable treatment ('quid pro quo' scenarios) to behaviour that generally creates a hostile environment. The behaviour in question may be sex-based without necessarily being sexual in nature, in the sense that it targets or impacts women on account of their sex.⁶⁷ This expansive understanding of the concept is particularly relevant in the context of education since it directs emphasis on the kind of learning environment that is created. An approach that dwells narrowly on delineating specific acts that amount to sexual harassment risks failure to take responsibility for the prevailing culture at an institutional level, perceiving the issue as an individual problem, which in turn makes it difficult for survivors to be taken seriously.

4.5 Gender sensitisation and human rights education

4.5.1 Gender sensitisation

This is the process of creating awareness of existing gender differences, issues and inequalities and incorporating these into strategies and actions that result in the modification of people's behaviour and views about themselves and other genders. Gender sensitisation is indispensable in countering gender stereotypes, as discussed in section 4.3. It is a reflective process that facilitates critical examination of one's attitudes and beliefs and contributes to achieving gender equality and a human rights culture. As further discussed in section 5, in several state reports and concluding observations, the term gender awareness has been used instead of gender sensitisation.⁶⁸

4.5.2 Human rights education

Human rights education is 'a process of empowerment' consisting of all learning activities aimed towards 'promoting the development of the individual as a responsible member of a free, peaceful, pluralist and inclusive society'.⁶⁹ Human rights education helps to combat and eradicate all forms of discrimination by equipping learners with knowledge, skills and positive attitudes and behaviours that prevent racism, stereotyping and 'incitement to hatred'.⁷⁰

5 Nature and scope of state obligations

The state obligations spelt out in article 12 call for state action at the level of legislation, policy formulation, and policy implementation. It calls upon state parties to implement measures guaranteeing equal opportunities and access to education and training for women by eliminating all forms of discrimination. State obligations include the integration of gender sensitisation and human rights content into teacher training curricula and at all levels of education, as well as the removal of

67 J Heymann, G Moreno, A Raub & A Sprague 'Progress towards ending sexual harassment at work? A comparison of sexual harassment policy in 192 countries' (2022) 25 *Journal of Comparative Policy Analysis* 9.

68 Eg, the CEDAW Committee calls on Kenya, Rwanda, South Africa among other states to strengthen gender awareness campaigns or efforts to address barriers to girls' enrolment, retention or progression in education. See Concluding Observations on the 8th Periodic Report of Kenya, Committee on Elimination of all Forms of Discrimination against Women (22 November 2017) UN Doc CEDAW/C/KEN/CO/8 (2017) para 35; Concluding Observations on the combined 7th to 9th Periodic Report of Rwanda, Committee on Elimination of all Forms of Discrimination against Women (9 March 2017) UN Doc CEDAW/C/RWA/CO/7-9 (2017) para 33; Concluding Observations on the 5th Periodic Report of South Africa, Committee on Elimination of Discrimination against Women (23 November 2021) UN Doc CEDAW/C/ZAF/CO/5 (2021) para 44.

69 UN Declaration on Human Rights Education and Training (2011) art 4.

70 As above art 4(b) & 4(c).

gender biases exemplified by stereotypes in curricula materials and in the media through music and film. Extension of the measures to teacher training reflects a recognition of teachers' transformational potential to change learners' gender-discriminatory mindsets within the contexts of the school and other educational and training institutions.

State parties are further required not only to protect women and girls in school and other educational institutions from any kind of harm and to ensure the sanctioning of perpetrators of abuse but also to provide access to counselling and rehabilitation services to women who have suffered abuses and sexual harassment.

It is worth mentioning that article 12(2) calls on states to take 'specific positive action'. This deviates from the formulation used in article 12(1), which is also found in CEDAW, namely, 'take all appropriate measures.' Article 12(2) employs the formulation 'take specific positive action' with respect to three issues: promotion of literacy among women, promotion of education and training for women and girls at all levels and in all disciplines, especially in the field of science and technology; and enrolment and retention of girls in educational institutions, including designing of programmes for women who leave school prematurely. The phrase 'specific positive action' does not introduce obligations different in nature from the obligation to take appropriate measures. However, it does underline the need for the state to make specific, targeted investment with these goals or outcomes in mind. The phrasing of article 12(2) identifies the areas singled out as posing particular challenges for advancing women's rights in the field of education. The positive action contemplated might therefore entail temporary special measures if necessary. The terminology of 'positive action' or 'positive measures' has been employed in other contexts to refer to temporary measures taken to correct a pattern of past discrimination that has disadvantaged a social group, such as women. This interpretation of the intended meaning in article 12(2) is consistent with international human rights law practice.⁷¹

5.1 State obligation with respect to legislation

Article 12 does not explicitly stipulate that states enact legislation so as to achieve the obligations placed upon them. Legislation, however, is a core function of a state and the primary means through which a state gives effect to the international and regional human rights standards it has committed itself to. As a first step, a state must encode equality and outlaw discrimination, in line with article 2 of the Protocol, usually through a robust constitution with a broad non-discrimination clause. Such a constitution is further strengthened by giving explicit attention to the rights of specific groups, for instance, children.⁷² Against the backdrop of such a constitutional framework, the elimination of discrimination in the sphere of education and training, as required under article 12(1)(a), would require a state to align specific laws, subsidiary legislation, regulations, and directives in the sphere of education to the constitutional standard of equality and non-discrimination. This calls for timely enactment and repeal as each situation demands continuous review to ensure compatibility with human rights standards under the Maputo Protocol and other related treaties.

This exercise of alignment must take a broad view so as to encompass laws and regulations in other sectors that have an impact on education and training. Examples include laws on birth registration,

71 See, eg, UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 25 on art 4, para 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures 2004 para 17; General Recommendation 36 on the right of women and girls to education 2017 para 31(c).

72 The African Children's Committee has stated that while it does not regard express inclusion of children's rights in the constitution as mandatory, it highly recommends it. See African Children's Committee General Comment 5 on State party obligations under the African Charter on the Rights and Welfare of the Child (art 1) and systems strengthening for child protection (2018) 18.

which make it possible to ascertain age, which is crucial for school enrolment and retention. Another crucial area of legislation is the minimum age of marriage, which article 6 of the Protocol sets at 18.

Laws that impose sanctions and avail redress for various forms of violence against women, such as female genital mutilation (addressed in articles 4 and 5 of the Protocol),⁷³ are central to the state's obligation under article 12(1)(c) to protect women – and especially the girl-child – from sexual harassment and other forms of abuse in the context of education.

5.2 State obligation with respect to policy formulation

The scope for policy formulation with respect to education is wide, covering policies oriented toward ensuring access for all and policies oriented toward assuring the delivery of quality education that has relevance. Examples of policies addressing access include policies on free basic education and policies that target the elimination of barriers for specific groups. Re-entry and continuation policies, which respect the right of pregnant girls and girl mothers to continue with their education, are an example of the latter. Examples of policies that address the quality of education and learning processes include curriculum policies (such as curriculum policies that mainstream gender sensitisation and human rights at various levels of education), school safety policies, school infrastructure policies, policies on teacher-learner ratios, and teachers' codes of ethics that regulate relationships between learners and teachers.

The policies in education do not stand in isolation. They need to be harmonised with overall national policies on children. The African Children's Committee has underlined the need for states to adopt comprehensive national child policies with accompanying National Action Plans, which in turn must be nested into the African Children's Agenda 2040 and the SDGs.⁷⁴ Addressing the barriers to the right to education and training for women and girls requires multi-sectoral partnerships. It is, therefore, imperative that policy formulation takes a coordinated approach beyond education to the health, protection, justice and media sectors, among other sectors.⁷⁵

5.3 State obligation with respect to policy implementation

At the level of concrete implementation, the state inevitably works with non-state entities to deliver services in the education and training sector. Nonetheless, the African Children's Committee emphasises that even though states have allowed private service providers to operate educational institutions, the state's human rights obligations are not thereby lessened.⁷⁶

Therefore, the state is obligated to give effect to its laws and policies by backing them up with the necessary administrative structures, processes, personnel and funds. For instance, with respect to the obligation to protect women and girls from abuse in educational institutions, it will not be enough to stop at requiring institutions to adopt sexual harassment policies. The state is still responsible for ensuring that there are systems in place for preventing, identifying, reporting, investigating, punishing and providing redress, as well as continuous investment in preventive measures, such as the maintenance of a public register of teachers who have been guilty of defiling children.⁷⁷ Policies

73 See R Nekura 'Article 4' and S Nabaneh 'Article 5' in this volume.

74 African Children's Committee General Comment 5 (n 72) 45-46.

75 See CEDAW Committee General Recommendation 36 (n 71).

76 African Children's Committee General Comment 5 (n 72) 17-18. See also African Commission on Human and Peoples' Rights, General Comment 7 on State obligations under the African Charter on Human and Peoples' Rights in the context of private provision of social services, adopted at the 72nd ordinary session (28 July 2022) Banjul, The Gambia.

77 African Children's Committee General Comment 5 (n 72) 20. National courts have also underlined the state's obligation in ensuring systems for child protection, including oversight of private institutions and individuals employed in school settings. See, eg, the Zambian case of *RM Katakwe v Edward Hakasenke and Others*, 2006/HP/0327 (High Court, Zambia),

addressing the quality of education need to be accompanied by a detailed setting of standards and monitoring of the implementation of those standards at school level. These implementation measures require adequate financing, and therefore the state obligation extends to budgeting and budget tracking to ensure adequate allocation and appropriate utilisation of funds. Implementation also entails keeping the policy in continuous review. Mechanisms for coordination across sectors are indispensable, given the vast array of rights that must work in tandem to eliminate barriers to the substantive realisation of gender equality in education.⁷⁸

The next section on implementation assesses how well states parties to the Maputo Protocol have fulfilled these obligations in relation to the issues discussed in the preceding section.

6 Implementation

In assessing the status of implementation of article 12, this section draws from concluding observations and states' reports on article 12 of the Maputo Protocol and article 17 of the African Charter. These are supplemented with data drawn from the CEDAW Committee's engagement with African states, UNESCO's Global Education Monitoring reports, which feed into the SDG monitoring process, and secondary research by education sector experts. This section evaluates the progress made by states against the specific obligations that article 12(1) places on them, namely: promotion of participation of women and girls in education; elimination of discrimination in access to training and education; elimination of stereotypes in textbooks, syllabuses and the media; protection from all forms of abuse including sexual harassment; and integration of gender sensitisation and human rights education into the curriculum.

While the majority of African Union member states have ratified the Maputo Protocol and other related legal instruments, reporting on article 12, in particular, is overlooked in a number of periodic state reports or merged with reporting on article 17 of the African Charter, contrary to the reporting guidelines issued by the Commission.⁷⁹ There appears to be an erroneous assumption that the reporting on article 17 in the African Charter adequately addresses education (article 12) under the Maputo Protocol.⁸⁰

citing art 4 of the Maputo Protocol; discussed in S Omondi, E Waweru & D Srinivasan (2018) *Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of Women and Girls in Africa*, Equality Now, Nairobi. See also the Kenyan case of *WJ & another v Astarikoh Henry Amkoah & 9 others* [2015] eKLR.

78 African Children's Committee General Comment 5 (n 72) 36.

79 African Commission, Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Centre for Human Rights, University of Pretoria, 2016). The Guidelines recommend reporting of art 12 under the theme of Equality/Non-discrimination. The Commission has taken issue with several states for not implementing the guidelines, and for failing to provide sex disaggregated data. See, eg, Concluding Observations on the Combined 8th to 11th Periodic Report of Kenya 2008-2014 on Implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights adopted at the 19th extraordinary session (16-25 February 2016) Banjul, The Gambia, 12, 16; Concluding Observations on the 6th Periodic Report of Namibia 2011-2014 on Implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 58th ordinary session (6-20 April 2016) Banjul, The Gambia, 10; Concluding Observations on the 2nd Periodic Report of South Africa 2003-2014 on Implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 58th ordinary session (6-20 April 2016) Banjul, The Gambia, 17.

80 Although Kenya, in its latest report includes a paragraph under Equality/Non-discrimination as recommended by the Commission, it references art 17 of the African Charter, without any reference to art 12 of the Maputo Protocol, and the data presented are not sex disaggregated. For other examples of state reports that have either subsumed art 12 of the Protocol under art 17 of the Charter and/or not provided adequate information on the same see Republic of Uganda 5th Periodic Report under the African Charter on Human and Peoples' Rights (2015) 8; United Republic of Tanzania 2nd to 10th Periodic Report 1992-2006 under the African Charter on Human and Peoples' Rights (2008); and Nigeria (2017, p 11).

The Commission expresses concern that, overall, inadequate information and lack of sex-disaggregated data (quantitative and qualitative) in many of the periodic state reports make it difficult to track progress within and across countries on commitments made by states to promote gender equality in and through education.⁸¹ In addition, the way information is communicated tends to be activity-centred rather than results-oriented. Among the 17 Concluding Observations we reviewed, only Zimbabwe gets commended for compiling gender-disaggregated data.⁸²

A review of 17 Concluding Observations that the African Commission has issued between 2012 and 2022 reveals that while the first two obligations (promotion of participation and elimination of discrimination in access) have received attention, the other three have gone almost completely unattended to. This trend is highlighted in the following discussion.

6.1 Promotion of participation of women and girls in education

The African Commission has commended some states for taking measures to promote the participation of women and girls in education. In some cases, the states provide enough specific information to indicate how the measures in question contributed to the goal, and in other cases, the information is too general.⁸³ Some states are criticised for not doing enough.⁸⁴

The overall picture in Africa is that progress has been slow,⁸⁵ while globally, the past 20 years have seen gender gaps in education access and completion close or even reverse.⁸⁶ More than one in four

81 See, eg, Concluding Observations on the 5th Periodic Report of Uganda (2015, p 8); Nigeria's 6th periodic country report: 2015-2016 on the implementation of the African Charter on Human and Peoples' Rights in Nigeria (2017) 10; Rwanda (2017, p 10); and South Africa (2016, p 17).

82 Concluding Observations and Recommendations on the Combined 11th to 15th Periodic Reports of Zimbabwe 2007-2019 on the implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 69th ordinary session (15 November-5 December 2021) para 29.

83 For instance, Burkina Faso is commended simply for reform to the education sector to make it more 'effective'. See Concluding Observations and Recommendations on the combined 3rd and 4th Periodic Report of Burkina Faso, African Commission on Human and Peoples' Rights, adopted at the 21st extraordinary session (23 February-4 March 2017) para 24; while Nigeria is specifically commended for construction of model junior secondary schools for girls in 13 states and training of female teachers. See Concluding Observations on the 5th Periodic Report of the federal republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights 2011-2014, African Commission on Human and Peoples' Rights, adopted at the 56th ordinary session (21 April-7 May 2015) para 40; Sierra Leone is specifically commended for implementing the recommendations of a commission (the Gbamanja Commission 2010) which made proposals on enrolment and retention of girls. See Concluding Observations on the initial and combined Periodic Reports of Sierra Leone on the implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 57th ordinary session (4-18 November 2015) para 36; Cameroon is commended for nationwide sensitization campaigns to promote education of girls. See Concluding Observations on the 3rd Periodic Report of Cameroon on the implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples's Rights, adopted at the 15th extraordinary session (7-14 March 2014) para 27.

84 See, eg, the African Commission's concern over persisting high rates of illiteracy among females in spite of policy measures adopted: Concluding Observations and Recommendations on 2nd and 3rd Periodic Reports of Malawi, on the implementation of the African Charter on Human and Peoples' Rights 2015-2019 and Initial report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Commission on Human and Peoples' Rights, adopted at the 70th ordinary session (23 February-9 March 2022) para 78; Concluding Observations and Recommendations on the 2nd and 3rd combined Periodic Report of Eswatini, African Commission on Human and Peoples' Rights, adopted at the 70th ordinary session (23 February-9 March 2022) para 86(i), urging the government to give more attention to retention of girls in school when implementing its 2019 education strategy by addressing girls' dropout and repetition of grades.

85 African Union, Economic Commission for Africa, African Development Bank, UNDP Africa Sustainable Development Report <https://www.undp.org/africa/publications/2022-africa-sustainable-development-report> (accessed 12 May 2023) (2022).

86 World Economic Forum, *Global Gender Gap Report 2022: Insight Report* (July 2022).

young women in sub-Saharan Africa do not know how to read or write.⁸⁷ There is a 13-point gender gap in adult literacy in sub-Saharan Africa, the second largest in the world.⁸⁸ In Benin, Central African Republic, Guinea, Liberia and Mali, there are 60 literate women for every 100 men, with the gender parity index almost twice as high in urban than in rural areas.⁸⁹

With two in five children out of school, sub-Saharan Africa is the only region in the world with a growing out-of-school population.⁹⁰ The female out-of-school rate in sub-Saharan Africa is 4.2 percentage points higher than the male rate.⁹¹ In Guinea and Togo the out-of-school rates for females are 20 percentage points higher than for males. A gap of about 15 percentage points is observed in Cameroon, Chad, Uganda, and Zambia.⁹² Thirteen of the 16 countries reporting gender gaps larger than ten percentage points are in sub-Saharan Africa.⁹³

At least a quarter of the children who enter the school system in sub-Saharan Africa will never complete primary education, while one third of the children do not complete primary school on time.⁹⁴ Progress in girls' education has stagnated since 2011 at the lower secondary level, and since 2014, at upper secondary level as well. In countries like Chad and Guinea, the gender gap at the expense of young women at the upper secondary level was observed to be 20 percentage points. However, there are some success stories: the Gambia and Mauritania have closed or even reversed the overall gender gap.⁹⁵

Unlike other regions of the world, where education opportunities for women have expanded strikingly, in sub-Saharan Africa, gender disparities at tertiary level linger on, with 73 female students enrolled for every 100 males in 2018.⁹⁶ This contrasts with countries in northern Africa, where women's enrolment has increased rapidly. An example is Morocco, which had one of the most gender-unequal tertiary enrolment ratios (30 women for every 100 men) in the 1990s and had achieved parity by 2017.⁹⁷

Gender disparity is the widest in STEM-related disciplines and is evident globally at all levels of education. In Africa, the gender gap tends to be to the disadvantage of girls. There is evidence of gender typing⁹⁸ of subjects from an early age, becoming apparent usually from upper secondary education and worsening up the education ladder.⁹⁹ Based on data from 20 countries, the Africa Gender Index Report 2019 reveals a very wide gender gap among STEM graduates, with the female-to-male ratio at 37.9 for the tertiary level.¹⁰⁰ On average, women constitute 34 per cent of STEM researchers in sub-Saharan Africa though there are significant variations across countries. In 2016, in Cape Verde, Tunisia, South

87 UNESCO Gender Report (n 8) 19.

88 The World Bank 'Sub-Saharan Africa' <https://genderdata.worldbank.org/regions/sub-saharan-africa/> (accessed 12 May 2023).

89 UNESCO Gender Report (n 8) 4.

90 Global Education Monitoring Report Team and UNESCO Institute of Statistics, 'New estimation confirms out-of-school population is growing in sub-Saharan Africa', *Factsheet 62*, Policy Brief 48,1.

91 Global Education Monitoring Report Team and UNESCO Institute of Statistics (n 4) 4.

92 UNESCO Gender Report (n 8) 30-38.

93 World Economic Forum, *Global Gender Gap Report* (n 87) 3.

94 UNESCO Spotlight Report (n 9).

95 UNESCO Gender Report (n 8) 14.

96 UNESCO Gender Report (n 8) 18.

97 UNESCO Gender Report (n 8) 21.

98 Gender typing refers to 'expectations about people's behaviour that are based on their biological sex, or the process through which individuals acquire and internalise such expectations.' See APA Dictionary 'Gender typing' <https://dictionary.apa.org/gender-typing> (accessed 12 May 2023).

99 UNESCO Cracking the code (n 59) 43-44.

100 African Development Bank and United Nations Economic Commission for Africa, *Africa Gender Index Report 2019* (March 2020).

Africa and Uganda, women constituted 52 per cent, 47 per cent and 40 per cent, respectively, with Guinea, Ethiopia, Mali, and Côte d'Ivoire registering only 6 per cent, 7.6 per cent, 10.6 per cent, and 16.5 per cent respectively.¹⁰¹

These dismal statistics are reflected more in the CEDAW Committee's than the African Commission's engagement with states' reports. The CEDAW Committee took on states that, on the face of it, had laws and policies aimed at increasing women's participation in education but still registered persistently low literacy rates for women (especially rural women) and low enrolment, retention, completion, and transition rates for girls.¹⁰² The picture suggests lapses in the implementation of the laws and policies in question, for instance, through under-resourcing of the education sector in general and of specific initiatives to promote women's education.

6.2 Eliminate discrimination against women and guarantee equal opportunity and access in education and training

The elimination of all forms of discrimination against women and girls is central to achieving their right to education and training. However, legislation prohibiting discrimination in education is not where the gap is. Several states are commended for enacting or reviewing their education laws toward greater inclusion. The CEDAW Committee, for instance, commends Kenya for adopting the Education Act of 2013,¹⁰³ and Malawi for similar legislation adopted in the same year, and Lesotho for its 2010 law.¹⁰⁴

From our analysis, the main issues that emerged concerning gender discrimination in, and exclusion of girls from education are punitive pregnancy policies, disability and discrimination against learners on the basis of school regulations on dress and hairstyle. The protection of women from discrimination on the grounds of disability has been addressed in detail in Chapter 25.¹⁰⁵ The following subsection will therefore focus on punitive pregnancy policies and restrictions on dress and hairstyle.

6.2.1 Punitive pregnancy policies

Eighteen of the 20 countries with the world's highest child marriage rates are in sub-Saharan Africa, and the region also has high rates of teenage pregnancy both within and outside of marriage.¹⁰⁶

101 JC Jackson, JG Payumo, AJ Jamison, ML Conteh & P Chirawu, 'Perspectives on Gender in Science, Technology, and Innovation: a Review of Sub-Saharan Africa's Science Granting Councils and Achieving the Sustainable Development Goals', *Frontiers in Research Metrics and Analytics* (2022) 14. See also African Academy of Sciences, *Factors that Contribute to or Inhibit Women in Science, Technology, Engineering, and Mathematics in Africa* (2020).

102 See, eg, CEDAW Committee Concluding Observations on: 6th and 7th Periodic Reports of Ghana (14 November 2014) UN Doc CEDAW/C/GHA/CO/6-7 (2014) para 32; Fourth Periodic Report of Benin (28 October 2013), UN Doc CEDAW/C/BEN/CO/4 (2013) para 26; Combined initial to 2nd Periodic Reports of Swaziland (Eswatini) (24 July 2014) UN Doc CEDAW/C/SWZ/CO/1-2 (2014) para 30; Combined first to 4th Periodic Reports of Chad (4 November 2011) UN Doc CEDAW/C/TCD/CO/1-4 (2011) para 30; Sixth Periodic Report of Equatorial Guinea (9 November 2012) UN Doc CEDAW/C/GNQ/CO/6 (2012) para 31; Eighth Periodic Report of Ethiopia (14 March 2019) UN Doc CEDAW/C/ETH/CO/8 (2019) para 33; Sixth Periodic Report of Gabon (11 March 2015) UN Doc CEDAW/C/GAB/CO/6 (2015) para 30; Kenya (n 68) para 34; Seventh Periodic Report of Malawi (24 November 2015) UN Doc CEDAW/C/MWI/CO/7 (2015) para 30; Combined 7th to 9th Periodic Report of Rwanda (9 March 2017) UN Doc CEDAW/C/RWA/CO/7-9 (2017) para 32.

103 Kenya's Education Act (2013) anchored in the 2010 Constitution, stipulates that, '(a) school or a person responsible for admission shall not discriminate against any child seeking admission on any ground, including ethnicity, gender, sex, religion, race, colour or social origin, age, disability, language or culture'. Kenya Education Act 2013, sec 34(2). Section 34(6) guarantees remedies for denial of admission.

104 See CEDAW Committee Concluding Observations Kenya (n 68) para 34; CEDAW Committee Concluding Observations Malawi (n 102) para 30; and Concluding Observations on the initial to 4th Periodic Report of Lesotho (8 November 2011) UN Doc CEDAW/C/LSO/CO/1-4 (2011) para 28.

105 See L Chenwi 'Article 23' in this volume.

106 Girls not Brides 'Top 20 countries with the highest prevalence rates of child marriage' <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/atlas/> (accessed 11 May 2023).

A review of state reports to the African Commission and CEDAW Committee identifies teen pregnancy as a leading cause of the low completion and transition rates for girls.¹⁰⁷ Adoption and implementation of policies on the continuation and readmission of girls following pregnancy would go a long way in mitigating the impact of teen pregnancy on girls' education and future prospects.

Regionally, significant progress has been made in this direction since the mid-1990s. High-level policy advocacy exemplified by a ministerial consultation on school drop-out and adolescent pregnancy convened by the Forum for African Women Educationalists (FAWE) in collaboration with the Government of Mauritius in 1994 gave further impetus to the drafting of school pregnancy policies in various Sub-Saharan African countries.¹⁰⁸ Guinea Conakry, Kenya, Malawi, Namibia and Zambia have had some form of policies in place safeguarding the right of pregnant girls and adolescent mothers to education since the early 1990s.¹⁰⁹

Currently, 38 out of 54 African countries have laws, policies, or measures in place protecting adolescent girls' education during pregnancy and motherhood.¹¹⁰ Countries that have in recent years repealed discriminatory laws and policies that ban pregnant girls and adolescent mothers from attending school include Togo and Cameroon, which in 2022 revoked circulars issued in 1978 and 1980, respectively, denying pregnant girls the right to education.¹¹¹ In Cameroon, the current policy allows pregnant girls to continue attending secondary schools. It also provides the option of maternity leave starting at the 26th week of pregnancy and promotes expanded access to sexual and reproductive health services and information.¹¹² Earlier, in 2019, Niger rescinded a discriminatory law that excluded girls who became pregnant and permanently expelled married students from school, replacing it with a new policy that explicitly protects their right to education.¹¹³ Burundi had a reintegration policy in place by 2016.¹¹⁴

In 2020, Zimbabwe amended its Education Act to align it with the country's 2013 Constitution. Among other progressive provisions protecting, respecting and fulfilling the right to education for all

107 Seventeen (17) Concluding Observations by the African Commission issued between 2012 and 2022 contained sections addressing the right to education, either under art 17 of the African Charter or art 12 of the Maputo Protocol. In all 17, pregnancy was cited as the main reason for a higher dropout rate for girls. A sample of eighteen (18) CEDAW Concluding Observations issued to African states between 2011 and 2022 registered the same observation.

108 FAWE's membership comprises women Ministers of Education, Vice Chancellors and other top level education policy makers. <https://fawe.org/about-fawe/> (accessed 12 May 2023).

109 FAWE 'School drop-out & adolescent pregnancy' A report of the Ministerial Consultation held from 15 to 18 September, 1994, Mauritius (1995). (Organised by the Forum for African Women Educationalists in collaboration with the Government of Mauritius).

110 Human Rights Watch 'Across Africa, many young mothers face education barriers' <https://www.hrw.org/news/2022/08/30/across-africa-many-young-mothers-face-education-barriers> (accessed 12 May 2023).

111 In Togo, the Ministry of Education replaced the 1978 circular banning pregnant girls from attending school via Decision No.33/2022/MEPSTA/CAB/SG portant abrogation de la lettre circulaire No 8478/MEN-RS du 15 decembre 1978.

112 Cameroon had stopped excluding girls from school even before this 2022 measure. See African Commission Concluding Observations Cameroon 2014 (n 83) para 27. See also E Calimoutou 'Accelerate equality: catalyzing legal change for Cameroon's inclusive communities' <https://blogs.worldbank.org/nasikiliza/accelerate-equality-catalyzing-legal-change-camerouns-inclusive-communities> (accessed 23 June 2023) and Republic of Cameroon. Ministry of Secondary Education Circular number 02/22/C/MINESEC/CAB of 22 April on the procedures for handling student pregnancies in government and private secondary schools.

113 Ministère de L'enseignement Primaire, de L'alphabétisation, de la Promotion des Langues Nationale et de L'Education Civique. Arrêté conjoint no 335/MEP/ A/PLN/EC/MES/MEP/T du 22 août 2019 modifiant et complétant l'arrêté no 25 du 4 février 2019, précisant les conditions de protection, de soutien et d'accompagnement de la jeune fille en cours de scolarité. Journal Officiel de la République du Niger. See also, <https://blogs.worldbank.org/nasikiliza/accelerate-equality-catalyzing-legal-change-camerouns-inclusive-communities> (accessed 23 June 2023).

114 See Concluding Observations on the combined 5th and 6th Periodic Reports of Burundi, Committee on Elimination of all Forms of Discrimination against Women (25 November 2016) UN Doc CEDAW/C/BDI/CO/5-6 (2016) para 34.

children, it prohibits the expulsion of pregnant girls from schools.¹¹⁵ Uganda revised its guidelines for preventing and managing teen pregnancies in school settings to include re-entry of teen mothers into the education system.¹¹⁶ Kenya issued policy guidelines in 2020 to allow pregnant girls to remain in school until delivery, allowing for up to six months to breastfeed the baby at home before returning to the same school or seeking a transfer to another one.¹¹⁷

However, despite this positive record of the adoption of policies and guidelines, challenges persist. For instance, while the African Commission commended Malawi for its 2016 readmission policy, which even allowed girls to sit the national examinations while pregnant, it was observed that a stigma still surrounded the returning girls, leading to low completion rates.¹¹⁸ Some policies impose conditions, such as a period of mandatory withdrawal from school during pregnancy and/or after delivery.¹¹⁹ In some cases, girls are subjected to restrictions such as barring them from taking national examinations, lack of provision for supplementary examinations when girls are unable to take scheduled national examinations,¹²⁰ or consignment to alternative education spaces of lower quality.¹²¹ In Equatorial Guinea, for example, there were only two centres nationwide with programmes for the reintegration of girls post-pregnancy, and they were privately owned, excluding those unable to afford the costs.¹²² The CEDAW Committee has also decried the absence of information on the assessment of the impact of post-pregnancy reintegration policies.¹²³

6.2.2 African Court, African Children's Committee and ECOWAS decisions on punitive pregnancy policies

Both the African Court and the African Children's Committee have had the opportunity to rule on the matter of the exclusion of pregnant schoolgirls. In 2022 the African Children's Committee ruled against the government of Tanzania's policy of excluding girls from public schools on the grounds of pregnancy, parenting, or marriage, ruling that the policy and practice violate the right to education, as well as the right to non-discrimination, in contravention of the African Children's Charter, African Charter and the Maputo Protocol.¹²⁴ The matter had also been brought before the African Court, but

115 Zimbabwe Education Act 1987 (revised 2020), sec 68C. Section 4(2)(b) forbids discrimination on grounds of pregnancy.

116 Ministry of Education and Sports, 2020, Revised Guidelines for the Prevention and Management of Teenage Pregnancies in School Settings in Uganda, <https://www.ungei.org/sites/default/files/2021-02/Revised-Guidelines-Prevention-Management%20-Teenage-Pregnancy-School-Settings-Uganda-2020-eng.pdf> (accessed 12 May 2023).

117 Ministry of Education, National Guidelines for School Re-entry in Early Learning and Basic Education, Republic of Kenya (2020).

118 African Commission Concluding Observations Malawi 2022 (n 84) paras 67, 77.

119 The CEDAW Committee observed in 2017, for instance, that pregnant girls in Rwanda were compelled to stay out of school for one year. See CEDAW Concluding Observations Rwanda 2017 (n 102) para 32.

120 Sierra Leone barred visibly pregnant girls from taking national examinations: African Commission Concluding Observations Sierra Leone 2015 (n 84) para 71. See also Ministry of Education, National Guidelines for School Re-entry in Early Learning and Basic Education, Republic of Kenya (2020).

121 Sierra Leone is one such example. Its policy of consigning pregnant girls to alternative institutions less accessible than public schools, and which only held classes three days a week, offering only four core subjects, was judged discriminatory by the ECOWAS Community Court. Had the separate institutions been of an equal standard and on a voluntary basis, justified only by the need to provide specialised health or other facilities for the girls, the move would not, in itself, be adjudged discriminatory. See *Waves* (n 51) 28.

122 CEDAW Concluding Observations Equatorial Guinea 2012 (n 102) para 31.

123 See, eg. CEDAW Concluding Observation Namibia 2022 (n 61) para 37.

124 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* Decision on Communication 0012/Com/001/2019 African Committee of Experts on Rights and Welfare of the Child, 39th ordinary session 21 March-1 April 2022.

the Court ruled that the African Children's Committee had already dealt substantively with the matter and endorsed the decision of the African Children's Committee.¹²⁵

The African Children's Committee ruling cited an earlier decision of the ECOWAS Community Court of Justice (ECOWAS Court) in December 2019 against Sierra Leone's policy of exclusion of pregnant and parenting girls from mainstream schools in a country where the teenage pregnancy rate in some regions is as high as 65 per cent.¹²⁶ The government compelled pregnant girls or parenting girls seeking readmission after childbirth to attend alternative institutions that only held classes three days a week and taught only four core subjects and not the full school curriculum.¹²⁷ The ECOWAS Court ruled that Sierra Leone's policy and practice constituted discrimination in contravention of the African Charter,¹²⁸ the CRC¹²⁹ and CADE.¹³⁰ It ordered the government to revoke the ban and publish the revocation throughout the country. The judgement does not refer to the Maputo Protocol, even though Sierra Leone is a party to it, but reflects the spirit of articles 2 and 12 of the Maputo Protocol. Following the judgment of the ECOWAS Court, Sierra Leone lifted the ban against pregnant schoolgirls and teenage mothers and in 2021, adopted a 'Radical Inclusion' policy that reaffirms the right of pregnant girls to stay in school during their pregnancy and to return to school when they are ready, without imposing any conditions, mandatory maternity leave, or restrictions for their return.¹³¹

6.2.3 Discrimination in school dress codes

School dress codes and their enforcement can constitute a barrier to girls' education, particularly for learners from religious minority groups. Contention has arisen with respect to regulations relating to the hijab or headscarf worn by Muslim girls and women and Afro hairstyles and hairdos, including dreadlocks that are banned in many schools. These conflicts have not surfaced in regional forums, but domestic courts and administrative forums in countries such as Kenya, Nigeria, South Africa, and Uganda have dealt with them.¹³²

(a) The hijab

The exclusion of Muslim girls on the grounds of violation of the school's uniform policies by wearing the hijab or head scarves has proved contentious. Central to the court cases is whether the exclusion of girls based on the dress code stipulated by school boards constitutes discrimination in contravention of the state's constitution and international human rights laws. The outcomes of the litigation have been varied, sometimes among courts in the same country, demonstrating just how contested the issue is. For example, the Nigerian Supreme Court, in a majority decision delivered on 17 June 2022, upheld a previous ruling by the Court of Appeal, Lagos Division on 21 July 2016, setting aside a ban on the use of hijab in public schools in Lagos State, which ban had been upheld by a lower court on 17 October

125 *Tike Mwambipile & Equality Now v United Republic of Tanzania*, Application 042/2020 African Court of Human and Peoples' Rights (delivered 1 December 2022). A similar challenge had also been brought before the East African Court of Justice. See *Inclusive Development for Citizens, and Center for Strategic Litigation v Attorney General of the United Republic of Tanzania*, East African Court of Appeal, Reference 10 of 2020.

126 *Waves* (n 51) 4.

127 *Waves* (n 51) 28, 32.

128 Articles 2, 3, 17(1), 18(3) & 25 of the African Charter.

129 Article 28(1) of the CRC.

130 Articles 1 & 3 of CADE.

131 Human Rights Watch 'Africa – Rights progress for pregnant students' <https://allafrica.com/stories/202109300116.html> (accessed 13 May 2023).

132 In Mozambique and Senegal, the issue has been resolved administratively outside the courts through state mediation. See <https://religionnews.com/2021/03/15/across-africa-hijab-in-schools-divides-christians-and-muslims/>; <https://www.aciafrica.org/news/137/catholic-school-in-senegal-lifts-ban-on-headscarves-for-muslim-students>; <https://www.wantedin africa.com/news/headscarves-allowed-in-mozambique-schools.html> (accessed 13 May 2023).

2014. The Supreme Court agreed with the Court of Appeal's ruling that the ban was discriminatory against Muslim girls and that it violated their rights to freedom of thought, conscience, religion, the dignity of human persons and freedom from discrimination guaranteed by the Nigerian Constitution 1999.¹³³

Similarly, in Kenya, the Court of Appeal had, in 2016, ruled that a school uniform policy that was applied so as to deny Muslim girls permission to wear the *hijab* (head covering) and trousers in addition to the prescribed uniform in a public school sponsored by the Methodist church, constituted discrimination.¹³⁴ The High Court had ruled that since the policy on the prescribed uniform applied uniformly to all students, it did not constitute discrimination.¹³⁵ The apex court (Supreme Court), in a majority decision delivered in 2019, reversed the Court of Appeal's orders on technical grounds.¹³⁶

The Court of Appeal judges had directed the Ministry of Education to develop school guidelines for better protection of freedom of religion and non-discrimination.¹³⁷ No such guidelines have been developed, and it is unclear whether the government will take steps in that direction given the reversal by the Supreme Court, even though undeniably, school officials are left without any guidance at all on the day-to-day handling of the issue.

(b) Hairstyle restrictions

A related concern has arisen from hair regulations in schools. Rooted in colonial practices, many African schools have regulations preventing learners from having Afro hairstyles and braids. Some schools allow braids and long hair but only for girls, while boys are expected to sport short hair. Such regulations have been perceived to discriminate on the grounds of race and, in some cases, religion, provoking protests by learners and activists and social media petitions. While hairstyle restrictions apply to both girls and boys, there are at least three grounds that raise concern in the context of the Maputo Protocol: First, such restrictions reflect stereotypes at the intersection of gender, coloniality and race. Second, there is greater pressure on girls to use chemicals to manage their hair, thus risking harmful exposure. Third, girls experience the consequences of exclusion from school in a different way from boys. Exclusion increases girls' risk of teen pregnancy and early marriage, which in turn spell premature and permanent exit from the education system.

The banning of dreadlocks has been challenged in domestic courts in Ghana, Kenya, Malawi, South Africa and Zimbabwe on the grounds of religious discrimination and exclusion of children from the Rastafarian community from attending classes. In a Kenyan case, the High Court declared the exclusion of a 15-year-old student on account of her 'rasta' hairstyle, which was proven to be a manifestation of her Rastafarian religious beliefs, to be a violation of her constitutional rights.¹³⁸ The school had required her to shave off her hair as a condition for readmission. The Court ruled that the school regulations amounted to forcing her to choose between her right to education and her freedom of conscience and religion. The school administration had not demonstrated that it had no other

133 *Lagos State Government & others v Asiyat AbdulKareem*, SC/910/16. The South African Constitutional Court made a similar ruling with respect to a Tamil-Hindu school girl's wearing of a nose stud, emphasising that if the person genuinely believed the item in question to be central to her religious and racial identity, it was secondary whether it was actually required by her religion. *MEC for KwaZulu Natal, School Liaison Officer & others v Pillay* 2008 (1) SA 474 (CC).

134 *Mohamed Fugicha v Methodist Church in Kenya and 3 Others* (2015) Civil Appeal 22 [2015] eKLR.

135 *Methodist Church in Kenya v Teachers' Service Commission & 2 others* (2014) High Court Petition 30 (Meru) [2014] eKLR.

136 *Methodist Church in Kenya v Mohamed Fugicha and 3 Others* (2016) Supreme Court Petition 16 [2016] eKLR, 10-11 (one dissenting judge upheld the Court of Appeal's finding of indirect discrimination).

137 *Mohamed Fugicha v Methodist Church* (n 136) 34.

138 *JWM (alias P) v Board of Management O High School, Ministry of Education & Attorney General* (2019) High Court, Constitutional and Human Rights Division, Petition 10 [2019] eKLR.

means of enforcing the school regulations besides coercing her to cut her hair, which would subject her and her faith community to indignity and degradation. The Court ruled that school regulations should not be applied in such a manner as to override constitutional rights. The Court, therefore, ordered the school administration to immediately re-admit the learner.¹³⁹

The judgment in the Kenyan case referred to a similar outcome in a 2007 decision of the Zimbabwean Supreme Court, involving a six-year-old child excluded from a public primary school on the same grounds.¹⁴⁰

The cases discussed above on dress codes and hairstyles deal with these in the context of religious expression. There is, however, a related issue of school regulations finding a balance between enforcing discipline and enabling an inclusive environment that affirms girls' outward expression of their identity.¹⁴¹ This issue has arisen with respect to hairstyle policy in schools. One prominent incident involved a girls high school in South Africa. Girls of African descent alleged that they were compelled to chemically straighten their hair as school authorities considered Afro hairstyles to be untidy.¹⁴² Protests over the school's policy accounted for the high number of online complaints alleging racism received by the South African Human Rights Commission in 2016 and 2017.¹⁴³

Stepping back from the specific cases and incidents discussed in this subsection, there is, overall, a valid concern about conducive learning environments as part of the process of eliminating the various forms of discrimination that pose obstacles to equal access to education by girls and women. The African Commission has, on occasion, referred to inclusive education. For instance, in 2015 and 2022, it commended Malawi on its self-reported inclusive education policy;¹⁴⁴ in 2016, it commended Namibia for adopting a national plan of action to complement its Education for All policy¹⁴⁵ and in 2018 Eritrea was commended for its policy on improving access to education for rural and nomadic communities.¹⁴⁶ The conversation could be deepened further by taking the initiative to enquire from states whether they have the necessary policies and guidelines in place and how those policies and guidelines take account of a diverse range of exclusions, including those that may be presumed neutral or inevitable, as the cases described here have illustrated. African regional human rights bodies have an opportunity to

139 *JWM (alias P)* (n 138) paras 42, 55 & 59.

140 *Dzvova v Minister of Education, Sports and Culture and Others* (2007) AHRLR 189 (ZwSC 2007). See discussion of the case in MO Mhango 'Upholding the Rastafari religion in Zimbabwe: *Farai Dzvova v Minister of Education, Sports and Culture and Others*' (2008) 8(1) *African Human Rights Law Journal* (2008) 221.

141 A Kenyan case has ruled that where a hairstyle is simply a fashion choice rather than an expression of religious freedom, school rules will take precedence, as long as they are applied fairly. *JK (suing on behalf of CK) v Board of Directors of R School & Another* (2014) High Court, Constitutional and Human Rights Division, Petition 450 [2014] eKLR.

142 AFP 'A prestigious South African school has been ordered to stop banning black students from having Afros or braids' <https://www.businessinsider.com/afp-s-african-school-told-to-halt-racist-hair-policy-2016-8?r=US&IR=T>; Agence France-Presse. 'Racism row over South Africa school's alleged hair policy' <https://www.theguardian.com/world/2016/aug/29/south-africa-pretoria-high-school-for-girls-afros> (accessed 13 May 2023). In Kenya and Uganda news reports document similar grievances, of girls of African descent treated differently from their Asian, Caucasian or biracial descent, but no complaints to official bodies are on record. See N Segawa 'Female students claim discrimination over short hair policies at some Uganda schools' <https://globalpressjournal.com/africa/uganda/female-students-claim-discrimination-short-hair-policies-uganda-schools/>; G Achieng 'The racist legacy of Kenyan schools' short hair policies' <https://womensmediacenter.com/fbomb/the-racist-legacy-of-kenyan-schools-short-hair-policies> (accessed 13 May 2023).

143 South African Human Rights Commission, *Annual Report: Advocacy and Communication Unit* (2017) 25.

144 Concluding Observations on the initial and combined report of Malawi on implementation of the African Charter on Human and Peoples' Rights 1995-2013, African Commission on Human and Peoples' Rights, adopted at the 57th ordinary session (4-18 November 2015) para 32, and African Commission Concluding Observations Malawi 2022 (n 85) para 23.

145 African Commission Concluding Observations Namibia 2016 (n 80) para 10.

146 Concluding Observations on the initial and combined Periodic Report of Eritrea, African Commission on Human and Peoples' Rights, adopted at the 62nd ordinary session (25 April-9 May 2018) para 28.

contribute to the relevant jurisprudence on ensuring that the environment in educational institutions is conducive for girls and affirming their identities, particularly girls from minority communities.

6.3 Eliminate stereotypes in textbooks, syllabuses and the media

A review of the 17 selected Concluding Observations of the African Commission issued between 2012 and 2022 registers a stunning silence on the issue of the elimination of stereotypes.¹⁴⁷ The African Commission has made no reference to the issue. By contrast, the CEDAW Committee's engagement with African states raises the issue of the persistence of gender stereotypes in textbooks and the media, pointing out that measures put in place for their elimination are inadequate. The CEDAW Committee expressed concern in reviewing the reports of Eswatini,¹⁴⁸ Ethiopia,¹⁴⁹ Gabon,¹⁵⁰ Rwanda,¹⁵¹ South Africa¹⁵² and Uganda.¹⁵³ In some cases, the CEDAW Committee also expressed concern that stereotypical attitudes seem to inform the selection of subjects by girls, which results in low enrolment in STEM courses at the tertiary level.¹⁵⁴

The 2020 GEM Gender Report confirms that stereotypes in textbooks persist in many countries. The report observes that despite political will in support of gender equality in Ethiopia, for instance, gender stereotypes in textbooks are common, reflected in the portrayal of men as powerful, assertive and intelligent leaders, doctors, engineers and politicians and women as weak, passive and submissive, generally depicted in domestic, caregiving and supportive roles: 'stories of African kings, male freedom fighters and leaders dominate, whereas females actively involved in the independence struggle were forgotten'.¹⁵⁵

Though the Protocol only mentions stereotypes in relation to textbooks, the syllabus and the media, stereotypes may also be embedded in school rules and regulations and oral communication by school authorities, teachers and learners.¹⁵⁶ The dress code and hairstyle restrictions discussed above reflect stereotypes based on race, religion and gender, resulting in intersectional discrimination.

147 It bears pointing out that slow progress in taking on the issue of elimination of gender stereotypes is not unique to the African region. It has proved to be a sticking point globally. See Cusack (n 54) 125.

148 CEDAW Committee Concluding Observations Eswatini 2014 (n 102) para 30.

149 CEDAW Committee Concluding Observations Ethiopia 2019 (n 102) para 33.

150 CEDAW Committee Concluding Observations Gabon 2015 (n 102) para 30.

151 CEDAW Committee Concluding Observations Rwanda 2017 (n 102) para 32.

152 CEDAW Committee Concluding Observations South Africa 2021 (n 68) para 45.

153 Concluding Observations on the combined 8th and 9th reports of Uganda, Committee on Elimination of Discrimination against Women (1 March 2022) UN Doc CEDAW/C/UGA/CO/8-9 (2022) para 22.

154 See, eg, CEDAW committee Concluding Observations Ethiopia 2019 (n 102) para 33; CEDAW committee Concluding Observations Gabon 2015 (n 102) para 30; CEDAW Committee Concluding Observations Lesotho 2011 (n 104) para 29.

155 The 2020 GEM Gender Report draws from several background papers that analysed text books and learning materials in several countries to arrive at this conclusion. See, eg, D A Wondifraw 'Survey of gender representation in social studies textbooks of Ethiopian primary schools' (2017) 21(1) *British Journal of Education, Society and Behavioural Science* 7. See also T Melesse 'Gender Responsive Teaching and Learning Materials Development and Revision in Ethiopia' (2020) (Background paper for UNESCO Gender Report 2020); D Ballini, 'Etudes sur les Manuels d'Enseignement et d'Apprentissage dans l'Union des Comores' (2020) [Study on Textbooks in the Union of the Comoros] (Background paper for UNESCO Gender Report 2020). Both Ballini and Melesse concluded that no significant change was achieved in gender representation in textbooks in Ethiopia and the Comoros. Their findings were consistent with the overall conclusion of the GEM Report 2020 that countries tend not to act on their commitment to bias-free textbooks.

156 Wamahiu (n 57) 141-142.

6.4 Protection from all forms of abuse, including sexual harassment

Not all parties to the Maputo Protocol have adopted laws against sexual harassment. A comparative study of legal prohibition of sexual harassment in 192 UN member states found that in a subset of 42 states that had ratified the Maputo Protocol as of January 2021, nine had not enacted legislation prohibiting workplace sexual harassment.¹⁵⁷ This means that a majority have at least acted at the level of enacting legislation.¹⁵⁸ Even more positive is the study's finding that between 2016 and 2021, five states either enacted legislation or amended existing legislation,¹⁵⁹ thus, suggesting progressive action.

A review of concluding observations suggests, however, that the African Commission's engagement with states on this issue has been scant. The African Commission only alludes to the issue of abuse and sexual harassment in one of the 17 Concluding Observations reviewed. The Commission commended the Gambia in 2021 for its policy of building schools within a three to five-kilometre radius nationwide, thus providing safety and security for children, especially girls.¹⁶⁰

The CEDAW Committee has done more in engaging states to go beyond the enactment of legislation and establishment of administrative mechanisms to actual enforcement. While lauding Ghana for the adoption of sexual harassment policies in key institutions, such as public universities, the CEDAW Committee lamented that sexual harassment still persisted in schools.¹⁶¹ The CEDAW Committee expressed particular concern over girls' exposure to sexual violence and harassment on their way to and from school, as well as in their dealings with teachers and school officials.¹⁶² The CEDAW Committee also decried the lack of or inadequate sanctions for perpetrators of abuse against girls and women in educational institutions, including a lack of clear procedures for sanction in key policies, such as teachers' codes of conduct.¹⁶³ This is made worse by underreporting by victims and low rates of prosecution of offenders, which calls attention to the need to interrogate whether the law or policy in question provides adequate safeguards against retaliation.¹⁶⁴ The CEDAW Committee has, on numerous occasions, urged states to strengthen a holistic response mechanism that incorporates awareness-raising, training of both school officials and students, confidential reporting and referral mechanisms, and provision of adequate psychological, medical and legal assistance.¹⁶⁵ It has also raised concern about the lack of enforcement and its disproportionate impact on girls from marginalised communities. The Concluding Observations on Namibia's 2022 Report to the CEDAW Committee notes that though overall literacy for girls has improved due to state provision of free primary and secondary education, reported cases of corporal punishment, gender-based violence, discrimination

157 Heymann et al (n 67) 16. The study did not break down 'workplace' into sectors, so educational settings are subsumed within this broad reference.

158 For discussion of sexual harassment in the broader context of addressing gender-based violence see R Nekura 'Article 4' in this volume.

159 Heymann et al (n 67) 17. The five countries that adopted legislation or amendments between 2016 and 2021 are: Burkina Faso, Burundi, Niger, São Tomé and Príncipe, and South Sudan.

160 Concluding Observations on the combined Periodic Report of Gambia, African Commission on Human and Peoples' Rights (19-25 February 2021) para 22.

161 CEDAW Concluding Observations Ghana 2014 (n 102) para 32.

162 See CEDAW Concluding Observations on Eswatini 2014 (n 102) para 30; Chad 2011 (n 103) para. 30; Ethiopia 2019 (n 102) para 33; Gabon 2015 (n 102) para. 30; Kenya 2017 (n 68) para. 34; Malawi 2015 (n 102) para 30; Lesotho 2011 (n 104) para 28; Rwanda 2017 (n 102) para 32.

163 See, eg, CEDAW Committee Concluding Observations on Benin 2013 (n 102) para 26; Kenya 2017 (n 68) para 34; Malawi 2015 (n 102) para 30.

164 A global study (192 countries) found that legal protection from retaliation was crucial in operationalizing legal prohibitions of sexual harassment. See Heymann et al (n 67) 10.

165 See CEDAW Concluding Observations on Kenya 2017 (n 68) para 34; Benin 2013 (n 102) para 26; Combined 5th and 6th reports of Zambia (19 September 2011) UN Doc CEDAW/C/ZMB/CO/5-6 (2011) paras 29-30; Combined 3rd to 5th Periodic Reports of Mozambique (30 July 2019) UN Doc CEDAW/C/MOZ/CO/3-5 (2019) paras 31-32; Fourth Periodic Report of Côte d'Ivoire (30 July 2019) UN Doc CEDAW/C/CIV/CO/4 (2019) paras 39-40.

and bullying in schools persist, particularly against indigenous girls.¹⁶⁶ The CEDAW Committee made similar observations regarding Rwanda's and Burundi's reports concerning refugees, Batwa (ethnic minority) and girls with disabilities.¹⁶⁷

Although sexual harassment is acknowledged as a problem in many educational institutions at all levels, statistical data on its prevalence is scant.¹⁶⁸ State reporting needs to go beyond simply indicating that relevant legislation or policy has been enacted, to giving specific data on action taken on specific cases. Without detailed data, taking concerted action on the issue remains difficult.

6.5 Integration of gender sensitisation and human rights education into the curriculum.

The African Commission does not appear to engage much with states on the issue of integration of gender sensitisation and human rights education into the school curriculum. In the entire review period (2012-2022), there is only one reference: in 2014, Cameroon was commended for introducing human rights education in its school curriculum.¹⁶⁹

However, a look at national level practice from other sources suggests that states are acting largely in collaboration with civil society in the education sector and UN agencies. In Rwanda, the Competence-based Curriculum, which was introduced in 2015, integrates a gender perspective into the curriculum to improve 'the outcome of quality teaching by enabling girls and boys to exploit their full potential and talents without any discrimination or prejudice'.¹⁷⁰ It recognises that efforts to eliminate gender inequality must address 'interactions within and out of the classroom'.¹⁷¹ Following this, in 2017, the Ministry of Education, in partnership with the United Nations Children's Fund (UNICEF), launched the National Gender Responsive Teacher Training Package to guide both teachers and school leaders in facilitating teaching in a school environment that is gender responsive and empowering.¹⁷²

The Gender Responsive Pedagogy (GRP) developed by FAWE has been influential in integrating gender sensitisation into the teaching and learning processes, including teacher training, as article 12(1)(e) of the Maputo Protocol requires. Several countries – notably Ethiopia and Malawi – have mainstreamed GRP as a policy in pre-service training in all public and private teacher training colleges.¹⁷³ In Uganda, FAWE, in collaboration with the teachers' union, UNATU, adapted the GRP for primary schools in an effort to implement the Gender in Education Sector Policy.¹⁷⁴ Between 2003 and 2010, UNATU implemented the Teachers' Action for Girls initiative, which offered a five-day in-service training for teachers to empower them 'with knowledge, skills, and values to become lead actors in creating gender responsive school environments'¹⁷⁵ in support of girls' education.

166 CEDAW Concluding Observations Namibia 2022 (n 61) para 37.

167 See Rwanda 2017 (n 102) para 32; Burundi 2016 (n 114) para 34.

168 GF Mbuya 'An appraisal of the legal framework on sexual harassment at the place of work and schools in Cameroon' in K Mwikya, C Osero-Ageng'o, & E Waweru (eds) (Equality Now, 2020) *Litigating the Maputo Protocol: a compendium of strategies and approaches for defending the rights of women and girls in Africa* 172.

169 African Commission Concluding Observations Cameroon 2014 (n 83) para 26.

170 Ministry of Education – Rwanda *Competence-based Curriculum. Curriculum Framework from Pre-Primary to Upper Secondary* (2015) 23.

171 *Rwanda Competence-based Curriculum* (n 170) 23.

172 A Uworwabayeho et al *National Gender Responsive Teacher Training Package* (2017) (Ministry of Education – Rwanda & UNICEF).

173 LN Wanjama & F Njuguna *Case study: gender responsive pedagogy as a best practice by the Forum for African women educationalists (FAWE)* (FAWE & UNGEI, 2015).

174 Republic of Uganda *Gender in Education Sector Policy* (2009).

175 A Davidson *Case study: teachers' action for girls* (n.d.) (UNGEI & Canadian Teachers' Federation, with support from Overseas Development Institute (ODI) 3.

The CEDAW Committee's engagement with African states on integrating gender and human rights education into the school curriculum has tended to emphasise the integration of education on sexual and reproductive health rights. The CEDAW Committee cites a lack of age-appropriate sexual and reproductive health rights education, attributing it in some cases to cultural resistance.¹⁷⁶ The African Commission could do more to initiate dialogue with states on this dimension of state obligation under the protocol.

7 Conclusion

Progress in implementing article 12 will reap benefits for the overall attainment of the rights contained in the Maputo Protocol. The converse is also true: lack of concrete progress in education will have a knock-on adverse effect. Already, an assessment of the progress on SDG 4 is cause for concern. With the exception of Mauritius and Seychelles, African states are set to miss almost all educational progress indicators by the target date.¹⁷⁷

As discussed throughout this chapter, education is acknowledged in several articles of the Maputo Protocol as being central to the overall attainment of women's human rights. In turn, the realisation of the rights of women and girls to education is dependent on progress in other areas of rights, such as protection from discrimination, violation of dignity, exploitative work and harmful practices that pose barriers to access to quality education and inhibit their progression up the education ladder. Yet, despite its potential for addressing deep-rooted barriers to gender equality in education, article 12 of the Maputo Protocol remains largely invisible in educational policy documents and in national level jurisprudence. Of the nine national level Court cases referred to in this chapter, for instance, none referred to the Maputo Protocol, even though it is clear that article 12 would have strengthened the case and contributed to the development of jurisprudence in this area.

The invisibility of the Maputo Protocol in policy documents and national level jurisprudence is reflective of the low prioritisation of the gender equality agenda by many African governments, driven by deep-rooted patriarchal attitudes, values and practices of exclusion and gender discrimination. Article 12, in particular, is often overlooked or unsatisfactorily reported on in multiple state reports. Sex-disaggregated data and information (quantitative and qualitative) that would assist in tracking progress on the implementation of the right to education of the Maputo Protocol is largely unavailable. This low prioritisation, in turn, suggests inadequate investment in creating awareness of the Protocol among critical education and other stakeholders, resulting in limited outreach and poor quality of efforts.

It is essential that the quality of awareness-raising and sensitisation activities must be interrogated, not only for gender responsiveness of the content but also for the methodology used for delivery. The methodology used should facilitate deeper analysis incorporating an intersectional perspective. Experiential methods, critical thinking, problem-solving and creativity skills are recommended for changing patriarchal mindsets and generating evidence-based solutions that match the rhetoric to sustainable actions for gender equality. At the same time, the gathering of sex-disaggregated data should be prioritised as a matter of routine. Though most African ministries of education have put education management information systems in place, they are still grappling with generating credible, timely,

176 See, eg, CEDAW Concluding Observations on Eswatini 2014 (n 102) para 30; Benin 2013 (n 102) para 26; Namibia 2022 (n 61) para 37; Mozambique 2019 (n 165) para 31-32; Uganda 2022 (n 153) para 37. In Uganda a government decision to ban comprehensive sexuality education (CSE) from the school curriculum was successfully challenged in court: *Center for Health, Human Rights and Development (CEHURD) v Attorney General and Family Life Network* (2016) High Court of Uganda Miscellaneous Cause 309 of 2016. The judgment was delivered in November 2021, ordering the Ministry of Education to develop a CSE policy within two years, informed by the provisions of the Ugandan Constitution and international laws. The case, however, made no reference to the Maputo Protocol.

177 AU, UNECA, AfDB and UNDP, *Africa Sustainable Development Report* (2022).

sex-disaggregated data, making monitoring the implementation of the Maputo Protocol and other related instruments challenging.¹⁷⁸ This calls for investing in gender-responsive education statisticians and planners.

Overall, as the chapter has shown, progress has been registered at the level of enactment of legislation and adoption of policies to promote literacy for women and eliminate barriers to access to education. Among the measures to be commended are the facilitation of the reintegration of girls after pregnancy into educational and training institutions and adopting legal and policy frameworks to deal with abuse and sexual harassment. However, inadequate data makes it difficult to assess impact and progress. Underfunding of the education sector is a reality across the states. The African Commission could do more to hold states to account to a more rigorous reporting standard, especially as article 12(2) calls for 'specific positive action' on the part of states.

The record of dismal engagement at the regional level on the issue of gender sensitisation and integration of human rights education and elimination of gender stereotypes in education materials and the media bears highlighting. The Protocol puts a potent tool in the hands of the African Commission in the form of articles 2(2) and 12(1)(b), which call for the elimination of negative gender stereotypes. This tool is made even more potent by the fact that virtually all states parties to the Maputo Protocol are also states parties to CEDAW, whose articles 2(f), 5(a) and 10(c) articulate the same call to eliminate negative stereotypes.

When it fails to engage states on these issues, the African Commission forfeits the opportunity to set the tone for states. Without concrete action on this front, there is no serious challenge to attitudes that justify or take for granted barriers to women's education and training in general or in fields viewed as traditionally male, such as STEM.

178 Data gaps as a challenge to adequate reporting on the SDGs and Agenda 2063 were highlighted in AU, UNECA, AfDB and UNDP, *Africa Sustainable Development Report* (2022).

Article 13

Economic and social welfare rights

Anneth Amin Mnzava

1. States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:
- (a) promote equality of access to employment;
 - (b) promote the right to equal remuneration for jobs of equal value for women and men;
 - (c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;
 - (d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;
 - (e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;
 - (f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it;
 - (g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;
 - (h) take the necessary measures to recognise the economic value of the work of women in the home;
 - (i) guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors;
 - (j) ensure the equal application of taxation laws to women and men;
 - (k) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
 - (l) recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;
 - (m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

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1 Introduction

Although existing international and regional human rights instruments addressed economic and social welfare rights at the time the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) was adopted, the socio-economic conditions of Africa's women had generally not improved. The African Charter on Human and Peoples' Rights (African Charter), for instance, contains provisions relating to non-discrimination, the right to work and women's rights.¹ However, these provisions have largely been assessed as inadequate.² Article 13 of the Maputo Protocol protects economic and social welfare rights. It also, importantly, responds to concerns about prevalent inequalities in accessing employment and related rights. Given the wide range of inequalities African women experience in this regard, this provision is indispensable in transforming socio-economic conditions.

In Africa, women experience a wide range of violations of their economic and social welfare rights in public and private spheres. 'Calculations using the UNDP gender indices indicate notable gender inequality in almost every African country. Gender gaps in income and non-income dimensions result in lower human development by females compared to males.'³ The 2022 Sustainable Development Goals Report reveals women's high level of working poverty rates.⁴ Data published by United Nations (UN) Women in 2022 reveals that 62.8 per cent of women in Africa live in extreme poverty.⁵ Thus, for every 100 men living in extreme poverty in Africa, there are 127 women in the same position.⁶ Any efforts to reduce overall poverty in Africa must therefore address the female face of African poverty.⁷

There are still sectors of the economy that are largely closed to women. For instance, the mining industry has historically been seen as a masculine occupational culture, despite technological advances

1 Maputo Protocol, arts 2, 15 & 18(3).

2 Center for Reproductive Rights 'The Protocol on the Rights of Women in Africa: an instrument for advancing reproductive and sexual rights' *Briefing Paper* 2 February 2006. See also MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 41.

3 United Nations Development Programme, *Africa Human Development Report 2016: Accelerating Gender Equality and Women's Empowerment in Africa* 4 https://www.afdb.org/fileadmin/uploads/afdb/Documents/AEC/2016/AfHDR_Summary_highres_EN.pdf (accessed 16 May 2023).

4 United Nations *Sustainable Development Goals Report 2022* (2022) 26.

5 Global poverty projections issued in February 2022 by UN Women <https://data.unwomen.org/features/poverty-deepens-women-and-girls-according-latest-projections#:~:text=New%20projections%20of%20global%20poverty,372%20million%20men%20and%20boys> (accessed 16 June 2022).

6 Remarks given by the United Nations Secretary-General Antonio Guterres at the high-level meeting on gender equality and women's empowerment in Africa, in Addis Ababa on 8 February 2020 <https://www.unwomen.org/en/news-stories/statement/2022/03/statement-by-un-secretary-general-antonio-guterres-on-international-womens-day> (accessed 6 March 2022).

7 HM McFerson 'Poverty among women in Sub-Saharan Africa: a review of selected issues' (2010) 11 *Journal of International of Women's Studies* 52.

that have redefined the nature of minework.⁸ There are also fields of education in which women are under-represented, for example, in science, technology, engineering and mathematics (STEM).⁹ This significantly diminishes their earning potential. Furthermore, the economic contribution of most African women is not recognised in national statistics because it is largely in the informal agricultural and domestic sectors. As such, African women's economic contribution in agriculture, entrepreneurship and other related economic sectors is not documented.¹⁰ Women's work such as subsistence agriculture, household maintenance, voluntary work, and other related unpaid services, are excluded from economic measurement.¹¹ The invisibility of women's work translates into exclusion from social security and control over resources.¹²

This chapter analyses the provisions of article 13 of the Maputo Protocol on economic and social rights with the aim of unpacking their nature and content of these rights. The chapter is, therefore, organised in 7 sections. Following this introduction, the section 2 gives the drafting history of article 13 of the Maputo Protocol. Section 3 unpacks the relationship between article 13 and other rights in the Maputo Protocol and in other relevant treaties. Section 4 examines the key concepts of article 13 of the Maputo Protocol. An analysis of the nature of states' obligations is conducted in section 5 of this chapter. Section 6 examines states' implementation of article 13 of the Maputo Protocol and section 7 concludes the chapter.

2 Drafting history

The drafting history of article 13 of the Maputo Protocol reveals the drafters' determination to create substantive equality in the socio-economic conditions of women in Africa. The provision on economic and social welfare rights was included in all the drafts leading up to the final text of the Maputo Protocol. Article 14 of the Nouakchott Draft guaranteed women equal opportunities to work.¹³ It incorporated rights to equality of remuneration and conditions of work, the right to women's freedom to choose their own job, right to decent conditions of work, and freedom from exploitation by their employers. Other rights included the right to insurance for women working in the informal and formal sectors, prohibition of children from working below the minimum age, and prohibition of sexual violation against children, right to protection of domestic work of women, right to adequate pre- and post-natal maternity leave, and equal parental responsibility.¹⁴

8 D Botha 'Women in mining: an assessment of workplace relations struggles' (2016) 46 *Journal of Social Science* 252.

9 C Hill et al 'Why so few? Women in science, technology, engineering, and mathematics' 5-9. A report published by AAUW in 2010.

10 African Union 'African Union set to launch the "What African Women Want" Campaign to rally more action on women's empowerment on International Women's Day' (2022) <https://au.int/en/pressreleases/20220307/african-union-set-launch-what-african-women-want-campaign-rally-more-action#:~:text=The%20%E2%80%9CWhat%20African%20Women%20Want%E2%80%9D%20campaign%20will%20be%20launched%20on,for%20the%20implementation%20of%20programmes> (accessed 23 June 2023).

11 M Waring 'The invisibility of women's work: the economics of local and global "bullshit"' (1997) 17 *Canadian Woman Studies* 31.

12 J Meeker & D Meekers 'The precarious socio-economic position of women in rural Africa: the case of the Kaguru of Tanzania' (1997) 40 *African Studies Review* 35.

13 See Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

14 Nouakchott Draft (n 13) art 14..

These concerns were revised into article 15 of the Kigali Draft.¹⁵ It provided for the promotion of equality in access to employment, terms of remuneration, conditions of work and taxation. Thus, the Kigali Draft focused the article on promoting access to employment and related rights.¹⁶

The next draft – the Addis Ababa draft (2001)¹⁷ – provided for economic and social welfare rights under article 13. It required states to adopt legislative and other measures to guarantee women equal opportunities to work.¹⁸ It listed much the same concerns as the previous draft, focusing on equality in access to employment and equal remuneration for jobs of equal value for men and women.¹⁹ The Addis Ababa draft also required states to ensure transparency in recruitment, promotion and dismissal of women and combating and punishing sexual harassment in the workplace. Women were guaranteed the freedom to choose their occupations. States were also required to create conditions that promote and support occupations and economic activities of women within the informal sector, including setting up systems of protection and social insurance for women in the informal economy. Other elements included minimum age for work and prohibition of child labour, recognition of the economic value of the work of women in the home, adequate and paid pre- and post-natal maternity leave, equality of taxation for men and women, and equality of allowances. States were furthermore called upon to recognise that the upbringing and development of children is the responsibility of both parents. The final clause of the draft article obliged states to take effective measures to prevent the exploitation and misuse of women in advertising practices.²⁰

A non-governmental organisation (NGO) forum convened in 2003 under the auspices of Equality Now gave extensive comments on the Addis Ababa draft (Comments by the NGO Forum).²¹ Attempting to keep the language as close to that of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as possible, the NGO Forum recommended certain improvements. For instance, the word ‘enforce’ in the opening statement was inserted in the NGO mark-up draft. It also proposed the insertion of the phrase ‘career advancement’, to align the language with CEDAW’s article 11(b) and (c). Other elements contained in the Comments by the NGO Forum included the application of non-discriminatory criteria in the recruitment, promotion, and dismissal of women. The Comments by the NGO Forum also strengthened the language by recommending deletion of the phrase ‘allow’ to replace it with the phrase ‘ensure’ (women’s freedom to choose their occupation), also in line with article 11(c) of CEDAW. The inclusion of the right to social benefits, particularly regarding retirement, unemployment, old age, and other incapacity to work, refers to article 11(e) of CEDAW. The Comments by the NGO Forum recognised the right to adequate and paid pre- and post-natal maternity leave.²² Finally, the Comments by the NGO Forum recommended the inclusion of the word ‘abuse’ in the final clause on ‘exploitation and abuse of women in advertising and pornography’.

At the second Meeting of Experts held in Addis Ababa, Ethiopia, in March 2003, amendments made to article 13 were included in the Draft Protocol, which was submitted to the Meeting of

15 Draft Protocol to the African Charter on Women’s Rights, 26th ordinary session of the African Commission on Human and Peoples’ Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

16 Kigali Draft (n 15) art 15.

17 See Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

18 As above, para 98.

19 Article 13(a) of the Addis Ababa draft (n 17).

20 Article 13(b)-(m) of the Addis Ababa draft (n 17).

21 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003.

22 The NGO mark-up draft proposal to include the phrase ‘address pregnancy needs in the workplace’ similar to art 11(2)(a) of CEDAW, and art 10(2) of the Declaration on the Rights of Women, and art 8 of the European Social Charter, was not successful. The final text summed it all up in the right to adequate pre- and post-natal maternity leave.

Ministers for consideration.²³ No reservations were made by any state regarding article 13, suggesting that the matter of women's economic and social welfare rights is, on the face of it, non-controversial.²⁴ The final draft improves the various drafts of the Maputo Protocol. Its stipulation of states' obligations uses stronger language. It also prohibits sexual harassment in the workplace, unlike earlier drafts that only addressed sexual violations against children. It prohibits the exploitation of employed women's fundamental rights by their employers. The addition of the phrase 'paid' maternity leave strengthens the right to adequate pre- and post-natal maternity leave. The final draft incorporated a wide range of recommendations for the NGO Mark-up draft.

3 Relationship between article 13 and other rights in the Maputo Protocol and other relevant treaties

Article 13 covers a broad subject matter, and so, inevitably, it relates to numerous other articles of the Maputo Protocol, which need to be taken into account to give full meaning to economic and social welfare rights. The main one is the provisions on non-discrimination in article 2, which requires states to combat all forms of discrimination against women through appropriate legislative, institutional, and other measures. Article 2 reiterates almost verbatim CEDAW's article 2.

The right to dignity in article 3, which resembles article 1 of the Universal Declaration of Human Rights (Universal Declaration), and article 5 of the African Charter, is also significant. The right to education and training in article 12, which closely resembles article 10 of CEDAW, is also vital. The right to special protection of elderly women, and women with disabilities in article 23 is also relevant. These rights resonate with the provisions of article 6 of the UN Convention on the Rights of Persons with Disabilities (CRPD). Another relevant right is the right to special protection of women in distress in article 24, which relates with special protection of rural women under article 14 of CEDAW. The rights to health and reproductive rights in articles 14 and 18 relate closely to article 12 of CEDAW.

Economic and social welfare rights also exist in other international treaties. The International Labour Organization (ILO's) various conventions and recommendations elaborate a wide range of employment standards relevant to women. ILO standards relevant to women include freedom of association, industrial relations, prohibition against forced labour, and protection of children and young persons, equality of employment opportunity and treatment, hours of work, night work, and wages including equal pay for work of equal value for men and women, and special consideration of workers with family responsibilities. The African Charter guarantees rights to non-discrimination, equality, property, work, health, education, wealth and natural resources, and development.²⁵ The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the right to work, just and favourable conditions of work, right to form and join a trade union, right to social security, family, an adequate standard of living, health, and education.²⁶ The Convention on the Elimination of All Forms of Discrimination (CEDAW) entrenches similar rights in articles 11 to 14.

23 Summary of the proceedings of the Ministerial Meeting on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the rights of Women in Africa, MIN/PROT.WOMEN/RTS/Rpt, Addis Ababa, Ethiopia, March 2003, para 14.

24 See table of reservations to the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

25 See arts 14-17 and arts 21-22 of the African Charter.

26 See arts 6-3 of the ICESCR.

4 Concepts and definitions

Substantially, article 13 is framed within two related concepts: equality and non-discrimination.²⁷ In the context of socio-economic rights the United Nations Committee on Economic, Social and Cultural Rights (UN CESCR) in its General Comment 20 states that ‘non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of socio-economic rights’.²⁸ Article 13 includes the concept of equality by requiring states to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. The inclusion of the concept of equality in economic and social welfare provisions renders equality a vital content of these rights and offers them substantial protection. Effective protection of economic and social welfare rights will only be attainable if women and men are broadly treated equally in the manner envisaged by the provisions of article 13 without discrimination of any form.

Article 13 entrenches the substantive as opposed to the formal dimension of equality. Formal equality requires that all persons who are in the same situation be accorded the same treatment, and that people should not be treated differently because of arbitrary characteristics such as gender.²⁹ Thus, formal equality presupposes similar or the same treatment. Substantive equality, on the other hand, is concerned to ensure outcomes that are equal in substance, not just on paper. It refers to ‘equality in distribution of economic and social power and of opportunities for people to experience self-realisation’.³⁰ Substantive equality takes cognisance of existing patterns of inequality, taking economic and social conditions into account. The aim is to enable women to realise their full potential as equal members and actors in society. This aim is elaborated in Fredman’s four features and dimensions of substantive equality.³¹ Substantive equality is asymmetric in that it distinguishes between different treatment that causes detriment, and different treatment that redresses past disadvantage to improve the disadvantaged group’s position.³² It moves away from relative equality – the assumption of conformity to a male norm. Rather, it takes difference into account when difference matters. Substantive equality is inherently transformative; it seeks to change existing structures.³³ Moreover, it insists on levelling up rather than down.³⁴ Finally, it entails a positive responsibility to bring about change, regardless of whether individual culpability or violation has been established.³⁵

The dimensions of substantive equality are four-fold. First, it concentrates on remedying disadvantage rather than achieving gender neutrality. It redresses gendered context, including women’s subordinate position in areas such as the workplace. Second, it aims to redress stigma, stereotyping, humiliation and violence on grounds of gender. The third dimension entails recognition of the ways in which the structures of society entrench women’s disadvantage. Instead of requiring women to conform to male norms, substantive equality requires the transformation of existing male-oriented institutions and structures. The final dimension of substantive equality is that it attaches importance to women’s

27 For detailed analysis of non-discrimination in the Maputo Protocol see E Lubaale ‘Article 2’ in this volume.

28 United Nations Committee on Economic, Social and Cultural Rights (ESCR committee) General Comment 20 on Nondiscrimination in Economic, Social and Cultural Rights, 2 July 2009, UN Doc E/C.12/GC/20, para 2.

29 A Smith ‘Equality constitutional adjudication in South Africa’ (2014) 14 *African Human Rights Law Journal* 611.

30 K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 153-154.

31 S Fredman ‘Women and poverty – A human rights approach’ (2016) *African Journal of International and Comparative Law* 505-506. See also R Holtmaat ‘The CEDAW: a holistic approach to women’s equality and freedom’ in A Hellum & HS Aasen (eds) *Women’s human rights: CEDAW in international, regional and national law* (2013) 106.

32 Fredman (n 31) 505.

33 As above.

34 As above.

35 As above.

agency and voice in engendering the socio-economic rights necessary for women's empowerment.³⁶ These dimensions are vital in understanding article 13 of the Maputo Protocol.

The introductory statement to article 13, which obliges states to adopt legislative and other measures to guarantee equal opportunity in work, holistically guarantees substantive equality. It makes sure that laws, regulations and policies adopted to give effect to economic and social welfare rights do not victimise women already suffering from socio-economic inequalities. Substantive equality requires that states adopt laws and policies enable women realise the full potential of their economic and social welfare rights. Laws, policies and practices are evaluated from the vantage point of their impact on a disadvantaged individual or group, so as to eliminate barriers to participation in the workplace.³⁷ The phrase 'other measures to guarantee equal opportunity in work' aims to empower women as equal members of society as their male counterparts. It does not refer to sameness between men and women. The significance of this choice of criterion is that achieving substantive equality for women does not depend on a comparison with men. This is crucial in dealing with the issue of a fair wage in areas of work dominated by or staffed exclusively by women.³⁸

Some other examples of substantive equality in article 13 include states' obligation to protect women from exploitation by their employers violating and exploiting their rights. The requirement that states should create conditions to promote and support the occupations and economic activities of women in the informal sector incorporates substantive equality. The right to equal remuneration for jobs of equal value for women and men is another significant element of substantive equality in article 13. A similar provision on remuneration and equal pay for work of equal value is included in article 11(1)(d) of CEDAW. This right is justified by the need to reverse the negative impact on women's pay that results from occupational segregation.³⁹ Furthermore, the requirement to guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors aims at attaining substantive equality.⁴⁰ Similarly, CEDAW guarantees substantive equality in article 11(1)(c), which protects the women's right to training and re-training, including apprenticeship, advanced and vocational training and recurrent training. These provisions embody substantive equality as they aim to skill or re-skill women so as to position them favourably for entry or re-entry into the workforce and thereby redress women's subordinate position in the workplace.

The Heads of State and Government in their Declaration on Gender Equality in Africa,⁴¹ adopted in Addis Ababa in July 2004, declares that gender equality aims at strengthening measures to reduce women's skewed workload, expand employment opportunities for women, and ensure equal pay for work of equal value.⁴² States should adopt a wide range of measures for eradication of the discrimination that women encounter in the enjoyment of their economic and social welfare rights. The African Commission elaborates equality to include the adoption of special measures for the purpose of securing the adequate advancement of members of vulnerable and disadvantaged groups to enable

36 Fredman (n 31) 506.

37 Smith (n 29) 613. See also CESCR General Comment 20 (n 28) para 8.

38 F Raday 'Article 11' in MA Freeman et al (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* 285.

39 Raday (n 38) 303.

40 As above.

41 'Declaration on Gender Equality in Africa,' Heads of State and Government of Member States of the African Union, adopted at 3rd ordinary session (6-8 July 2004) Addis Ababa, Ethiopia.

42 Declaration on Gender Equality (n 41) para 10.

their equal enjoyment of the rights of a socio-economic nature.⁴³ Concern about substantive equality undergirds each of the respective components of the economic and social welfare rights contained in article 13, as elaborated in the next section.

5 Nature and content of economic and social welfare rights

5.1 Right to equality of access to employment

Article 13(a) of the Maputo Protocol provides for the right to equality of access to employment.⁴⁴ CEDAW incorporates a similar provision in article 11(1)(b) on the right to the same employment opportunities. The right includes access to employment opportunities for which a woman is qualified.⁴⁵ This right broadly incorporates the right of women not to be unfairly deprived of employment opportunities.

Equality of access covers three fundamental elements of employment, namely, availability, accessibility, and acceptability.⁴⁶ Availability is about ensuring that women are equally able to identify and secure available employment. States are required to assist and support individuals in identifying and finding available employment opportunities.⁴⁷ Accessibility refers to physical access and the right to seek, obtain and impart information on the means of gaining access to work. Acceptability is largely about protecting the right of the worker to just and favourable conditions of work.⁴⁸

5.2 Right to equal remuneration for jobs of equal value

The right to equal remuneration for jobs of equal value in article 13(b) is integral to economic and social welfare rights. The right resonates with the African Charter's right to equal pay for equal work.⁴⁹ A similar provision is found in article 11(1)(d) of CEDAW which elaborates on the right to equal remuneration to include benefits and equal treatment in respect of work of equal value.

The Maputo Protocol does not explicitly define the term remuneration. The ILO Equal Remuneration Convention⁵⁰ defines remuneration to include the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.⁵¹ Drawing inspiration from the ILO's Equal Remuneration Convention allows a holistic interpretation of article 13, to include all necessary allowances that employed women are entitled to. Equal remuneration for men and women for work of equal value means rates of pay established without discrimination on the basis of sex.⁵² The essence of article 13(b) is to prohibit pay discrimination against a woman working in the same or comparable position as a man.

43 African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Guidelines on the Implementation of Economic, Social and Cultural Rights).

44 Article 13(a) of the Maputo Protocol.

45 Raday (n 38) 288.

46 CESCR General Comment 18 on The right to work (art 6 of the Covenant) 6 February 2006, E/C.12/GC/18, CESCR General Comment 18, para 12(b).

47 CESCR General Comment 18 (n 46) para 12(a).

48 CESCR General Comment 18 (n 46) para 12(c).

49 Article 15 of the African Charter.

50 International Labour Organization (ILO), Equal Remuneration Convention, 29 June 1951, C100 (ILO Equal Remuneration Convention).

51 Article 1(a) of the ILO Equal Remuneration Convention (n 51).

52 As above.

The right to equal pay for jobs of equal value is significant to address the historical underestimation of work done by women in Africa's societies. The ILO has noted the following:

Historical attitudes towards the role of women in society, along with stereotypical assumptions regarding women's aspirations, preferences, capabilities and "suitability" for certain jobs, have contributed to occupational sex segregation in the labour market. As a result, certain jobs are held predominantly or exclusively by women and others by men. These views and attitudes also tend to result in the undervaluation of "female jobs" in comparison with those of men who are performing different work and using different skills, when determining wage rates.⁵³

The right to equal pay for jobs of equal value should be construed broadly to include not only similar jobs but also different jobs of equal value. The framing of the right permits a broad scope of comparison. It includes, but goes beyond equal remuneration for 'equal', the 'same', or 'similar' work and encompasses work that is of an entirely different nature, which is nevertheless of equal value.⁵⁴ Furthermore, the right is not limited to comparisons between men and women in the same establishment but rather it allows comparison between jobs performed by men and women in different places or for different employers.⁵⁵ In its General Recommendation 13, the CEDAW Committee requires states to develop job evaluation systems to facilitate the comparison of the value of jobs of a different nature.⁵⁶ The right should not be confined to equal pay for the same work, but should extend to work of equal value.⁵⁷

Furthermore, the right to equal pay for jobs of equal value holistically intends to address the issue of low remuneration for jobs considered to be women oriented. It takes account of the fact that lower wages for women are not only a result of direct discrimination but also, and perhaps chiefly, of the horizontal segregation of jobs and the payment of lower wages in feminised occupations or professions.⁵⁸ The right to equal remuneration for jobs of equal value is integral to the right to dignity. The African Commission held in *Malawi African Association v Mauritania*⁵⁹ that 'the right to remuneration ensures for everyone and his or her family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection'.⁶⁰

Integral to the right to equal remuneration is the concept of work of equal value. The question centres on the methods of assessing equal value. The CEDAW Committee in its General Recommendation 13 noted that states should consider the study, development, and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate.⁶¹

The Maputo Protocol in general, and article 13, in particular, does not explicitly prescribe the methods of assessment. This omission does not necessarily mean that such an assessment is irrelevant.

53 ILO Report of the African Children's Committee on the application of Conventions and Recommendations, Report III (Part 1A), 96th Session, 2007 p 271 para 2.

54 ILO Report of the African Children's Committee (n 53) 271 para 3.

55 As above.

56 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation 13: Equal remuneration for work of equal value, 8th session (1989) contained in A/RES/44/38. Resolution of the United Nations General Assembly, 1989, para 2.

57 S Fredman 'The right to equal pay for work of equal value' Background paper for the Working Group on discrimination against women in law and practice: economic and social life' <https://www.ohchr.org/Documents/Issues/Women/WG/ESL/BackgroundPaper2.doc> (accessed 22 May 2023).

58 Raday (n 38) 293.

59 *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

60 *Malawi African Association* (n 59) para 135.

61 General Recommendation 13 (n 56) para 2.

In fact, the ILO stated the need to examine the tasks involved to establish whether different jobs are of equal value.⁶² Inspiration may be drawn from the ILO Equal Remuneration Convention that implicitly incorporates the methods of examination. According to ILO, such examination must be undertaken on the basis of entirely objective and non-discriminatory criteria to avoid an assessment being tainted by gender bias.⁶³ In respect of assessment methods, the ILO states further that

analytical methods of job evaluation are effective to ensure gender equality in the remuneration because they apply objective factors (to analyse and classify jobs) relating to jobs to be compared such as skill, effort, and responsibilities or working conditions.⁶⁴

5.3 Right to transparency in recruitment, promotion, and dismissal

Integral to the right to economic and social welfare rights is the right to transparency in the recruitment, promotion and dismissal of women covered in article 13(c) of the Maputo Protocol.⁶⁵ Transparency in recruitment requires job positions to be advertised openly to the public in order to afford both women and men the opportunity to apply on a competitive basis. Applying undisclosed criteria in recruitment processes is contrary to article 13(c). Equality in criteria applied in recruitment is vital to avoid recruitment being tainted by gender bias. Employers, public and private, are obligated not to discriminate against women when taking on new employees, even prior to the existence of a contractual relationship. Hence, recruitment policy must conform to the non-discrimination principles.⁶⁶ Similarly, criteria for promotion at any workplace should be clearly and openly known.

Article 13(c) also requires transparency in dismissal. The Maputo Protocol does not define the phrase dismissal. Inspiration must therefore be drawn from other relevant sources such as the ILO Convention on Termination of Employment.⁶⁷ The ILO Convention on termination defines termination as termination at the initiative of the employer.⁶⁸ Employment shall not be terminated unless there is a valid reason. Valid reasons relate to the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.⁶⁹ Valid reasons may include but are not exclusive to unjustified absence from work. Race, colour, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin are not valid reasons for termination.⁷⁰ Perhaps no employer would overtly give any of these reasons as the basis for termination but rather, use other proxy reasons to mask the real valid reasons. In *RKB v Turkey*,⁷¹ the complainant left the workplace following threats and pressure exerted by the employer's agent, who then forced her to sign a document to the effect that she had been paid all her dues. The employer threatened the complainant, a married woman, that he would spread rumours that the complainant had been engaging in extra-marital relationships with other men. The complainant alleged violation of article 11(1)(a) and (d), in particular, the principle of equal treatment in the workplace following the termination of her employment. She also complained of gender-based discrimination by the employer.⁷²

62 ILO Report of the African Children's Committee (n 53) 271 para 5.

63 As above.

64 As above.

65 Article 13(c) of the Maputo Protocol.

66 Raday (n 38) 289.

67 Article 3 International Labour Organization (ILO), Convention Concerning Termination of Employment at the Initiative of the Employer, 22 June 1982, C158 (Termination of Employment Convention)

68 As above.

69 Termination of Employment Convention (n 67) art 4.

70 Termination of Employment Convention (n 67) art 5(a)-(e).

71 Communication 28/2010 *RKB v Turkey* CEDAW Committee (13 April 2012) UN Doc CEDAW/C/51/D/28/2010 (2012).

72 *RKB* (n 71) para 3.4.

The CEDAW Committee believed that the pressure exerted and the nature of the threat and harassment were made to the complainant because she was a married woman, and therefore constituted a violation of the principle of equal treatment.⁷³ The Committee stated that the former employer's treatment of the complainant in the context of the unlawful termination of her labour contract constituted gender-based discrimination under article 11, paragraphs 1(a) and (d), of CEDAW.⁷⁴

It is worth noting that an employee should be granted an opportunity to be heard before employment is terminated. Right to transparency in dismissal or termination of employment in article 13(c) implies the right to meaningful engagement throughout the termination process. In this regard, inspiration may be drawn from article 7 of the ILO Convention on termination of employment, which provides that employment should not be terminated before an employee is given a chance to defend herself, unless the employer cannot reasonably be expected to provide such opportunity in the specific circumstances.⁷⁵ Considering the ILO Conventions' clarity and explicit meaning of the concepts in article 13(c), the Maputo Protocol's textual clarity might have been enhanced by cross-reference to the ILO Conventions.

5.4 Combat and punish sexual harassment

The right to economic and social welfare rights is weakened or violated when women in the workplaces or in the recruitment process are subjected to sexual harassment. The CEDAW Committee notes that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.⁷⁶ Significantly, the provisions in article 13(c) recognise the right of women against sexual harassment in the workplace. The Maputo Protocol does not explicitly define the phrase sexual harassment. However, the meaning of sexual harassment can broadly be construed through the provisions of article 1(j) on violence against women. According to the Maputo Protocol, violence against women means

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or of war.⁷⁷

This definition is broad enough to include sexual harassment in the workplace. Moreover, inspiration may be drawn from CEDAW's General Recommendation 19, which defined sexual harassment along similar lines.⁷⁸

CEDAW's General Recommendation 19 was updated vide General Recommendation 35.⁷⁹ The update helps to enrich the understanding of 'sexual harassment' in article 13(c) by considering sexual harassment as a social problem rather than an individual woman problem. Moreover, the use of the phrase 'violence against women' may be considered in line with the broad context of gender-based violence against women in General Recommendation 35. This allows states to consider comprehensive

73 *RKB* (n 71) para 8.9.

74 As above.

75 Termination of Employment Convention (n 67) art 7.

76 CEDAW committee General Recommendation 19 on Violence against women, adopted at the 11th session (1992) para 17.

77 Article 1(j) of the Maputo Protocol. See also African Commission on Human and Peoples' Rights, 'Guidelines on Combating Sexual Violence and Its Consequences in Africa', adopted on 22 May 2017 para 3.1.

78 CEDAW Committee General Recommendation 19 (n 76) para 6.

79 CEDAW Committee General Recommendation 35 on Gender-based violence against women, updating General Recommendation 19, adopted on 14 July 2017, CEDAW/C/GC/35.

responses including legislative, administrative, and other measures to address sexual harassment in workplaces.

In *Anna Belousova v Kazakhstan*,⁸⁰ the Committee found the director's treatment of the complainant, by demanding that she enters into a sexual relationship with him if she wished to continue to work at the school and refusing to extend her labour contract for the following school year, violated the complainant's rights to work and to equal treatment and constituted gender-based discrimination under articles 11(1)(a) and (f) of CEDAW.⁸¹

5.5 Right of women to choose an occupation

The right of women to choose their occupation broadly incorporates the right to resign from a job and join or choose another job at a different workplace. A similar right is incorporated in article 1 of the ILO Convention 122 on Employment Policy,⁸² article 6 of the ICESCR, article 15 of the African Charter, and article 11(1)(c) of CEDAW.

The African Commission, while elaborating on the right to work stated that the right to work includes the right to freely and voluntarily choose what work to accept.⁸³ The right also includes women's access to employment and the right to protection against deprivation of employment.⁸⁴ In its General Comment 18 the UN Committee on Economic Social and Cultural Rights (CESCR) concluded that the right to choose occupation incorporates the right of access to a system of protection guaranteeing each worker access to employment and implies the rights not to be unfairly deprived of employment.⁸⁵ The CEDAW Committee elaborates on women's freedom to choose their occupation in its General Recommendation 28. According to the CEDAW Committee, inherent to the principle of equality between men and women, or gender equality is the concept that all human beings are free to pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.⁸⁶

The right of women to choose their occupation is significant in that it enables them to choose any occupation, including traditionally considered male-dominated occupations. States may take various measures to enable girls and women to acquire skills and knowledge that will enable them to exercise and enjoy the right to choose their occupation. In this regard, the Beijing Declaration and Platform for Action⁸⁷ urges states to diversify vocational and technical training and improve access for and retention of girls and women in education and vocational training in STEM fields.⁸⁸ States should take positive measures to promote training for the full range of occupational choices, including the development of

80 Communication 45/2012 *Anna Belousova v Kazakhstan* CEDAW Committee (12 September 2012) CEDAW/C/61/D/45/2012 (2015).

81 *Belousova* (n 80) para 10.13.

82 International Labour Organization (ILO), Abolition of Forced Labour Convention, C105, 25 June 1957, C105 (Abolition of Forced Labour Convention).

83 Guidelines on the Implementation of Economic, Social and Cultural Rights (n 43) para 58. See also CESCR General Comment 18 (n 46) para 6.

84 CESCR General Comment 18 (n 46) para 6.

85 As above.

86 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para 22.

87 Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

88 Beijing Platform (n 87) Strategic objective B.3 para 82(e).

multidisciplinary courses for science and mathematics teachers to sensitise them to the relevance of science and technology to women's lives.⁸⁹

This right also includes protection from employers' actions that would constrain the choice of employment.⁹⁰ The right of women to choose their occupation includes prohibition of forced labour. The CESCR noted in its General Comment 18 that the right to freely choose work implies not being forced in any way whatsoever to exercise or engage in employment. According to the ILO Convention on the abolition of forced labour, labour should not be used as a means of social discrimination.⁹¹

5.6 Right to protection of women working in the informal sector

In developing countries, 92 per cent of women workers are employed in the informal sector.⁹² Considering this substantial number, improving their work conditions will contribute to the overall development of their countries' economies, as well as to the countries' human development indicators.⁹³ High unemployment and lack of secure employment are causes that induce workers to seek employment in the informal sector of the economy.⁹⁴ 'An informal sector is a group of production units, which form part of the household sector as household enterprises, or unincorporated enterprises owned by households'.⁹⁵ It includes 'informal own-account enterprises' and 'enterprises of informal employers'.⁹⁶ The definition of the informal sector depends on the kind of workplace and duration of the operation of the enterprise.

Informal sector includes the agricultural sector, which engages most women in Africa.⁹⁷ Women make essential contributions to the agricultural and rural economies in all developing countries. Rural women often manage complex households and pursue multiple livelihood strategies. Their activities typically include producing crops, tending animals, processing and preparing food, working for wages in agricultural or other rural enterprises, collecting fuel and water, engaging in trade and marketing, caring for family members, and maintaining their homes.⁹⁸ Many of these activities are not defined as 'economically active employment' in national accounts but are essential to rural households' well-being.⁹⁹

Article 13(e) protects the rights of women working in the informal sector. Protection of women working in the informal sector requires the guarantee of various rights, including equal pay for work of equal value, social insurance, and other labour-related rights. Commenting on a similar right, the CEDAW Committee reiterated in its General Comment 16 that states are required to guarantee

89 As above para 82(g).

90 Article 13(d) of the Maputo Protocol.

91 Abolition of Forced Labour Convention (n 82) art 1.

92 WA Pallangyo 'The informal sector and the safety of female traders in Tanzania: a reflection of practices, policies, and legislation' *Wider Working Paper* 2021/160 (2021) United Nations University World Institute for Development Economics Research. The informal sector developed as a concept in the early 1970s through the World Employment Programme (WEP) Research Programme on Urban Unemployment. It was the comprehensive employment mission to Kenya in 1972 that coined the term informal sector. See PE Bangasser 'The ILO and the informal sector: an institutional history' *Employment Paper* 2000/9 at 2 & 8.

93 Pallangyo (n 92) 1.

94 CESCR General Comment 18 (n 46) para 10.

95 Resolution adopted by the International Conference of Labour Statisticians concerning statistics of employment in the informal sector adopted by the 15th International Conference of Labour Statisticians (January 1993).

96 Resolution concerning statistics of employment (n 95) para 6.

97 FAO 'The role of women in agriculture' (*ESA Working paper* 11-02) Environmental Research Institute <https://www.fao.org/3/am307e/am307e00.pdf> (accessed 18 May 2023).

98 As above.

99 FAO (n 97) 2.

payment, social security and social benefits for women working in family enterprises in rural and urban areas.¹⁰⁰ The right to freedom of association, collective bargaining and elimination of all forms of forced labour or compulsory labour for women working in the informal sector is a fundamental human right. The efforts to improve the socio-economic conditions of women cannot be fully achieved until these rights are recognised and protected.

5.7 Right to social insurance

The Maputo Protocol protects the right to social insurance in article 13(f). The right to social insurance is vital to the economic and social welfare rights for women working in the informal sector.¹⁰¹ The emphasis on women working in the informal sector helps to empower women living in abject poverty to enjoy this right. In its General Comment 19 on the right to social security, the CESCR elaborates the right to social security to include social insurance.¹⁰² Social insurance is a contributory scheme involving compulsory contributions from beneficiaries, employers, and sometimes, the state in conjunction with the payment of benefits and administrative expenses from a common fund.¹⁰³ In *Natalia Ciobanu v Republic of Moldova* the CEDAW Committee stated that the right to social security, including social insurance obliges states to ensure right's owners enjoy, at the very least, minimum essential levels of that right. It is an obligation of states to ensure equality of access to social security schemes including old-age benefits and other assistance necessary for the elderly, in particular those who do not have insurance-based pension or pension linked to a source of income. Non-contributory schemes must consider women living in poverty with no contributory pensions, who also have childcare responsibilities.¹⁰⁴

The right to social insurance in article 13(f) is vital based on its potential to reduce risks relating to loss of income, to sickness, disability and other risks that women may encounter. According to the ILO, social insurance encompasses a wide range of functions, including minimising risks, compensating or partially replacing income when workers have to face the risks (illness, loss of a job or working capacity), and reducing pressure on the social assistance system.¹⁰⁵ This right is important in ensuring that women live a dignified life during and beyond the peak of their economically productive years. This right is also important for categories of women such as the elderly.¹⁰⁶ The CEDAW Committee held in *Ciobanu* that the right to social security, including social insurance, is of central importance in guaranteeing human dignity.¹⁰⁷

Social insurance should be construed holistically to include the right to equal access to benefits such as medical care, sickness benefit, maternity benefit, disability benefit, old-age benefit, survivors' benefit, employment injury benefit and unemployment benefit in respect of occupational injuries and diseases, and family benefit.¹⁰⁸ The CESCR notes that social security (including social insurance) encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection from lack of work-related income.¹⁰⁹ The right of women to social insurance

100 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 16: on unpaid women workers in rural and urban family enterprises, UN Doc A/46/38 at 1 (1993) para c.

101 Article 13(f) of the Maputo Protocol.

102 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 19: The right to social security (art 9 of the Covenant), 4 February 2008, E/C.12/GC/19 (CESCR General Comment 19) para 1.

103 CESCR General Comment 19 (n 102) para 4(a).

104 Communication 104/2016 *Natalia Ciobanu v Republic of Moldova* (4 November 2019) UN Doc CEDAW/C/4/D/104/201.

105 ILSA & ILO 'Social insurance: enhancing social security to everyone' (2014) 3 *Policy Brief*.

106 CESCR General Comment 19 (n 102) para 1.

107 *Ciobanu* (n 104) para 7.6.

108 CESCR General Comment 19 (n 102) para 2.

109 As above.

encompasses essential elements, including availability, accessibility, acceptability, and adequacy. Accessibility encompasses coverage, eligibility, affordability, participation and information, and physical access. Adequacy requires the social insurance benefits to be of a level that prevents women from falling below an adequate standard of living.¹¹⁰ The ability of women in the informal sector to contribute should be considered in developing social insurance schemes. In *Ciobanu* the CEDAW Committee urged states to review restrictions on access to social security schemes to ensure that they do not discriminate against women in law or in practice.¹¹¹ In particular, states must bear in mind that, due to the persistence of stereotypes and other structural causes, women spend much more time than men in unpaid work, including providing care for children and family members with disabilities. States should, therefore, take steps to eliminate the factors that prevent women from making equal contribution to social security schemes that link benefits with contributions or ensure that schemes take account of such factors in the design of benefit formulas, for example by considering time spent providing care for children, family members with disabilities, and adult dependants.¹¹²

5.8 Right to recognition of the economic value of women's work in the home

Article 13(h) establishes the right to recognition of the economic value of women's work in the home. This right addresses home-based care work or family labour, which is often unremunerated. Unpaid care work is both an important aspect of economic activity and an indispensable factor contributing to the well-being of individuals, their families and societies.¹¹³ Work in the home includes, but is not exclusive to, activities such as cooking, cleaning and caring for children, the ill and the elderly.¹¹⁴ Despite its importance for well-being, unpaid care work is commonly left out of policy agendas due to a common misperception that it is a matter for the private sphere and therefore, irrelevant for policy design. Neglecting unpaid care work leads to skewed policies on account of incorrect inferences about levels and changes in individuals' well-being and the value of time, which in turn limit policy effectiveness across a range of socio-economic areas, notably gender inequalities in employment and other empowerment areas.¹¹⁵

Article 13(h) requires that women's work in the home be valued. In its General Recommendation 17 the CEDAW Committee notes that women's domestic activities contribute to each country's development.¹¹⁶ The obligation is placed on states to take necessary measures to give effect to this right. The phrase 'necessary measures' is broad and encompasses a wide range of measures. It requires states to take legislative, administrative, and policy measures to give effect to this right. States should adopt laws and policies that guarantee protection of women's work in the home. The laws should prohibit discrimination against women working in the home. In its General Recommendation 17 the CEDAW Committee in relation to unremunerated domestic activities urges states to encourage and support research and experimental studies to measure and value the unremunerated domestic activities of women. Furthermore, states should take steps to quantify and include the unremunerated domestic activities of women in the gross national product.¹¹⁷

110 See also CESCR General Comment 19 (n 102) paras 11-27.

111 *Ciobanu* (n 104) para 7.10.

112 As above.

113 G Ferrant et al 'Unpaid care work: the missing link in the analysis of gender gaps in labour outcomes' (2014) OECD Development Centre 1.

114 Ferrant (n 113) 1.

115 As above.

116 Preamble, CEDAW General Recommendation 17: Measurement and Quantification of the Unremunerated Domestic Activities of Women and their Recognition in the Gross National Product, adopted at the 10th Session (1991) A/46/38 para 4.

117 CEDAW Committee General Recommendation 17 (n 116) paras (a) & (b).

5.9 Right to adequate maternity leave

Article 13(i) frames this right as applicable to both the private and public sectors.¹¹⁸ This includes self-employed women.¹¹⁹ Drawing from the Maternity Protection Convention,¹²⁰ this right should be construed broadly in a manner that includes time between the presumed date of childbirth, the actual date, and the post-natal leave.

A woman's right to adequate pre- and post-natal maternity leave broadly includes rights to benefits such as cash and medical care. It also includes protection against discrimination and termination of employment during her pregnancy or following her return to work. The CESCR stated in its General Comment 18 that pregnancies must not constitute an obstacle to employment and should not constitute justification for loss of employment.¹²¹ In the context of socio-economic rights in the ICESCR the CESCR stated in its General Comment 20 that the refusal to hire a woman, on the ground that she might become pregnant, constitutes discrimination.

The CEDAW Committee has had occasion to interpret what adequate maternity protection means. *Elisabeth de Blok et al v The Netherlands* involved six self-employed women who gave birth between June 2005 and March 2006. They argued that repeal of a public incapacity insurance scheme left them with no protection against loss of income on account of maternity leave, and that this amounted to a violation of the Netherlands' obligation under article 11(2)(b) of CEDAW. The CEDAW Committee affirmed that article 11(2)(b) is also applicable to self-employed women, and therefore by failing to provide an alternative maternity leave scheme in the period in question, the state had failed to discharge its obligation to take all appropriate measures to eliminate discrimination under article 11 of CEDAW.¹²²

5.10 Right to equal application of taxation laws

The right to equal application of taxation laws in article 13(j) of the Maputo Protocol should be read in conjunction with provisions on the elimination of discrimination in article 2 of the Maputo Protocol. The obligation to prohibit discrimination against women and to ensure substantive equality applies to all government policies including taxation.¹²³

Historically, tax laws are one of most important instruments for governments with redistributive ambitions. However, tax systems and fiscal policy decisions may affect men and women differently. The persisting gender differences in rates of employment, gender gaps in unpaid care work, income, old-age security, poverty and wealth are all closely linked to the allocative and distributional outcome of tax regulations.¹²⁴ Women experience uneven tax burdens compared to men. They spend much of their income on value-added tax (VAT)/consumption-taxed goods such as groceries and other household goods. Tax reliefs do not generally cover these basic goods. Tax policies incorporate discriminatory social norms and gender stereotypes that limit women's progression towards equality.¹²⁵ Considering

118 Article 13(i) of the Maputo Protocol.

119 Communication 36/2012 *Elisabeth de Blok et al v The Netherlands* CEDAW Committee (17 February 2014) UN Doc CEDAW/C/57/D/36/2012.

120 ILO Convention 183 on Maternity Protection 2000 (C183).

121 CESCR General Comment 18 (n 46) para 13.

122 *Elisabeth* (n 119) paras 8.4 & 8.9.

123 Å Gunnarsson 'Gender equality and taxation: international perspectives' (2021) an Open Access Article distributed under the terms of the Creative Commons CC-BY4.0 9.

124 Gunnarsson (n 123) 2.

125 PeaceWomen *Why is tax a feminist issue?* <http://peacewomen.org/resource/why-tax-feminist-issue> (accessed 16 May 2023).

the explicit and implicit negative impacts of tax policies on women, including impact on unpaid care, paid work, and unpaid labour, states should progressively review such policies to eliminate gender inequalities.¹²⁶

The right to equal application of taxation laws to women and men requires tax systems to be applied in a manner that guarantees gender equality for all categories of workers. Equally, tax systems should not adversely affect women who are mostly low-income earners. Gender bias may exist explicitly in the tax laws or implicitly through the differential impact of the tax on women and men.¹²⁷ In Africa taxes are mostly generated through direct and indirect taxes. The most common direct taxes are personal income tax, corporate income tax and wealth or inheritance taxes.¹²⁸ Gender equality tax issues do not arise with respect to direct income taxes, but indirect taxes. VAT and other goods and services taxes have been of central importance for resource mobilisation in the majority of low- and medium-income countries, on account of their relatively lower administrative cost. The downside is that since they apply a fixed rate regardless of one's income, they are regressive rather than progressive. As women are over-represented among the poorest, the regressive profile is not only a low-income issue, but also a gender issue.¹²⁹

Policymakers usually do not consider gender inequalities when designing tax laws, even though many aspects of taxation substantially affect gender-related socio-economic inequalities.¹³⁰ Assessments of gender equality in taxation often distinguish between explicit and implicit gender bias. Explicit forms refer to tax provisions that explicitly treat men and women differently. Implicit forms of gender bias describe tax regulations that are written in gender-neutral terms, but affect men and women differently due to socio-economic inequalities or gender-specific roles in the economy.¹³¹ Article 13(j) obliges states to monitor the impact of tax policies and laws and adopt them to ensure substantive equality for women.

5.11 Right to the same allowances and entitlements

The obligation to prohibit discrimination in article 2 and ensure substantive equality applies to salaried women too. The protection of the salaried women's allowances and entitlements is significant because employed women have been experiencing differential treatment compared to their male counterparts in workplaces. Unlike article 13(h) and article 13(e) on women working in the home and in the informal sector respectively, the aim of article 13(k) is to address discrimination against women working in paid, structured employment outside the home, whether formal or informal.

Article 13(k) resonates with the provisions relating to equal pay for work of equal value and the right to remuneration. As noted above, remuneration includes the ordinary wage or salary and any other additional emoluments payable directly or indirectly to the worker arising out of the worker's employment.¹³² Equality in allowances requires such allowances to be established in a transparent

126 A submission of the women's working group on financing for development to the *Report of the Secretary-General to the Economic and Social Council on options for further strengthening the work and operational capacity of the African Committee of Experts on International Cooperation in Tax Matters 2* https://www.un.org/esa/ffd/wp-content/uploads/2015/03/ICTM2015_wwg.pdf (accessed 16 May 2023).

127 K Barnett & C Grown *Gender impacts of government revenue collection: the case of taxation* (2004) 9. This report is part of the Commonwealth Economic Paper Series published by the Economic Affairs Division of the Commonwealth Secretariat. <https://gender-financing.unwomen.org> (accessed 16 May 2023).

128 Barnett (n 127).

129 Gunnarsson (n 123) 7.

130 As above.

131 As above.

132 Article 1(a) of the Equal Remuneration Convention.

manner and paid without discrimination based on sex. These allowances may include but are not exclusive to hardship allowances for workers working in hazardous/dangerous workplaces such as in mines. Moreover, article 13(k) broadly obliges states to establish a wide range of allowances and entitlements for salaried women including maternity benefits, leave and other social benefits and allowances.

5.12 Parents' responsibility for the upbringing and development of children

In most cultures, women are mothers both biologically and socially- they are the ones in charge of childcare.¹³³ The CEDAW Committee expressed its concerns over the persistence of skewed deep-rooted traditional attitudes and stereotyping of women as mothers and caregivers and men as breadwinners only.¹³⁴

The provisions of article 13(l) recognise the responsibility of both parents for the upbringing and development of children, similar to article 6(i) of the Maputo Protocol and article 5(b) of CEDAW. Article 13(l) is significant in that it aims to abolish discriminatory attitudes and practices that treat women as only (or the only) caregivers, advocating for equality of parental roles. Writing on the corresponding provision in CEDAW (article 5(b)), Holtmaat notes that article 5(b) concerns the stereotypical assignment of sole or major responsibility for childcare to women. The provisions on common responsibilities of men and women in the upbringing and development of their children elaborate parental gender roles. They incorporate the obligation to modify gender stereotypes in parenting.¹³⁵ Vesting the responsibility on both parents is vital in that it affords women an opportunity to engage in paid work and other opportunities for their economic advancement. The provisions allow parents – male or female – to choose to participate in the labour market freely.¹³⁶ The UN Committee on the Rights of the Child stated in its General Comment 7 that states parties should respect the primacy of parents to their children.¹³⁷

The right in article 13(l) should be construed to include states' measures to avail men opportunity and time to effectively participate in raising their children and taking up family responsibilities. In circumstances where people are engaged in multiple roles, such as employees and parents, government policies such as paternity leave facilitate parents' choice to spend more time with their children.¹³⁸ Having men participating fully in the upbringing of children offers women opportunities to engage in the workforce.

5.13 Right of women against exploitation and abuse in advertising and pornography

Article 13(m) of the Maputo Protocol obliges states parties to take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography. States are therefore required to adopt legislation, regulations and policies that prohibit exploitation and abuse of women in order to combat, punish and criminalise exploitation and abuse of women in advertising and

133 R Holtmaat 'Article 5 CEDAW' in MA Freeman et al (eds) *UN Convention on Elimination of All Forms of Discrimination against Women: a commentary* (2012) 148.

134 Concluding Observations on the 6th Periodic Report of Austria, Committee on the Elimination of Discrimination against Women (20 February 2007) UN Doc CEDAW/C/AUT/CO/6 (2007) para 17.

135 Holtmaat (n 134) 142-143.

136 Raday (n 39) 301.

137 UN Committee on the Rights of the Child General Comment 7 on Implementing child rights in early childhood (20 September 2006) UN Doc CRC/C/GC/7/Rev.1 (2006) para 18.

138 K Feldman & BK Gran 'Is what is best for dads best for families? Paternity leave policies and equity across forty-four nations' (2016) XLIII *Journal of Sociology & Social Welfare* 95-96. See also L Addati et al *Maternity and paternity at work: law and practice across the world* (2014) 52.

pornography. Commenting on the situation in Germany, the CEDAW Committee stated its concerns about the persistent depiction of women as sex objects in media and in advertising. It recommended that states adopt policies and strengthen programmes including awareness-raising and educational campaigns directed at women and men and media and advertising agencies. These policies and programmes would ensure the elimination of stereotypes to project a positive image of women and make efforts to change men's and society's perception of women as sex objects.¹³⁹

6 Nature and scope of states' obligations

6.1 Obligations to adopt and enforce legislative and other measures

Article 13 of the Maputo Protocol broadly formulates states' obligations to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. For states to give effect to economic and social welfare rights, domestic legislation and effective enforcement of such legislation is vital.¹⁴⁰

The obligation to legislate implies that states must pass legislation consistent with the economic and social welfare rights protected in the Maputo Protocol. In addition, this obligation requires states to amend all existing legislation that is inconsistent with the economic and social welfare rights recognised in the Maputo Protocol. In *Lawyers for Human Rights v Swaziland (Swaziland)*,¹⁴¹ the African Commission (while deciding on the obligation to adopt legislative measures under the African Charter) held that a state's failure to take steps to ensure the conformity of its domestic laws with the provisions of the African Charter amounted to a violation of the obligation to adopt legislative measures.¹⁴²

Additionally, the obligation to legislate indicates that the adopted domestic legislation should be able to guarantee substantive economic and social welfare rights. Laws should provide for effective enforcement mechanisms and means that can ensure governmental accountability. Legislation should also provide for effective and adequate redress and remedy for violations of these rights. The African Commission states in its Guidelines on the Implementation of Economic, Social and Cultural Rights that the adoption of legislative or other measures requires states to protect socio-economic rights by guaranteeing appropriate administrative, as well as judicial remedies, to redress the violations of such rights.¹⁴³ The CESCR stated in its General Comment 9 that for states to justify their failure to provide remedies, they must show that the remedies are either not appropriate or are unnecessary.¹⁴⁴

The obligation to adopt and enforce measures in article 13 does not limit states exclusively to legislative measures. States are also required to adopt administrative, financial, educational, and social measures. This broad and flexible formulation allows states to consider a variety of necessary measures that can facilitate the enjoyment of economic and social welfare rights. This formulation implies that legislative measures are necessary but insufficient for fully realising human rights.¹⁴⁵

139 Report of the Committee on the Elimination of Discrimination against Women CO Germany A/59/38 31st Session (2004) para 384.

140 See also CESCR, General Comment 3 on The nature of States parties obligations (art 2, para 1) adopted at the 5th session of the Committee on Economic, Social and Cultural Rights, 14 December 1990) UN Doc E/1991/23 para 3.

141 *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

142 *Swaziland* (n 141) para 51. See also I Brownlie *Principles of public international law* 6 ed (2003) 35.

143 Guidelines on the Implementation of Economic, Social and Cultural Rights (n 43) para 2.

144 General Comment 9: The domestic application of the Covenant, 3 December 1998, UN Doc E/C.12/1998/24 para 3.

145 SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: theories, laws, practices and prospects* (2013) 45.

6.2 States' obligations to protect and promote

The formulation of states' obligations in article 13 incorporates the obligations to protect and promote.¹⁴⁶ The African Commission held in *Social and Economic Rights Action Centre (SERAC) v Nigeria (SERAC)*¹⁴⁷ that the state is obliged to protect right-holders against third-party violations through legislation and effective remedies. This is very much intertwined with the tertiary obligation of the state to promote the enjoyment of all human rights. The last layer of obligation requires the state to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is a positive expectation that the state will deploy its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote. It could consist in setting up a national health insurance scheme that does not depend on employment contributions. In this regard, women working in the informal sector or in unpaid care work will be able to benefit.

States are therefore required to respect the existing rights to employment opportunities, freedom of association through trade unions, maternity rights and all related employment rights. States must protect women's economic and social welfare rights against interference from their employers, family members, political, economic, and social institutions. States also have an obligation to promote social insurance and social security policies.

6.3 Obligation to ensure equality and non-discrimination

Article 13 should be read in conjunction with articles 2 and 8 of the Maputo Protocol on non-discrimination and access to justice and equality before the law respectively. It implies further that states are required to protect women's economic and social welfare rights against discriminatory practices by non-state actors. For example, non-state actors (such as employers) may conduct discriminatory practices in different labour circumstances, such as recruitment processes, working conditions, training opportunities, remuneration, promotion, termination, and retirement.¹⁴⁸ Social attitudes and practices may subtly circumscribe women's employment and business opportunities. States' measures must therefore address both direct and indirect discrimination. The latter can occur even in the absence of intent to discriminate.¹⁴⁹

The obligation of non-discrimination does not rule out special measures to correct existing inequalities in women's enjoyment of economic and social welfare rights. Such measures are valid provided they are 'reasonable, objective and proportional' to remedy *de facto* discrimination.¹⁵⁰

7 Implementation

States have been making efforts to implement article 13 of the Maputo Protocol through legislative and other measures. Gender policies have been developed in almost all countries, resulting in legislative and policy reforms.¹⁵¹ For example, Rwanda enacted legislation that guarantees women

146 See also the *Updated study on the right to food* submitted by A Eide in accordance with Sub-Commission Decision 1998/106 E/CN.4/Sub.2/1999/12 paras 52-53.

147 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 44.

148 D Kinley & J Tadaki 'From talk to walk: the emergence of human rights responsibilities for corporations at international law' (2004) 44 *Virginia Journal of International Law* 977.

149 IT Winkler *The Human right to water: significance, legal status and implications for water allocation* 112-113.

150 CESCR General Comment 20 (n 28) para 9.

151 Status of implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa issued by Justice Lucy Asuagbor Commissioner, Special Rapporteur on Rights of Women in Africa (African Commission on Human and Peoples' Rights) issued at the 60th Meeting – Commission on the Status of Women 18 March 2016 New York at 3 & 12.

equal rights with men on land access, ownership, and utilisation. In 2009 Rwanda enacted a law on equal opportunities and pay for women and men, and prohibition of sexual harassment in the work place.¹⁵² The African Commission's Concluding Observations on Rwanda's initial report commended Rwanda for this development.¹⁵³ In its Concluding Observations on Burkina Faso's Combined Periodic Report the African Commission commended Burkina Faso for adopting labour law on equality of access of employment between men and women.¹⁵⁴ Correspondingly, the Democratic Republic of the Congo (DRC) has enacted labour legislation protecting workers in the informal sector, which employs more women than men.¹⁵⁵ It also prohibits discrimination against pregnant women in workplaces, in recruitment processes and with respect to maternity benefits.¹⁵⁶

In Namibia, the Labour Act makes explicit provision for maternity benefits.¹⁵⁷ In addition to laws governing equality of access to employment between men and women,¹⁵⁸ Namibia has adopted a National Employment Policy guiding the government to achieve decent employment for men and women.¹⁵⁹ The African Commission commended South Africa for enacting the Employment Equity Amendment Act 47 of 2013 entrenching the concept of equal pay for work of equal value.¹⁶⁰ However, the Commission was concerned about the high level of unemployment among women, and required South Africa to adopt appropriate measures to correct the situation.¹⁶¹ In Sierra Leone, strides have been made in ensuring and guaranteeing women's rights to work, including paid maternity leave, social security benefits, and guarantees against dismissal for working mothers during a reasonable period before and after childbirth.¹⁶²

Despite the strides made there still remain areas of concern. The African Commission was concerned with the lack of current statistical data regarding the employment of women in public institutions at community and national levels in Angola.¹⁶³ It recommended that Angola adopt legislation, policies, and plans to give effect to the provisions of the Maputo Protocol, including article 13.¹⁶⁴ The African Commission was also alarmed about Eswatini's delay in adopting legislation on employment.¹⁶⁵

The CEDAW Committee has had comparable Concluding Observations on African states' reports regarding the implementation of the corresponding provision in CEDAW (article 11). It

152 Status of implementation (n 151) 5.

153 Concluding Observations and Recommendations on the combined 11th, 12th and 13th Periodic Report of the Republic of Rwanda on the implementation of the African Charter on Human and Peoples' Rights 2009-2016 and Initial Report under the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa, African Commission on Human and Peoples' Rights, adopted at the 61st ordinary session (1-15 November 2017) Banjul, The Gambia para 63.

154 Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights 2011-2013, African Commission on Human and Peoples' Rights, adopted at the 21st extraordinary session (23 February-4 March 2017) para 38(vi).

155 Democratic Republic of the Congo combined 11th, 12th and 13th Periodic Reports 2008-2015 on the African Charter and Initial and 1st, 2nd and 3rd Periodic Report on the Maputo Protocol para 252 (Combined Report of the DRC).

156 Combined Report of the DRC (n 155) para 253.

157 Status of implementation report (n 151) 9.

158 Namibia's Initial Report on the Implementation of the Maputo Protocol 2015 para 43.

159 Namibia's 2nd Report under the Maputo Protocol 2020 para 25(1).

160 2nd Periodic Report of South Africa 2003-2014 adopted at the 58th ordinary session (6-20 April 2016) paras 10-11.

161 African Commission Concluding Observations South Africa 2016 (n 160) paras 33(vii) & 47(iv).

162 Status of implementation report (n 151) 9.

163 Concluding Observations on the Cumulative Periodic Reports (2nd, 3rd, 4th and 5th) of the Republic of Angola, 12th extraordinary session, 30 July-4 August 2012 para 31.

164 Concluding Observations on Angola (n 164) para 41(IV).

165 Concluding Observations on the 1st to 9th Periodic Reports of Eswatini 2001-2020, adopted at the 70th ordinary session (23 February-9 March 2022) para 54(iv).

applauded Rwanda on its 2009 legislation prohibiting discrimination against women in employment and prohibition of sexual harassment against women in workplaces. Rwanda was also applauded for including equal opportunities in employment and equal pay for work of equal value in its legislation. However, the CEDAW Committee was uneasy with the high unemployment rates, persistence of sexual harassment in workplaces, and discrimination in access to employment including low-paid agricultural work and informal sectors staffed largely by women.¹⁶⁶ Tanzania's lack of implementation of the principle of equal pay for work of equal value and tenacity of the wage gap between men and women was also a concern to the CEDAW Committee.¹⁶⁷

8 Conclusion

Most of Africa's women live in abject poverty and experience socio-economic hardship in an absolute sense and relative to their male counterparts. Limited employment opportunities contribute immensely to women's poverty and dire socio-economic conditions. Efforts to empower Africa's women necessitated the inclusion of economic and social welfare rights in the Maputo Protocol. In this regard, the drafters included in article 13 of the Maputo Protocol the concept of substantive equality as a vital tool for women's enjoyment of their economic and social welfare rights. The drafters of article 13 then integrated substantive equality into the myriad aspects of economic and social empowerment, focusing on equal access to formal and informal employment opportunities for women.

The drafters' entrenchment of the concomitant obligations that enable states to realise these rights are relevant to the right to economic and social welfare rights. The states' implementation highlighted in this chapter demonstrates in brief states' efforts, including the adoption of legislative measures, to realise economic and social welfare rights in the Maputo Protocol. However, there remains a mismatch between laws protecting economic and social welfare rights and the reality of women's socio-economic conditions. The substantive equality envisaged by article 13 has not yet been attained.

Finally, considering its relevance to Africa's socio-economic conditions, it is unfortunate that no case law was developed from article 13 of the Maputo Protocol. Only case law of the African Commission on rights similar to economic and social welfare rights has been used to elaborate on the rights in article 13. The non-existence of case law around article 13 is indeed a matter of concern. The invisibility of these rights in the decisions and judgments of the treaty bodies set up to protect women's rights on the African continent is glaring.¹⁶⁸

There is, therefore, a need for awareness that will enable litigation before the African Court and advisory opinions before the African Commission on violations of article 13. Non-state actors have a huge role to play in the protection of the rights in article 13. Private employers should strive to protect economic and social welfare rights. Moreover, NGOs have a huge role to play in litigating economic and social welfare rights. The development of the case law around article 13 requires the vibrant participation of NGOs, similar to NGOs' efforts invested in developing the African Charter's socio-economic rights case law. This way, the object and purpose of economic and social welfare rights in article 13 will be advanced to transform Africa's women's socio-economic conditions effectively.

166 Concluding Observations on the Combined 7th to 9th Periodic Report of Rwanda, Committee on Elimination of Discrimination against Women (9 March 2017) UN Doc CEDAW/C/RWA/CO/7-9 (2017) para 34.

167 Concluding Observations on the Combined 7th to 9th Periodic Reports of the United Republic of Tanzania, Committee on the Elimination of Discrimination against Women (9 March 2016) UN Doc CEDAW/C/TZA/CO/7-8 (2016) paras 32-33.

168 A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: the effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 323.

Article 14

Health and reproductive rights

Ebenezer Durojaye

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
 - (a) the right to control their fertility;
 - (b) the right to decide whether to have children, the number of children and the spacing of children;
 - (c) the right to choose any method of contraception;
 - (d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
 - (e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
 - (f) the right to have family planning education.
2. States Parties shall take all appropriate measures to:
 - (a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
 - (b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
 - (c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

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1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is the first human rights instrument that expressly articulates the rights of women and girls in Africa. Its adoption was informed by a series of activities that started with the plans of

action adopted in Dakar, Senegal, in 1994 and Beijing in 1995.¹ The significance of this chapter lies in the need to cover the gap in the literature on the rationale for the adoption of the Maputo Protocol as a whole, but more importantly, the contextual reasoning behind the adoption of the wording in article 14. Of equal importance is the need to examine the nature and scope of state party obligations and to identify emerging practices regarding the implementation of article 14 by both state parties and stakeholders. The importance of this chapter also lies in the author's attempt to map a relationship between article 14 of the Protocol and other human rights institutions.

Article 14 of the Maputo Protocol provides normative health and reproductive rights guidance. This chapter is important because it sets the broad recognition of women's and girls' right to health and reproductive health. The right to health is one of the fundamental rights crucial for women's well-being. For a continent that bears the burden of sexual and reproductive ill health, the importance of article 14 cannot be overemphasised. The Maputo Protocol complements the provision in the African Charter on Human and Peoples' Rights on the right to the highest attainable standard of health,² as well as the provision on health and health services in the African Charter on the Rights and Welfare of the Child.³ While in many instances, article 14 draws inspiration from international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), in some instances, the provisions of the Protocol's article 14 break new ground.

A recent report indicates that the mortality rate of sub-Saharan African women is 533 per 100,000 live births annually.⁴ This is exacerbated by the fact that women in Africa suffer the consequences of unsafe abortion-related issues.⁵ This is an escalation from earlier statistics that indicate that while Africa accounts for about one-tenth of the world's population and 20 per cent of global births, approximately half of the mothers who die during pregnancy and childbirth are from Africa.⁶ In light of the foregoing statistics, the specific aspects of reproductive rights and their known benefits remain out of reach for most populations. Some of the critical aspects of women's reproductive rights, such as family planning and the use of contraception, remain low at about 13 per cent at an unparalleled rate of 5.5 children per woman.⁷ It has been noted that the ability of a woman to determine the number and spacing of children is crucial to her well-being and the realisation of her human rights.⁸ This chapter offers an academic audit of article 14 of the Maputo Protocol as an important step towards improving its implementation.

1 See fourth and fifth preambular paragraph of the draft protocol, Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

2 This is in the cumulative interpretation of this is in the cumulative interpretation of arts 1(b), (e), (g), 14, 16 & 18. This is in line with the UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14: The Right to the Highest Attainable Standard of Health (art 12 of the Covenant), 11 August 2000, UN Doc E/C.12/2000/4 paras 1, 2, 4, 8, 9, 27, 47, 49 & 53.

3 See African Charter on the Rights and Welfare of the Child art 14.

4 L Rodriguez 'Why maternal mortality is so high in sub-Saharan Africa' (2021) Global Citizen <https://bit.ly/3t0QCAo> (accessed 23 June 2023).

5 S Singh 'Global consequences of unsafe abortion' (2010) 6 *Women's Health* 849-860.

6 T Ketsela 'Reproductive health in the African region. What has been done to improve the situation?' <https://bit.ly/3PDFkM7> (accessed 23 June 2023).

7 Ketsela (n 6).

8 See UN Women *Progress of the world's women: families in a changing world* (2019) 56.

With regard to conceptual issues, this chapter is one of the most progressive and radical as well as controversial provisions of the instrument.⁹ It is the first human rights instrument to protect the rights of women in the context of HIV. Equally, it is the first to affirm a state's obligation to ensure access to safe abortion services, albeit in designated circumstances.¹⁰ The issues addressed in the provision respond to the realities of the African context. The concept of sexual and reproductive rights has been expounded in a non-conclusive list that includes fertility,¹¹ decision-making on having children, their number and their spacing,¹² contraception,¹³ and self-protection against sexually transmitted infections.¹⁴ The state is also expected to balance the right to privacy against the right to information on one's health status and the health status of one's partner, particularly if affected by sexually transmitted infections.¹⁵ The final concept relates to the ensuring and promotion of the right to have family planning education.¹⁶

Various countries have not actively implemented article 14 of the Maputo Protocol. This is due to various reasons such as logistical challenges to ensure the progressive realisation of sexual and reproductive health and rights (SRHR), lack of political goodwill and the failure to prioritise SRHR. These challenges exist in instances where the state parties have not entered reservations or interpretative declarations to the implementation of the Maputo Protocol. On the other hand, some states have engaged in other drastic steps to stifle the implementation of the Maputo Protocol – and numerous examples show this. This includes the entry of reservations by Kenya and Namibia and interpretative reservations by Uganda and Rwanda.¹⁷ In addition, as of 2022, 6 out of 55 countries in Africa outlawed abortion without any exception.¹⁸ These are Morocco, Mauritania, Senegal, Sierra Leone, Egypt and Madagascar.¹⁹ Consequently, as of 2022, a great percentage of African women in various countries still have restrictive abortion laws.²⁰ In instances where abortion is allowed, women find navigating the process to obtain a safe and legal procedure hard. In many African countries, access to sexual and reproductive health information to prevent unwanted pregnancies remains a source of contestation. Due to religious and cultural beliefs, stiff opposition to teaching comprehensive sexuality education in schools has remained a source of concern.²¹ This has been associated with high rates of teenage pregnancies in the region. Cross-regional comparisons from 24 countries from East, West, Central, North and Southern African sub-regions showed a high prevalence of 21.5 per cent in East

9 See F Banda 'Blazing the trail: the African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 72-84, see also F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11-47.

10 For more on this see, E Durojaye 'An analysis of the contribution of the African human rights system to the understanding of the right to health' (2021) 21 *African Human Rights Law Journal* 751-781.

11 Maputo Protocol art 14(1)(a).

12 Maputo Protocol art 14(1)(b).

13 Maputo Protocol art 14(1)(c).

14 Maputo Protocol art 14(1)(d).

15 Maputo Protocol art 14(1)(e).

16 Maputo Protocol art 14(1).

17 L Asuagbor (2016) Status of the implementation of the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol), Commissioner and Special Rapporteur on Rights of Women in Africa (African Commission on Human and Peoples' Rights) 60th meeting Commission on the Status of Women 18 March 2016, New York, paras 1-5. The United Nations Office of Legal Affairs (Treaty Handbook) defines interpretative declarations, unlike reservations, as not purporting to exclude or modify the legal effects of a treaty. Rather they serve the purpose of clarifying the meaning of certain provisions or of the entire treaty. See para 3.6.1, <http://untreaty.un.org/English/TreatyHandbookkyhbframeset.htm> (accessed 8 March 2023).

18 M Armstrong 'Twenty-eight years of progress: legal status of abortion in African countries in 1994 and 2022' 18 May <https://www.statista.com/chart/27472/abortion-legal-status-african-countries-timeline/> (accessed 23 June 2023).

19 Armstrong (n 18).

20 Armstrong (n 18). Seventeen countries have legislation that supports abortion to save the life of a woman, and nineteen countries regarding the preservation of health.

21 See for instance, E Durojaye 'Legal and human rights dilemma in sexuality education in Africa' (2016) *International Journal of Public Law and Policy* 305-316.

Africa, 9.2 per cent in Northern Africa and 18 per cent in sub-Saharan Africa.²² Therefore, Africa is home to a large number of teenage mothers.²³

Over three decades into the HIV/AIDS pandemic, there are concerns that new infection rates in the region are fuelled by stigma and discrimination, human rights violations and a lack of political will on the part of African governments. While significant progress has been made in addressing the epidemic, Africa remains its epicentre. Yet, efforts to ensure universal access to HIV treatment are still far from reality, given the disparities among the sub-regions.²⁴ This scenario, coupled with the devastating effect of COVID-19, makes it imperative for African governments to strive to live up to their obligations under article 14 of the Protocol. Emerging research shows that the economic impact of the pandemic has hit women hard because approximately 74 per cent are gainfully employed in the informal sector of the economy as street vendors and domestic workers, while they receive low pay in other formal sectors like tourism and the hospitality industry.²⁵

This chapter is organised into seven sections. Following this introduction, the second section discusses the drafting history of article 14. Section 3 explores the article's relationship with other relevant treaty provisions. Section 4 discusses the evaluation of the interpretative rendering by the treaty body and relates SRHR to other rights. The fifth section engages with the nature and scope of state parties' obligations. Section 6 evaluates the measures taken by states in the implementation of the article. Section 7 presents the conclusion and recommendations. This chapter aims to give an understanding of the normative foundations of SRHR in the Maputo Protocol and evaluate the various jurisprudential developments in the interpretation of article 14.

2 Drafting history

The Nouakchott Draft²⁶ version of the current article 14 of the Maputo Protocol was at the Experts Meeting organised by the International Commission of Jurists and the African Commission on Human and Peoples' Rights (African Commission) in Nouakchott, Mauritania.²⁷ The draft article that was presented for discussion had a different text. The first draft of the article (15 as it then was) provided:

With reference to article 16 of the African Charter on Human and Peoples' Rights, women shall benefit from the right to health on an equal footing with men. They are entitled, therefore, to exercise control over their fertility, to decide to give birth, when to give birth, chose [sic] any method of contraception, and to protect themselves against sexually transmitted diseases. State Parties shall take adequate measures to: entitle women to benefit from the right to have an abortion and to exercise this right.²⁸

Two important positions were presented in the Nouakchott Draft. First, this draft pointed to five intricate aspects: equality of both men and women in accessing the right to health, discretion on the part of

22 GM Kassa, AO Arowojolu, AA Odukogbe & AW Yalew 'Prevalence and determinants of adolescent pregnancy in Africa: a systematic review and meta-analysis' (2018) 15 *Reproductive Health* 195.

23 S Mkwanzani 'It takes two to tango! The relevance and dilemma in involving men in the realisation of sexual and reproductive health and rights in Africa' in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa: constraints and opportunities* (2021) 84.

24 UNAIDS *Global 2020 Report* (2020).

25 Office of the High Commissioner for Human Rights (2022) Covid-19 and women rights: 7 possible actions, <https://bit.ly/3Rs26GU> (accessed 23 June 2023).

26 Nouakchott Draft (n 1).

27 Abortion in Africa Guttmacher Institute (2021) https://www.guttmacher.org/sites/default/files/factsheet/ib_aww-africa.pdf (accessed 29 July 2022). The countries include Angola, Congo-Brazzaville, Congo-Kinshasa, Egypt, Gabon, GuineaBissau, Madagascar, Mauritania, São Tomé and Príncipe, Senegal.

28 Article 15 of the draft protocol prepared by the International Association of Jurists in collaboration with the African Commission on Human and Peoples' in Nouakchott, Mauritania, 12-14 April 1997 (ICJ Draft).

women to exercise control over their fertility, autonomous decision-making concerning childbirth and selection of mode of contraception, and mandatory protection against sexually transmitted diseases.²⁹ Second, the Nouakchott Draft also spoke to the need to enable the enjoyment of the right to sexual and reproductive health.³⁰ Such enablers include the need to facilitate access to health services for women within reasonable distances and at affordable costs.³¹ In addition, the drafters proposed that states provide pre-and post-natal care and adequate nutrition during pregnancy and lactation.³²

It is worth mentioning that this draft proposed guaranteeing women an unqualified right to abortion services. The draft took a much more expansive approach than the current provision in the Maputo Protocol, which is further discussed below. One other point to note is that the draft provision was silent on protecting women from HIV, as currently contained in the Maputo Protocol.³³ The reason for this omission is unclear, given that the HIV pandemic was already acknowledged as a threat to the lives of women at that time.

The second draft was presented at a meeting in Kigali in 1999 as article 16.³⁴ It provided:

1. With reference to article 16 of the African Charter, women shall have the right to health. This right includes:
 - (a) the right to control their fertility;
 - (b) the right to decide whether to have children;
 - (c) the right to space their children;
 - (d) the right to choose any method of contraception;
 - (e) the right to protect themselves against sexually transmitted diseases;
 - (f) the right to be informed on one's health status and on the health status of one's partner;
2. State Parties to this Protocol shall take appropriate measures to:
 - (a) provide adequate, affordable and accessible health services to women especially those in rural areas;
 - (b) establish pre-and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
 - (c) protect the reproductive rights of women particularly in cases of rape and incest.³⁵

This represents a significant departure from the Nouakchott Draft. First, it deviates from the focus on equality between men and women, instead setting out in detail the health and reproductive rights of a woman. It reiterates the discretion on the part of women to exercise control over their fertility, the decision to give birth, the choice in the selection of mode of contraception, and the mandatory protection against sexually transmitted diseases. In addition, the Kigali Draft introduces two important aspects: the right to decide on child spacing and the right to be informed of one's health status and that of one's partner.

Second, the Kigali Draft also refers to the need for enablers for the enjoyment of the right to sexual and reproductive health. These are framed as obligations on the part of the state. These include the need to go beyond access and affordability to adequate health services for women within rural areas, the provision of pre-and post-natal care, especially during breastfeeding, and the protection of reproductive rights in cases of rape and incest.

29 ICJ Draft (n 28) art 15.

30 As above.

31 As above.

32 As above.

33 There is a lack of documentation on the reasons that informed the first draft, and the subsequent draft.

34 Second Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

35 Kigali Draft (n 34) art 16.

While minor editorial changes were made to the Kigali Draft, the subsequent version upheld a woman's right to information on her health status and that of her partner, trumping concerns over the right to privacy.³⁶ It is argued that the drafters sought to ensure that the right to privacy was appropriately balanced against the woman's autonomy over her health and accessing information about the health condition of her partner.³⁷ In addition, the right to family planning was extended to include information and services.³⁸ In addition to establishing pre and post-natal health and nutritional services, state parties are obliged to enhance the existing ones.³⁹ The Kigali Draft did not provide for an obligation on states to ensure that women have access to safe and legal abortion services as a bare minimum in instances of sexual assault such as rape and incest or where their life, physical or mental health was in danger.⁴⁰ In addition, the Kigali Draft made a vague requirement on state parties to 'protect the reproductive right of women particularly in cases of rape and incest', without providing any further detail. The lack of detail in the Kigali Draft invites speculation as to what informed the unambiguous provision in the final version on this specific issue.

The Final Draft⁴¹ drew input from government experts who proposed a few changes.⁴² First, there was an overlap between clauses 13(b) and (c).⁴³ The merged clause read: 'the right to make decisions concerning reproduction'. Second, the experts reiterated that the right to information on the health status of one's partner would affect the right to privacy. It was proposed that the text would be retained if the application of the article was subjected to the limitation test.⁴⁴ Third, the application of the article would be limited to an 'infected' rather than an 'affected' partner.⁴⁵

Unfortunately, a look at the drafting history does not explain the reason for the origin or the reasons for the inclusion of the various components of SRHR under article 14. This lack of detailed drafting history to use to understand the intent of the drafters is a shortcoming to understanding article 14. In contrast, articles such as article 13 are punctuated with extensive insights, such as an NGO commentary. Regarding article 14, its history simply tells us that the provision underwent various amendments. While the article is titled 'Health and Reproductive Rights', the provision also leaves open the possibility of a broad construction to include sexual health and rights.⁴⁶

36 Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001 (Revised Final Draft) art 13(1)(e).

37 Revised Final Draft (n 36) art 13(1)(e).

38 As above.

39 As above.

40 As above.

41 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 86.

42 For avoidance of having large quotations on this draft, please compare the text of art 16 (quoted above) of the Second Draft Protocol to the African Charter on Women's Rights (Kigali 15 November 1999).

43 Government Experts Meetings 16 November 2001, art 13(1), and notes thereon.

44 As above.

45 As above.

46 See E Durojaye & N Murungi 'The African Women's Protocol and sexual rights' (2014) 18 *International Journal of Human Rights* 881-897.

Various moral and political controversies unfolded during the discussion of the article especially with regard to abortion. Most of the countries formed the opinion that abortion needed not to be allowed in their communities because of cultural and religious beliefs.⁴⁷ Civil society played a critical role in advancing the narrative for a stronger draft that would speak to aspects of abortion, among other things. For instance, in 2002, FEMNET raised the concern that the draft Protocol was generally weak.⁴⁸ This led to the convening of more consultation meetings by other civil society organisations such as Women in Law and Development in Africa, Equality Now and the African Centre for Democracy and Human Rights Studies in January 2003 in Addis Ababa. The author is of the view that the AU's 2004 commitment to the Solemn Declaration on Gender Equality indirectly had a bearing on the final version of article 14. This was largely because it called on member states to continue their action towards achieving gender equality and reinforcing their commitment to international and regional women's rights instruments such as the Maputo Protocol.⁴⁹

3 Linkages to other treaty provisions

Various human rights have implications for sexual and reproductive rights. They include the rights to life,⁵⁰ dignity,⁵¹ education and information,⁵² equality and non-discrimination, and the right to full consent to and equality in marriage.⁵³ Within the Maputo Protocol, specific provisions have a demonstrably close relationship with article 14. For instance, the provisions on violence against women are very instructive. The wide definition of violence encapsulates aspects of physical, sexual, psychological, and economic harm that fit in neatly with any acts of the state that may stifle the enjoyment of sexual and reproductive rights.⁵⁴ In addition, the right to dignity requires states parties to adopt and implement appropriate measures to protect every woman's right, including the right to reproductive health.⁵⁵ Another important link to article 14 is the call on state parties to eliminate harmful practices that negatively affect women's human rights, such as the protection of women who are at risk of being subjected to harmful practices, abuse and intolerance.⁵⁶

47 This was evident in the reservation to the application of the final text of the Maputo Protocol art 14(2)(c). See the discussion under sec 6 below.

48 African Women's Organizing for the Ratification and Implementation of the Maputo Protocol <https://www.awid.org/news-and-analysis/african-womens-organizing-ratification-and-implementation-maputo-protocol> (accessed 28 February 2023).

49 Solemn Declaration on Gender Equality in Africa (SDGEA) <https://blogs.lse.ac.uk/vaw/sdgea/> (23 June 2023).

50 General Comment 14 (n 2) para 3 provides that 'the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health'.

51 General Comment 14 (n 2) para 3.

52 General Comment 14 (n 2) paras 3, 11 & 16.

53 See the Maputo Protocol art 6; Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) art 16; International Covenant on Civil and Political Rights (ICCPR) art 23(4).

54 Article 1(j) defines violence against women to include all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war. The conceptualisation of violence in physical, sexual, psychological and economic contexts includes violations of sexual and reproductive health and rights.

55 Article 3(4) provides for the right to dignity.

56 Article 5(d). Article 5 provides for the right to elimination of harmful practices.

Other rights include the right to privacy;⁵⁷ the right to be free from torture or other cruel, inhuman and degrading treatment or punishment,⁵⁸ to be free from sexual and gender-based violence; from practices that harm women and girls; and the right to an effective remedy.⁵⁹ It should be noted that SRHR is potentially linked to various rights. This is briefly elucidated hereunder. First and foremost, the obligation on states parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures points to the recognition of their right to human dignity as individuals as a critical pillar in the protection of both her civil and political liberties as well as her socio-economic rights.⁶⁰ The elimination of harmful practices such as female genital mutilation goes a long way to enhance a woman's SRHR as well as the right to life that can be interfered with by such practices.⁶¹ In equal measure, the respect of a woman's SRHR complements the protection of her right to life in the context of the quality of life that is punctuated by the provision of adequate health services and the right to decide when to have children.⁶² This protection extends from areas of peace to areas with armed conflict or places of displacement and refugee host communities.⁶³

These various rights provide an enabling platform that empowers and guarantees individuals and persons in relationships (especially women) to make decisions around matters of bodily integrity and family relations.⁶⁴ The right to sexual and reproductive health is interdependent with these and other related human rights.⁶⁵

According to General Comment 22 of the Committee on Economic, Social and Cultural Rights (CESCR), the right to sexual and reproductive health is linked to the right to education, non-discrimination and equality between men and women.⁶⁶ In the same vein, the right to work⁶⁷ coupled with just and favourable working conditions⁶⁸ calls for a mandate on states to ensure employment with maternity protection and parental leave for workers.⁶⁹

The provisions of the Maputo Protocol, in general, and article 14, in particular, are influenced by existing human rights instruments and standards. These include binding instruments such as the

57 ICCPR (n 53) art 17. This article mandates that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Clause 2 calls on the State to provide for the protection of the law against such interference and attacks.

58 ICCPR (n 53) art 23. See also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

59 To this end, CEDAW is very instructive.

60 See Maputo Protocol arts 1 & 3.

61 See Maputo Protocol art 5. Under art 5, states parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards.

62 See Maputo Protocol arts 3 & 4.

63 Article 9 calls on states parties to undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

64 Such decisions inform the various sexual and reproductive rights that determine the size of families, where women are guaranteed safe and healthy pregnancies. This also addresses other intricate aspects such as protection against sexually transmitted infections like HIV and other sexually transmitted infections.

65 Committee on Economic, Social and Cultural Rights General Comment 22 (2016) on the right to sexual and reproductive health (art 12 of the International Covenant on Economic, Social and Cultural Rights, UJ Doc E/C.12/GC/22).

66 General Comment 22 (n 65) para 9.

67 Under the ICESCR art 6.

68 Under the ICESCR art 7.

69 African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) & art 14(2)(a) & (c) of the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 54th ordinary session of the African Commission held in Banjul, The Gambia, 22 October-5 November 2013 para 9 (African Commission General Comment 2).

ICESCR, CEDAW and the Convention on the Rights of the Child (CRC), and the interpretation provided by the relevant monitoring bodies. In addition, decisions reached at important international meetings such as the International Conference and Population and Development⁷⁰ and the Fourth World Conference on Women 1995 have inspired the provisions of the Protocol.⁷¹ Article 14 has a relation in both general and specific terms. Concerning the Universal Declaration of Human Rights, there is an emphasis on the recognition of the right of all persons to an adequate standard of living, including guarantees for health and well-being.⁷²

The ICESCR takes on a wide spectrum of the right to health by recognising ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’⁷³ As indicated earlier, states need to use progressive realisation to achieve the full realisation of this right as provided for in the CESCR in its General Comments 14 and 22.⁷⁴ In these general comments, the CESCR emphasises the need to ensure access to health care, including sexual and reproductive health care services, to all on a non-discriminatory basis.⁷⁵ The CESCR further emphasises that health care services, including sexual and reproductive health care services, must be made available, accessible, acceptable and of good quality.⁷⁶ Article 12 of the ICESCR, together with the interpretive comments, provide a good guide to developing the jurisprudence of article 14 of the Maputo Protocol. The African Commission always encourages drawing inspiration from other international law sources.⁷⁷

Various other international instruments speak about the right to health generally. For instance, the CRC also recognises the right to health for children.⁷⁸ The CEDAW obligates states to adopt measures to guarantee women’s access to health and medical care, with no discrimination whatsoever, including access to family planning services.⁷⁹ States parties to CEDAW are required to take all appropriate measures to eliminate discrimination against women in the area of health care to ensure that on a platform of equality of men and women, there is access to health care services, such as family planning.⁸⁰ The CEDAW mandates state parties to ensure that women have appropriate pregnancy and post-natal care services.⁸¹ The CEDAW Committee has noted that failure by states to ensure health care services peculiar to women’s needs will amount to discrimination under the Convention.⁸²

70 UN Population Fund (UNFPA), Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, 1995, UN Doc A/CONF.171/13/Rev.1.

71 United Nations, Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women, 27 October 1995, UN Doc A/CONF.177/20 (1995) and UN Doc A/CONF.177/20/Add.1 (1995).

72 Universal Declaration of Human Rights, art 16.

73 ICESCR art 12.

74 General Comment 14 (n 2) and General Comment 2 (n 69)

75 As above.

76 As above.

77 African Charter on Human and Peoples’ Rights art 60. It states that ‘the Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members’.

78 UN Convention on the Rights of the Child art 24, See also UN Committee on the Rights of the Child (CRC), General Comment 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art 24), 17 April 2013, UN Doc CRC/C/GC/15.

79 CEDAW (n 53) art 12.

80 CEDAW (n 53) art 12(1).

81 CEDAW (n 53) art 12(2).

82 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation 24: art 12 of the Convention (Women and Health), 1999, UN Doc A/54/38/Rev.1.

Articles 14 of the Maputo Protocol and 16 of the African Charter both provide for the enjoyment of the right to health in the context of the highest attainable standard. The normative guidance from the African Charter provides a platform for the interpretation and application of article 14 of the Maputo Protocol. States parties are expected to use ‘necessary measures’ and guarantee medical services. The Commission has clarified this provision through its Principles and Guidelines for the Implementation of the Economic, Social and Cultural Rights in the Charter (Nairobi Principles),⁸³ its Concluding Observations and its jurisprudence. In the Nairobi Principles, the Commission observes that a broad interpretation must be given to the right to health to encompass access to relevant goods and services.⁸⁴ It aligns itself with the concept of minimum core for the enjoyment of the right to health and urges states to allocate adequate resources to realise the right to health.⁸⁵ In some of its decisions, the Commission has reiterated the point that the enjoyment of the right to health goes beyond access to health care but includes provisions of relevant goods and services for the realisation of this right.⁸⁶ More importantly, the Commission has urged states to remove all barriers to the enjoyment of this right by embarking on law reforms and allocating adequate resources to the health sector.⁸⁷

4 Concepts and definitions

Article 14 raises conceptual issues that need to be defined and or interpreted. These include the right to health, sexual and reproductive health, progressive realisation, adequate, affordable, accessible and acceptable health services, and the right to self-protection.

In its first General Comment on article 14(1)(d) and (e) of the Maputo Protocol, the African Commission explains that for women and girls to be protected from HIV infection, states must remove all barriers to women’s enjoyment of their human rights and freedoms.⁸⁸ In this regard, the African Commission specifically requests states to dismantle cultural practices that undermine women’s rights and ensure the adoption of laws and policies that guarantee equality for women.⁸⁹ The Commission further notes that other provisions of the Protocol must be guaranteed for women to be protected from sexually transmitted infections, including HIV. Thus, an overall context of protection of women’s rights is crucial for undergirding the realisation of the rights guaranteed under article 14.

The second General Comment relates to the other provisions of article 14, where the African Commission affirms the right of women and girls to access sexual and reproductive health information and services on a non-discriminatory basis, prioritising those in rural areas.⁹⁰ The African Commission further urges states to remove all barriers to universal access to sexual and reproductive health services for women and girls, especially regarding abortion services.⁹¹ The Commission urges states with

83 Adopted in Nairobi 2012 – The Guidelines and Principles for the Implementation of the Economic, Social and Cultural Rights in the African Charter.

84 Nairobi Principles (n 83).

85 Nairobi Principles (n 83).

86 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003). See also *Free Legal Assistance Group v Zaire* (2000) AHRLR 74 (ACHPR 1995).

87 For instance, see Concluding Observations to Malawi in the Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples’ Rights (1995-2013), 57th ordinary session 4-18 November 2015, Banjul, The Gambia, paras 75-79.

88 African Commission General Comment 1 on art 14(1)(d) and (e) of the Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted during the 52nd ordinary session of the African Commission, held in Yamoussoukro, Ivory Coast, 9-22 October 2012.

89 General Comment 1 (n 88).

90 General Comment 2 (n 69).

91 General Comment 2 (n 69).

restrictive abortion laws to reform their laws to ensure access to safe abortion services within the grounds recognised under article 14.⁹²

The right to health is accorded the meaning assigned to it in General Comment 22 of the Committee on Economic, Social and Cultural Rights (CESCR). It is defined as ‘the highest attainable standard of health’.⁹³ Sexual and reproductive health amalgamates various freedoms and entitlements. These include the right to ‘make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one’s body and sexual and reproductive health’.⁹⁴ The point of intersection between General Comment 22 and the Maputo Protocol’s article 14 is in the reiteration of the need for access to health facilities, goods, services and information to inform the full enjoyment of the right to sexual and reproductive health.⁹⁵

Since the right to health is a socio-economic right, the concept of progressive realisation takes centre stage. The African Commission’s Principles and Guidelines on the Implementation of Socio-economic Rights offer insights on three fronts. First, it is informed by the availability of a state’s resources.⁹⁶ It complements the African Charter’s silence on the progressive realisation of socio-economic rights.⁹⁷ To this end, the state is expected to implement a reasonable and measurable plan subject to specific timeframes.⁹⁸ States are further reminded of the immediate realisation of some rights and the setting of achievable benchmarks and timeframes for the incremental enjoyment of rights over time.⁹⁹ Third, states are advised on various ways of raising resources, such as innovations in taxation based on an effective and fair system.¹⁰⁰

It should be noted that in *Purohit and Moore v The Gambia*, the African Commission would seem to suggest that the right to health guaranteed in article 16 of the Charter is subject to progressive realisation.¹⁰¹ In that case, the Commission explained that the obligation on states parties ‘to take concrete and targeted steps while taking full advantage of their available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind’, is implicit in article 16.¹⁰²

The concept of progressive realisation takes on the understanding alluded to by the UN CESCR’s General Comment 3 on the nature of state obligations. Concerning the right to sexual and reproductive health, states should take ‘all appropriate means such as the adoption of legislative measures that are desirable and indispensable to establish normative guidance to promote and protect the rights of girls and women’.¹⁰³ The right to sexual and reproductive health is punctuated by availability, accessibility, affordability, acceptability and quality.¹⁰⁴

92 General Comment 2 (n 69).

93 General Comment 14 (n 2) para 1.

94 General Comment 2 (n 69) para 5.

95 As above.

96 African Commission Principles on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, para 13.

97 Principles on the Implementation of Economic, Social and Cultural Rights (n 96) para 13.

98 Principles on the Implementation of Economic, Social and Cultural Rights (n 96) para 14.

99 As above.

100 Principles on the Implementation of Economic, Social and Cultural Rights (n 96) para 15.

101 *Purohit* (n 86).

102 As above.

103 General Comment 2 (n 69) para 5.

104 General Comment 2 (n 69) paras 11-22.

5 Nature and scope of state obligations

The state has various obligations under article 14 of the Maputo Protocol, including respecting, protecting, promoting, and fulfilling African women's right to health and reproductive health.¹⁰⁵ State parties are mandated to recognise the rights, duties and freedoms in the Charter and adopt legislative or other measures to give effect to them.¹⁰⁶ The nuanced understanding of this provision may be found in some recent general comments.

As stated above, the African Commission has issued two General Comments to clarify the nature of states' obligations regarding the provisions of article 14. In the first General Comment, the Commission notes that to protect women from sexually transmitted infections, including HIV, states must ensure an enabling environment where the rights of women are respected. In the second General Comment, the Commission emphasises the need for states to remove barriers to contraceptive and abortion services for women.¹⁰⁷ In both General Comments, states are enjoined to repeal laws and policies that perpetuate the inequitable status of women in society in relation to men and ensure access to information and services on SRHR to all women on a non-discriminatory basis.

The provisions of article 14 impose obligations on the state to, first and foremost, ensure and promote the rights, and second, take appropriate measures. States have an obligation to ensure the respect and promotion of SRHR of women.¹⁰⁸ In this regard, states are mandated to take all appropriate measures in three thematic areas. First, to provide health services that are adequate, affordable, and accessible, especially in rural areas.¹⁰⁹ A codification of the elements of the right to health as expounded by the UN CESCR in its general comment 14.¹¹⁰ Second, they must establish and strengthen health services in the three areas of pre-natal, delivery and post-natal services.¹¹¹ Third, to authorise medical abortion in instances of sexual violence or where the continued pregnancy endangers the mother's or foetus's life or health.¹¹²

5.1 Obligation to respect

Regarding the obligation to respect, states parties must refrain from directly or indirectly violating the right to health and reproductive health.¹¹³ Direct violation of the right to health and reproductive health includes the failure of the state to provide contraception in health centres and a conducive environment that enables women to decide on child spacing. This obligation is rather wide, and it is argued that parameters need to be defined to ensure that a state upholds this obligation. Thus, failure by the state to enact appropriate laws that will facilitate access to sexual and reproductive health care services for women and girls will result in a breach of this obligation.

Similarly, adopting laws and policies that create barriers for women and girls' access to healthcare services will be inconsistent with the obligation to respect. For instance, where access to health care services for adolescents is conditioned on the need for parental consent, this will be regarded as a breach

105 See General Comment 1 (n 88) paras 20-25.

106 African Charter, art 1.

107 General Comment 2 (n 69).

108 Maputo Protocol art 14(1).

109 Maputo Protocol art 14(1).

110 General Comment 14 (n 2) art 12.

111 Maputo Protocol art 14(1). This forms some of the specific obligations of the State. See General Comment 2 (n 69) paras 46-51.

112 Maputo Protocol art 14(1).

113 Paragraphs 20-21 of the General Comment on art 14 of the Maputo Protocol. See General Comment 1 (n 88).

of the obligation to respect. The conceptual difficulty lies in defining the boundaries of this obligation for various reasons. First, a conducive environment must be framed around the interests of the woman and the best interests of the girl-child in the context of a child rights-based approach.¹¹⁴ Second, ‘an enabler concept’ may be subjective depending on the cultural undertones of a given community. While access to contraception may be allowed in some communities, in others, it may be opposed for reasons based on cultural and religious grounds.¹¹⁵

States are expected to take steps to identify policies that condone stereotypes and cultures that devalue the agency and autonomy of women in making decisions concerning their sexuality since, arguably, these also constitute a direct violation of article 14.¹¹⁶ Any steps by the state that hinder women’s access to information on family planning and safe abortion services also violate this obligation.¹¹⁷ Regarding article 14, Ngwena states that this obligation requires African states to take concrete and positive measures to realise women’s sexual and reproductive health.¹¹⁸ This would require states to adhere to the principle of substantive equality.

5.2 Obligation to protect

In reference to the obligation to protect, the article calls on states to take measures to prevent third parties from interfering with these rights.¹¹⁹ It is documented that third parties may affect the enjoyment of the right to health and reproductive rights through various gender and cultural stereotypes attached to matters of sexual and reproductive health, in particular, abortion.¹²⁰

The obligation to protect extends to vulnerable groups such as adolescent girls, women with disabilities, women living with HIV and women in conflict situations.¹²¹ States parties have an obligation to formulate standards and guidelines regarding issues of consent and the involvement of third parties like parents, guardians, spouses and partners.¹²² Also, adult women and adolescent girls should not require third-party consent before deciding to access health services like family planning, contraception, and safe abortion services.¹²³ Importantly, states are obligated to ensure that healthcare providers’ attitudes do not hinder access to healthcare information and services for women and girls. Thus, judgmental attitudes by healthcare providers toward adolescent girls seeking sexual and reproductive health services will require the state’s intervention. Similarly, states are required to regulate the exercise of conscientious objection by healthcare providers regarding women seeking safe abortion services and provide mechanisms for dealing with any deleterious consequences that may result from such conscientious objection.¹²⁴

114 It is argued that the best interests’ principle is not objective but rather subjective depending on the perceived best interests of the child.

115 RD Nanima ‘Mainstreaming the “abortion question” into the right to health in Uganda’ in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa* (2021) 51.

116 This is evident from a reading of the Maputo Protocol art 14(1).

117 See General Comment 2 (n 69) para 42.

118 C Ngwena ‘Inscribing abortion as a human right: significance of the Protocol on the Rights of Women in Africa’ (2010) 32 *Human Rights Quarterly* 783.

119 See art 14(1)(d) & (e). See also General Comment on art 14, para 22 and General Comment 2 (n 69) para 43.

120 General Comment on art 14 of the Maputo Protocol para 23.

121 General Comment 2 (n 69) para 43.

122 As above.

123 As above. See generally, UN Committee on the Rights of the Child (CRC), General Comment 20 (2016) on the Implementation of the Rights of the Child During Adolescence, 6 December 2016, UN Doc CRC/C/GC/20.

124 S Nabaneh ‘Abortion and conscientious objection in South Africa: the need for regulation’ in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa: constraints and opportunities* (2021) 16.

5.3 Obligation to promote

States parties have an obligation to promote the rights in article 14 through the creation of legal, social and economic conditions to enable women to exercise their rights concerning sexual and reproductive health.¹²⁵ The state is expected to use mass mobilisation and sensitisation of the public on women's health and sexual rights at community levels, training various stakeholders such as healthcare workers, religious, traditional and political leaders on the importance of this right. These measures must inform women of the right to self-protection, including the right to be informed about their own HIV status and that of their partners.¹²⁶

5.4 Obligation to fulfil

The obligation to fulfil calls for the adoption of measures to ensure the realisation of the right.¹²⁷ It should be recalled that the right to health is a socio-economic right, which calls for engagement with the principle of progressive realisation.¹²⁸ For instance, concerning article 14(1)(d) and (e), states should adopt all the necessary measures, such as the allocation of adequate resources to realise the right to self-protection.¹²⁹ This obligation extends to the adoption of relevant laws, policies and programmes.¹³⁰ It also requires training and recruitment of skilled healthcare providers that are adequately remunerated.¹³¹

6 Implementation

States have adopted various measures toward the implementation of article 14. This section reviews state reports and concluding observations and evaluates the extent to which these measures align with the obligations identified above. The section concludes with a reflection on the role of different actors in implementing article 14.

6.1 Examples of state practices

Some states' practices demonstrate steps taken to implement the Maputo Protocol. Various constitutions provide for the right to health,¹³² while others, like Uganda, Nigeria and Zambia, provide for the same under non-binding Principles of State Policy.¹³³ Other countries are still drawing up strategic plans to provide a framework for the enjoyment of the right to health.¹³⁴ In one of its Concluding Observations

125 General Comment on art 14 of the Maputo Protocol para 23. See also General Comment 2 (n 69) para 46.

126 General Comment on art 14 of the Maputo Protocol para 23.

127 General Comment on art 14 of the Maputo Protocol para 24.

128 A discussion on the relation with other provisions in other instruments is captured in sec 5 below.

129 General Comment on art 14 of the Maputo Protocol para 24.

130 General Comment 2 (n 69) para 45.

131 As above.

132 These include the Constitutions of South Africa, Kenya, Democratic Republic of Congo, Benin, Zimbabwe and Rwanda. For instance, the Constitution of the Republic of South Africa 1996 provides in sec 27 that everyone has the right to have access to health care services, including reproductive health care services and no one may be refused emergency medical treatment. The Constitution of Kenya, 2010 provides in art 43(1)(a) that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

133 For instance, the Constitution of the Government of Uganda (1995) provides among its social and economic objectives that the State shall ensure that all Ugandans enjoy rights and opportunities and access to health services. See Initiative for Socio-economic Rights (ISER) 'Introduction to the right to health in Uganda: a handbook for community health advocates' (undated) <https://iser-uganda.org/publication/a-handbook-for-community-health-advocates/> (accessed 20 May 2023).

134 For instance, in Sierra Leone the Health Programme and the National Health Maternity Protection Strategic Plan of Sierra Leone address the plight of pregnant women and children aged five and below.

to the report of Malawi, the African Commission commended the government for its efforts towards addressing maternal mortality and improving post-natal care for women in hard-to-reach areas.¹³⁵ The Commission further commended the government for its efforts to domesticate the provisions of article 14 by enacting appropriate legislation such as the HIV and AIDS (Prevention and Management) Act 9 of 2018 aimed at advancing the right to health of women and girls in the country.¹³⁶ However, the Commission expresses concern about the silence of the government regarding the adoption of the Termination of Pregnancy Bill recommended by the Law Reform Commission.¹³⁷ Concerning the report of Kenya, the African Commission commended the government for improved efforts at addressing HIV/AIDS but expressed concerns regarding inadequate budgetary allocation to the health sector, which is inhibiting universal access to health care services for women and girls.¹³⁸ Thus, the Commission enjoined the government to increase allocation to the health sector. This notwithstanding, other serious challenges from a governance perspective persist. For instance, African States spend a lot on military, often to the detriment of other sectors like health.¹³⁹ Various countries spend much of their gross domestic product on military purchases with little expenditure on healthcare.¹⁴⁰ While it is true that some countries spend on both, more is spent on military ware.¹⁴¹

It should be noted that some of the special mechanisms of the African Commission have played an important role in ensuring a better understanding of the provisions of article 14 and states' compliance with it. Two of the special mechanisms stand out in this regard – the Special Rapporteur on Women in Africa¹⁴² and the Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV (HIV Committee).¹⁴³ These two mechanisms were instrumental to the adoption of General Comment 1 on article 14(1)(d) and (e) of the Maputo Protocol. In addition, the Special Rapporteur on Women in Africa has continued to play a crucial role in advocating for the decriminalisation of abortion in Africa and the need for states to ensure that their laws are consistent with article 14(2)(c).¹⁴⁴ The Special Rapporteur on Women in Africa has issued

135 African Commission Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (2015-2019) and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2005-2013) adopted during the 70th ordinary session of the African Commission on Human and Peoples' Rights 23 February-9 March 2022 para 68.

136 Concluding Observations and Recommendations Malawi (n 135).

137 Concluding Observations and Recommendations Malawi (n 135) 70. The Termination of Pregnancy Bill seeks to regulate abortion and clarify the instances in which it may be allowed for instance where there is possible risk of harm to the physical and mental health of the pregnant woman; in instances of incest, rape or sexual assault, and where the foetus may likely be born with a serious disability.

138 See African Commission Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya adopted at the 57th ordinary session 4-18 November 2015.

139 M Jakovljevic, Y Liu, A Cerda, M Simonyan, T Correia, RM Mariita & M Varjadic 'The Global South political economy of health financing and spending landscape – history and presence' (2021) 24 *Journal of Medical Economics* 25-33.

140 The World Bank indicates that although military spending in sub-Saharan Africa is the lowest globally, its military spending accounts for a substantial portion of both the region's gross domestic product (GDP) and overall government expenditure. It is estimated that the expenditure of 1.7 per cent of GDP by sub-Saharan Africa indicated the third highest regional military spending (and high burden globally, following North Africa (3.6% of GDP) and the Middle East (5.2% of GDP). See T Nan, W Pieter & Y Youngju *Military expenditure in sub-Saharan Africa* (SIPRI Policy Paper 48) Stockholm International Peace Research Institute (2018) 6 <https://www.sipri.org/sites/default/files/2018-11/sipripp48.pdf> (accessed 20 May 2023).

141 Nan et al (n 140) 6.

142 The Special Rapporteur on Rights of Women in Africa, one of the oldest mechanisms of the African Commission, was established by the African Commission at the 23rd Ordinary, which was held in Banjul, The Gambia, in April 1998.

143 The Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV was established by the African Commission on Human and Peoples' Rights with the adoption of Resolution 163 at the 47th ordinary session held in Banjul, The Gambia in May 2010.

144 For a detailed discussion on the activities of the Special Rapporteur on Women in Africa see, K Kariseb 'The responsibility of the mechanism of the Special Rapporteur on the Rights of Women in Africa in combating violence against women'

press releases¹⁴⁵ and embarked on mission visits to African countries to engage with policymakers and government institutions on this issue.¹⁴⁶ Similarly, the HIV Committee has produced a comprehensive report on HIV and the Law in Africa, which provides an overview of the nature, challenges and opportunities in addressing the HIV pandemic from a rights-based approach.¹⁴⁷ The report contains useful information on strategies and recommendations to different stakeholders to combat HIV and address the human rights challenges raised by HIV/AIDS. The HIV Committee has also visited some African countries to organise consultative meetings with government officials, civil society groups, and other stakeholders to address specific human rights issues in the context of HIV confronting the continent.¹⁴⁸

The role of civil society groups in ensuring accountability to realise the SRHR of women and girls in article 14 cannot be overemphasised. Through advocacy, monitoring and submissions of shadow reports to the African Commission, these organisations have kept states on their toes. One of the outcomes of the efforts of these organisations is the adoption of the Reporting Guidelines for States regarding the obligation under the Maputo Protocol. Prior to that time, there was no guidance as to what the contents of state reports should be and the progress that has been made to effectively implement the provisions of the Maputo Protocol at the national level. This is particularly important in the context of sexual and reproductive rights guaranteed in article 14, which have become subject to contestation and moralisation.

Also, the efforts of civil society groups in conjunction with the Special Rapporteur on Women in Africa led to the adoption in 2017 of the Guidelines to Combat Sexual Violence and its Consequences in Africa (Niamey Guidelines).¹⁴⁹ The Niamey Guidelines are crucial in articulating states' obligations to realise women's rights to sexual and reproductive health in article 14. It is a known fact that violence generally results in negative consequences for the health and well-being of women. Thus, the Niamey Guidelines provide very useful and detailed steps and measures that states should adopt to prevent and punish sexual violence and rehabilitate victims of sexual violence.

(2022) 33 *Stellenbosch Law Review* 42-57. See also, E Durojaye 'The Special Rapporteur on the Rights of Women in Africa 2007-2015' (2018) 16 *Gender and Behaviour* 10700-10709.

145 See for instance, Statement of the special Rapporteur on the Rights of Women on the occasion of the Global Day of Action for Access to safe abortion, where the Special Rapporteur on Women in Africa calls for a renewed efforts on the part of African countries to address death resulting from unsafe abortion. The Special Rapporteur on Women in Africa further calls on states to intensify efforts to decriminalise abortion and remove barriers to abortion services for women during COVID-19 era: ACHPR 'Statement by the Special Rapporteur on the Rights of Women in Africa, on the Occasion of the "Global Day of Action for Access to Safe and Legal Abortion"' <https://achpr.au.int/en/news/press-releases/2022-09-28/rights-women-africa-global-day-action-access-safe-legal-abortion> (accessed 15 May 2023).

146 See for instance Intersession Activity Report of Hon Lucy Asuagbor presented during the 66th ordinary session of the African Commission 13 July-7 August 2020, where the Special Rapporteur on Women in Africa called for the implementation of laws to ensure safe abortion services for women and girls.

147 UNAIDS *HIV, the law and human rights in the African human rights system: key challenges and opportunities for a rights-based responses* (2018).

148 Some of the countries visited by the HIV Committee for this purpose include Kenya, Benin Republic, Namibia Uganda, Côte d'Ivoire and Cameroon.

149 ACHPR Guidelines to Combat Sexual Violence and its Consequences in Africa (2017).

6.2 Implementation of article 14, reservations and interpretative declarations

It is worth noting that 42 states have ratified the Maputo Protocol.¹⁵⁰ Thirteen states have cited issues relating to the normative content of the right to sexual and reproductive health rights, such as access to safe abortion, as their reason for not ratifying the Maputo Protocol.¹⁵¹ This is an improvement from an initial number of 17.¹⁵² Five states have ratified the Protocol with reservations.¹⁵³

Concerning article 14, Cameroon stated in its reservation that the ratification of the Maputo Protocol 'should in no way be construed as endorsement, encouragement or promotion of '... abortion (except therapeutic abortion)'.¹⁵⁴ On the other hand, Kenya does not consider itself to be bound by article 14(2)(c) because it is 'inconsistent with the provisions of the Laws of Kenya on health and reproductive rights'.¹⁵⁵ A recent Court of Appeal decision in Kenya has broadened access to abortion services by affirming the right to privacy, which reduces the barriers to accessing therapeutic abortion. The court relied on General Comment 2 of the African Commission on article 14 of the Maputo Protocol¹⁵⁶ in holding that 'the right to therapeutic abortion, the practice of interrogation by healthcare providers, the police and/or judicial authorities is a violation of their right to privacy and confidentiality'.¹⁵⁷

Some countries entered interpretative declarations, which in some cases may have the effect of limiting the implementation of the Maputo Protocol. In some instances, however, interpretive statements have the effect of broadening the scope of implementation. Uganda, for instance, extends the right of a woman to control her fertility under article 14(1)(a) by specifying that it will apply to all women regardless of marital status. In the same statement, Uganda's reservation specifies that the state's obligation under article 14(2)(c) with regard to medical abortion will only be upheld as far as it is provided for by domestic legislation.¹⁵⁸ It is argued that this position of non-domestication is not a valid argument for non-fulfilment.¹⁵⁹ While there is no judicial clarification on the import of this reservation, the Ugandan Supreme Court has held that failure by the government to ensure access to quality maternal care services to women in rural areas, which resulted in avoidable death, amounted to a breach of the obligation under international and national law.¹⁶⁰ According to the court, this breach of obligation violates several rights of women guaranteed in the constitution and human rights treaties, including the Maputo Protocol and CEDAW.¹⁶¹ The court noted that failure to prevent maternal death undermines women's rights to life, health, dignity and non-discrimination. More importantly, the court noted that poor or inadequate health sector funding has contributed to high maternal mortality in the

150 These include Angola, Burkina Faso, Cameroon, DRC, Eswatini, Gambia, Kenya, Lesotho, Malawi, Nigeria, Mauritius, Namibia, Rwanda, Senegal, Seychelles, South Africa, Togo and Zimbabwe.

151 African Union 'Maputo Protocol Scorecard and index introduced to monitor implementation of Women's Rights' <https://bit.ly/3LBsmeJ> (accessed 23 June 2023).

152 These include Algeria, Botswana, Burundi, Central African Republic, Chad, Egypt, Eritrea, Ethiopia, Madagascar, Mauritius, Niger, Sahrawi Arab Democratic Republic, São Tomé and Príncipe, Somalia, South Sudan, Sudan and Tunisia.

153 These are Cameroon, Kenya, Namibia, Rwanda and South Africa.

154 See full text of the reservation in the Report of the Special Rapporteur on the status of implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Justice Lucy Asuagbor, Commissioner and Special Rapporteur on Rights of Women in Africa at the 60th meeting on the Commission on the Status of Women, 2 18 March 2016, <https://bit.ly/3PFEEaA0> (23 June 2023).

155 Report of the Special Rapporteur (n 154).

156 General Comment 2 (n 69).

157 Constitutional Petition *PAK and Mohammed v Attorney General* Malindi HC Const Pet No E009 of 2020 24.

158 For a detailed engagement of the abortion question in Uganda and the polarities presented by various groups, see Nanima (n 115) 51H.

159 The Vienna Convention on the Law of Treaties, art 27.

160 *Centre for Health Human Rights & Development v Attorney General* (Constitutional Petition 16 of 2011) [2012] UGSC 48 (5 June 2012).

161 *Centre for Health Human Rights & Development* (n 160).

country and amounted to discrimination against women. The court further urged the government to live up to its obligations under the Maputo Protocol and the Abuja Declaration by committing more resources to maternal health care services in the country.¹⁶²

7 Conclusion

There is tangible progress in the implementation of the Maputo Protocol. This is evident through the increased number of countries that are reporting on the implementation of the same; more positive steps on the adoption of various laws that are positives towards the use of abortion in Africa; constitutional recognition of the right to health; increased budgetary allocation to the health sector; and the need to use civil society to support states in both reporting processes and implementation of the obligations under article 14 of the Maputo Protocol. In addition, the fact that national courts are beginning to affirm the norms and standards of the Maputo Protocol as a yardstick presents a positive development for the future. The prospects for implementation of article 14 will be significantly improved if other courts across the region emulate this development.

States could invest in various critical practical measures to enable agency and empowerment of women to have control of their fertility, decide on the spacing and number of children, family planning, and modes of contraception. This requires going beyond the use of only legislative measures to other necessary measures such as sensitisation and mass mobilisation.

Deliberate efforts to provide adequate, affordable and accessible health services should be a priority for states to ensure the progressive improvement in reproductive health and rights. For instance, abortion remains the elephant in the room with various reasons that are pro and anti-abortion that do not place the lived realities of the African woman at the centre. This should be done as a step towards the implementation of the Maputo Protocol. States need to exhibit the political will to effectively implement the provisions of article 14.

162 The Abuja Declaration was a product of a meeting of 189 Heads of State adopted the Millennium Declaration, to improve social and economic conditions in the world's poorest countries by 2015, informed by a set of eight goals devised to track its progress. Some of the critical elements of the declaration included the pledge to allocate at least 15% of their annual budget to improve the health sector. See WHO 'The Abuja Declaration: Ten years later' <https://bit.ly/3cJwfD8> (accessed 23 June 2023).

Article 15

Right to food security

Trésor Muhindo Makunya and Mercy Bwanaisa

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

(a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;

(b) establish adequate systems of supply and storage to ensure food security.

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1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is the first international treaty to explicitly protect the right to food security. Before its advent, the legal protection of the right to food security could be deduced directly or indirectly from existing African and global human rights instruments.¹ Article 15 of the Maputo Protocol crowns

1 International Convention on Economic, Social and Cultural Rights, art 11 (right to food); Convention on the Elimination of All the Forms of Discrimination against Women (CEDAW) art 14 (right of rural women); UN Convention on the Rights of the Child (CRC) arts 24 & 27; African Charter on the Rights and Welfare of the Child (African Children's Charter) art 14 (health and health services) and, indirectly, from the African Charter on Human and Peoples' Rights (African Charter) arts 4, 16 & 22.

political and economic strides made by African states within and outside the African Union to ensure that the best attainable standard of living for women is protected by binding legal standards.² These standards are supplemented with a robust institutional framework comprising the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). These two human rights organs are mandated to deal with communications or complaints related to food security;³ the former can specifically review the implementation of article 15 by member states.⁴ This judicialisation of the right to food security, understood as the ability for individuals to bring food security-related claims before judicial and quasi-judicial mechanisms, ensures that the right of women to food security is not merely on paper.

Given the significance of women's right to food security in Africa, the normative and institutional frameworks safeguarding the right are vital. Women shoulder significant responsibility for ensuring personal and household food security in Africa. This responsibility is often explicitly reflected in the multiplicity of roles African women juggle in food systems, from agricultural production to consumption.⁵ African women make up 50 to 60 per cent of the agricultural labour force and are further involved in long hours of unpaid household work, including food gathering and preparation.⁶ Whether directly or indirectly involved in food system processes, African women are critical to individual, national and continent-wide food security levels.

Despite their quintessential role in food systems and food security, African women are highly represented in food insecurity and malnutrition statistics. As of 2018, 25.2 per cent of women in Africa were food insecure against 23.7 per cent of men.⁷ In addition, more women in Africa suffer from one or more forms of malnutrition, with underweight affecting an estimated 27-51 per cent of African women of reproductive age, while obesity is a challenge for 17 per cent.⁸ Intersectionality must be recognised in the way women face food security problems.⁹ Rural women, refugee women, internally displaced women, older women, women with disabilities or indigenous women are among the most vulnerable to food insecurity and malnutrition. The food security needs of these categories of women must therefore be considered and prioritised by states because of the disproportionate impact of food insecurity on their lives and dignity. For these reasons, including article 15 in the Maputo Protocol is a welcome development.

This chapter aims to unpack the normative content of article 15 by analysing its meaning, nature and scope. The chapter is divided into 7 sections, including this introduction. The next section details the drafting history of article 15. Section 3 examines the relationship between article 15 and other international human rights treaty provisions. Section 4 deals with critical concepts arising from article 15, followed by a discussion of the nature and scope of states parties' obligations in section 5. Section

2 R Murray *Human rights in Africa: from the OAU to the African Union* (2004) 253-255.

3 Maputo Protocol art 27.

4 Maputo Protocol art 28.

5 Kingdom of Eswatini Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa (2001-2019) para 551; African Commission Resolution on the Right to Food and Nutrition in Africa ACHPR/Res.431 (LXV) 2019 recognises the role women play in improving livelihoods especially in rural areas but acknowledges that their face the risk of being poor and malnourished.

6 Food and Agriculture Organization *The role of Women in Agriculture* (ESA Working Paper No. 11) Agricultural Development Economics Division <https://www.fao.org/3/am307e/am307e00.pdf> (2011) 3-17.

7 Food and Agriculture Organization & African Union 'Leaving no one behind: Empowering Africa's rural women for zero hunger and shared prosperity' (2018) 4 <https://www.fao.org/family-farming/detail/en/c/1153850/> (accessed 24 May 2023).

8 P Conceicao, R Fuentes-Nieva, L Horn-Phathanothai & A Ngororano 'Food security and human development in Africa: strategic considerations and directions for further research' (2011) 23 *African Development Review* 238.

9 J Bond *Global intersectionality and contemporary human rights* (2021) 2.

6 reviews measures of implementation by states parties, while section 7 concludes with broader reflections on article 15 and offers recommendations.

2 Drafting history

The Maputo Protocol's drafting history shows little debate on the normative content of the right to food security. During the inception meeting by the International Commission of Jurists and the African Commission in April 1997, aspects of the right to food security were protected under article 16 of the proposed Nouakchott Draft, guaranteeing the right of 'all women [to] have an equal right to men to have a healthy and adequate nutrition'.¹⁰ It was not identified as the 'right to food security' although the content of the provision resembles what is the right to food security in the Maputo Protocol today. In the 1999 Kigali Draft, article 16 went through a few linguistic clarifications and additions.¹¹ First, the indication 'right to food security' was added to the title of what then became article 17. Second, by contrast to the Nouakchott Draft, the Kigali Draft removed the reference to 'equal right to men,' simply guaranteeing women's right to 'access to nutritious and adequate food'.¹² Third, a few concepts were replaced with others,¹³ most notably, 'nutritional security' under article 17(1)(b), which was replaced with 'food security', the latter being broader in scope and content than mere 'nutrition'.¹⁴ The change from 'nutritional security' to 'food security' leaves one with the impression that the idea of framing the current article 15 as the right to food security only emerged during the Kigali meeting. While the normative content of the provision did not change significantly, framing this provision as one related to the right to food security has the potential of extending the protection to aspects of food security, for example, food prices and food safety, not explicitly mentioned under that provision but widely recognised in international law and by specialised 'food security' institutions.¹⁵

In the Final Draft¹⁶ and the Revised Final Draft,¹⁷ the right to food security became article 15 and 14, respectively. The notable modification was that instead of guaranteeing a qualified subjective right of women to food security as article 17 of the Kigali Draft did when it stated that 'women *shall have the right* to access to nutritious and adequate food',¹⁸ these provisions weakened the language in which the right to food security was couched by stating that '*states parties shall ensure that women have the right to nutritious and adequate food*'.¹⁹ This wording reflects the general understanding under international law that the realisation of socio-economic rights should be progressive and must consider resources

10 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft) 7.

11 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

12 Kigali Draft (n 11) art 17(1).

13 Eg, 'potable water' with 'clean drinking water'; 'domestic sources of energy' with 'sources of domestic fuel' as well as 'appropriate supply and storage systems so as to ensure their nutritional security' with 'adequate systems of supply and storage to ensure food security'.

14 DM Chirwa *Child poverty and children's rights of access to food and basic nutrition in South Africa: a contextual, jurisprudential and policy analysis* (2009) 10.

15 See broadly O de Schutter 'Building resilience: A human rights framework for world food and nutrition security', Report of the Special Rapporteur on the Right to Food, 8 September 2008, para 11.

16 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-65.

17 Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001 (Revised Final Draft).

18 Our emphasis. The South African Constitution sec 27(1)(b) provides: 'Everyone has the right to have access to sufficient food and water'.

19 Our emphasis.

available to the state.²⁰ In a 2003 meeting convened to discuss the Revised Final Draft, the Law Project of Equality Now and ten other women's rights organisations proposed that the auxiliary 'have' in the first sentence be replaced by 'enjoy' and that 'domestic' be removed.²¹ They also proposed that article 15(b) include a second limb which would read '... food security and *ensure that all family members, including girls, shall have access to nutrition and food*'.²² These proposed changes were not incorporated in the Addis Ababa Draft.²³

There is no evidence that the inclusion of women's right to food security was resisted at the various drafting and discussion meetings or by member states. Although the provision on women's right to food security was not the only uncontested provision during the drafting process,²⁴ the lack of opposition to this right offers several insights into the legal protection of the right to food security in Africa. First, the acceptance of article 15 may stem from the assumption that its content was not 'new' to African states, given that they had already committed to similar obligations provided for under relevant international human rights treaties.²⁵ Second, states that included the right to food security in their national constitutions may have viewed article 15 as nothing more than a restatement of their domestic commitment to an international treaty.²⁶ Last, article 15 could be interpreted as an effort by African countries to fill the normative lacuna left by the African Charter.²⁷ In any case, the relevance of article 15 in Africa is not in doubt, given the unequal effect of food insecurity on men and women, the latter bearing a heavy burden in feeding the family.

3 Linkages with other treaty provisions

This section explores the relationship between article 15 of the Maputo Protocol with other relevant international treaties. Article 15 can be said to have two types of relationships with other relevant provisions which enhance the quality of women's right to food security in Africa: an intra-textual, systemic and horizontal relationship with other provisions of the Maputo Protocol, the African Charter and its normative protocols, and other African human rights instruments. This is followed by a vertical relationship between article 15 and relevant global human rights treaties provisions. All these norms may constitute a system of legal norms that aim to improve women's food security in Africa and must be looked at as interlinked.²⁸

20 African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Socio-Economic Rights Principles) para 16; ICESCR art 2; UDHR art 22. L Hennebel & H Tigroudja *Traité de droit international des droits de l'homme* (2018) 1203-1204.

21 Revised Final Draft (n 17) 16 & 8.

22 Our emphasis. Revised Final Draft (n 17) 16.

23 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

24 Articles 16 & 17 were also adopted without amendment.

25 ICESCR art 11; CEDAW art 14; CRC arts 24 & 27; African Children's Charter art 14. The Universal Declaration of Human Rights, art 25 encapsulates the right to food security aspects.

26 South African Constitution secs 27(1), 28(1)(c) & 35(2)(e); Constitution of the Republic of Malawi, 1994 sec 30(2); Constitution of the Republic of Uganda, 1995 xxii. The Constitution of the Democratic Republic of the Congo (DRC), 2005 art 47(1) contains a right to food security.

27 L Chenwi 'The African system' in J Dugard, B Porter & D Ikawa (eds) *Research handbook on economic, social and cultural rights as human rights* (2020) 31; F Viljoen *International human rights law in Africa* (2012) 215. See also Report submitted by the Special Rapporteur of the Commission on Human Rights on the Right to Food Security to the UN General Assembly (28 August 2003) para 17.

28 See also B Nkrumah 'Opening Pandora's box: a legal analysis of the right to food in South Africa' (2019) 52 *De Jure Law Journal* 47, 55.

Human rights are interdependent, interrelated and indivisible.²⁹ This entails that article 15 must be read in conjunction with other rights in the Maputo Protocol, whether civil and political, socio-economic, or collective rights. Article 15 is linked to foundational women's rights provisions such as the elimination of discrimination against women (article 2), the right to dignity (article 3), the rights to life, integrity and security of person (article 4) and the elimination of harmful practices (article 5). Article 2 advances the right to food security by requiring states to ensure equal access of women and men to the means of production and to take positive or remedial action to redress historical imbalances rooted in harmful cultural or religious practices that have feminised most food-related household activities.³⁰

Dignity is central to every human right,³¹ so the realisation of women's right to food security is integral to upholding their dignity.³² While the distribution of food parcels to women in need can be lauded, a dignified approach should empower them to produce their own food.³³ The African Commission took this approach in *Endorois*.³⁴ Indigenous women for whom land is more than a commodity should be enabled to produce and consume food from their ancestral lands. In *ACHPR v Kenya*³⁵ the African Court ruled that the Ogiek, who are a Kenyan indigenous community, should enjoy 'the right to use (*usus*) and the right to the produce of [their ancestral lands] (*fructus*)'.³⁶ This presupposes their right to access and possession of the land. Violating these rights means the Ogiek 'have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands'.³⁷ Article 7 is critical to women's rights to food security, particularly regarding land ownership after separation, divorce and annulment of marriage.³⁸ Effective protection of the right to food security under article 15 goes hand in hand with assuring women can own land and property and that widows can inherit the land of their deceased spouse irrespective of the matrimonial regime.³⁹ Similarly, their right of access to justice to vindicate their right to food security must be ensured, as should their participation in decision-making regarding food programmes and relevant development projects. Access to drinking water, food sources, and arable lands can be hampered when peace is absent.⁴⁰ Therefore realisation of the right to peace is also central to food security.⁴¹

29 Vienna Declaration and Programme of Action (Vienna Declaration). The Preamble to the African Charter makes it clear that 'civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.

30 As explained in the introduction.

31 L Ackermann *Human dignity: lodestar for equality in South Africa* (2012).

32 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 65.

33 B Saul, D Kinley & J Mowbray *The International Covenant on Economic, Social and Cultural Rights: commentary, cases, and materials* (2014) 870.

34 *Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya (Endorois)* (2009) AHRLR 75 (ACHPR 2009) para 283.

35 *African Commission on Human and Peoples' Rights v Kenya (ACHPR v Kenya)* (merits) (2017) 2 AfCLR para 201.

36 *ACHPR v Kenya* (n 35) para 201.

37 As above.

38 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The right to property during separation, divorce or annulment of marriage (art 7(d), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia (19 February-4 March 2020) para 47. See CN Musembi 'Article 7' in this volume.

39 African Commission Resolution on Women's right to land and productive resources – ACHPR/Res.262 (LIV) 2013 (African Commission Resolution 262).

40 A Ujunwa, C Okoyeuzu & EU Kalu 'Armed conflict and food security in West Africa: socioeconomic perspective' (2018) 46 *International Journal of Social Economics* 182.

41 See *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) 251. See A Budoo-Scholtz 'Article 10' in this volume.

Articles 15 and 19 (on the right to sustainable development) can be said to be twin provisions in many respects. Food security programmes and plans of action are generally an integral part of national development policies and programmes. For women to effectively enjoy their right to food security, ‘access to and control over productive resources’, ‘access to credit, training, skills development and extension services at rural and urban levels’ must be guaranteed.⁴² Significantly, globalisation and neoliberal economic policies have reduced women’s control over productive resources, which are being grabbed by multinational corporations, with weakened state capacity for effective intervention. The impact of neoliberal policies and African countries’ liberal policies *vis-à-vis* foreign direct investment⁴³ must be minimised and appropriately checked to ensure full realisation of article 15.

Article 15 of the Maputo Protocol can also be linked to the African Charter and its other three normative protocols on the rights of older persons,⁴⁴ the rights of persons with disabilities⁴⁵ and on social protection and social security,⁴⁶ as well as with the African Children’s Charter. While all the rights under the African Charter are significant, those that deserve particular mention include:

- article 3 (equality and equal protection by and before the law both in its formal and substantive dimensions);
- access to public property and services (article 3(3));
- article 14 on the right to property;
- article 18(3) and (4) on the elimination of discrimination against women, including older and disabled women; and
- women’s rights to development, national and international peace and self-determination.

A combined reading of article 15 with article 14 of the African Children’s Charter enhances girls’ right to food security as the former complements aspects of food security not covered by the latter, just as the latter does for areas not dealt with under article 15, for example, the prevention of malnutrition within the framework of ‘primary health care through the application of appropriate technology’.⁴⁷

Three UN Conventions – two specific and the other general – have a direct relationship with article 15 of the Maputo Protocol. Article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) protects rural women’s rights in a manner that contains aspects of the right to food security. The notion of ‘rural’ represents a geographical area and a place where individuals are mainly excluded from ‘services and opportunities’.⁴⁸ Generally, women living in rural areas face unfavourable legal frameworks that exclude them from land ownership and the decision-making process. They are also victims of neoliberal economic policies. Article 14 of CEDAW, on which article 19 of the Maputo Protocol seems to have been modelled, lists critical considerations that further women’s rights to food security. Today, 45 African states have ratified/acceded to

42 See A Jegede & N Mulaudzi ‘Article 19’ in this volume.

43 T Mfete ‘Neo-liberalism and inequality in post-apartheid South Africa’ (2020) 14 *Pretoria Student Law Review* 412.

44 Adopted 31 January 2016.

45 Adopted 31 January 2016. See art 20 on the right to adequate standard of living.

46 Adopted 6 February 2022. See arts 19 (food and nutrition) and 22 (environment and climate change).

47 Article 14(1)(d) & (e).

48 F Banda ‘Article 14’ in MA Freeman, B Rudolf & C Chinkin (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* (2012) 359.

CEDAW,⁴⁹ 37 of which have also ratified the Maputo Protocol.⁵⁰ The protection afforded by these two treaties thus enhances the protection of women's right to food security. Furthermore, article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also captures a spate of elements relevant to the protection of the right to food security, as do articles 24 and 27 of the UN Convention on the Rights of the Child (CRC) for they seek to ensure that children's highest attainable standard of health and an adequate standard of living are met.⁵¹ Together, these human rights treaties complement already existing national standards on the right to food security.

The foregoing discussion in this section highlights that the approach to the interpretation of article 15 at the regional and domestic levels must consider the complex relationship the provision has with other relevant treaties and laws. Clearly, literalism as an approach to interpretation will fail to acknowledge these relationships and may lead to simplistic outcomes. A contextual, purposive and systemic interpretation will go a long way toward giving effect to what article 15 seeks to achieve. The African Commission should also be aware of the linkages between article 15 and other human rights treaties when reviewing measures of implementation adopted by states as described in their initial and/or periodic reports. It should also understand critical concepts arising from article 15 for meaningful examination of states' compliance with the right to food security.

4 Concepts and definitions

This section defines the following concepts: food security, nutritious food, adequate food, clean drinking water and domestic fuel sources.

4.1 Food security

The thinking around food security has undergone tremendous evolution since the 1940s when the concept first gained attention.⁵² This long history notwithstanding, food security is currently understood to exist 'when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.'⁵³ The foregoing definition encapsulates the accumulative understanding of the multidimensional nature of the concept over the years and adequately portrays food security as resting on six pillars or dimensions. These are availability, accessibility, utilisation, stability, agency and sustainability,⁵⁴ each discussed briefly below.

49 Office of the High Commissioner for Human Rights 'Ratification Status for CEDAW – Convention on the Elimination of All Forms of Discrimination against Women' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en (accessed 23 June 2023); Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Democratic Republic of Congo, Egypt, Eritrea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, South Sudan, Togo, Tunisia, Uganda, Tanzania, Zambia and Zimbabwe.

50 Of the above list, the following states have not ratified the African Women's Rights Protocol: Burundi, Botswana, CAR, Chad, Egypt, Eritrea, Morocco and South Sudan.

51 The Committee has developed these standards in two notable general comments; General Comment 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, adopted by the Committee at its 62nd session (14 January-1 February 2013) and General Comment 19 on Public Budgeting for the Realisation of Children's Rights adopted on 20 July 2016.

52 S Hendriks 'The food security continuum: a novel tool for understanding food insecurity as a range of experiences' (2015) 7 *Food Security* 609.

53 Food and Agriculture Organization 'Report of the World Food Summit' 13-17 November (1996) <https://www.fao.org/3/w3548e/w3548e00.htm> (accessed 23 June 2023). See also Socio-Economic Rights Principles (n 20) point k.

54 High Level Panel of Experts on Food Security and Nutrition (HLPE) 'Food security and nutrition: building a global narrative towards 2030. A report by the High-Level Panel of Experts on food security and nutrition of the Committee on World Food Security' (2020) 35; UN Committee on Economic, Social and Cultural Rights (Socio-Economic Rights

Availability as a dimension of food security entails an adequate supply of food that meets dietary needs⁵⁵ and is directly linked with systems, strategies, and structures that facilitate the efficient functioning of agricultural production, trade, transportation and storage mechanisms.⁵⁶ Adequate availability of food at the macro level is not sufficient for food security, especially when differentials in access to food exist at the household and individual levels. This explains the inclusion of accessibility as a dimension of food security. Accessibility refers to physical, social and economic access to adequate quantity and quality food.⁵⁷ While access to food is necessary, it is not sufficient to assure food security, particularly when the human body does not properly utilise accessible food. Therefore, utilisation in food security speaks to the consumption of safe foods rich in macro and micro-nutrients and the metabolism of those nutrients by the body for optimum physical and cognitive health.⁵⁸ Utilisation is complemented by access to safe drinking water, sanitation facilities, hygiene and health care.⁵⁹ Availability, accessibility and utilisation cannot thrive in isolation. They depend on the stability of the biophysical, political, economic and social environment within which people operate.⁶⁰ In addition to the four dimensions above, agency and sustainability have recently been explicitly considered dimensions of food security.⁶¹ Agency is concerned with people's autonomy in making individual or group decisions regarding the production and consumption of foods that meet their dietary needs without violating cultural and religious prohibitions.⁶² Sustainability speaks to using food systems without harming ecosystems and the political economy in the long run.⁶³ Ultimately, food security is a complex phenomenon, with all six of its dimensions intricately interlinked. In fact, food security is only realised when all six dimensions are attained simultaneously.

4.2 Nutritious food

The Global Alliance for Improved Nutrition (GAIN) has defined nutritious food as

a food that, in the context where it is consumed and for the individual who consumes it, provides beneficial nutrients (e.g., vitamins, major and trace minerals, unrefined complex carbohydrates, protein, unsaturated fats, essential amino acids, essential fatty acids, and dietary fibre) and minimises potentially harmful elements (e.g., trans fats, excess quantities of saturated fats, free sugars, and sodium).⁶⁴

This definition aligns with the Food and Agricultural Organisation of the United Nations (FAO) definition of the same and with the Voluntary Guidelines set out by the Committee on World Food Security on Food Systems and Nutrition.⁶⁵ To date, a single, universally accepted method for categorising

Committee) General Comment 12, The right to adequate food (art 11), 20th session, 12 May 1999, E/C.12/1999/5 para 11.

55 C Barret 'Measuring food insecurity' (2010) 375 *Science* 825.

56 Barret (n 55).

57 Food and Agriculture Organization 'Food security information for action: Practical guides. An introduction to the basic concepts of food security' (2008) 3 <https://www.fao.org/3/a1936e/a1936e00.pdf> (accessed 20 May 2023).

58 Barret (n 55).

59 Hendriks (n 52).

60 As above.

61 HLPE (n 54) 35; General Comment 12 (n 54).

62 As above.

63 As above.

64 Global Alliance for Improved Nutrition (GAIN) *GAIN's definition of nutritious and safe foods*. (GAIN Briefing Paper No 8) (2021) DOI: <https://doi.org/10.36072/bp.8>.

65 Committee on World Food Security (CFS) 'Voluntary guidelines on food systems and nutrition' adopted at the 47th Session of the Committee on World Food Security 8-11 February (2021) 6, para 19; Food and Agriculture Organization 'Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security' adopted by the 127th Session of the FAO Council November 2004 (2005) 38 para 10(3).

individual foods as nutritious does not exist, partly because the process of such categorisation has to consider a myriad of internal and external factors like individual nutritional requirements, which vary according to age, sex, physical activity, lifecycle, health, genetics, among others.⁶⁶ That classification would be possible in the face of a lot of context-specific data, which is often missing, especially in most parts of Africa.

4.3 Adequate food

In General Comment 12, the Socio-Economic Rights Committee unpacks the term ‘adequate food’ as a combination of three factors: availability, accessibility and adequacy.⁶⁷ Availability speaks to the ability of people to feed themselves either from their own production or from well-functioning food supply systems that can move food from production points to consumption points. Accessibility entails that food sources should be within easy reach of individuals both in physical proximity and economic terms. Adequacy is achieved when the food consumed is free from contaminants and meets all of an individual’s dietary needs according to sex, age, health status, physical activity and living conditions without violating cultural and religious prohibitions.⁶⁸

4.4 Access to clean drinking water

Clean drinking water is free from chemical, biological and radiation contaminants and of an acceptable odour, colour and taste, used for personal and domestic purposes. Access to clean drinking water is pivotal to food security because clean water facilitates the effective absorption and utilisation of nutrients by the body.⁶⁹ Unsafe and unclean drinking water can promote ill health caused by waterborne diseases and intestinal infections.⁷⁰ Poor health affects the body’s ability to absorb nutrients and increases the risk of malnutrition.

Africa is home to almost half of the people without access to safe water. The rural African population is disproportionately affected. For example, in 2012, 47 per cent of the African population without access to safe, clean drinking water lived in rural areas.⁷¹ Collectively, it is reported that women in Africa spend nearly 40 billion hours each year collecting water, face physical safety risks, lose time for education and income-generating activities, and risk health problems due to the physical toll of carrying heavy loads.⁷² Improvement in the food security outcomes of African women is closely tied to the ability of water supply facilities and services in their respective countries to provide water in adequate quantities and quality in addition to having water sources within physical and economic reach.

66 GAIN (n 64) 1.

67 General Comment 12 (n 54) 3-4, paras 9-13.

68 General Comment 12 (n 54).

69 N Vilakazi, K Nyirenda & E Vellemu ‘Unlocking water issues towards food security in Africa’ in B Mahmoud (ed) *Food security in Africa* (2021) 2.

70 High Level Panel of Experts on Food Security and Nutrition (HLPE) ‘Water for food security and nutrition. A report by the High-Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security’ (2015) 11 <https://www.fao.org/3/a-av045e.pdf> (accessed 20 May 2023).

71 HLPE (n 70) 11.

72 UN Women ‘Facts and figures’ <https://www.unwomen.org/en/news/in-focus/commission-on-the-status-of-women-2012/facts-and-figures> (2012) (accessed 5 June 2022).

4.5 Sources of domestic fuel

Most foods need some form of cooking before they are consumable and digestible. This makes access to fuel sources integral to food security and to the realisation of the right to adequate food.⁷³ In Africa, more than 70 per cent of the population relies on wood fuel, mainly in the form of charcoal or firewood for cooking.⁷⁴ Charcoal is commonly used in urban centres, while firewood is the default fuel in rural areas.⁷⁵ Fuel wood collection and procurement and food preparation are gendered activities. The workload falls disproportionately on women and girls. Women and girls work longer days than men finding and providing fuelwood. In trying to provide energy for household use, women are exposed to physical threats (injuries or animal attacks) and suffer from ‘time poverty.’⁷⁶ Women spend time that could be used for income generation, food production and other activities on seeking out fuel wood. It thus behoves states, based on their obligations flowing from article 15, to alleviate the plight of women facing food insecurity.

5 Nature and scope of state obligations

The right to food security generates the obligation ‘to respect, protect, promote and fulfil’ generally recognised under international human rights law.⁷⁷ Food security imposes positive and negative duties on member states, and there is no hierarchy among these obligations; states must meet them on equal terms. One needs to look at whether measures adopted by states have met all the six elements of food security – availability, accessibility, utilisation, stability, agency, and sustainability⁷⁸ – in relation to women.

5.1 The obligation to respect women’s right to food security

The obligation to respect the right to food security imposes a duty on states not to interfere with how women exercise this right, for example, by letting women freely choose the methods and resources for food production as they deem suitable.⁷⁹ Non-interference includes refraining from practices, such as concessions on agricultural or customary land, to companies without providing alternative cultivable lands for food production.

The notion of state, irrespective of the form of government and the nature of its political system of governance, encompasses the triad of central government – the executive, the legislature and the judiciary – and sub-national levels of government as well as its organs. Drawing on the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, state organs would include private entities vested with public law mandates.⁸⁰ A violation of the right to food security by a private company empowered to build roads in rural areas through a public-private

73 P Sola, C Ochieng, J Yila & M Iiyama ‘Links between energy access and food security in sub-Saharan Africa: an exploratory review’ (2016) 8 *Food Security* 636.

74 Sola et al (n 73) 636.

75 R Mendum & M Njenga ‘Integrating wood fuels into agriculture and food security agendas and research in sub-Saharan Africa’ (2018) 3 *Facets* 1-11.

76 Africa Renewable Energy Access Program (AFREA) ‘Wood-based biomass energy development for sub-Saharan Africa: Issues and approaches’ (2011) 11 <https://openknowledge.worldbank.org/bitstreams/2102a5a7-54b5-57c5-a8a5-4164e8b16b30/download> (accessed 20 May 2023).

77 Socio-Economic Rights Principles (n 20) para 7.

78 General Comment 12 (n 54) paras 7-13.

79 Socio-Economic Rights Principles (n 20) para 5.

80 Adopted by the Commission at its 53rd session (2001) art 5. See J Crawford *The International Law Commission’s Articles on State Responsibility: introduction, text and commentaries* (2002) 100.

partnership cannot be considered as falling outside the ambit of the state's obligation to respect the right to food security.⁸¹

5.2 The obligation to protect women's right to food security

Apart from the obligation to respect, states have the obligation to protect the right to food security which entails adopting positive measures 'to ensure that non-state actors such as multinational corporations, local companies, private persons, and armed groups'⁸² do not violate women's right to food security. The African Commission draws two conclusions from this obligation.⁸³ First, states must regulate and monitor the activities of non-state actors, which may adversely affect the exercise of women's right to food security. The Commission has reiterated this obligation in several cases implicating the violation of human rights by multinational corporations alone or with the complicity of state agents.⁸⁴ In *SERAC*, Nigeria contravened its obligations under the Charter for failing to prevent private parties from destroying and contaminating 'food sources', which prevented people's ability to achieve their food needs.⁸⁵ States are accountable for actions conducted by private parties because only states may be held accountable for human rights violations under the human rights law regime.⁸⁶ Armed groups are enjoined to protect women's right to food security in so far as they exercise 'government-like functions' in areas they largely control.⁸⁷ Land grabbing can leave women deprived of their land.⁸⁸ The African Commission urged states to protect women from such deprivations and evictions, which adversely affect their livelihoods.⁸⁹ Second, states must ensure that legislation which imposes a duty on private parties to respect the right to food security is implemented and appropriate remedies provided to victims.⁹⁰ The remedies may range from administrative to judicial and quasi-judicial. Not only should women victims be able to approach courts and tribunals, but also emerging independent institutions such as human rights or gender equality commissions should be empowered to receive complaints and issue remedial orders that courts of law can enforce.⁹¹

5.3 The obligation to promote women's right to food security

States must adopt measures to enhance people's understanding of women's right to food security and of mechanisms that are in place to protect the right.⁹² The African Charter, the Maputo Protocol and some constitutions impose on states the duty to educate their citizens, including women, on the

81 Eg, South Africa's Promotion of Administrative Justice Act 3 of 2000 sec 1(b) defines an 'administrative action' to include actions or omissions by private entities exercising 'a public power or performing a public function in terms of an empowering provision'.

82 Socio-Economic Rights Principles (n 20) para 7.

83 As above.

84 *Institute for Human Rights and Development in Africa v Democratic Republic of Congo*, Communication 393/10, 9-18 June 2016 paras 101-102.

85 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 65-66.

86 EA Posner *The twilight of human rights law* (2014) 52.

87 J-M Henckaerts & C Wiesener 'Human rights obligations of non-state armed groups: an assessment based on recent practice' in E Heffes, MD Kotlik & MJ Ventura (eds) *International humanitarian law and non-state actors: debates, law and practice* (2019) 208-212.

88 J Chu 'Gender and "land grabbing" in sub-Saharan Africa: women's land rights and customary land tenure' (2011) 54 *Development* 35.

89 African Commission Resolution 262 on Women's right to land and productive resources ACHPR/Res.262 (LIV) 2013.

90 Socio-Economic Rights Principles (n 20) para 7.

91 The Commission for Human Rights and Administrative Justice of Ghana is empowered under sec 9 of its 1993 Act to 'bring an action before a Court in the Republic and may seek a remedy which is available from that Court'. The South African Human Rights Commission has brought before courts several petitions under sec 184(3) of the 1996 South African Constitution.

92 Socio-Economic Rights Principles (n 20) para 8.

rights, freedoms and duties that are enshrined in those texts.⁹³ Women have a fundamental right to be educated on food security. Awareness-raising has been considered an effective means through which states may see to it that their organs and private parties, especially in rural areas, understand the normative content of rights and mechanisms to protect them. Due to the technical nature of the right to food security, states should rely on technical cooperation with national and international specialised institutions⁹⁴ to produce sensitisation materials in plain English and other languages for everyone. Promoting the right to food security also entails the adoption of administrative and judicial decisions that advance the values and objectives of the right. The African Commission, when considering states' reports, should engage state representatives on the extent to which the obligation to promote the right to food security was realised. In its report, Malawi indicated that sensitisations on women's right to land in rural areas was conducted as part of its efforts to promote the right to food security.⁹⁵ Other states should emulate Malawi's example.

5.4 The obligation to fulfil women's right to food security

States must take steps to advance women's right to food security in the form of legislative, administrative, judicial and other measures which are 'comprehensive, co-ordinated, transparent, and contain clear goals, indicators and benchmarks for measuring progress'.⁹⁶ The number of women who have access to quality and adequate food of their choosing, as well as efforts to increase women's purchasing power must be demonstrated as part of states' efforts to fulfil the right to food security. These efforts should not remain merely theoretical; they must be enforced through clear programmes. These programmes must also aim to remove cultural, traditional and other barriers to realising women's rights to food security. Despite efforts by Cameroon to increase women's ownership of land – which was met with significant custom-related barriers, the number of women participants reached still remains low.⁹⁷ The African Commission may review whether states have established specific institutions whose role is safeguarding food-related women's rights.

A state's obligation to progressively realise socio-economic rights within its available resources was read into the African Charter and is applicable to the right to food security.⁹⁸ The existence of national plans and policies on food security shows that states are aware they should move expeditiously towards food security for women, which would be a proxy indicator for food security overall. Each of the six elements of food security must be examined against the backdrop of the number of women country-wide who are food secure. Intersectionality is key for such an analysis. Emphasis must be placed on the most vulnerable of all women, starting from rural women, women with disabilities, older women, internally displaced women, women deprived of liberty, and sexual minority women, including transgender women and girls.⁹⁹

93 Socio-Economic Rights Principles (n 21) para 8; Maputo Protocol, art 12; 1990 Constitution of Benin art 40; 2006 Constitution of DRC art 45.

94 General Comment 12 (n 54) para 36. See also 10th, 11th, 12th, 13th, and 14th Periodic reports of the Islamic Republic of Mauritania on the Implementation of the provisions of the African Charter (July 2016) 64-65.

95 Malawi: 2nd to 3rd Periodic Report on the African Charter and the Maputo Protocol (May 2015 to March 2019) para 242.

96 Socio-Economic Rights Principles (n 20) para 10.

97 Single Report Comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter and 1st Report relating to the Maputo Protocol and the Kampala Convention (2015-2019) paras 881-883. The state, both national and sub-national, should therefore enact internal policies and regulations, which advance a culture promoting women's right to food security.

98 Socio-Economic Rights Principles (n 20) para 13.

99 African Commission Resolution on the Right to Food and Food Insecurity in Africa ACHPR/Res.374(LX) 2017 (African Commission Resolution 374).

Women's right to food security may also contain a minimum core obligation where states may be expected to show that they have allocated their available resources to meet the core content of the six food security elements with regard to women.¹⁰⁰

It is relevant to emphasise the duty not to adopt 'retrogressive measures'¹⁰¹ that reduce the enjoyment of the right to food security. The validity of these measures under the African Charter is subjected to stringent conditions. If a state adopts a retrogressive measure, it must demonstrate that such a measure is reasonable and justified, that it is the least intrusive means toward the enjoyment of the right to food security, that meaningful and informed participation of affected women was sought, that the measure was not discriminatory in nature and application and that local remedies were provided to the affected group.¹⁰² The African Court has started to use this test to assess states' compliance with their socio-economic rights' obligations.¹⁰³ The African Court can therefore adopt this test in future to scrutinise measures employed by states towards the enjoyment of the right to food security.¹⁰⁴

Overall, the African Court and the African Commission should review states' compliance with their obligations under article 15 of the Maputo Protocol by using the 'respect, protect, promote and fulfil' framework. It provides a holistic picture during the examination of state reports on a state's progress toward realising all six limbs of the right to food security. The African Commission has not employed this approach in monitoring compliance with article 15 during the examination of states' reports.¹⁰⁵ In its publicly available Concluding Observations, the Commission does not allude to issues relevant to women's rights to food security either.¹⁰⁶

6 Measures of implementation

A review of the state practice reveals the adoption of a myriad of constitutional, legislative and policy measures to realise state obligations under article 15. In this section, we analyse what states have achieved in the area of women's rights to food security. The analysis is based on a review of 18 reports submitted to the African Commission at the time of writing pursuant to article 26 of the Protocol.

100 R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2019) 33.

101 S Liebenberg 'Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression' (2021) 37 *South African Journal on Human Rights* 188-191.

102 Socio-Economic Rights Principles (n 20) para 20.

103 Sébastien Germain Marie Aïkoué Ajavon *v Benin* (merits and reparations) (4 December 2020) 4 AfCLR 133 para 137; TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* 1262-1263.

104 On art 6-related adjudication, see BK Kombo 'Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389-413.

105 Some aspects of food security are recommended under the right to property, see Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of The Gambia on the Implementation of the African Charter (1994-2018) and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2005-2014), African Commission on Human and Peoples' Rights, adopted at its 31th extraordinary session (19-25 February 2021) para 59 21-22.

106 Concluding Observations and Recommendations on the 2nd and 3rd Combined Report of Malawi (23 February-9 March 2022); Concluding Observations and Recommendations on the Combined 2nd Periodic Report under the African Charter and the Initial Report under the Maputo Protocol submitted by South Africa (9 to 18 June 2016); Concluding Observations and Recommendations on the Periodic and Combined Periodic Report of the Democratic Republic of Congo on the Implementation of the African Charter and Initial Report on the Implementation of the Maputo Protocol (21 October-10 November 2019).

6.1 Conflating food security with hunger and poverty

In reporting on the implementation of women's right to food security, some states, including the Democratic Republic of Congo (DRC)¹⁰⁷ and Lesotho,¹⁰⁸ reported on measures adopted to address issues like hunger. While hunger and food security are intricately interlinked, they are not interchangeable, and efforts made by states towards ending hunger cannot, on their own, be used to represent progress towards achieving food security.¹⁰⁹ The concept of hunger relates to the inadequate consumption of dietary energy resulting in an uncomfortable physical sensation and, at the macro level, is usually measured by a country's general food availability against the country's food needs.¹¹⁰ By contrast, food security is concerned with more than simply the sufficient intake of dietary energy. As defined earlier, food security is concerned with the availability, access and utilisation of safe and nutritious food while also considering stability, agency and sustainability issues surrounding the production, distribution and consumption of food.¹¹¹ Measures instituted by states to combat hunger are necessary but insufficient to address the multidimensionality of food security concerns.

Similarly, states like Angola¹¹² presented the measures put in place to reduce poverty. Indeed, poverty and food insecurity have a bidirectional relationship. Poverty is an underlying cause of food insecurity, and it undermines a person's ability to acquire nutritious food either through own production or purchase.¹¹³ At the same time, inadequate access to food and nutrition is an underlying cause of poverty. Nevertheless, poverty alleviation measures may not always translate into improved food security outcomes unless the interlinkages between poverty and food security are properly mapped out and leveraged in the implementation of poverty reduction measures.¹¹⁴ What states can do instead is to clearly demonstrate the pathways through which hunger and poverty alleviation measures will lead or have led to improvement in women's general food security outcomes. This element is missing in the state reports. Ideally, in the absence of a universal food security indicator, states can report on measures they have adopted towards improving the various dimensions of food security, namely, availability, access, utilisation, stability, agency and sustainability, using existing indicators to measure these dimensions. Taking this route will be more representative of the food security situation than simply reporting on hunger and poverty.

6.2 Adoption of measures not related to food security

In certain reports, countries adopt measures that do not directly provide comprehensive solutions to food security issues. Some of the reported measures revolve around the provision of agricultural support. In Africa, agriculture is an important driver of economic growth and a source of livelihood for much of the continent's population. Agriculture can be an important lever for improving household food security, nutrition outcomes and incomes and raising millions of people out of poverty.¹¹⁵ However, the reality of much of the African agriculture sector is that there is a disconnect between

107 Democratic Republic of Congo Combined 11th, 12th and 13th Periodic Reports 2008-2015 on the African Charter and Initial and 1st, 2nd and 3rd Periodic Reports on the Maputo Protocol (2017) paras 266, 269 & 270.

108 Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter and Initial Report under the Maputo Protocol 2001-2017 (April 2018).

109 FAO (n 57).

110 As above.

111 HLPE (n 70) 6-11.

112 Republic of Angola 6th Periodic Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Maputo Protocol 2011-2016 (January 2017).

113 FAO (n 57) 3.

114 As above.

115 JM Alston & PG Pardey 'Agriculture in the global economy' (2014) 28 *Journal of Economic Perspectives* 135.

agriculture and important elements of food security like nutrition and access.¹¹⁶ The design of existing agricultural interventions, programmes and policies emphasises improving agricultural productivity and food availability while hardly impacting on equally important components for food security like food distribution channels, marketing infrastructure or nutrition outcomes. Besides, agriculture sector policy strategies such as fertiliser subsidies, import subsidies and price regulation are often criticised for being driven more by political economy considerations than a concern for food security and adequate nutrition.¹¹⁷

Kenya,¹¹⁸ Lesotho,¹¹⁹ Malawi,¹²⁰ Mauritania,¹²¹ Rwanda,¹²² and Togo¹²³ report on policy interventions supporting the agricultural sector in the form of input subsidies, training programs and economic inclusion. While these measures may arguably be commendable for agricultural development, they may not directly translate into improved food security and nutrition outcomes. For example, while subsidies, which are issued mainly for staple food production, may improve the aggregate staple food availability in the country, food security and nutrition will not improve unless the subsidising of staple production is complemented by measures that ensure availability, access and utilisation of a wide range of diverse, safe and nutritious foods.¹²⁴ Investment in agriculture is only beneficial to food security outcomes if it leads to direct consumption of what is produced (nutritious food) or offers the means to people to access nutritious foods. The same reasoning applies to other agriculture support measures adopted by states, such as training and livestock breeding. These measures can only lead to improved food security outcomes if their direct links with food security are properly leveraged. South Africa¹²⁵ acknowledges that food security goes beyond the availability of food and highlights measures put in place to tackle other dimensions of food security, like nutrition. However, the nutrition information available in the report focused on children and the general population and did not specifically address women.¹²⁶

116 P Pingali 'Agricultural policy and nutrition outcomes-getting beyond the preoccupation with staple grains' (2015) 7 *Food Security* 583.

117 L Sneyd 'We eat what we have, not what we want: the policy effects of food riots and eating after 2008 crisis in Cameroon' in N Hossain & P Scott-Villiers (eds) *Food riots, food rights and the politics of provisions* (2017) 106 & 109; CN Musembi & P Scott-Villiers 'The constitution lies to us! Food protests in Kenya, 2007-2012' in N Hossain & P Scott-Villiers (eds) *Food riots, food rights and the politics of provisions* (2017) 146; L de Brito, E Chaimite & A Shankland 'Authoritarian responsiveness and the *greve* in Mozambique' in N Hossain & P Scott-Villiers (eds) *Food riots, food rights and the politics of provisions* (2017) 168.

118 Republic of Kenya Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (April 2020) para 274.

119 Lesotho Combined Reports (n 108) para 470.

120 Malawi Combined Report (n 95) para 239.

121 Mauritania Combined Periodic Reports (n 94) para 2.

122 Republic of Rwanda the 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the Implementation Status of the African Charter on Human and Peoples' Rights & the Initial Report on the Implementation Status of the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa (Maputo Protocol) (2009-2016) para 97.

123 Togolese Republic 6th, 7th and 8th Periodic Reports of the State of Togo on the Implementation of the African Charter on Human and Peoples' Rights (August 2017) para 616.

124 H Walls et al 'The impact of agricultural input subsidies on food and nutrition security: A systematic review' (2018) 10 *Food Security* 1425 & 1428.

125 Republic of South Africa Combined 2nd Periodic Report under the African Charter and Initial Report under the Maputo Protocol (August 2015) para 450.

126 South Africa Combined Report (n 125) paras 452, 455 & 456.

Countries like Cameroon¹²⁷ and Togo¹²⁸ report that they adopted land registration and policy interventions to ensure access to land so as to improve food security. Clarity on whether the land is for agricultural purposes, the productivity of that land, whether it is going to be used for the production of food security-enhancing crops and whether there are any measures in place for women to have access to that land is lacking. It is one thing to put in place land access interventions. It is entirely another for women to benefit from institutionalising those interventions and improving their personal and household food security. Besides, Cameroon reports that rural women may still face cultural hindrances in their ownership of land, implying that land registration initiatives still leave many women behind. Meanwhile, Mauritania¹²⁹ specifically adopted measures that grant developed agricultural land to women's cooperatives. However, without data on the proportion of women in the country who belong to women's cooperatives, it is difficult to assess the impact of this measure on women's food security.

Measures that involve the financial and economic inclusion of women, as reported by Namibia¹³⁰ and Rwanda,¹³¹ need clarification on how and whether they promote women's right to food security. Namibia, reporting on women's access to financial services, states that the country does not restrict women from getting loans from banks. This statement assumes that a lack of restrictions at national policy level is a sufficient condition for women to access loans that could be pivotal in improving food security. The statement fails to acknowledge the underlying issues that impede women's access to loans and other financial services, which include women's lack of control over productive assets that could serve as collateral for obtaining loans. The lack of restrictions will not guarantee or foster women's access to financial services. Relatedly, The Gambia¹³² reports on loan availability for the general population of farmers. However, the food security benefits from access to loans will only accrue if that loan is used to ensure food security.

In addition to reporting on measures that have complex linkages with food security, many countries failed to interlink food security (particularly nutrition) with some of its important determining factors, such as health. Research has long established that health and nutrition reinforce one another.¹³³ The causal nexus between health and nutrition is such that poor nutrition leads to ill health, while ill health could lead to poor nutrition.¹³⁴ While the foregoing scenario depicts the vicious cycle of poor nutrition and ill health, the converse is also true. In this light, one would hope to see nutrition-health interlinkages mapped out in the reports. However, out of the 18 countries covered, only Angola, Rwanda and South Africa explicitly linked women's nutrition with the realisation of their health and reproductive rights.

6.3 The presentation of population-wide measures and statistics

Another inadequacy that was observed in the states' reports was the tendency to highlight general measures that apply to the food security situation of the country's entire population, not just women. As already established, African women face unique challenges in attaining food security. Therefore, measures that address these challenges must contain features that consider and recognise the uniqueness of the obstacles faced by women. For example, Togo¹³⁵ reports on the measures the country put in

127 Cameroon Single Report (n 97) paras 877-879.

128 Togo Combined Periodic Reports (n 123) para 616.

129 Mauritania Combined Periodic Reports (n 94) para 2.

130 Namibia 7th Periodic Report on the African Charter (2015-2019) and the Second Report under the Maputo Protocol (2020) para 27(10).

131 Rwanda Combined Periodic Reports (n 122) para 97.

132 Gambia Combined Report on the African Charter (1994 and 2018) and Initial Report under the Maputo Protocol (August 2018) 111.

133 Vilakazi (n 69).

134 As above.

135 Togo Combined Periodic Reports (n 123) paras 617-620.

place to improve access to land and access to drinking water. While such efforts are commendable, the report is not clear on how these measures have specifically protected and catered for women's right to food security. A similar generalisation issue can be observed in reports presented by Burkina Faso,¹³⁶ Eswatini,¹³⁷ Namibia,¹³⁸ Seychelles,¹³⁹ and South Africa.¹⁴⁰

The best practice in future reports and actions would be to disaggregate the general statistics by gender to facilitate a clear distinction of women's access to measures that governments have put into place. Aggregated data, as presented in the prior-mentioned reports, are not truly reflective of the situation of women. For example, as Togo reports on the works it has put in place to improve the national safe drinking water supply, the country reports a 48 per cent supply rate.¹⁴¹ However, that data is a national aggregate, and the proportion of women benefiting from that water supply rate increase is unclear. Regional differentiation of the data would reveal even deeper disadvantages for specific categories of women, such as rural women. The same case can be observed in the South African report. Therefore, the drafting of state reports should include specialised civil society organisations (CSOs) and research institutes so that they can provide accurate and well-documented data on women's food security situation in the country.¹⁴² The African Commission should equally encourage CSOs to submit shadow reports.

6.4 Focus on certain groups of women

The right to food security under the Maputo Protocol should be a reality for all African women. While we recognise the disproportionate impact of food insecurity on rural women as compared to urban women, the latter must not be side-lined in state measures.¹⁴³ Extensive focus on rural women can perpetuate the idea that food insecurity is mainly a rural problem and further contribute to the invisibility of the food insecurity that women in urban areas equally face. Women in urban areas are also often susceptible to food insecurity due to their over-dependence on the cash economy and volatile markets for their food needs. The situation is worse when these urban women face insecure and low-paying employment. Government efforts to address women's food security should comprehensively cover women irrespective of their location. In addition, some of the measures are focused on the reproductive nature of women, for instance, in the report by The Gambia.¹⁴⁴ These measures are directly linked to improving women's food security and nutrition before, during and after pregnancy. While the nutritional needs of women of reproductive age are critical and should therefore be prioritised,¹⁴⁵ reproduction should not be the main or only reason efforts are made to improve the food security situation of women. Women should have access to adequate nutrition at all life stages regardless of whether they choose to reproduce or not. Measures put in place should foster food security and nutrition outcomes for women as, first and foremost, human beings who need good nutrition for a healthy and active life, not merely as reproduction conduits.

136 Periodic Report of Burkina Faso on the Implementation of the African Charter and Initial Report on the Implementation of the Maputo Protocol (January 2015) paras 55-57.

137 Eswatini Combined Reports (n 5) paras 553-564.

138 Namibia Periodic Reports (n 130) paras 27(2)-27(4).

139 Seychelles Initial Report on the Maputo Protocol (2019) paras 15(1)-15(2).

140 South Africa Combined Report (n 125) para 460.

141 Togo Combined Periodic Reports (n 123) para 620.

142 On the DRC, see TM Makunya 'Beyond legal measures: a review of the Democratic Republic of Congo's initial report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2023) 67(2) *Journal of African Law* 230-231.

143 Cameroon Single Report (n 97) paras 881, 885 & 886.

144 Gambia Combined Report (n 132) 158-159.

145 FAO, ECA & AUC 'Africa-regional overview of food security and nutrition 2021: Statistics and trends' (2021) 32 <https://reliefweb.int/attachments/e9041375-bca4-3d44-b5bc-ef414f12f6ca/cb7496en.pdf> (accessed 20 May 2023).

6.5 The lack of judicial measures

Since modern African constitutions incorporate or give effect to international human rights treaties,¹⁴⁶ one can expect that state reports include information on how article 15 is being used to enhance the protection of women's right to food security, in particular before domestic courts. No state provided such information. To our knowledge, this provision has not been invoked before domestic courts either, although there is a potential that it could become the stepping stone for developing comprehensive jurisprudence on women's right to food security. In *Equal Education v Minister of Basic Education*, the High Court of South Africa (Gauteng Division) ruled that the respondents violated the right of learners to basic nutrition by failing to roll out the National School Nutrition Plan (NSNP).¹⁴⁷ Given the NSNP's pivotal role in providing daily meals to learners, 50 per cent of whom are from poor backgrounds, suspending the program plunged half of the learners nationally into food insecurity which had potentially adverse effects on their ability to study.¹⁴⁸ The Court was of the view that learners' right to basic nutrition was not subject to the progressive realisation clause.¹⁴⁹ The Court did not tether provisions of the Constitution of the Republic of South Africa, 1996 (South African Constitution) related to the right to food to article 15 of the Maputo Protocol or to article 14(2) (c) of the African Children's Charter – to which South Africa is a party. Arguably, this would have strengthened the protection of learners from poor backgrounds, particularly girls. However, the Court did cite provisions of other international human rights instruments, namely, articles 24, 27(2) and 27(3)¹⁵⁰ of the UN Convention on the Right of the Child, its General Comment 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health,¹⁵¹ and 19 on Public Budgeting for the Realisation of Children's Rights (article 4),¹⁵² as well as article 11 of the ICESCR. The latter prompted the Court to strictly scrutinise the state's retrogressive measures with respect to the right to food.¹⁵³ In *Wary Holdings v Stalwo*,¹⁵⁴ the Constitutional Court of South Africa ruled that 'equitable access to "agricultural land"' and the obligation to protect the environment were integral parts of the state obligation to protect the right to food, to make food available and accessible.¹⁵⁵ While not representing a continental jurisprudential trend on (women's) right to food (security),¹⁵⁶ both cases point to the existence in South Africa of ample opportunities for litigants and judges to use article 15 when women's right to food security is at stake. In this era of 'intra-African cross-fertilisation' of constitutional and human rights ideas,¹⁵⁷ these cases may inspire litigants and courts elsewhere in Africa to foster a judicial culture protective of women's right to food security.

Still, whether domestic courts can apply article 15 will largely depend on every state's approach to international human rights instruments and the ability of litigants to rely on international law-based arguments. Article 15 is more likely to be invoked in jurisdictions with constitutions that enjoin judges to 'consider' international law when interpreting human rights or to further an interpretation

146 M Killander 'The effects of international law norms on constitutional adjudication in Africa' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017).

147 *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 34.

148 *Equal Education* (n 147) paras 32-33.

149 *Equal Education* (n 147) para 54.

150 *Equal Education* (n 147) para 39.1.

151 CRC/C/GC/15 adopted on 17 April 2013.

152 CRC/C/GC/19 adopted on 20 July 2016.

153 *Equal Education* (n 147) para 46.

154 *Wary Holdings v Stalwo* 2009 (1) SA 337 (CC).

155 *Wary Holdings v Stalwo* (n 154) para 85.

156 B Nkrumah *Seeking the right to food: food activism in South Africa* (2021) 83-89.

157 C Fombad 'The diffusion of South African-style institutions? A study in comparative constitutionalism' in R Dixon & T Roux (eds) *Constitutional triumphs, constitutional disappointments: a critical assessment of the 1996 South African Constitution's local and international influence* (2018) 360.

that is consistent with international law.¹⁵⁸ Whether monist or dualist, the obligation to take necessary measures to implement international human rights law places a duty on judges and other state actors to construe the meaning of women's right to food security in a manner that is consistent with international law and democratic ideals, values and principles propelled by the Protocol and the African Charter as a whole.¹⁵⁹

7 Conclusion

Food security remains key to improving the lived realities of women and girls in Africa. Article 15 is a legal contribution to the existing social, economic and political initiatives the African Union, its partners, and African states have undertaken to reduce the effect of food insecurity. The nature of obligations that it imposes on states and non-state actors are wide and comprehensive to combat actions detrimental to food security as state and corporate development projects are increasingly likely to deprive women of their livelihoods, such as land¹⁶⁰ or render the land unproductive. A legal provision cannot be expected to cover all the aspects of social life. In this regard, the systemic linkages between article 15 and other relevant provisions strengthen the latter's capacity to transform regressive policies at the domestic and regional levels.

National and international cooperation is also necessary for this provision to realise its potential. Sadly though, the provision has not attracted much attention in the work of the African Commission and national judicial bodies. The African Commission has not placed significant emphasis on article 15 when reviewing states' reports, although some of its resolutions have underlined member states' obligations to improve women's rights to food security and reminded those that have not done so to ratify the Protocol. Furthermore, the example of courts in South Africa suggests that article 15 can be used as the launchpad for developing robust food security jurisprudence in order to alleviate the plight of women and girls. Overall, the impact of article 15 will depend on states' readiness to see to it that legislative and policy measures adopted in the area of food security are accompanied by actions aiming at raising the awareness of critical societal actors on women's rights to food security and women's rights literacy so that the multifaceted barriers to the enjoyment of the right are removed.

States should develop programs and policies that are specific to women's right to food security, which intentionally acknowledge and address underlying obstacles to women's food security. Existing programs and policies lack grounding in and are divorced from the specific realities of African women and therefore are inadequate and unlikely to improve food security outcomes for women. Better responses could be geared towards addressing the root causes of women's food insecurity. These root causes include insecure land tenure, inequitable access to productive resources, unfair labour burden, and inadequate education. States must also clarify and leverage the interconnectedness of food security with other sectors. Food security is inherently complex, and it is linked across multiple sectors of the economy, from agriculture to health, environment, trade, energy, law and finance. Intersecting policies must map out and leverage pathways that will support women's food security. Third, states' policies must go beyond the 'inclusion' of women. Current measures do not seem to take women as equal, fully embodied individuals that should fully participate in the development processes around them, including food security matters. The measures adopted by states highlight statements like 'inclusion of women' or 'include rural women', all of which could be indicative of women lacking a seat at the table, as though their participation was an afterthought. Policy action must move beyond hollow promises. Lastly, research institutions should collect and publish quality quantitative and qualitative economic

158 South African Constitution secs 38 & 233.

159 TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen et al (eds) *A life interrupted: essays in honour of the lives and legacies of Christof Heyns* (2022) 475.

160 European Parliament *Land grabbing and human rights: The involvement of European corporate and financial entities in land grabbing outside the European Union* (2016) 7.

data that are disaggregated by sex and other relevant markers, such as regional disparity. This data and research would help highlight the diverse experiences of women and how best to address issues that face them.

Article 16

Right to adequate housing

Magnus Killander

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

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1 Introduction

Access to housing is an integral part of an adequate standard of living.¹ As set out by the African Commission on Human and Peoples' Rights (African Commission), the right to housing entails access to a 'safe and secure home and community in which to live in peace and dignity'.² In reality, however, many women, men, non-binary persons, and children live in squalor.³ While inadequate housing affects many people living in poverty there is a clear gender dimension.⁴ This requires states to take specific measures to address the right to adequate housing for women. As noted by Chenwi and McLean:

A gendered, or feminist, perspective on women and housing focuses on the lived reality of poor women and women-headed households, and the survival strategies employed by these women. It also provides a critique of the ways in which existing laws, policies and social practices perpetuate their situation.⁵

Article 16 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) provides one avenue to address the gendered dimension of inadequate housing. Article 16 provides for the right to access to housing of women, that women have the right to acceptable living conditions in a healthy environment and that in all aspects of the

1 Universal Declaration of Human Rights art 25(1).
2 African Commission on Human and Peoples' Rights 'Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights (2011) para 78.
3 United Nations Statistics Division 'Make cities and human settlements inclusive, safe, resilient and sustainable', <https://unstats.un.org/sdgs/report/2021/goal-11/> (accessed 2 April 2023).
4 See eg United Nations *Women and the right to adequate housing* (2012).
5 L Chenwi and K McLean "A woman's home is her castle?" – Poor women and housing inadequacy in South Africa' (2009) 25 *South African Journal on Human Rights* 517.

right to access to housing, women should be treated equally to men, including that there should be no discrimination based on marital status.

This chapter is organised into six sections. Following this introduction, the second section discusses the drafting history of Article 16 and some possible impetus for the inclusion of Article 16 in the Maputo Protocol. This is followed in section 3 by a discussion of the key concepts addressed by the article. Section 4 analyses the nature and scope of state obligation under article 16 while the fifth section examines state practice in relation to implementation, drawing primarily on state reporting to the African Commission. The concluding section makes suggestions to the African Commission on how to further strengthen its engagement on the right to adequate housing of women.

2 Drafting history

The right to housing was incorporated in the early stages of the drafting of the Maputo Protocol. The 1997 Experts' Meeting included the right to housing provision in what eventually became Article 16 of the Maputo Protocol.⁶ Article 17 of the draft adopted at the 1997 meeting provided:

All women have an equal right to men to have adequate housing in acceptable housing conditions in a healthy environment. To that effect, State Parties undertake to enable women, whatever their matrimonial status, to have access to adequate housing.

Article 18 of the draft adopted at the November 1999 meeting adopted the formulation that was retained in the final protocol adopted in July 2003 as Article 16.⁷ The linguistic changes included that there was no longer any explicit comparison with men and that the first sentence of the article provides for a right to 'access to housing' rather than a right to housing.

As illustrated in the next section, equal access to housing had not been singled out previously as of major concern in human rights treaties. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) refers to access to housing for rural women but does not provide any detail. The impetus to include the housing provision in the draft Protocol may have been the 1995 Beijing conference on women's rights.⁸ Further incentive may have come from the Habitat II Agenda adopted in Istanbul in 1996.⁹ Women's rights NGOs pushed for the inclusion of the gender dimension of housing on the agenda. In 1996, Schlyter noted:

One of the controversial issues at the UN conferences in Cairo and Beijing was if a woman should have power to be in control over her own body, her sexuality and her fertility. Women's control over land and houses was another controversial issue on which discussions will continue at the Habitat II conference in Istanbul.¹⁰

6 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

7 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft) art 18.

8 United Nations, Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995, A/CONF.177/20/Rev.1, para 58(m): Governments should 'Enable women to obtain affordable housing and access to land by, among other things, removing all obstacles to access, with special emphasis on meeting the needs of women, especially those living in poverty and female heads of household'.

9 Report of the United Nations Conference on Human Settlements (Habitat II), Istanbul, 3-14 June 1996, A/CONF.165/14.

10 A Schlyter (ed) *A place to live: gender research on housing in Africa* (1996) 6.

The Habitat II Agenda highlighted the link between access to housing and the empowerment of women:¹¹

Women have an important role to play in the attainment of sustainable human settlements. Nevertheless, as a result of a number of factors, including the persistent and increasing burden of poverty on women and discrimination against women, women face particular constraints in obtaining adequate shelter and in fully participating in decision-making related to sustainable human settlements. The empowerment of women and their full and equal participation in political, social and economic life, the improvement of health and the eradication of poverty are essential to achieving sustainable human settlements.

To sum up, while CEDAW made provision for the right to access to housing for rural women, there was an increasing realisation in the 1990s that the issue of access to housing for women was important to address more generally. The Beijing conference on women's rights and the Habitat II conference on human settlements put this on the agenda of the international community and provided the impetus for the inclusion of the issue in the Maputo Protocol.

3 Concepts and definitions

The right to housing is included as part of the right to an adequate standard of living in the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Universal Declaration in article 25 sets out that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family', including housing. The ICESCR in almost identical wording provides in article 11(1):

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The gendered language of the provisions on an adequate standard of living is clear to everyone and may represent the prevalent view at the time of men as breadwinners and heads of households. However, arguably 'his' and 'himself' should be read as gender neutral. This reading finds support in the use of the word 'everyone', as elsewhere in the ICESCR and the Universal Declaration, which could hardly refer only to men. The Committee on Economic, Social and Cultural Rights noted in General Comment 4 on the right to housing:¹²

The right to adequate housing applies to everyone. While reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups.

That it was necessary to refer to 'female-headed households', a term still commonly used, is one illustration of the fact that patriarchy was still the norm in 1991 when the General Comment was adopted, and still reflects the assumption as to gender roles today, more than 30 years after the adoption of the General Comment. In patriarchal societies, where men are often viewed as the 'head

11 Habitat II (n 9) para 15.

12 Committee on Economic, Social and Cultural Rights, General Comment 4: The Right to Adequate Housing (art 11(1) of the Covenant) (1991) para 6.

of the household' women are, in many different ways, discriminated against in relation to housing.¹³ In General Recommendation 29, the CEDAW Committee criticised 'laws stating that the man is the head of the household, thus giving him the role of sole economic agent as well.'¹⁴

The right to housing is also reflected in a number of other UN human rights treaties, including CEDAW which refers to access to housing as part of 'adequate living conditions' of rural women in article 14(2)(h).

At the African regional level, the African Charter on the Rights and Welfare of the Child¹⁵ (African Children's Charter) provides for the duty of the state to assist parents and other caretakers in need with 'material assistance and support programmes ... with regard to nutrition, health, education, clothing and housing'.¹⁶

The right to housing is not explicitly provided for in the African Charter on Human and Peoples' Rights (African Charter).¹⁷ However, the African Commission in *SERAC*,¹⁸ held that the right was implied in the right to property, health and protection of the family as set out in the African Charter.¹⁹

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.

The African Commission's Guidelines on Economic, Social and Cultural Rights (ESCR Guidelines) set out that the right to housing entails 'the right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity'.²⁰ This entitlement 'includes access to natural and common resources, safe drinking water, energy for cooking, heating, cooling and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services'.²¹ Further, as noted by the African Commission in the *SERAC* case the right to shelter 'extends to embody the individual's right to be left alone and to live in peace – whether under a roof or not'.²²

Chenwi notes how the African Commission draws on General Comment 4 of the UN Committee on Economic, Social and Cultural Rights (ESCR Committee).²³ The ESCR Committee's factors for determining 'adequacy' of housing are therefore also relevant in the African regional context. These

13 See eg M Sobantu 'Revisiting gender and housing: Housing as seen through the eyes of women in social rental housing in Gauteng, South Africa' (2020) 56 *Social Work* 63.

14 General Recommendation 29 on art 16 of the Convention on the Elimination of All Forms of Discrimination against Women (economic consequences of marriage, family relations and their dissolution) (2013), UN Doc CEDAW/C/GC/29 para 36.

15 African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) (African Children's Charter).

16 African Children's Charter art 20(2)(a).

17 African Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986) art 20(2)(a).

18 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

19 *SERAC* (n 18) para 60.

20 African Commission (n 2) para 78.

21 As above.

22 *SERAC* (n 18) para 61.

23 L Chenwi 'The right to adequate housing in the African regional human rights system: convergence or divergence between the African Commission and South African approaches' (2013) 17 *Law, Democracy & Development* 21.

factors include legal security of tenure; availability of services, materials, facilities and infrastructure, affordability; habitability; accessibility; location; and cultural adequacy.²⁴ It is noticeable that the Committee does not explicitly address issues of discrimination against women and gender-based vulnerability apart from highlighting the applicability of Article 11 to women as quoted above and calling for a broad and inclusive interpretation of ‘family’.²⁵ In contrast, a number of UN reports and resolutions over the last two decades have dealt with women’s access to housing.²⁶

The right to housing is interlinked with many other rights such as non-discrimination, an adequate standard of living, dignity, security, protection against domestic violence, access to land and rights at the dissolution of marriage through divorce or the death of a spouse. These related rights are reflected in the Maputo Protocol: article 2 (elimination of discrimination against women), article 4 (the rights to life, integrity and security of the person), article 5 (elimination of harmful practices), article 6 (marriage), article 7 (divorce), article 8 (equal protection of the law), article 18 (healthy environment), article 21 (inheritance) and article 24 (women in poverty). The related important issue of access to land is dealt with in the Protocol’s provisions on food security (article 15) and sustainable development (article 19). Despite the many provisions that are interlinked with the right to housing, some aspects are not explicitly addressed in the Protocol. For example, the Protocol makes no mention of the need to ensure that women and their dependents are not rendered homeless on account of domestic violence. Another issue that is not explicitly addressed in the Protocol but clearly linked to ‘acceptable living conditions’ is access to water and sanitation.

4 Nature and scope of state obligations

4.1 Equal access to housing

The African Commission has gone further than the ESCR Committee in considering the gendered dimension of access to housing. The African Commission in its ESCR Guidelines calls on states to ‘[i]mplement measures to ensure that titles to housing and land are conferred on women, and that they are able to access housing and land independently’.²⁷ States should further ‘ensure fair and equitable inheritance of land and rights in housing regardless of sex’.²⁸ Women should ‘enjoy equal rights to compensation for violation of their housing rights as men. Single women and widows should be entitled to their own adequate level of compensation’.²⁹ In its Resolution on Women’s Right to Land and Productive Resources, the Commission encouraged states to take special measures to ensure equal treatment in social housing projects.³⁰

24 CESCR General Comment 4 (n 12) para 8.

25 CESCR General Comment 4 (n 12) para 6.

26 See, eg, ‘Women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing’, Report of the Secretary-General submitted in accordance with Commission resolution 2001/34, E/CN.4/2002/53; UN Commission on Human Rights resolution 2002/49, Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing; Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, Women and their right to adequate housing, A/76/408 (2011); Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Balakrishnan Rajagopal, Discrimination in the context of housing, A/76/408 (2021); United Nations (n 4).

27 African Commission (n 2) para 79(q).

28 African Commission (n 2) para 79(p).

29 African Commission (n 2) para 79(r).

30 African Commission on Human and Peoples’ Rights, Resolution on Women’s Right to Land and Productive Resources – ACHPR/Res.262(LIV)2013, para 4.

4.2 Acceptable living conditions in a healthy environment

The right to acceptable living conditions in a healthy environment is a right that applies equally to men and women. The gendered dimension that the Maputo Protocol seeks to address is that in most countries, women are overrepresented among those living in unacceptable and unhealthy conditions.³¹ States must therefore approach the progressive realisation of the right to acceptable living conditions with a gendered lens. The African Commission defines the minimum core in relation to acceptable living conditions as ‘basic shelter for everybody’.³² Of course, this does not just mean a roof over one’s head. The Commission’s guidelines on economic, social and cultural rights for example highlight the importance of providing access to water and sanitation ‘taking into account the needs of women and children’.³³

Acceptable living conditions arguably include that household chores are equitably divided among the members of the household. Thus, the Commission has called on states to ‘[e]nsure that women and girls are not denied enjoyment of their rights because of a disproportional share of child care and other domestic responsibilities within the family’.³⁴

The Commission in its ESCR Guidelines called on states to

[e]nsure the equal rights of women and men to protection from forced evictions and the equal enjoyment of the human right to adequate housing and security of tenure. Implement measures to ensure that titles to housing and land are conferred on women, and that they are able to access housing and land independently.³⁵

The Commission further in its resolution on adequate housing further noted that: ‘women, children and other vulnerable groups suffer disproportionately from forced evictions and their effects’.³⁶ Given its practical relevance, it is surprising that the Maputo Protocol does not explicitly deal with the issue of forced eviction.

4.3 Marital status

The last sentence of Article 16 reads as follows: ‘[t]o ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.’ This aims to deal with discrimination in access to housing on the grounds of being unmarried, married, divorced or widowed. The most common such discrimination would be against married women. An example would be not paying housing allowances to female employees who are married, on the assumption that they are housed by their husbands.

5 State practice/implementation

The right to housing is linked to property ownership which throughout Africa is dominated by men.³⁷ There are few examples of formal gender discrimination in statutory law concerning access to housing

31 UN-Habitat ‘11.1 Adequate housing’, <https://unhabitat.org/11-1-adequate-housing> (accessed 5 April 2023).

32 African Commission (n 2) para 79(c).

33 African Commission (n 2) para 92(s) & (t).

34 African Commission (n 2) para 95(z) (right to family).

35 African Commission (n 2) para 79(q).

36 African Commission on Human and Peoples’ Rights, Resolution on the Right to Adequate Housing and Protection from Forced Evictions – ACHPR/Res.231(LII)2012.

37 I Gaddis, R Lahoti & W Li ‘Gender gaps in property ownership in sub-Saharan Africa’ (30 August 2018) <https://papers.ssrn.com/abstract=3246145> (accessed 31 July 2022). See also I Gaddis, R Lahoti & H Swaminathan ‘Women’s legal rights and gender gaps in property ownership in developing countries’, 21 January 2021 <https://blogs.worldbank.org/>

in Africa. Some example of legal discrimination is provided in the CEDAW Committee's Concluding Observations on Cameroon where it called on the repeal of provisions of the Civil Code which recognises the husband as the head of the household, the choice of residence by the husband and the administration of family property and of the wife's property by the husband.³⁸

Customary law or patriarchal misuse of customary law by male relatives remain a challenge in many African states. The words of one of the participants in a Ugandan study would resonate with many women across the continent: 'Even sons, *your own blood* can send you, the mother away. They know women do not inherit real estate. You end up with only cups and baskets.'³⁹

The approach to reporting on the right to housing in state reports submitted by states which have ratified the Maputo Protocol varies. Benin,⁴⁰ The Gambia,⁴¹ Kenya,⁴² Mali,⁴³ Mauritius,⁴⁴ Mozambique,⁴⁵ Nigeria⁴⁶ and Senegal⁴⁷ only provide a general discussion of the right to housing as it relates to various articles of the African Charter. Burkina Faso,⁴⁸ Cameroon,⁴⁹ Lesotho,⁵⁰ Mauritania,⁵¹

developmenttalk/womens-legal-rights-and-gender-gaps-property-ownership-developing-countries (accessed 23 June 2023).

- 38 Concluding observations on the Combined 4th and 5th Periodic Reports of Cameroon, Committee on Elimination of Discrimination against Women (9 March 2014), UN Doc CEDAW/C/CMR/CO/4-5 (2014) para 38(a).
- 39 J Ahikire "'Cutting the coat according to the cloth": decentralisation and women's agency on land rights in Uganda', Final report under the project entitled: Decentralization, Land Rights and the Construction of Women's Citizenship: A Comparative Study of Uganda, Kenya and Tanzania, 29 December 2010.
- 40 Benin Combined Periodic Report from the 6th to the 10th Periodic Reports on the implementation of the provisions of the African Charter on Human and Peoples' Rights, 2009-2018.
- 41 Gambia 2nd Periodic Report on the African Charter on Human and Peoples' Rights and initial Report on the Protocol to the African Charter on the Rights of Women in Africa 1994-2018. However, the Report notes that the Women's Act provides that women should have equal access to housing, 159.
- 42 Kenya's Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the initial report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2015-2021.
- 43 Mali 2nd to 7th Combined Periodic Report to the African Commission on Human and Peoples' Rights relating to the implementation of the African Charter on Human and Peoples' Rights, 2001-2011.
- 44 Mauritius 9th to 10th Combined Periodic Report on the implementation of the African Charter on Human and Peoples' Rights 2016- 2019.
- 45 Report from the government of the Republic of Mozambique submitted in terms of art 62 of the African Charter on Human and Peoples' Rights (Combined Report 1999-2010).
- 46 Nigeria's 6th Periodic Country Report – 2015-2016 on the implementation of the African Charter on Human and Peoples' Rights in Nigeria, 66-67.
- 47 Periodic Report on the implementation of the African Charter on Human and Peoples' Rights presented by the Republic of Senegal, April 2013, 59-60.
- 48 Periodic Report of Burkina Faso within the framework of the implementation of art 62 of the African Charter on Human and Peoples' Rights, 53-56.
- 49 Single Report comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention [2020], 33-35, 67-70.
- 50 Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and initial Report under the Protocol to the African Charter on the Rights of Women in Africa, April 2018.
- 51 10th, 11th, 12th, 13th and 14th Periodic Reports of the Islamic Republic of Mauritania on the implementation of the provisions of the African Charter on Human and Peoples' Rights, July 2016.

Namibia,⁵² Rwanda,⁵³ South Africa,⁵⁴ and Togo⁵⁵ include housing in general in the discussion on the implementation of the African Charter while setting out the implementation of the gendered dimension separately in the section on implementing the Maputo Protocol, even though a general discussion on housing is often included also in the Maputo Protocol section. The Democratic Republic of the Congo (DRC)⁵⁶ discusses housing only in the section on the implementation of the Maputo Protocol while the report of Seychelles only covers the implementation of the Maputo Protocol.⁵⁷ Angola⁵⁸ and Eswatini⁵⁹ only discuss housing under article 16 of the Maputo Protocol but do not refer to how the various housing initiatives set out in the report affect women at all. Malawi reported on the implementation of both the African Charter and the Protocol but provided very little information about housing.⁶⁰

Most state reports focus the discussion on access to adequate housing on the provision of subsidised housing.⁶¹ The reports rarely provide any information specifically about women's access to subsidised housing, though the report of The Gambia notes that '[d]espite the numerous initiatives to make adequate housing affordable, owning a home remains a problem in the country particularly for women who tend to take on low paid jobs which affect their ability to afford such housing schemes.'⁶² States which included separate sections on implementation of the Maputo Protocol generally highlighted how the various housing programmes reported on were implemented in a non-discriminatory manner.⁶³ Some highlight that customary law may stand in the way of women's access to adequate housing.⁶⁴ Important measures such as requiring registration of subsidised housing in the name of both spouses, as provided for in South Africa,⁶⁵ is not discussed in the state reports. There is not much discussion about forced evictions in the state reports.⁶⁶ The DRC report takes note of the disadvantage faced by women in accessing housing but does not provide any details or say what the state is doing to address

52 Republic of Namibia 7th Periodic Report (2015-2019) on the African Charter on Human and Peoples' Rights and the second Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2020.

53 The 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the implementation status of the African Charter on Human and Peoples' Rights & the initial Report on the implementation status of the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa (Maputo Protocol) (2009-2016).

54 Republic of South Africa, Combined 2nd Periodic Report under the African Charter on Human and Peoples' Rights and initial Report under the Protocol to the African Charter on the Rights of Women in Africa, August 2015.

55 Togolese Republic, 6th, 7th and 8th Periodic Reports of the state of Togo on the implementation of the African Charter on Human and Peoples' Rights, August 2017.

56 Democratic Republic of the Congo, Report to the African Commission on Human and Peoples' Rights on the implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005 to 2015 (initial Report and 1st, 2nd and 3rd Periodic Reports).

57 Republic of Seychelles, Country Report 2019 Protocol to the African Charter on Human and Peoples' Rights of Women in Africa.

58 Republic of Angola, 6th and 7th Report on the implementation of the African Charter on Human and Peoples' Rights and initial Report on the Protocol on the Rights of Women in Africa, January 2017.

59 Republic of Eswatini, Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and initial Report to the Protocol to the African Charter on the Rights of Women in Africa.

60 Republic of Malawi, Periodic Report on the African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019.

61 See eg Benin (n 40) 43; Kenya (n 42) 52-54; Mali (n 43) 39; Mauritius (n 44) 46-51; Mozambique (n 45) 32-33; Nigeria (n 46) 66-67.

62 Gambia (n 41) 160.

63 See eg Cameroon (n 49) 146-147.

64 Burkina Faso (n 48) 39.

65 O Elliot 'A place to call my own: the significance of housing for women' (8 March 2019) <https://www.fsdafrica.org/news/a-place-to-call-my-own-the-significance-of-housing-for-women/> (accessed 23 June 2023).

66 However, see Burkina Faso (n 48) 53-54.

this situation.⁶⁷ The most detailed discussion about challenges encountered by women is found in the Lesotho state report. The report notes that one of the key challenges is the provision in Lesotho's Constitution permitting gender discrimination under customary law.⁶⁸

Section 18(4) of the Constitution of Lesotho allows for discrimination based on customary law. As a result many women have been expelled from their marital and /or maiden homes and left with no housing on the basis of customary law principles on marriage and inheritance. For instance, in the case of *Ramatlapeng v Jessie*, the Court of Appeal of Lesotho upheld a decision of the High Court that a woman who has returned to her maiden home to seek solace from her husband's ill-treatment without divorcing her husband, 'ngala' does not have a right to live in her maiden home indefinitely.

Discussion linking the right to housing to women's rights in the state reports and Concluding Observations is limited. For example, the report of Burkina Faso notes, '[t]here is no discrimination in housing. Men and women enjoy the same right to housing. The housing policies and programmes considered earlier in this report aim at promoting this right'.⁶⁹ To this the Commission responds in its Concluding Observations, '[t]he Commission commends Burkina Faso for promoting a non-discrimination policy in the area of housing, ensuring that men and women have equal rights of access to housing'.⁷⁰ Nothing in Burkina Faso's report gives assurance that the absence of discrimination in law has resulted in the achievement of substantive equal access to housing, yet the Commission takes the state report at face value. Although in other Concluding Observations the Commission has criticised states for not doing enough to ensure access to housing for women, it could certainly take a more engaging approach.⁷¹ Despite Lesotho's admission that it faced numerous challenges about the implementation of article 16, not least, from the constitution itself, the Commission did not enquire into measures that Lesotho intended to take to overcome those challenges, apart from a general call for constitutional reform to remove article 18(4)(c).⁷²

It is relevant to compare the African Commission's Concluding Observations with those adopted by the CEDAW Committee.⁷³ The Committee has in a number of Concluding Observations highlighted the importance of access to housing for rural women. It has further highlighted the vulnerability of

67 DRC (n 56) para 285.

68 Lesotho (n 50) para 484.

69 Burkina Faso (n 48) para 348.

70 Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights (2011-2013) adopted at the 21st extraordinary session of the African Commission on Human and Peoples' Rights, 23 February to 4 March 2017.

71 Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of The Gambia on the Implementation of the African Charter on Human and Peoples' Rights 1994-2018 and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) 2005-2014 adopted at the 31st extraordinary session of the African Commission on Human and Peoples' Rights, 19-25 February 2021, para 45(vii); Concluding Observations and Recommendations on the Combined Periodic Report of on the Implementation of the African Charter on Human and Peoples' Rights 2007-2019 and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) 2008-2019, African Commission on Human and Peoples' Rights, adopted at the 69th ordinary session 5 November-5 December 2021, para 48(x).

72 Concluding Observations and Recommendations on Lesotho's Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, African Commission on Human and Peoples' Rights, adopted at the 68th ordinary session, 14 April to 4 May 2021.

73 A survey by the author of Concluding Observations on state reports to the UN Committee on Economic, Social and Cultural Rights shows that the Committee has rarely, if ever, commented on the gendered dimension of the right of equal access to housing in art 11(1) of the ICESCR.

‘women and girls with disabilities, with albinism, living with HIV/AIDS and in prostitution, lesbian, bisexual and transgender women and intersex persons’ in relation to access to housing’.⁷⁴

Most state reports, whether to UN treaty monitoring bodies or the African Commission lack disaggregated data. Thus, the CEDAW Committee recommended to Mauritius the establishment of ‘monitoring mechanisms ... [including] comprehensive statistical data disaggregated by sex, age, disability, ethnicity, location and socioeconomic status in its next periodic report to illustrate the degree to which women benefit from existing anti-poverty initiatives, including on housing, in line with Sustainable Development Goal 5’.⁷⁵ In its Concluding Observations on South Africa, the CEDAW Committee expressed concern that the Basic Conditions of Employment Act 75 of 1997, Sectoral Determination on Domestic Workers did not cover the right to adequate housing for domestic workers.⁷⁶ This issue was not covered by the African Commission in its Concluding Observations on South Africa’s state report which included no criticism in relation to access to housing for women specifically.⁷⁷ This further reinforces the point of the need for the African Commission to have a deeper level of engagement with states.

The CEDAW Committee’s strongest criticism has been reserved for those African states that have not ratified the Maputo Protocol. Thus, in its Concluding Observations on Botswana, the Committee noted the ‘disproportionate levels of poverty among women and the limited access for women to land and housing’.⁷⁸ The Committee called on the Botswana government to ‘increase awareness among women of their rights concerning access to land and housing, including the right to have access to a land tribunal to challenge abuses in land allocation and to benefit from a housing scheme for low-income people’.⁷⁹ The Committee further recommended quotas for housing for women as ‘temporary special measures with time-bound targets’.⁸⁰ With regard to South Sudan the Committee expressed concern over how in the absence of codified family law, discriminatory customary law prevailed in many matters, among them access to housing.⁸¹

The ESCR Committee has highlighted forced eviction as a violation of the right to housing in a number of Concluding Observations against African states. This is in line with its General Comment 7. However, the Committee has not highlighted the specific plight of women in this context.

There has been no litigation in relation to women’s access to housing before the African Commission or the African Court. The *Endorois*,⁸² and *Curtis Doebbler*⁸³ cases before the African Commission all deal

74 Concluding Observations on the 7th Periodic Report of Angola, Committee on the Elimination of Discrimination against Women (14 March 2019) UN Doc CEDAW/C/AGO/CO/7 (2019) para 43(a).

75 Concluding Observations on the 8th Periodic Report of Mauritius, Committee on the Elimination of Discrimination against Women (14 November 2018) UN Doc CEDAW/C/MUS/CO/8 (2018) para 30(c).

76 Concluding observations on the 5th Periodic Report of South Africa, Committee on the Elimination of Discrimination against Women (23 November 2021) UN Doc CEDAW/C/ZAF/CO/5 (2021) para 49.

77 Concluding Observations and Recommendations on the Combined 2nd Periodic Report under the African Charter on Human and Peoples’ Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of South Africa, African Commission on Human and Peoples’ Rights, adopted at the 20th extraordinary session, 9-18 June 2016.

78 Concluding Observations on the 4th Periodic Report of Botswana, Committee on the Elimination of Discrimination against Women (14 March 2019) UN Doc CEDAW/C/BWA/CO/4 (2019) para 39.

79 CEDAW Committee Concluding Observations Botswana (n 78) para 40.

80 CEDAW Committee Concluding Observations Botswana (n 78) para 22.

81 Concluding Observations on the initial Report of South Sudan, Committee on the Elimination of Discrimination against Women (23 November 2021) UN Doc CEDAW/C/SSD/CO/1 (2021) para 50.

82 *SERAC, Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya (Endorois)* (2009) AHRLR 75 (ACHPR 2009).

83 *Curtis Doebbler v Sudan (Doebbler)* Communication 236/2000 (2009) AHRLR 208 (ACHPR 2009).

with the right to housing, specifically forced evictions.⁸⁴ However, none of these cases dealt with the issue from a women's rights perspective.

At the national level, there have been no cases directly citing article 16 of the Maputo Protocol. In *Asola v Attorney General*,⁸⁵ before the Kenyan Court of Appeal, Ms Asola claimed that she and her daughter had been evicted from her matrimonial home by her in-laws following the death of her husband. She argued that the High Court had 'erred in law by failing to make a finding that the practice of widow eviction is discriminatory and violates the fundamental rights of the appellant and the other women as enshrined in the Constitution of Kenya 2010, *Maputo Protocol and CEDAW*'.⁸⁶ Ms Asola argued that certain provisions of the Law of Succession Act discriminated against women. The Court of Appeal held that the cited provisions of the Law of Succession Act did not apply to the case at hand and the court could thus not make a finding in relation to their constitutionality. The Court of Appeal further confirmed the order of the High Court that Ms Asola had no right to compensation from the state as it had done what it could to protect her rights and that if a claim for compensation should be submitted this should be submitted against her in-laws. The appellants did not cite which article of the Maputo Protocol they claimed had been violated. Article 21(1) sets out the right of a widow 'to continue to live in the matrimonial house'. However, article 16 on access to housing regardless of marital status is arguably also of relevance.

6 Conclusion

State reports to UN treaty monitoring bodies and the African Commission and Concluding Observations adopted imply that there is little formal discrimination in national legislation in African states in relation to women's right to housing. However, the African Commission and other actors should pay more attention to cultural norms and practices that may affect women's right to access to housing. This is even more important when such discrimination is constitutionally endorsed like in the case of Lesotho. Also, interventions that could promote equality in housing such as requiring joint registration of spouses in subsidised housing should be encouraged. Further issues that are not formally captured in the Protocol such as forced eviction and homelessness as a result of domestic violence tend to be neglected by states and the African Commission in the state reporting procedure.

It is noticeable that women's right to housing has been more thoroughly dealt with by the CEDAW Committee compared to the African Commission and the ESCR Committee. State reporting practice indicates that states which follow the guidelines of the African Commission to report separately on the Maputo Protocol engage more with the gendered dimension of housing than those states that do not include a specific section. However, often the engagement with the issue is superficial. The African Commission should be more thorough in its engagement with the issue in its review of state reports and in adopting its Concluding Observations.

84 Chenwi (n 23).

85 *Asola & another v Attorney General* (Civil Appeal 100 of 2017) [2021] KECA 201 (KLR) (19 November 2021) (Judgment).

86 *Asola* (n 85) para 3(v).

Article 17

Right to a positive cultural context

Adetokunbo Johnson

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.
2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

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1 Introduction

Cultural rights are a fundamental and integral component of human rights for individuals and communities in two ways. First, cultural rights provide the context for living a life of human dignity.¹ Second, cultural rights are vital for positive social interaction between individuals and across groups in multicultural communities.² Yet, despite its importance, culture is often portrayed as being at odds with human rights. Indeed, culture is considered contentious and complicated, especially concerning women’s rights.³ Right at the outset, therefore, how cultural rights are to be protected and how they are to be balanced with other human rights, especially women’s rights, calls for serious reflection.⁴

Cultural rights, or the right to participate in cultural life, are enshrined in several international and regional human rights instruments. For example, at the international level, article 27(1) of the Universal Declaration of Human Rights (Universal Declaration) recognises the right of everyone

1 United Nations General Assembly Report of the Special Rapporteur in the field of cultural rights ‘Universality, cultural diversity, and cultural rights’ (2018) A/73/227 para 13.

2 Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 21 (right of everyone to take part in cultural life (art 15, para 1(a), of the International Covenant on Economic, Social and Cultural Rights 2-20 November 2009 E/C.12/GC/21.

3 S Tamale ‘The right to culture and the culture of rights: critical perspective on women’s sexual rights in Africa’ (2008) 16(1) *Feminist Legal Studies* 49.

4 JO Onyango ‘Who’s watching ‘Big Brother’? Globalisation and the protection of cultural rights in present-day’ (2005) 5 *African Human Rights Law Journal* 16.

to participate in their community's cultural life freely.⁵ In addition, article 15(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides that individuals have the right to participate in cultural life.⁶ Furthermore, other international human rights instruments emphasise the equal participation of all persons in cultural activities.⁷ Notably, special attention is given to cultural minorities and indigenous peoples.⁸ Concerning the latter, cultural rights extend to their distinct cultural institutions, ancestral lands, natural resources and traditional knowledge.⁹

The United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the leading international treaty on women's rights, does not contain such a right.¹⁰ Culture in CEDAW has a negative connotation despite providing for women's right to 'participate in all aspects of cultural life'.¹¹ It has been suggested that the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee's) approach to interacting with states on the matter of culture proceeds from a counterproductive perception of culture as a hindrance to the realisation of women's human rights.¹²

At the regional level, the African Charter on Human and Peoples' Rights (African Charter) recognises cultural rights and elaborates on their protection. For example, article 17(2) identifies the right to participate in cultural life freely. Article 17(3) upholds promoting and protecting morals and traditional values. Article 29(7) takes these rights further and provides a duty on every person to 'preserve and strengthen positive African cultural values in *his* relations with other members of the society'.¹³ These provisions have been criticised for at least three reasons.¹⁴ First, because they emphasised African culture more than protecting women's rights.¹⁵ Second, because they offer little clarity on the nature, scope, and content of promoting positive and traditional values.¹⁶ Third, as has been pointed out, a blanket reference to African values can be used to justify infringing on human rights in general and women's in particular.¹⁷

Article 17 on the right to a positive cultural context is integral to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa's (Maputo Protocol) overall goal to 'promote, realise and protect the rights of African women'.¹⁸ Such articulation confirms that African culture can be positive and allows for a balance to be struck between women's rights and culture. This balance ensures that African women do not necessarily have to choose between their valued cultural identity and their rights.¹⁹ Additionally, guaranteeing this right restores women's agency as

5 Universal Declaration art 27(1)

6 ICESCR art 15(1).

7 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) art 5(e)(vi). CEDAW art 13(c). Convention on the Rights of the Child (CRC) art 31(2). International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families art 43(1)(g). Convention on the Rights of Persons with Disabilities (CRPD) art 30(1).

8 ICCPR art 27.

9 As above.

10 CEDAW GA Res 54/180 UN GAOR 34th session Supp 46 UN Doc A/34/46 1980.

11 CEDAW art 13(c).

12 CN Musembi 'Pulling apart? Treatment of pluralism in CEDAW and Maputo Protocol' in A Hellum & HS Aasen (eds) *Women's human rights: CEDAW in international, regional, and national law* (2013) 187.

13 Emphasis added to show the male preferences in the articulation of art 29(7).

14 R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2019) 449-454.

15 JE Bond 'Gender discourse and customary law in Africa' (2010) 83 *Southern California Law Review* 512.

16 F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 75.

17 Murray (n 14) 451.

18 Preamble para 14.

19 Tamale (n 3) 55.

active participants in determining cultural policies and emphasises the threefold obligation of states to protect, promote and fulfil all human rights.²⁰

This chapter aims to provide a commentary on article 17 and proceeds as follows. First, this section introduces article 17. Section 2 maps article 17's drafting history. This history is followed by section 3, which discusses article 17's linkages to other treaty provisions. Thereafter, section 4 identifies the key concepts in the article and offers definitions. This examination lays the foundation for section 5, which explores article 17's implementation in African countries. Finally, section 6 offers conclusive arguments.

2 Drafting history

The idea of an article dedicated to the right to a positive cultural context was first mentioned in the Nouakchott Draft. Initially articulated in article 18, this draft provided:

All women have the right as human beings to enjoy life in a positive cultural environment and to participate at all levels in the determination of cultural policies. State Parties shall take all measures to protect women and society from the harmful effects of fundamentalism and of cultural and religious practices which oppose this right.²¹

The drafters understood the enjoyment of life for 'all women as human beings' to be tied to a positive cultural environment. However, the drafters seemed to acknowledge that the opposite is also true: a lack of enjoyment of life occurs where negative culture thrives. Moreover, the language concedes that certain cultural and religious practices restrict women from enjoying life in a positive cultural context. Nevertheless, the phrase 'the harmful effects of fundamentalism' used in this draft is ambiguous and could explain why it was not included in the final draft.

Significantly, an amended Kigali Draft proposed the inclusion of article 19 on cultural practices, which reads:

1. Women shall have the right to live in a positive cultural environment and to participate at all levels in the determination of cultural policies.
2. States Parties to this Protocol shall take all appropriate measures to:
 - (a) Favour the participation of women in the conception of cultural policies at all levels;
 - (b) Protect women and society from all forms of intolerance and repugnant cultural and religious practices.²²

Notably, the enjoyment of life for 'all women as human beings' in the Nouakchott Draft did not make it to the Kigali Draft. Moreover, the sub-articles that appeared in the Kigali Draft were not included in the final text. Interestingly, the word 'favour' used in the Kigali Draft was not included in the final draft. The omission could be because it is vague and less persuasive, as it is unclear what exactly a state would be expected to do that would constitute 'favour'. However, the Kigali Draft undoubtedly informed the current article 17(2) mandate to States Parties to 'take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.'

20 Maputo Protocol art 17(2).

21 See Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft) art 18.

22 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft) art 19.

In November 2001, a Meeting of Experts was convened. As a result, further amendments to strengthen the text and make it more comprehensive were made, including the following revisions to the draft article on cultural rights:²³

1. Women shall have the right to live in a positive *and non-discriminatory* cultural context *without degrading portrayals of women* and to participate at all levels in the determination of cultural policies
2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation *and implementation* of cultural policies at all levels.

However, these proposed changes (in italics) in subsections 1 and 2 were removed from the final version. The vagueness and unwieldiness of these suggestions as well as the difficulties in determining what acts would, for example, constitute *degrading portrayals of women*, could explain its exclusion in the final draft.

3 Linkages to other treaty provisions

The recognition of cultural rights can be traced to article 27(1) of the Universal Declaration, which guarantees the right to participate freely in cultural activities. The right of women to live in a positive cultural context is further linked to article 2(f) of CEDAW, which mandates state parties to take all ‘necessary steps, including legislation, to modify or abolish existing customs and practices which constitute discrimination against women’. This mandate is elaborated in article 5(a), which requires state parties to ‘modify the social and cultural patterns of conduct of men and women, to eliminate prejudices and customary and all other practices’.

Article 17 is the first legally binding instrument to recognise women’s right to live in a positive cultural context. It is therefore linked to the 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions (Convention), the first legally binding international instrument on culture.²⁴ The Convention recognises the cultural and economic nature of cultural expressions and has been regarded as a landmark in international cultural policy.²⁵ Like the Convention, which pays attention to the situation of minorities,²⁶ article 17(1) explicitly recognises African women’s right to positive cultural expression.

In addition, the Convention recognises the cultural and creative industries as pivotal in efforts to achieve ‘inclusive economic growth, reduce inequalities including realising the goals set out in the 2030 Sustainable Development Goals (SDG) Agenda’.²⁷ This recognition is similar to women’s right to live in a positive cultural context viewed as integral to achieving gender equality, also set out in SDG Goal 5.

Moreover, like article 17(2), which recognises women’s right to be consulted and participate in the formulation of cultural policies, the Convention calls for citizens’ full participation in the creation,

23 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

24 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted 20 October 2005. M Burri ‘The UNESCO Convention on Cultural Diversity: an appraisal five years after its entry into force’ (2013) 20 *International Journal of Cultural Property* 357.

25 UNESCO Website, <https://en.unesco.org/creativity/convention> (accessed 15 May 2023).

26 UNESCO ‘Basic texts of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions’ (2013) Preamble para 15.

27 As above art 13 General Considerations 6.3.

production, dissemination and distribution of cultural expressions.²⁸ It provides a 'framework for informed, transparent and participatory systems of governance for culture'.²⁹

The right to a positive cultural context under the Maputo Protocol builds onto the right to culture enshrined in the African Charter. For instance, the African Charter provides for the right to freely participate in the community's cultural life, promoting and protecting community-recognised morals and traditional values and preserving and strengthening positive cultural values at the individual level.³⁰

Article 17's drafting history reveals its close interconnection with other critical rights in the Maputo Protocol. For example, the link between article 2 on ending discrimination against women with article 17 is clear. In article 2(2), the drafters acknowledge that human rights violations are not just the consequences of law but are a result of culture and social practice. Therefore, it asks member states to modify the social and cultural patterns of conduct and include the principle of equality in their constitutions, not just at the formal but substantive and transformative levels.

The Maputo Protocol prohibits violence against women both in private and public.³¹ To achieve this, States Parties must employ peace education and social communication strategies to end traditional and cultural beliefs, practices and stereotypes that rationalise and worsen violence against women. These strategies illustrate the importance of ending violence against women and allowing women to live in a positive cultural context.³²

The correlation between article 5 and article 17 is evident.³³ By requiring member states to forbid all harmful practices that infringe on women's human rights, including practices rationalised by culture, such as female genital mutilation (FGM) encapsulated in article 5, a significant aspect of the right to live in a positive cultural context is realised. This point is valid, considering these harmful practices affect women's equal rights, denying them the right 'to live in a positive cultural context and participate at all levels in determining cultural policies that affect their lives.' Moreover, the inclusion of 'positive' in article 17 suggests that harmful traditional practices should be ended.³⁴ However, although the Maputo Protocol specifically mentions FGM and child marriage as harmful practices, this obligation is held to extend to other practices that entrench discrimination.³⁵

Further, the connection between article 17 and article 14 is clear, as the right to live in a positive cultural context would depend on abolishing harmful practices predisposing women to HIV infection.³⁶ Article 17 also relates to the special protection extended to some categories of women listed in articles 20 to 24. For example, guaranteeing widows' right to inherit and remain in the marital home, including maintaining custody and guardianship rights of their children, is attentive to the discrimination and inhumane widowhood practices legitimised by sub-Saharan African cultures.

Likewise, the right of older women to live in a positive cultural context is crucial, considering distinct forms of violence, including witchcraft accusations usually targeted at older women, contrary

28 As above art 13 General Consideration 6.3.

29 UNESCO Website (n 25)

30 African Charter arts 17(2), 17(3) & 29(7).

31 Maputo Protocol art 4(2)(e).

32 F Kabata 'Evening out the divide between rights and culture: a case for mobilising positive culture in state responses to gender-based violence in Kenya' (2022) 33 *Stellenbosch Law Review* 141.

33 MB Berna 'The cultural factor and women's rights within the African Charter on Human and Peoples' Rights and Its Protocol' (2015) 2 *Law Annals from Titu Maiorescu University* 14.

34 Murray (n 14) 451.

35 As above.

36 As above.

to the culture of respect for older people in Africa. Finally, the right of women with disabilities to live in a positive cultural context is imperative, given their increased susceptibility to discrimination and violence often rationalised by cultural and religious misconceptions about disability.³⁷

4 Concepts and definitions

4.1 Definition of culture

Defining culture is essential to unpacking the phrase ‘positive cultural context’. However, the multifaceted nature of culture makes it difficult to define.³⁸ Unsurprisingly, arriving at a globally agreed and acceptable meaning for culture has been challenging.

Anthropologists have studied different definitions of culture without consensus on its meaning.³⁹ For anthropologists, culture is defined as a way of life.⁴⁰ It connotes a society or group in which many or all individuals live and think in similar ways.⁴¹ This definition captures culture’s two components: social culture, which relates to people’s interaction and organisation;⁴² and ideological culture, which is linked to people’s thinking, belief and value system.⁴³

Similarly, for sociologists, culture has two interconnected dimensions, namely the material and nonmaterial aspects of culture.⁴⁴ Material culture denotes the physical objects, resources, and spaces people use to define their culture – these physical aspects of culture help to explain behaviours and perceptions. In contrast, nonmaterial culture refers to people’s nonphysical ideas about their culture, including beliefs, values, rules, norms, morals, language, organisations, institutions, ideas, and attitudes.

Culture has been variously defined. For example, in the 2001 Universal Declaration on Cultural Diversity, culture is defined as

the set of distinctive spiritual, material, intellectual and emotional features of society or a social group that encompass, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.⁴⁵

Building on this definition, the African Commission on Human and Peoples’ Rights (African Commission) defines culture as a concept that

encompasses a complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a

37 Article 11 and 27 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities (Protocol on the Rights of Persons with Disabilities) adopted 30 January 2018.

38 D Ngira ‘The implication of an African conception of human rights on the women rights movement: a bottom-up approach to women’s human rights protection’ (2018) *East African Law Journal* 140, 142.

39 NH Msuya ‘Advocating positive traditional culture to eradicate harmful aspects of traditional culture for gender equality in Africa’ (2020) *Obiter* 48-49.

40 F Raday ‘Culture, religion, and gender’ (2003) 1 *International Journal of Constitutional Law* 665-666.

41 Raday (n 40) 665-666.

42 As above.

43 As above.

44 W Little *Introduction to sociology* (2014) 56-57.

45 Preamble to the 2001 UNESCO Universal Declaration on Cultural Diversity para 5.

member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.⁴⁶

This definition lays out certain generally accepted features and aspects of culture. Culture is usually associated with the way of life of a particular group or society, manifested in identifiable ideas, customs, symbols, language, rituals, dress codes, knowledge, and shared moral and value systems.⁴⁷ It also encompasses a group's religion, language, and other defining characteristics. However, anthropologists caution against treating culture as a timeless bounded entity defined by antiquity and homogeneity.⁴⁸

Notably, General Comment 21, adopted by the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR), resolves some difficulties with defining culture and makes up for the insufficient attention that had previously been accorded to cultural rights especially compared to other rights.⁴⁹ The Committee on ESCR defines culture as an 'inclusive term encompassing all aspects of human life.' It is associated with values, morals and ethical codes of conduct and behaviour that potentially distinguish people of a society or ethnic group from other people of another society.⁵⁰ The UN Independent Expert on Cultural Rights reiterates how culture can be understood as a process, way of life, and product encompassing more than religion, ethnicity, and language.⁵¹

Cultural rights are linked to culture as captured in the Universal Declaration and the ICESCR but have not been explicitly defined or have no official definition.⁵² The UN Special Rapporteur on Cultural Rights clarifies that cultural rights are not synonymous with cultural relativism and must be consistent with international human rights standards. Therefore, cultural rights cannot be invoked to infringe on women's rights.⁵³ For her, cultural rights are the 'rights in the field of culture'.⁵⁴ This definition suggests that cultural rights possess a cultural character and are directly connected to culture.⁵⁵

In making their decisions, African courts have given some insight into how culture is understood. For example, in *State v TB Chirembwe (Chirembwe)*, the Court cites how the prevalent 'rape culture' deprives women of the right to live in a positive cultural context.⁵⁶ The Court's use of 'rape culture' suggests a nonmaterial definition that means that the society's patriarchal ideas, attitudes, and beliefs condone rape. Additionally, in *MEC for Education: KwaZulu-Natal v Pillay*,⁵⁷ the Constitutional Court held that a school policy that forbids wearing a small nose stud, worn as a religious and cultural expression, is discriminatory and unconstitutional. This decision is consistent with the African Commission's reasoning that freedom of (religious and cultural) expression is essential to culture.⁵⁸

46 *Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya (Endorois)* (2009) AHRLR 75 (ACHPR 2009) para 114.

47 Murray (n 14) 449, 450.

48 C Brumann 'Writing for culture: why a successful concept should not be discarded' (1999) 40 *Current Anthropology* S1.

49 ESCR Committee General Comment 21 (n 2) paras 10, 11.

50 As above para 11.

51 Report of the Independent Expert in the Field of Cultural Rights" (2010) UN Doc A/HRC/14/36 para 5.

52 As above para 4.

53 United Nations General Assembly Report of the Special Rapporteur in the field of cultural rights (2017) A/72/155 para 50.

54 Human Rights Council 'Report of the Special Rapporteur in the Field of Cultural Rights' (2016) UN Doc A/HRC/31/59 para 7.

55 Y Donders & A Laaksonen *Finding ways to measure the cultural dimension of human rights and development* (2009).

56 *The State v Chirembwe* <https://media.zimlil.org/files/judgments/zwhhc/2015/162/2015-zwhhc-162.pdf> (accessed 15 May 2023).

57 *MEC for KwaZulu Natal, School Liaison Officer v Pillay* 2008 1 SA 474 (CC).

58 African Commission on Human and Peoples' Rights 'Principles and Guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (2010) <https://www.escr-net.org/>.

Moreover, in the Kenyan case of *Kamau*, although the concept of culture is used several times, there is no explicit definition.⁵⁹ However, the case provides some implicit insights into how culture is viewed. For instance, in laying out their claim, the petitioners object to the imprisonment of women circumcisers who are believed to be ‘practising the African way of life’.⁶⁰

Also, the right to culture is recognised in some constitutions in Africa. However, there are usually no definitions of what culture means. For example, section 11(1) of the Kenyan Constitution recognises culture as the ‘foundation of the nation and the cumulative civilisation of the Kenyan people and nation’.⁶¹ However, there is no explicit definition of culture in this document. This failure to define culture could mean an assumption that there is consensus on the definition of culture, which is not necessarily the case. It could also mean a recognition of the contestations around the conceptualisation of culture that is avoided.

4.2 Article 17(1): women shall have the right to live in a positive cultural context

Reference to a positive cultural context implies the existence of a negative cultural context. Article 2(2) and 5 of the Maputo Protocol address this negative cultural context. States Parties are called upon to ‘modify the social and cultural patterns of conduct of men and women and to eliminate harmful traditional practices based on the idea of the inferiority or superiority of either of the sexes or stereotyped roles for men and women.’ This language borrows heavily from articles 2(f) and 5(a) of CEDAW. Article 2(f) of CEDAW mandates states parties’ to take all necessary steps, including legislation, to modify or abolish existing customs and practices which constitute discrimination against women’. This mandate is elaborated in article 5(a), which requires States Parties’ to modify the social and cultural patterns of conduct of men and women, to eliminate prejudices and customary and all other practices.’

Again, the CEDAW Committee reiterates in article 2(f), read together with article 5(a), that legislation alone cannot tackle discriminatory and harmful cultural practices and requires other holistic measures.⁶² Central to these provisions is the requirement for States Parties to enact legislation to forbid harmful practices rationalised as custom. This mandate arguably goes beyond a call to enact legal sanctions to requiring positive action toward transformative cultural change to tackle discrimination concretely.

Unfortunately, in several instances, the CEDAW Committee’s stance does not seem to follow its recommended transformative cultural approach, favouring a narrow approach emphasising legislative action. This point is illustrated in documented observations of the CEDAW Committee’s approach to interacting with some African states concerning cultural practices. The approach predominantly favours immediate prohibition through legislation within a framework that presumes from the outset that women’s rights are inherently incompatible with culture.⁶³ Thus, culture’s potentially positive and transformative role in achieving CEDAW’s objective through women’s agency in engaging with and formulating cultural policy is underestimated.⁶⁴

resources/principles-and-guidelines-implementation-economic-social-cultural-rights-african-charter para 74 (accessed 15 May 2023).

59 *Dr Tatu Kamau v the Attorney General* (2019) High Court Constitutional Petition 244 [2019] eKLR.

60 *Dr Tatu Kamau* (n 59) para 18.

61 Constitution of Kenya, 2010 art 11(1).

62 CEDAW Committee General Recommendation 21 Equality in marriage and family relations UN Doc. A/47/38, (1994) paras 14, 15 & 17.

63 Musembi (n 12) 188-189.

64 J Geng ‘The Maputo Protocol and the reconciliation of gender and culture in Africa’ in S Harris-Rimmer & K Ogg (eds) (2019) *Research handbook on feminist engagement with international Law* 7. See also Bond (n 15) 525.

As argued above, as far as the CEDAW Committee is concerned, culture is rarely positive.⁶⁵ Thus, the possibility that African women value their cultural identity and still desire to realise their rights is underestimated.⁶⁶ However, the Maputo Protocol does not adopt a negative framing of culture. On the contrary, it goes beyond ending negative cultural expression to requiring that a positive cultural context is established and ensured. In this sense, the Maputo Protocol transcends CEDAW's static and essentialist view of culture.⁶⁷

The reference to a positive cultural context in the Maputo Protocol draws inspiration from article 29(7) of the African Charter, which calls on individuals to 'preserve and strengthen positive African cultural values.'⁶⁸ Similarly, states must promote and protect morals and traditional values recognised by communities.⁶⁹ Positive cultural values have been defined as values consistent with international human rights standards.⁷⁰ Furthermore, the African Commission has emphasised that only 'positive' values are to be upheld, thus mandating state parties to end harmful traditional practices that negatively affect human rights. This obligation also ensures participation at all levels in determining cultural policies and cultural and artistic activities.⁷¹ Thus, positive African values refer to values that do not tolerate discriminatory acts against women, are consistent with international human rights standards, and work to eliminate harmful traditional practices that negatively affect human rights.⁷²

Despite this clarification, residual ambiguity surrounds the phrase 'positive African values'.⁷³ The term 'African' values leave room for confusion, indicating that some cultural practices are considered African while others are not.⁷⁴ Aside from portraying a fixed perception of culture, it is also unclear what criteria determine the 'Africanness' of a value.⁷⁵ For example, as far as the African Union is concerned, homosexuality is a colonial import contrary to African values.⁷⁶ However, this argument has been debunked.⁷⁷ Ngwena demonstrates that the term 'African values' has been invoked to prescribe homogenised African sexuality.⁷⁸ The term's ambiguity leaves it open to selective deployment by a powerful, more often than not, male political and cultural elite to suit their interests, especially regarding culturally sensitive issues.

The same ambiguity besets the term 'positive cultural context' in article 17 of the Maputo Protocol.⁷⁹ However, the Preamble to the Maputo Protocol goes some way toward mitigating the ambiguity. In the Preamble to the Protocol, African values are listed as 'equality, peace, freedom, dignity, justice, solidarity and democracy.'⁸⁰ Moreover, article 1(g) defines 'harmful practices' as 'all aspects of culture

65 Musembi (n 12) 197-198.

66 Bond (n 15) 519.

67 Geng (n 64) 17.

68 African Charter art 29(7).

69 African Charter art 17(3).

70 African Commission 'Pretoria Declaration on Economic Social Cultural Rights' (2004) Available at https://www.achpr.org/public/Document/file/English/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf (accessed 5 May 2022) para 9.

71 African Commission (n 70) para 9.

72 African Commission (n 70) para 9.

73 Murray (n 14) 594.

74 Murray (n 14) 594.

75 As above.

76 As above. See also C Ngwena *'What is Africanness? Contesting nativism in race, culture, and sexualities'* (2018) 15.

77 Murray (n 14) 594.

78 Ngwena (n 76) 15.

79 DM Chirwa 'Reclaiming (Wo)manity: the merits and demerits of the African Protocol on Women's Rights' (2006) 53 *Netherlands International Law Review* 85.

80 Maputo Protocol Preamble para 10.

including all behaviour, attitudes and practices which negatively affect the fundamental rights of women and girls.’ This definition is complemented by article 5, which adds the dimension of such practices being contrary to international standards. These provisions combined mean that a positive cultural context is free of behaviour, attitudes, and practices that negatively affect the fundamental rights of women and girls and are contrary to international standards. Additionally, as per article 17(2), it is a context in which women are free and able to participate in the formulation of cultural policies in all spheres of society.

Unsurprisingly, positive culture has been associated with the African principle of ‘ubuntu’ equated with humanism.⁸¹ However, this principle is also ambiguous, with limited usage by the African Commission.⁸²

Lastly, in the *Chirembwe* case (cited above), heard by the High Court of Zimbabwe in 2015, the Court’s reference to women’s right to live in a positive cultural context is insightful.⁸³ In the case, the High Court was confronted with a scenario where a convicted thief entered homes unlawfully and raped female victims. The Court highlights how the prevalent ‘rape culture’ deprives women of the right to live in a positive cultural context.

4.3 Article 17(1): women’s right to participate at all levels in the determination of cultural policies

It is instructive to explore how the Committee on ESCR has elaborated on the treaty’s scope and content in defining women’s right to participate.⁸⁴ Borrowing from the Committee on ESCR’s reasoning, women’s right to participate has a twofold connotation, as outlined in article 17(1): a right to participate in determining and formulating cultural policies and a collective right as a member of a community or society to define and formulate cultural policies jointly.

Women’s right to participate implies three fundamental components: participation, access and contribution.⁸⁵ Guidance from the African Commission suggests that women have the right to “participate in the definition, preparation and implementation of policies on culture and the enjoyment of other rights, especially the freedom of expression necessary for the enjoyment of the right to participate in cultural life.”⁸⁶ Moreover, it is crucial to explore what meaning is conveyed by ‘cultural policies’ as referred to in article 17(1) and (2). Cultural policies are policies on culture.⁸⁷ UNESCO has defined national cultural policies as ‘a body of operational, administrative and budgetary principles, practices and procedures that provide a basis for cultural action by member-states.’⁸⁸ In general, ‘cultural policies’ are not necessarily only framed at the national level in the sense of a formal state policy. Indeed, the reference to ‘at all levels’, borrowed from CEDAW, indicates that women at the

81 Ngira (n 38) 139, 140.

82 Murray (n 14) 451.

83 *The State v TB Chirembwe* (n 56).

84 ESCR Committee General Comment 21 (n 2) paras 14, 15.

85 As above paras 14, 15, 16(a)-(e). First, participation: a basic tenet of participation is choice, emphasising, for instance, women’s ability to freely choose their cultural identity. Secondly, access: women’s right to know and understand their culture, to express and disseminate their culture through education, training, and information. Thirdly, contribution: the right of women to engage in the definition, elaboration and implementation of cultural policies and expressions of their community.

86 African Commission (n 58) para 73-74.

87 African Commission (n 58) para 74.

88 UNESCO ‘Cultural policy: A preliminary study’ (1969) <https://unesdoc.unesco.org/ark:/48223/pf0000001173> (accessed 15 May 2023) p 10.

community and clan levels should be involved in creating cultural policies.⁸⁹ Additionally, it is worth noting that there cannot be a homogenised African cultural policy. Each African society determines and develops its cultural policies according to its ideas and values.⁹⁰

However, what ‘cultural policies to be formulated’ as envisaged under article 17(2) is unclear. Therefore, there might be a need to clarify whether it is the cultural policies that are contained in the colonial and state conception of customary law. This clarification is important as it is difficult to imagine culture’s transformative power when drafted as policies.

4.4 Article 17(2): nature and scope of state obligations

As with all human rights treaties, member states hold a threefold obligation under article 17(2) of the Maputo Protocol. The guidance from the Committee on ESCR about this triple obligation is instructive.⁹¹

The obligation to ‘respect’ requires state parties to desist from interfering, directly or indirectly, with the enjoyment of the right to live in a positive cultural context.⁹² A state’s failure to respect women’s right to live in a positive cultural context could manifest where discriminatory laws and practices against women continue to exist or where official interpretations of customary law endorse harmful rigid norms over flexible practices.⁹³ Where the state refuses to uphold or enhance practices that can promote a positive cultural context for women but opts instead for rigid interpretations or applications that erode that potential, the state has failed to respect women’s right to live in a positive cultural context.

According to the Committee on ESCR, the obligation to ‘protect’ requires state parties to take all necessary steps to protect women from violations in the public or private sphere and to take positive steps to fulfil their rights to live in a positive cultural context.⁹⁴ This obligation also encompasses a commitment that prevents private individuals, entities and third parties from interfering or meddling with the enjoyment of the right to live in a positive cultural context. The obligation to protect has a preventative and remedial dimension, including taking measures to ensure women’s participation at all levels in determining cultural policies and in cultural and artistic activities. This includes steps for safeguarding, protecting, and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems. The obligation to protect is evident in the *Chirembwe* case discussed above, where the Court emphasised that the state’s duty is ‘not just to protect women against any abuses which infringe their fundamental rights, but to also prosecute and punish appropriately as part of the due diligence obligation.’⁹⁵

Article 17 of the Maputo Protocol goes further than the African Charter to obligate states to ensure women’s active participation and contribution in formulating cultural policies at all levels. The obligation is essential, considering African women do not necessarily have the same access or influence as powerful men in culture’s creation.⁹⁶ The reality, according to scholarship, is that what is most often considered culture as presented by powerful, influential male elites is hardly representative. Moreover,

89 LR Pruitt ‘Deconstructing CEDAW’s Article 14: naming and explaining rural difference’ (2011) 17 *William & Mary Journal of Women and the Law* 363.

90 UNESCO (n 88) 10.

91 ESCR Committee General Comment 21 (n 2) paras 48-54.

92 ESCR Committee General Comment 21 (n 2) paras 49(a)-(e)

93 JE Stewart ‘Why I can’t teach customary law’ (1997) 14 *The Zimbabwe Law Review* 20, 21.

94 ESCR Committee General Comment 21 (n 2) para 50.

95 *The State v Chirembwe* (n 56) 5.

96 B Nayak ‘Challenges of cultural relativism and the future of feminist universalism’ (2013) 6 *Journal of Politics and Law* 85.

if there were an option for women to determine what is important to them, they would most likely discard the male version of several cultural practices.⁹⁷

Lastly, the obligation ‘to fulfil’ requires States Parties to take appropriate legislative, administrative, judicial, budgetary, and promotional measures to fully realise the right to a positive cultural context.⁹⁸ For example, the commitment to fulfilling the right to a positive cultural context obligates member states to establish the appropriate legal, economic and social enabling conditions that positively influence African women’s lives.

Significantly, for women’s right to live in a positive cultural context to be fulfilled, member states are mandated to include and involve women and do away with marginalising conditions that prevent women from participating in the determination of cultural policies. This calls for an inclusive plan which should also be intersectional, allowing the voices of, for example, rural women – considered the most marginalised – to be heard at every stage of determining and formulating cultural policies.

Additionally, the African Commission expounded on states’ obligations on cultural rights to include two dimensions.⁹⁹ First, states are urged to enact policies targeted at “the conservation, development and diffusion of culture and the promotion of cultural identity.”¹⁰⁰ These policies should be implemented through available funds and the establishment of institutional infrastructure for implementing policies.¹⁰¹ Second, states must ensure the equality and non-discrimination of vulnerable groups.¹⁰² This obligation involves ending harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and captures three aspects:¹⁰³ 1. customs and practices that threaten the health or life of the child; and 2. customs and practices that are discriminatory to the child on the grounds of sex/gender or other status. 3. Forbids child marriage and the betrothal of girls and boys.

5 Implementation

5.1 Constitutional jurisprudence

As shown above, the enshrinement of the right to a positive cultural context in the Maputo Protocol attempts to strike a balance between guaranteeing positive culture that is expected to strengthen and complement women’s human rights while simultaneously confronting and prohibiting harmful cultural practices that are detrimental to women’s rights. This approach sees culture as a helpful resource that enhances claiming rights and possibly expanding the rights domain.

A few African constitutions that recognise the right to practice culture and prohibit harmful cultural practices have been documented. For instance, while article 37 of the 1995 Ugandan Constitution grants the right to practise culture, article 33 explicitly provides for women’s rights and forbids cultures, customs and traditions undermining women’s status.¹⁰⁴ Similarly, article 11 of the 2010 Kenyan Constitution recognises ‘culture as the foundation of the nation ... and grants women and men the

97 Nayak (n 96) 85.

98 ESCR Committee General Comment 21 (n 2) paras 51-54.

99 African Commission (n 58) para 76.

100 African Commission (n 58) para 76(d).

101 African Commission (n 58) paras 76(d) 1, 2.

102 African Commission (n 58) para 76(e).

103 African Commission (n 58) paras 76(e), (f), (g), (h).

104 Constitution of Uganda, 2005 art 33(6).

right to equal treatment and opportunities in cultural spheres'.¹⁰⁵ However, it protects every child and youth from harmful cultural practices and exploitation.¹⁰⁶

Another example is section 30 of the South African Constitution, which recognises everyone's right to participate in the cultural life of their choice. Despite this recognition, exercising this right to culture is subject to the Bill of Rights.¹⁰⁷ In addition, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) defines unfair discrimination based on gender to include 'any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men.'¹⁰⁸

Likewise, section 252(2) and 252(3) of the 2005 Constitution of Eswatini recognises Eswatini's customary law principles but requires that these principles are not inconsistent with the Constitution. For instance, section 20(1) provides for the equality of all persons in all spheres of cultural life but mandates that 'a woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.'¹⁰⁹ Interestingly, section 35 of the 1993 Constitution of Lesotho grants every citizen, including women, the right to participate freely in the community's cultural life. However, it appears to limit this right due to section 10 of the 1968 Chieftainship Act, which restricts chieftainship succession to men.

The Government of the Kingdom of Lesotho's reservations to article 2 of CEDAW is also worth mentioning. Lesotho entered a reservation to article 2 of CEDAW, declaring that it does not consider itself obligated by the provision to the extent that it clashes with Lesotho's constitutional laws on traditional leadership and chieftainship successions.¹¹⁰ Nonetheless, section 17 of the Children's Protection and Welfare Act 2011 mandates Lesotho to protect all children from harmful traditional practices.

Apart from the African constitutions discussed above, assessing case law jurisprudence on article 17 at the national level is pivotal in understanding how the right to a positive cultural context is implemented in African countries. Article 17 of the Maputo Protocol is explicitly invoked in the *Chirembwe* case discussed above.¹¹¹ The Court held that the 'accused' raped as a form of adventure to exert power and control over the victims. The Court cited how the pervasive nature of sexual violence and 'rape culture' that views women as inferior allows sex to be weaponised as a tool of power and control, subjecting women to constant fear and hindering the right to live in a positive cultural context.¹¹²

Similarly, although the right to live in a positive cultural context is not explicitly mentioned in the outcome of *Bhe v Magistrate Khayelitsha (Bhe)*, the spirit of the provision is invoked in the ruling.¹¹³ The *Bhe* case involved two minor daughters disallowed from inheriting from their father's intestate estate under the customary law of succession and the principle of male primogeniture. In *Bhe*, the

105 Constitution of Kenya, 2010 art 27(3).

106 Constitution of Kenya, 2010 arts 53(1)(d) & 55(d).

107 Constitution of the Republic of South Africa, 1996 secs 30, 31.

108 2000 Equality Act sec 8(d).

109 The Constitution of Eswatini 2005 sec 28(3).

110 Concluding Observations on the Combined initial to fourth Periodic Reports of Lesotho, Committee on the Elimination of Discrimination against Women (8 November 2011) UN Doc (CEDAW/C/LO/CO/1-4) (2011) para 14.

111 *The State v Chirembwe* (n 56) 1. See also S Omondi et al *Breathing life into the Maputo Protocol: jurisprudence on the rights of women and girls* (2018) <https://www.equalitynow.org/resource/breathing-life-into-the-maputo-protocol-case-digest-jurisprudence-on-the-rights-of-women-and-girls-in-africa/> (accessed 15 May 2023).

112 As above 84, 85.

113 *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) para 10.

South African Constitutional Court ruled that the law establishing the customary law's principle of male primogeniture into statutory law is unconstitutional.¹¹⁴ In this case, the Constitutional Court held that customary law is protected and subject to the Constitution – the supreme law of the land. Since women's rights and equality are enshrined in the Constitution, customary law cannot be invoked to deny women's rights. The Constitutional Court had offered similar reasoning in other cases after the *Bhe* case.¹¹⁵

Another example is the *Shilubana v Nwamitwa* case.¹¹⁶ The case involved a woman's right to succeed her father as chief, although she was initially considered ineligible based on her gender. The outcome of the case echoes the *Bhe* case in two ways. First, the Constitutional Court, in deciding the case, upheld the plaintiff's right to succeed her father as the chief and not to be discriminated against because of her gender. Second, the Constitutional Court emphasised that customary law is subject to the Constitution.

In light of these progressive Constitutional Court decisions, it could be suggested that a positive cultural context is defined as one that is consistent with the constitutional principle of equality. The examples mentioned above illustrate how the harmful aspects of culture that are detrimental to women's rights are challenged. In this way, human rights standards of equality and non-discrimination are applied without discarding culture wholesale. Thus, the outcomes of these cases are proof of the possibility of culture being progressive and adaptable in a way that upholds human rights principles of equality and non-discrimination.¹¹⁷

From the above examples, it is evident that the male primogeniture principle as a harmful cultural practice has been challenged in African courts. However, the outcome of *Monica Jesang Katam v Jackson Chepkwony (Katam)* is perhaps an example of how custom can be implemented positively.¹¹⁸ The case involved a dispute questioning whether a young mother of two sons had the right to inherit the property of an 85-year-old deceased unmarried woman against the claims of her relatives. The two women had engaged in an arrangement colloquially known as a 'woman-to-woman marriage',¹¹⁹ under which she had the same customary rights as any widow. In its decision, the Court applied the constitutionally recognised 'right to culture' in article 11 of the Kenyan Constitution to uphold the young mother's inheritance claim. This example illustrates how the young mother exercised agency in claiming her cultural rights and how it can be argued that custom was applied positively in this scenario.

Despite these examples of progressive jurisprudence on the right to a positive cultural context, the reality suggests a fluid and fragile balance between gender equality and culture in Africa. For example, the outcome of *Senate Gabasheane Masupha v The Senior Resident Magistrate for Subordinate Court of Berea (Senate case)* demonstrates how African women are still discriminated against and prevented from holding leadership positions in Lesotho.¹²⁰ Such outcomes stem from the cultural beliefs that it is against culture for a woman to be a chief.¹²¹ Such cases exemplify that achieving the delicate balance

114 *Bhe* (n 113) para 10.

115 The other cases are *Bhe* (n 113) para 7. Additionally in a separate case, *Hassam v Jacobs* 2009 (5) SA 572 (CC), the South African Constitutional Court invalidated provisions of the Intestate Succession Act that excluded widows of polygynous marriages from inheritance.

116 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).

117 M Ssenyonjo 'Culture and the human rights of women in Africa: between light and shadow' (2007) 51 *Journal of African Law* 66.

118 High Court of Kenya at Mombasa, Succession Cause 212 of 2010 [2011] eKLR.

119 Musembi (n 12) 197-198.

120 *Senate Gabasheane Masupha v The Senior Resident Magistrate for Subordinate Court of Berea* (2013) Court of Appeal (CIV) 29/2013 [2014] LSCA 22.

121 BO Oyetola 'A deadly blow for women's rights in Lesotho' (2014) <https://africlaw.com/2014/06/19/a-deadly-blow-for-womens-rights-in-lesotho/> (accessed 15 May 2023).

between guaranteeing positive culture that promotes women's rights while simultaneously confronting a negative culture that is detrimental to women's rights is no easy feat in Africa.

5.2 State reporting before the African Commission

A review of the states' reports shows that states have taken different approaches in reporting on article 17 of the Maputo Protocol. For example, in its state report, the Angolan Government mentions several activities and programmes to guarantee the right to a positive cultural environment.¹²² The report lists several steps taken to respect, encourage and protect national cultural diversity in the country.¹²³ According to the report, research has been initiated on cases of 'initiations and rituals such as girls and male circumcision through programmes focused on traditional medicine.'¹²⁴ The report mentions how women's participation in these cultural events is encouraged but does not provide further information on how this is done.

The Government of Cameroon, when reporting on the article, begins by listing efforts taken to promote a favourable socio-cultural environment with respect to women's rights.¹²⁵ These efforts include criminalising cultural practices that harm women's rights, such as FGM and degrading widowhood rites. Other efforts documented in the report include awareness-raising actions.¹²⁶

The Democratic Republic of Congo (DRC) report documents efforts to guarantee the right to a positive cultural environment.¹²⁷ According to the report, the government has formulated and adopted several policies and strategies to ensure the right to a positive cultural environment.¹²⁸ These efforts include promulgating laws prohibiting discrimination against women and protecting and promoting their rights. In addition, the report emphasises the revised Family Code to create a positive cultural environment for women in the DRC.

In reporting on this article, the government of the Gambia states, 'The Gambia has taken several measures to promote and preserve the cultural heritage of its people.'¹²⁹ However, these specific measures are not mentioned. Still, the report gives insight into the National Centre for Arts and Culture function: 'to promote and develop Gambian arts and culture'. Also, it does not provide additional information on how this Centre guarantees the right to a positive cultural context.¹³⁰

Notably, although the Government of Kenya reports on the right to take part in cultural life under the African Charter, the report does not contain specific information on measures undertaken

122 The 6th and 7th Combined Periodic Reports of the Republic of Angola on the African Charter on Human and Peoples' Rights and the Initial Report of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2011-2016.

123 As above paras 102-109. Some of these steps listed in the report include: the construction of cultural centres, financing package, adoption of the artistic and cultural scholarship programmes, art schools and multimedia libraries.

124 As above para 103.

125 The single report comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention 2015-2019 para 892.

126 As above para 892.

127 The Democratic Republic of Congo's Report to the African Commission on Human and Peoples' Rights on the implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women From 2005 To 2015 (Initial Report and 1st, 2nd and 3rd periodic Reports) paras 287-294.

128 As above paras 287-294.

129 The Republic of the Gambia's Combined Report on The African Charter on Human and Peoples' Rights for the period 1994 and 2018 and initial report under the Protocol to The African Charter on The Rights of Women in Africa (2018) 160.

130 As above 160.

to guarantee women's right to live in a positive cultural context.¹³¹ This omission is made despite recognising a right to culture under the Kenyan Constitution.¹³² However, the Kenyan report mentions several efforts undertaken to eliminate harmful cultural practices against women in other articles.¹³³

On its part, Lesotho's state report cites section 35 of the 1993 Constitution of Lesotho as granting every citizen, including women, the right to participate freely in the community's cultural life.¹³⁴ It admits that section 10 of the 1968 Chieftainship Act restricts traditional leadership and chieftaincy succession to men. However, it explains that this law is not entirely exclusionary to women as it allows women to act as chiefs in at least three scenarios.¹³⁵ This explanation is offered despite Lesotho's reservations under article 2 of CEDAW, declaring that it does not consider itself obligated to forbid discrimination against women to the extent that it clashes with Lesotho's constitutional laws on traditional leadership and chieftainship successions.¹³⁶

Further, the report mentions the 2003 Gender and Development Policy stipulating that 'positive aspects of the Sesotho culture shall be retained and used to protect previously marginalised groups such as women'.¹³⁷ It is not explicit about how the Sesotho culture's positive aspects would be used to protect women but then concludes that women and girls in Lesotho do not encounter significant challenges to their participation in cultural life. The report mentions how women show creativity through artistic and cultural items such as '*mokorotlo*' (Basotho hats) and traditional dresses.¹³⁸ However, the report discusses challenges to women's participation in cultural activities, including limited access to specialised technical and entrepreneurial training and financial resources to fully benefit from participation in cultural activities.¹³⁹

In reporting on article 17 of the Maputo Protocol, the South African government comprehensively lists constitutional provisions and measures to guarantee the right to a positive cultural context.¹⁴⁰ The report cites case law to illustrate efforts to guarantee the right. For example, the report cited the case of *MEC for Education: KwaZulu-Natal v Pillay*.¹⁴¹ In the case, the Constitutional Court held that a school policy forbidding wearing a small nose stud as a religious and cultural expression is discriminatory and unconstitutional. A similar decision was taken in *Antonie v Governing Body, Settlers High School*.¹⁴² According to the state report, a student had been accused of violating school policy by coming to school with dreadlocks and a cap – 'something which was considered part of the Rastafarian religion'.¹⁴³

131 Kenya's Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2015-2020 paras 122, 123.

132 As above paras 122, 123.

133 The Constitution of Kenya, 2010 art 11.

134 Kenya's Combined report (n 131) paras 242, 252, 254, 262.

135 The Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa 2001-2017 para 487. The three scenarios mentioned in the report include: first, women can be chiefs when men are unable to act as chiefs; second, women can act as regents for their male children; third, women can be chiefs if they do not have male children.

136 CEDAW Committee Concluding Observations Lesotho 2011 (n 110) para 14.

137 Combined Report of Lesotho (n 135) para 489.

138 As above para 491.

139 As above.

140 The Republic of South Africa's Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa 2003-2014 paras 481-483.

141 As above para 497.

142 As above para 498.

143 As above.

However, the Cape High Court recognised constitutional values, which include the student's freedom of expression.

Similarly, Eswatini, in its report, cites how infringements of women's right to live in a positive cultural context have been remedied through several progressive decisions.¹⁴⁴ The report documents how women's right to a positive cultural context has led to women assuming traditional leadership and chieftaincy positions. Nevertheless, the report documents how the practice of male primogeniture is 'still problematic in some communities due to the complexity with the non-codification of Swazi Law and custom resulting in a lack of consistency in its application on the enjoyment of women's rights.'¹⁴⁵

In its report, the government of Seychelles mentions activities undertaken to promote cultural rights, including laws enshrined in its Constitution. However, it provides minimal information on how the article is implemented domestically.¹⁴⁶

Furthermore, several observations may be made in examining the African Commission's Concluding Observations with regard to article 17 of the Maputo Protocol. For instance, in its Concluding Observations to Burkina Faso, the African Commission gives some insight into the measures it considers when examining whether states have fulfilled their obligation under 'the right to a favourable cultural environment'.¹⁴⁷ The African Commission commends efforts undertaken to guarantee equality between men and women in participation in all aspects of cultural life. Some aspects of cultural life include recreational activities, sports and scientific progress and its applications, and protection of intellectual property for scientific, literary and artistic productions. The commission also commends Burkina Faso for establishing structures that support the exercise of cultural rights by establishing the National Observatory for Religious Affairs, which is responsible for monitoring the implementation of regulations on cultural practices.

The Gambia is similarly praised for its legislative efforts to recognise intellectual property rights for cultural expressions, the establishment of the National Council of Arts, cultural festivals to showcase Gambian culture and measures to guarantee the right to culture. Still, it is unclear how this information links to women's right to live in a positive cultural context.¹⁴⁸ On its part, Namibia is commended for its recognition of women as traditional leaders in their communities and their participation in government decision-making processes, including determining cultural policies.¹⁴⁹

One common feature in the Concluding Observations reviewed above is the fact that the African Commission consistently draws attention to 'sociological and cultural challenges, the persistence of customary practices and deep-rooted prejudice, particularly against women, which continue to restrict women's full realisation of their rights in accordance with the principles guaranteed in the

144 The Kingdom of Eswatini's Combined 1st to 9th Periodic Report on the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on The Rights of Women in Africa 2001-2020 paras 582-593.

145 As above para 593.

146 Seychelles 3rd Periodic Report 2006-2019 Protocol to the African Charter on Human and Peoples' Rights of Women in Africa.

147 Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the implementation of the African Charter on Human and Peoples' Rights 2011-2013, African Commission on Human and Peoples' Rights, adopted at the 21st extraordinary session (23 February-4 March 2017) para 49.

148 Concluding Observations and Recommendations on the Combined Report of the Gambia, African Commission Human and Peoples' Rights, adopted at the 64th ordinary session (24 April-19 May 2019).

149 Concluding Observations and Recommendations on the 6th Periodic Report of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights 2011-2013), African Commission on Human and Peoples' Rights, adopted at the 58th ordinary session (6-20 April 2016).

Maputo Protocol'.¹⁵⁰ For example, in its Concluding Observations to Nigeria and to Senegal, the African Commission does not mention the right to a positive cultural context.¹⁵¹ However, the African Commission reiterates factors hindering the African Charter's realisation. It reinforces the need to eradicate harmful cultural practices, highlighting deeply-rooted prejudices embedded in religious and traditional norms and practices and how they hamper women's and children's enjoyment of their rights.

This same concern is expressed in its Concluding Observations to Gabon.¹⁵² Again, the African Commission uses the same language of 'sociological and cultural factors and deeply-rooted prejudices' against women that prevent them from fully participating in the public affairs of their country. The African Commission replicated this language in its Concluding Observations to Kenya, Gambia and Ethiopia.¹⁵³

From the above review of the state reports and Concluding Observations, the commission's engagement with states lacks depth on the issue of how women's right to live in a positive cultural context is to be guaranteed concretely. This situation might be due to a lack of clarity on content and what the fulfilment of state obligation with regard to article 17 entails.¹⁵⁴ However, it could also be explained by the fact that only a minority of states have taken up the practice of reporting on the Maputo Protocol article by article.

The African Commission's practice points to the need to move away from rote replication of recommendations to active engagement with each specific state. This is a much-needed investment if the practice is to match the advance made in the text of the Maputo Protocol from the dismissal of culture as a purely negative factor to engagement with culture as a potential force for positive transformation.

6 Conclusion

The right to live in a positive cultural context represents a transformative and innovative approach to cultural rights that goes beyond CEDAW and the African Charter in setting out the parameters for 'positive cultural' values. Its articulation recognises that legal sanction to 'modify' culture may be insufficient, ineffective or time-consuming. This is because certain 'cultural' practices have eaten deep into the fabric of African societies. Hence, as the emerging jurisprudence in article 17 in African courts indicates, culture is gradually seen as a powerful resource for realising women's rights.

However, the state of jurisprudence also shows that despite the progressive and innovative nature of article 17, which enshrines women's right to live in a positive cultural context, it has been unable to reconcile the tensions between culture and women's human rights in Africa. Moreover, despite

150 Concluding Observations and Recommendations on the 5th and 6th Periodic Report of Ethiopia, African Commission on Human and Peoples' Rights, adopted at the 56th ordinary session (21 April -7 May 2015). See also Kenya's Combined Report (n 131).

151 African Commission Concluding Observations and Recommendations on: the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights 2011=2014, adopted at the 57th ordinary session (4-18 November 2015); the Combined Periodic Report of the Republic of Senegal on implementation of the African Charter on Human and Peoples' Rights 2004-2013, adopted at the 18th extraordinary session (29 July-7 August 2015).

152 Concluding Observations and Recommendations on the Initial and Combined Report of the Gabonese Republic on the Implementation of the African Charter on Human and Peoples' Rights 1986-2012, African Commission on Human and Peoples' Rights, adopted at 15th extraordinary session (7-12 March 2014).

153 Concluding Observations and Recommendations Ethiopia 2015 (n 150); Kenya's Combined Report (n 131).

154 Chirwa (n 79) 85.

scholarship's attempts to interpret the phrase 'positive cultural context', it is still ambiguous.¹⁵⁵ The challenge with such ambiguity is that it leaves room for (mis)interpretations. Therefore, clarifying what positive cultural context entails would enhance the prospects for realising this right in Africa.

Domestic implementation of treaty provisions significantly determines the relevance and efficacy of the treaty. Yet the practical realisation of women's right to live in a positive cultural context depends greatly on clarity about the concept and the resulting state obligations emerging from this right. There is a need for a General Comment from the African Commission to define and clarify the positive cultural context, elaborate on its normative content, and the scope of state obligations.

Finally, as the article requires, there is a need for significant conversations and engagement with women at various levels, particularly at the grassroots level, to deepen understanding of this right. Engagement with civil society in African countries at multiple levels of governance is essential to ensure that women's right to live in a positive cultural context becomes a reality in Africa.

155 Chirwa (n 79) 85.

Article 18

Right to a healthy and sustainable environment

Ademola Oluborode Jegede and Pfanelo Lorrain Mamphiswana

1. Women shall have the right to live in a healthy and sustainable environment.
2. States parties shall take all appropriate measures to:
 - (a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;
 - (b) promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control;
 - (c) protect and enable the development of women's indigenous knowledge systems;
 - (d) regulate the management, processing, storage and disposal of domestic waste;
 - (e) ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.

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1 Introduction

Article 18 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is the only provision of a regional human rights instrument in Africa to specifically guarantee women the right to a healthy and sustainable environment. The recognition of a clean and healthy environment as a human right is revealed in article 24 of the African Charter on Human and Peoples' Rights (African Charter) which guarantees to all people 'the right to a general satisfactory environment favourable to their development'.¹ The significance of a clean and healthy environment to support the fulfilment of other rights of women is obvious, yet no treaty expressly guarantees the right to a clean, safe and healthy environment under the auspices of the United Nations (UN). Neither the International Covenant on Civil and Political Rights (ICCPR) nor

1 Article 24.

the International Covenant on Economic Social and Cultural Rights makes express provisions for an environmental right. Nor does the Convention on the Elimination of All Forms of Discrimination against Women have a specific provision on women's right to a healthy and sustainable environment. The United Nations Committee on Economic, Social and Cultural Rights (CESCR Committee) in General Comment 14 affirms that the right to health includes a healthy environment.² Being a General Comment, however, it is not binding; it makes no express reference to women, and it is no substitute for a specifically guaranteed right in a human rights treaty. Similarly, General Recommendation 34 of the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), in elaborating on the rights of rural women under CEDAW's article 14, affirms the equal right of women in rural areas to participate in environmental decision-making.³

Article 18 is an important provision in that it responds to the real-life challenges of African women relating to a healthy and sustainable environment. In many African societies, women bear a disproportionate share of the impact of environmental challenges on account of their gendered societal role. While there is a paucity of sex-disaggregated data throughout environmental sectors globally,⁴ there is anecdotal evidence to support this observation. About 82 per cent of Africans cook with polluting fuels,⁵ primarily firewood, followed by charcoal, kerosene, dung and coal. It falls on women to use traditional stoves for cooking which result in air pollution.⁶ Women spend an average of 2.1 hours gathering fuel⁷ and about 3 hours daily close to open biomass stoves.⁸ In Africa, women and girls' exposure to household air pollution due to cooking and domestic work was reported as their single greatest health risk.⁹ Also, women in Africa hardly participate in decision-making processes relating to the maintenance of a healthy environment.¹⁰ At the global level, women occupy just one-third of decision-making positions under the United Nations Framework Convention on Climate Change (UNFCCC)¹¹ and the Paris Agreement¹² on climate change.¹³ Women constituted only 29 per cent of the participants at the negotiations of the Paris Agreement at the 21st meeting of the Conference of Parties to the UNFCCC (COP 21).¹⁴ Only 15 per cent of environment ministers globally are women.¹⁵ While these statistics do not necessarily dictate the degree to which gendered environmental concerns

- 2 CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (art 12). Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4) (CESCR General Comment 14) para 15.
- 3 Committee on the Elimination of Discrimination against Women General Recommendation 34 on the Rights of Rural Women CEDAW/C/GC/34, 4 March 2016, para 12.
- 4 Environment and Gender Index (EGI). 'Women's participation in Global Environmental Decision Making. An EGI Supplemental Report' (2015).
- 5 WHO *Burning opportunity: Clean household energy for health, sustainable development, and wellbeing of women and children* (2016); UN Women 2019 'Progress on the sustainable development goals' *The Gender Snapshot* 2019.
- 6 The World Bank Group *Clean cooking: why it matters* (2019).
- 7 F Lambe et al 'Bringing clean, safe, affordable cooking energy to households across Africa: An agenda for action' (2015), prepared by the Stockholm Environment Institute, Stockholm.
- 8 BD Odo et al 'Women's empowerment and household fuel use in 31 African countries: a cross-sectional analysis of households in the demographic and health survey' (2021) 16 *Environmental Research Letters* 1.
- 9 WHO (n 5).
- 10 OO Ilesanmi 'Women's visibility in decision making processes in Africa – progress, challenges, and way forward' (2018) 3 (38) *Frontiers in Sociology* 1.
- 11 United Nations Framework Convention on Climate Change (1992) ILM (UNFCCC).
- 12 Paris Agreement under the United Nations Framework Convention on Climate Change adopted 30 Nov-11 Dec 2015 at the 21st Sess., Conference of the Parties, FCCC/CP/2015/L.9/Rev.1 (Paris Agreement 2015).
- 13 Economic and Social Council Commission on the Status of Women 'Greater female participation, gender-responsive approaches key for tackling climate change, natural disasters', Speakers stress as women's commission opens session WOM/2213 14 March 2022.
- 14 European Capacity Building Initiatives (ECBI), *Pocket guide to gender equality under the UNFCCC* (ECBI 2018) 9.
- 15 Economic and Social Council Commission on the Status of Women (n 13).

will be taken into account, they reflect the marginalisation of those who bear a disproportionate share of the negative impact of environmental degradation in the decision-making space.

Across the world, women traditional knowledge and role relating to the management and sustainability of environmental resources are often invisible.¹⁶ In Africa, evidence shows that it is hardly utilised to shape the formulation and implementation of environmental policies.¹⁷ In the waste management sector, by 2050, the volume of waste is projected to triple to 516 million tonnes per year across Africa (from 174 million tonnes per year in 2016).¹⁸ Due to the gendered division of household labour, women are more closely associated with the generation and management of domestic waste and are exposed to its risks.¹⁹ In artisanal mining across the African continent, women often carry out potentially hazardous mineral processing in their homes alongside regular domestic activities, putting themselves and their families at risk.²⁰ Yet women are less likely to hold decision-making positions, whether in public policymaking spaces or in the private sector where innovative solutions are sought concerning the management of hazardous chemicals and other waste from domestic and industrial sources.²¹

The focus of article 18 on these lived environmental experiences makes it one of the most significant provisions in the rights regime of women in Africa. Article 18 of the Maputo Protocol addresses issues of significance to the African woman, such as participation in environmental decision-making, energy sources, sustainable use of natural resources, women's indigenous knowledge systems and management of waste.

This chapter discusses article 18 of the Maputo Protocol by profiling its drafting history, and examining its relationship with other treaty provisions, the nature and scope of state obligations and implementation measures as deployed by states. It concludes with recommendations for strengthening the implementation of article 18 of the Maputo Protocol. The chapter is organised into six sections. Following this introduction, section 2 discusses the drafting history of article 18. The third section deals with key concepts in article 18 and its linkages with other treaty rights. Section 4 focuses on state obligations and practices, while section 5 analyses the extent of implementation of article 18. Section 6 presents the conclusion and recommendations.

2 Drafting history

The *travaux préparatoires* on the Maputo Protocol shows that article 18 of the Maputo Protocol derives some inspiration from article 24 of the African Charter, the trendsetter on the right to a healthy environment in Africa.²² Under the general title of environmental rights, article 20 of the Kigali Draft²³ asserts that 'in conformity with article 24 of the African Charter, women shall have the right to live in

16 'Indigenous women's rights in biodiversity conservation and sustainable use' Expert paper prepared by GM Catacora-Vargas, EGM/ENV/EP.21 September 2021; see sec 3.1 of this chapter for discussion of the concept.

17 'UNESCO calls for recognizing African Indigenous knowledge in disaster management' <https://www.unesco.org/en/articles/unesco-calls-recognizing-african-indigenous-knowledge-disaster-management> (accessed 1 November 2022).

18 As above.

19 W Mwangi et al, Domestic solid waste management practices in an informal settlement: A gendered perspective (2021) 4(2) *International Journal of Research and Scholarly Communication* 26.

20 D Buss & B Rutherford 'Gendering women's livelihoods in artisanal and small-scale mining: an introduction' (2020) 54 *Canadian Journal of African Studies/Revue canadienne des études africaines* 1.

21 A Caterbow & J Hausmann 'Women and chemicals: The impact of hazardous chemicals on women (WECF 2016) 11; UNDP 'UNDP Guidance document: Gender and chemicals: Mainstreaming gender into UNDP GEF projects on chemicals and waste' https://procurement-notices.undp.org/view_file.cfm?doc_id=225056 (accessed 23 June 2023).

22 African Charter, art 24.

23 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

a healthy environment'.²⁴ There is little basis for the use of the word 'conformity' as article 24 of the African Charter is not as developed as article 20 of the Kigali Draft; it does not have sub-articles on state measures incorporated under article 20 of the Kigali Draft on environmental rights. However, it is clear from the wording of article 20 that it goes beyond the parameters of the 'parent' provision: its specific intention is to guarantee the rights of women to a healthy environment and impose clear obligations on states. Both of these features are absent from article 24 of the African Charter.

At some of the meetings that preceded the Maputo Protocol's adoption, several amendments were suggested and effected on article 20 of the Kigali Draft. For instance, in 2001, the sub-article 20(a) of the Kigali Draft that urges states to 'involve women in the management of the environment at all levels' was amended to 'ensure a greater participation of women in the planning, management and preservation of the environment at all levels'. The latter is more specific and of clearer focus in its details on different spaces for participation of women in environmental issues. It addresses the exclusion of women by insisting on participation in the planning, management and preservation of the environment. The idea of including women in environmental planning is necessary as it is the most foundational space for environmental decision-making. Also, the expectation that women should participate in conserving the environment is not strange, as reports have shown that women possess traditional knowledge that is useful for that purpose.²⁵

Article 19 of the Nouakchott Draft²⁶ refers to article 24 of the African Charter as an inspiration. It asserts that the right is 'in accordance with article 24 of the African Charter on Human and Peoples' Rights'. But just as it has been observed with the Kigali Draft, article 19 of the Nouakchott Draft is more developed than article 24 of the African Charter. It is, however, not as developed as the current article 18 of the Maputo Protocol. There are some sections of article 18 of the Maputo Protocol that are missing in the Nouakchott Draft. For instance, the Nouakchott Draft provides for 'the right to live in a durable and healthy environment' and makes no mention of a 'sustainable environment'. Article 18 of the Maputo Protocol does not use the word 'durable', rather, it provides for 'the right to a healthy and sustainable environment'. No reason for this change is evident in the drafting history. Unlike the word 'durable', the word 'sustainable' has a known meaning in legal jurisprudence.²⁷ Hence, the term 'sustainable' can apply to differentiate or define the nature of the environment to which every African woman is entitled as a right. Another noticeable difference is that article 19 of the Nouakchott Draft does not require state parties to 'protect and enable the development of women's indigenous knowledge systems', which is covered by article 18(c) of the Maputo Protocol. A similar observation can be made of the Final Draft²⁸ of September 2000, which provides for the right to a healthy and sustainable development in article 18, but lacks a provision for the protection of women's indigenous knowledge system.

24 Kigali Draft (n 23) art 20.

25 YA Aluko 'Women's use of indigenous knowledge for environmental security and sustainable development in Southwest Nigeria' (2018) 9(3) *The International Indigenous Policy Journal* 1; N Wane & DJ Chandler 'African women, cultural knowledge, and environmental education with a focus on Kenya's indigenous women' (2002) 7(1) *Canadian Journal of Environmental Education* 86.

26 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

27 For instance, sustainable development was defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It seeks to reconcile economic development with the protection of social and environmental balance' see Report on the World Commission on Environment and Development- Our Common Future, UN Doc. A/42/427 4 August 1987.

28 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

Key amendments were made to the Final Draft of September 2000 by the Expert Meetings of November 2001,²⁹ the Comments by the AUOLC in 2002,³⁰ and the NGO Forum in 2003.³¹ The Expert Meetings adopted sub-article 18(1) and sub-article 18(2)(c) without amendment.³² Sub-article 18(2)(a), however, was altered to read 'ensure a greater participation of women in the planning, management and preservation of the environment at all levels'³³ while sub-article 18(2)(d) was adjusted to read as follows 'ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.'³⁴ The AUOLC in 2002 proposed the rewording of the opening line to read 'women shall have the right to live in an environment that is not harmful to their health or well-being'.³⁵ It then noted that such a suggestion does not cover a 'sustainable environment'.³⁶ The 2003 Draft Protocol to the Maputo Protocol, with comments by NGO,³⁷ featured the right to a healthy and sustainable environment in its article 17, and equally made an amendment to sub-article 17(2)(b) to read as 'promote research and investment into new and renewable energy sources and appropriate technologies and facilitate women's access to and control of them'.³⁸ It also called for the proposed Protocol's provisions to measure with the provisions of CEDAW and general international standards.³⁹ However, article 18 of the Maputo Protocol does not benefit much from CEDAW as the latter lacks a specific provision on the right of women to a sustainable environment.

The right to a healthy and sustainable environment featured in article 18 of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Addis Ababa Draft).⁴⁰ The provision does not only endorse the 2003 provision on the right under the Addis Ababa Draft, with comments by NGO.⁴¹ For the first time, it included a provision on the protection of women's indigenous knowledge system in its sub-article 18(2)(c). It can safely be stated that the Addis Ababa Draft was captured in the current version of article 18 of the Maputo Protocol adopted in 2003.

3 Concepts and linkages

Article 18(1) to (2)(a)-(f) contains key concepts such as a 'healthy and sustainable environment', participation, 'sustainable use of natural resources', 'transition to renewable energies', 'indigenous

29 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts on the Draft Protocol).

30 Comments by African Union Office of the Legal Counsel (AUOLC), CAB/LEG/66.6/Rev.1, 2002 (Comments by the AUOLC).

31 Comments by the NGO Forum (2003): CAB/LEG/66.6/Rev.1 (Comments by the NGO Forum).

32 Report of the Meeting of Experts on the Draft Protocol (n 29) paras 129 & 132.

33 Report of the Meeting of Experts on the Draft Protocol (n 29) para 130.

34 Report of the Meeting of Experts on the Draft Protocol (n 29) para 133.

35 Comments by the AUOLC (n 30) 9.

36 As above.

37 As above.

38 Comments by the NGO Forum (n 31) 17.

39 Draft Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, 6 January 2003 Markup from the meeting convened on 4-5 January 2003 in Addis Ababa by the Africa Regional Office and the Law Project of Equality Now & Others.

40 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

41 Comments by the AUOLC (n 30).

knowledge systems', 'domestic waste' and 'toxic waste'. The clarification of these concepts and the linkages with other rights is the focus of this section.

3.1 Healthy and sustainable environment

The definition of a 'healthy and sustainable environment' in article 18(1) is problematic. It is similar to article 24 of the African Charter, which Van Der Linde and Louw have termed 'vague and ambiguous'.⁴² They reason that no clear indication is given on the exact meaning of terms such as 'satisfactory' and 'healthy' environment.⁴³ Despite this concern, it is still possible to distil the meaning of the phrase from some of the works of treaty monitoring bodies at the UN and African regional levels. General Comment 14 of the CESCR Committee on the Right to the Highest Attainable Standard of Health⁴⁴ includes a healthy environment as a determinant of health⁴⁵ and addresses itself to healthy occupational and environmental conditions.⁴⁶ In a similar context, the Committee referred to Principle 1 of the Stockholm Declaration of 1972, which states that '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'.⁴⁷

The above position is supported by the African Commission on Human and Peoples' Rights (African Commission) in *SERAC*⁴⁸ which considers article 24 of the African Charter on the right of all peoples to a generally satisfactory environment favourable to their development. In that communication, the African Commission asserts that a generally satisfactory environment connotes 'a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual'.⁴⁹ Although it has no specific section devoted to the right to a healthy environment, the Principles and Guidelines on the Implementation of Economic, Social Cultural Rights in the African Charter on Human and Peoples' Rights reinforces the position.⁵⁰ It presents a healthy environment as a cross-cutting issue to consider by states in implementing a number of rights, including the right to health,⁵¹ the right to education,⁵² the right to housing,⁵³ and the right to water and sanitation.⁵⁴ This signals that article 18(1) of the Maputo Protocol is linked to other socioeconomic rights, such as the right to health under article 14(1), the right to access water under article 15(a) and the right to adequate housing under article 16 of the Maputo Protocol. The common feature of these rights is that they touch on a healthy environment as a precursor to the enjoyment of rights. Some of the issues covered by article 18 of the Maputo Protocol also resonate with article 14 of the Convention on the Elimination of all Forms of Discriminations Against Women (CEDAW), which acknowledges the role of women in development and imposes duties on the state in relation to

42 M van der Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the *SERAC* communication: recent developments' (2003) 3 *African Human Rights Law Journal* 167.

43 Van der Linde & Louw (n 42) 174.

44 CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 E/C.12/2000/4.

45 CESCR General Comment 14 (n 44) para 4.

46 CESCR General Comment 14 (n 44) para 11.

47 Declaration of the United Nations Conference on the Human Environment at Stockholm 1972, Principle 1.

48 *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2011) (*SERAC*) para 52.

49 As above.

50 Principles and Guidelines on the Implementation of Economic, Social Cultural Rights in the African Charter on Human and Peoples' Rights (ACHPR ECOSOC Principles).

51 ACHPR ECOSOC Principles (n 50) paras 63, 67(j) & (q).

52 ACHPR ECOSOC Principles (n 50) para 71(f)(6).

53 ACHPR ECOSOC Principles (n 50) para 79(p).

54 ACHPR ECOSOC Principles (n 50) para 87.

rural women's rights to development. The pursuit of a healthy environment has also featured in non-binding instruments on sustainable development, including the Beijing Declaration and Platform of Action,⁵⁵ the UN Millennium Declaration,⁵⁶ and the UN Sustainable Development Goals (SDGs).⁵⁷ The UNGA Resolution on 'The Future We Want' acknowledges that a healthy living environment for women should be an important consideration in promoting sustainable development.⁵⁸ Efforts under the UN human rights structure to recognise the right to a healthy environment have yielded a number of resolutions,⁵⁹ the most recent being Resolution 76/75 of 28 July 2022, which recognises the right to a clean, healthy, and sustainable environment as a human right.⁶⁰ However, the foregoing normative development towards the recognition of the right to a healthy environment under the auspices of the UN remains ambitious and does not specifically reference women.

Based on the foregoing, it can be surmised that a healthy and sustainable environment under the Maputo Protocol refers to the right of women to live in an environment – whether domestic or workplace – that supports their well-being and a life of dignity.

3.2 Participation

Article 18(2)(a) of the Maputo Protocol underlines the need to ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels. Arguably evidence of women's lack of or limited participation can be discerned in the framing of foundational instruments dealing with the environment. For instance, Principle 1 of the Stockholm Declaration provides that 'man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'.⁶¹ The reference to 'man' in the language, appears discriminatory and patriarchal, but it is a product of the historical period in which the Stockholm Declaration was adopted. Twenty years on, the pendulum of international law had evidently swung in the direction of recognising women's participation in environmental decision-making. In 1992, the Rio Declaration on Environment and Development emphasised the vital role of women in environmental management and development and the importance of ensuring their full participation.⁶² The Beijing Platform adopted at the fourth world conference on women in 1995 recognises the essential role women have to play in creating sustainable development and lays out a number of actions to be taken by states to address the situation of women and the environment.⁶³ In the context of environmental protection, the rationale for the participation of women, as explained by the CEDAW Committee's Recommendation 37, is useful.

55 Beijing Declaration and Platform of Action, adopted at the 4th World Conference on Women, 27 October 1995 (Beijing Platform).

56 United Nations Millennium Declaration, Resolution Adopted by the General Assembly, 18 September 2000, A/RES/55/2.

57 Report of the United Nations Department of Economic and Social Affairs on *Global Sustainable Development*, 2015 edition (30 June 2015) (UN DESA Report).

58 UN General Assembly (UNGA) Resolution 66/288 'The future we want', A/RES/66/288, 27 July 2012 para 135.

59 Human rights and the environment' Resolution adopted by the Human Rights Council on 12 April 2011, A/HRC/RES/16/11 (Resolution 16/11; Human rights and the environment', Resolution adopted by the Human Rights Council on 15 March 2012 A/HRC/19/L.J. Rights of the child: realizing the rights of the child through healthy environment on 7 October 2020 A/HRC/RES/45/30; Human rights and the environment', Resolution adopted by Human Rights Council on 23 March 2021 A/HRC/46/L.6.REV.17.

60 United Nations General Assembly Resolution (A/76/L.75), The human right to a clean, healthy and sustainable environment.

61 Declaration of the United Nations Conference on the Human Environment at Stockholm 1972; see also General Assembly resolution 2581 (XXVI) which set out the purpose of convening the Stockholm Conference (Stockholm Declaration).

62 United nation conference on environment and development, Rio Declaration on Environment and Development A/CONF.151/26.14 June 1992, principle 20.

63 Beijing Platform (n 55) Chapter IV.

It is necessary to ensure that all necessary sectors and perspectives are included in environmental governance. Women's viewpoints are important as they are often overlooked despite the significance of their experiences.⁶⁴ In its Preamble, the Convention on Biodiversity (CBD) recognises 'the vital role that women play in the conservation and sustainable use of biological diversity and affirms the need for the full participation of women at all levels of policy making and implementation for biological diversity conservation'.⁶⁵ Article 17(3) of the African Convention on the Conservation of Nature and Natural Resources (African Conservation Convention) affirms that active participation by the local communities is crucial to the sustainable use of resources. In *SERAC*,⁶⁶ while interpreting the right to a satisfactory environment favourable to their development, the African Commission noted that the realisation of that right is possible only where communities participate in the decision-making process relating to the environment.⁶⁷ Participation of women in environmental decision-making is necessary for protecting and conserving the environment.⁶⁸

3.3 Sustainable use

Sustainable use is an important element of article 18(2)(a) of the Maputo Protocol. It is a functional concept to mediate the tension between human survival and the need for the conservation of biodiversity. Sustainable use forms a core part of the three objectives of the CBD – the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits from the use of genetic resources – that are mutually supportive and stand on equal footing.⁶⁹ In particular, to validate its relevance to biodiversity, article 2 of the CBD defines sustainable use as:

the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.⁷⁰

The notion of sustainable use is stressed in other relevant provisions of existing key environmental instruments outside the CBD: Convention on the Conservation of Migratory Species of Wild Animals (CMS),⁷¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),⁷² the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa,⁷³ the United Nations Framework

64 Committee on the Elimination of Discrimination against Women 'General Recommendation 37 on gender-related dimensions of disaster risk reduction in the context of climate change' CEDAW/C/GC/37, 7 February 2018 (General Recommendation 37) para 32.

65 The Convention on Biological Diversity of 5 June 1992 (1760 UNTS 69) Preamble; also see C Kabaseke & EC Lubaale 'Making a case for recognition of women's contribution in the legal framework for environmental conservation in Uganda' (2021) 30(3) *Stellenbosch Law Review* 392.

66 *SERAC* (n 48).

67 *SERAC* (n 48) para 53.

68 C Kabaseke 'Women's right to participation in environmental decision-making in Uganda' in M Addaney & AO Jegede (eds) *Human rights and the environment under African Union law* 287-314.

69 CBD (n 65); South Sudan is the only state in Africa that is not signatory to the CBD, see Convention on Biodiversity 'List of Parties' <https://www.cbd.int/information/parties.shtml> (accessed 1 November 2022).

70 CBD (n 65) art 2.

71 Convention on the Conservation of Migratory Species of Wild Animals UNTS Volume Number: 1651, Preamble; all except four African states (Sudan, Democratic Republic of Congo, Botswana and Namibia) have ratified the instrument, see 'Convention on the Conservation of Migratory Species of Wild Animals: Parties and Range States' <https://www.cms.int/en/parties-range-states> (accessed 1 November 2022).

72 Convention on International Trade in Endangered Species of Wild Fauna and Flora UNTC Volume Number 14537 which calls for the protection of the flora and fauna for the present and future generation; 53 states in Africa are parties to the instrument, see CITES 'List of Contracting Parties' <https://cites.org/eng/disc/parties/chronolo.php> (accessed 23 June 2023).

73 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/

Convention on Climate Change,⁷⁴ the Paris Agreement thereunder,⁷⁵ the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention),⁷⁶ the United Nations Convention of the Law of the Sea,⁷⁷ and the 2030 Agenda for Sustainable Development.⁷⁸

At the regional level in Africa, a fundamental objective of the African Conservation Convention is to foster the conservation and sustainable use of natural resources.⁷⁹ Also, sustainable use is a key component of Aspiration 1, dealing with inclusive growth and sustainable development under the African Union (AU) Agenda 2063.⁸⁰

3.4 Renewable energy

Article 18(2)(b) imposes an obligation on states to facilitate women's participation and control of 'research and investment in new and renewable energy sources and appropriate technologies, including information technologies'.⁸¹ Considering the societal role of household responsibility that women have, the importance of access to and control of renewable energies cannot be overstated. Studies show that improved biomass-burning stoves have an incremental positive impact on air quality and can yield modest health benefits.⁸² AU Agenda 2063 prioritises the need to harness alternative energy sources as it is 'efficient, reliable, cost-effective, renewable and environmentally friendly', for the benefit of all African households.⁸³ The necessity for this policy direction is further reinforced by the AU Commissioner for Infrastructure and Energy, who expressed that it is in the best interest of Africa to use the availability of abundant renewable energy sources for power generation and clean cooking.⁸⁴

or Desertification, particularly in Africa United Nations, Treaty Series, vol 1954, p 3, art 19(1)(c) seeks to empower capacity building of states for the conservation and sustainable use of natural resources; all the states in Africa are parties to the UNCCD, see 'UNCCD: Annex 1: Africa' [https://www.unccd.int/convention/regions/annex-i-africa#:~:text=Africa%3A%20Regional%20cooperation,National%20Action%20Programmes%20\(NAPs\)](https://www.unccd.int/convention/regions/annex-i-africa#:~:text=Africa%3A%20Regional%20cooperation,National%20Action%20Programmes%20(NAPs)) (accessed 23 June 2023).

74 United Nations Framework Convention on Climate Change (UNFCCC) (1992) ILM 851, art 3(4) on the recognition of sustainable development and 3(5) on sustainable economic growth in State parties especially developing states; All the states in Africa are parties to the UNFCCC, see UNFCCC 'Parties to the United Nations Framework Convention on Climate Change' <https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states> (accessed 23 June 2023).

75 Paris Agreement under the United Nations Framework Convention on Climate Change, adopted 30 Nov-11 Dec 2015 at the 21st Sess., Conference of the Parties, FCCC/CP/2015/L.9/Rev.1 (*Paris Agreement 2015*); its Preamble deals with equitable access to sustainable development, sustainable lifestyle and sustainable consumption while article 6 generally deals with sustainable development; all the states in Africa are parties to the Paris Agreement, see UNFCCC 'Paris Agreement – Status of Ratification', <https://unfccc.int/process/the-paris-agreement/status-of-ratification> (accessed 23 June 2023).

76 Convention on Wetlands of International Importance Especially as Waterfowl Habitat UNTS Volume Number 14583, art 3(1) on the wise use of wetlands; fifty states in Africa are signatories to the instrument, see The Danish Institute for Human Rights 'Signatories for Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat' <https://sdg.humanrights.dk/en/instrument/signees/2485> (accessed 23 June 2023).

77 Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 397, art 119(1)(a) on the need for States to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield; fifty three states in Africa are signatories to the instrument, see Convention on the Law of the Sea 'Status of Ratification' <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf> (accessed 23 June 2023).

78 United Nations General Assembly Transforming our World: the 2030 Agenda for Sustainable Development, A/res/70/1, adopted by the General Assembly on 25 September 2015.

79 Revised African Convention on the Conservation of Nature and Natural Resources. 7 March 2017 (African Conservation Convention).

80 UNGA Resolution 66/288, para 18.

81 Maputo Protocol art 18(2)(b).

82 J Rosenthal et al 'Clean cooking and the SDGs: Integrated analytical approaches to guide energy interventions for health and environment goals' (2018) 42 *Energy for Sustainable Development* 152.

83 UNGA Resolution 66/288, 16.

84 AU Press release 'Is energy transition the answer to Africa's climate change and socio-economic development? What will

Also, women working in the coal based sector need special attention as studies highlight that the implementation of a just energy transition may be uneven, as states may neglect the rights of workers whose livelihood depends on the fossil-based sector.⁸⁵

3.5 Indigenous knowledge systems

The protection and the development of women's indigenous knowledge systems under article 18(2) (c) of the Maputo Protocol are critical to the realisation of women's right to a healthy and sustainable environment. Women in Africa have a pivotal role to play in the protection of the environment in that they possess traditional knowledge, experiences and wisdom, which are valuable.⁸⁶ Traditional knowledge refers to 'a set of cultural traditions, values, belief systems, and world views in any indigenous society that are imparted to the young generation by community elders'.⁸⁷ Such knowledge is based on collective understandings and interpretations of the social, physical, and spiritual worlds.⁸⁸ They include the concepts, beliefs, perceptions, and experiences of local peoples in their natural and human-built environments.⁸⁹ The knowledge extends to all aspects of life, including the management of the natural environment and the interaction of people with the environment.⁹⁰ It has been argued that if supported by appropriate strategies, women's indigenous knowledge can contribute to the earth's recovery.⁹¹ Although women are not specifically mentioned, article 17 of the African Conservation Convention recognises the need to promote indigenous knowledge in the context of conservation and urges states to ensure that the intellectual property rights of members of local communities are respected.⁹² Such knowledge, in terms of article 17(3) of the African Conservation Convention, is to be integrated and incentivised in the process of planning and management of natural resources with a view to encouraging conservation and sustainable use of such resources. Besides, considering their local traditional knowledge, women can make important contributions to environmental management. The knowledge is derived from their involvement in agricultural practices and closeness to nature as they can observe its changes and respond through 'different adaptive practices in crop selection, planting, harvesting, land conservation techniques and careful management of water resources'.⁹³

The protection and development of women's indigenous knowledge systems are consistent with CEDAW General Recommendation 37, which affirms the importance of including all significant sectors and perspectives in environmental governance.⁹⁴

it take for Africa to reach net-zero emissions?' 9 November 2021.

85 L Eicke, S Weko & A Goldthau 'Countering the risk of an uneven low-carbon energy transition' (2019) 8 IASS Policy Brief 4; C Strambo, J Burton & A Atteridge 'The end of coal? Planning a "just transition" in South Africa' (2019) SEI Report 1-16.

86 Catacora-Vargas (n 16).

87 AO Jegede 'African Union peace and security architecture: can the panel of the wise make a difference?' (2009) 9 *African Human Rights Law Journal* 409.

88 As above.

89 AO Jegede & A Masoga 'Climate change adaptation and indigenous knowledge: prospecting African Union channels for influencing national policy (2016) 15(2) *Indilinga African Journal of Indigenous Knowledge Systems* 1.

90 S Harding *Is science multicultural?: Postcolonialism, feminism, and epistemologies* (1998).

91 N Wane 'Indigenous knowledge: lesson from the elders: a Kenyan case study' in G Dei, B Hall & D Rosenberg (eds) *Indigenous knowledges in global contexts* (2000) 93.

92 African Conservation Convention (n 79) art 17(1).

93 General Recommendation 37 (n 64) para 33.

94 General Recommendation 37 (n 64) para 32.

3.6 Domestic and toxic waste

Under article 18(2)(d) and (e), states have an obligation to regulate domestic waste and put in place proper standards for the disposal of toxic waste.⁹⁵ This is generally because of the hazard they pose to the health and livelihood of women. Article 1(1) of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa defines ‘wastes’ as ‘substances or materials which are disposed of, or are intended to be disposed of, or are required to be disposed of by the provisions of national law’.⁹⁶ Household hazardous waste has been defined as ‘the fraction of waste, originated from households, which contains corrosive, explosive, flammable, toxic, ignitable, or reactive ingredients and is difficult to dispose of or which put human health and the environment at risk because of its bio-chemical nature’.⁹⁷

Africa is facing an increasing waste management problem. The mismanagement of waste is adversely impacting human and environmental health. Women’s exposure to waste can cause direct and indirect incremental harm to their health, including the disruption of their hormonal and reproductive health.⁹⁸ Another trend of exposure is experienced when women play their role as important agents in recycling waste.⁹⁹ Activities associated with recycling do not only expose women to pollution.¹⁰⁰ Research has shown that women who sift through the waste for their livelihood also suffer from reproductive health problems.¹⁰¹

The African Conservation Convention requests states to take action concerning the management and processing of waste and its transboundary movement.¹⁰² The likely consequence that hazardous waste may have on human health is well noted in the only African regional instrument on hazardous waste: the Bamako Convention. It affirms that waste can pose the risk of damage to human health and threaten the environment and that the most effective way of addressing the risk is for states to reduce waste generation and its potential harm.¹⁰³ The urgency of addressing waste is evident in SDG 6 (clean water and sanitation), SDG 12 (responsible consumption and production), and SDG 5 (gender equality, which is at the centre of all the strategic goals). Consequently, for women in Africa, article 18(2)(d) and (e) of the Maputo Protocol requires states to adopt such measures that reduce the health and environmental consequences of waste on women’s pursuit of their livelihoods.

95 Maputo Protocol arts 18(c) & (d).

96 Bamako Convention on the Ban of the Import into Africa and the control of transboundary movement and management of hazardous wastes within Africa (1991) (Bamako Convention).

97 J Gutberlet & SMN Uddin ‘Household waste and health risks affecting waste pickers and the environment in low- and middle-income countries’ (2017) 23(4) *International Journal of Occupational and Environmental Health* 299, 301; also see ES Bass, RL Calderon & ME Khan ‘Household hazardous waste: a review of public attitudes and disposal problems’ (1990) 52(6) *Journal of Environmental Health* 358.

98 M Lakhani ‘Wasting women – the biopolitics of waste and women’ *Empowering Women for Gender Equity* 73 (2007) 1(1) *Biopolitics New Technologies Trilogy* 93.

99 A Almasi et al ‘Assessing the knowledge, attitude and practice of the Kermanshahi women towards reducing, recycling and reusing of municipal solid waste’ (2019) 141 *Resources, Conservation and Recycling* 329.

100 Africa Institute ‘Regional policy guidelines: economic instruments for the environmentally sound management of used lead acid batteries’ (2013).

101 S Kumar, A Sharma & C Kshetrimayum ‘Environmental & occupational exposure & female reproductive dysfunction’ (2019) 150(6) *Indian Journal of Medical Research* 532; S Hariparsad & RN Naido ‘The effects of occupational pollutants on the reproductive health of female informal street traders in Warwick junction, Durban, South Africa – A cross-sectional study’ (2019) 19 *BMC Women’s Health* (2019) 163.

102 African Conservation Convention (n 79) art 22(2)(g).

103 Bamako Convention (n 96) Preamble.

4 Nature and scope of state obligations

Article 18(2)(a)-(e) of the Maputo Protocol requires states parties to undertake certain measures. The nature and scope of state obligations can be clarified by reference to human rights soft law, which stipulates measures that are relevant to different aspects of article 18 elements. As shown in the ensuing discussion, such reference can offer an interpretive insight into the application of article 18 as a whole.

Article 18(2)(a) urges parties to take appropriate measures to ‘ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels’. The CEDAW guarantees the equal right of women to ‘participate in the formulation of government policy and the implementation thereof’ and to ‘participate in non-governmental organizations and associations concerned with the public and political life of the country’. The CEDAW further provides that women living in rural areas have the right to ‘participate in the elaboration and implementation of development planning at all levels’. The right of women to participate in political and decision-making processes is specifically guaranteed under article 9 of the Maputo Protocol, which also requires states to take positive measures, including affirmative action and craft appropriate legislation to aid their effective representation and participation.

Participation in the context of article 18(1)(a) focuses on the sustainable use of natural resources. The obligations relating to this expectation can be explained with the provisions of other relevant international instruments. Article 5 of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), for example, guarantees the rights of peasants to sustainable use of natural resources and participation in its management.¹⁰⁴ Article 4 of UNDROP requires states to take measures to ensure participation, empowerment, access to natural resources and enjoyment of general human rights of peasant women.

Article 18(2)(b) focuses on research and investment in contemporary renewable energy sources as a crucial component of states’ obligation to realise the right to a healthy and sustainable environment. The obligation includes promoting technologies, including information technologies, and facilitating women’s access and control of these means. The significance of the transition to renewable energy for women is underscored by CEDAW Committee General Recommendation 37. It affirms that to address the negative consequences of climate change on women’s rights, states should put in place and ensure the participation of women in measures that reduce pollution and promote the transition to renewable energies.¹⁰⁵ The foregoing comments justify that states have a unique role to play in fulfilling the content of article 18(2)(b) of the Maputo Protocol as a necessary component of the right of women to a healthy environment. State measures should not only showcase women as the centre of investments and research on renewable energy sources but also their participation in research and investments meant to drive such an agenda. Shedding light on the direction of such measures, CEDAW Recommendation 37 requires states to ensure that such measures are gender respective.¹⁰⁶ Involving women in the renewable energy sector can positively impact their quality of life. According to the World Health Organisation, investing in clean household energy can prevent climate change and protect the health of women and children.¹⁰⁷ Participation, access and control of women can also be improved by including women in the decision-making process, programmes and agendas on research and investment in renewable energies and appropriate technologies. CEDAW Recommendation 37 explains that participation of women in environmental decision-making includes the promotion of

104 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Area, Resolution adopted by the General Assembly on 17 December 2018, A/RES/73/165 (UNDROP) art 4.

105 General Recommendation 37 (n 64) para 51.

106 General Recommendation 37 (n 64) para 64(e).

107 WHO Report (n 5) 89.

equal representation and equipping them with ‘sufficient resources, skills, and authority to lead, advise, monitor and carry out strategies’.¹⁰⁸

Similarly, the protection of women while transitioning to renewable energy sources requires states’ interventions. For instance, it has been argued that states should ensure that transitioning to alternative energy sources does not unduly affect workers.¹⁰⁹ This position applies especially to women workers as they are more vulnerable to losing their job in the coal sector, which is largely male-dominated. The principles and imperatives of a just transition that may be helpful in shaping states’ measures are well laid down in the International Labour Organization (ILO) *Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All*.¹¹⁰ ILO Guidelines set out key principles to guide the transition to environmentally sustainable economies and societies. These principles include informed consultation with stakeholders; protection of human rights; regard for gender in environmental challenges and opportunities; the creation of more decent jobs; preparation for projected impacts of transition on job losses and displacement; skills development; and collective bargaining.¹¹¹ The Guidelines also call upon states to provide a regulatory framework to enable sustainable enterprise development and decent work.¹¹² The foregoing measures are needed to protect the interests of women working in energy-related sectors while transiting to alternative energy sources.

In terms of article 18(2)(c), to realise the right of women to a healthy and sustainable environment, states should ‘protect and enable the development of women’s indigenous knowledge systems’. Measures of states with regard to the development and protection of women’s indigenous knowledge may include recognition of their role, promotion of their conservation techniques and incentivising their involvement in environmental management. Writing generally on the protection of traditional knowledge, Ferras argues that most legal systems offer limited protection because it is generally in oral form and not in a written format.¹¹³ This, arguably, signifies that the starting point for the promotion of women’s indigenous knowledge in environmental management by states is to accord it formal legal recognition in the legal system. Further light on other measures to be taken can be found in the *African Union Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (AU Model Law). The AU Model Law underscores the key role of women ‘in the generation, conservation, and sustainable use of biological diversity and associated knowledge’.¹¹⁴ In the main, the AU Model Law calls for the implementation of the Consultation and Prior Informed Consent rule in any project that involves indigenous knowledge,¹¹⁵ ensuring that they benefit from earnings that accrue from the use of such knowledge,¹¹⁶ and establishing a national information centre and database on traditional knowledge.¹¹⁷

Article 18(2)(d) requires states to ‘regulate the management, processing, storage and disposal of domestic waste’ while article 18(2)(e) calls for compliance with appropriate standards ‘for the storage,

108 General Recommendation 37 (n 64) para 36(d).

109 AO Jegede ‘Should they “just” leave? Global energy transition, climate change and the protection of workers’ rights in South Africa’ (2021) 19(1) *Oil, Gas and Energy Law Journal* 1.

110 International Labour Organization, *Guidelines for a just transition towards environmentally sustainable economies and societies for all* (ILO 2015) (ILO Guidelines).

111 ILO Guidelines (n 110) para 13.

112 ILO Guidelines (n 110) para 15(a).

113 L Ferris ‘Protecting traditional knowledge in Africa: considering African approaches (2004) 2 *African Human Rights Law Journal* 242.

114 African Union Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, Algeria 2000 (AU Model Law) Preamble.

115 AU Model Law (n 114) sec 5(1) & (2).

116 AU Model Law (n 114) sec 12(2).

117 AU Model Law (n 114) secs 64 & 65.

transportation and disposal of toxic waste'. The African Conservation Convention prescribes measures that states should implement to address the detrimental effects of 'toxic, and other hazardous substances and waste' on the environment. It urges states to:

- (a) establish, strengthen and implement specific national standards, including for ambient environmental quality, emission and discharge limits as well as process and production methods and product quality.
- (b) provide for economic incentives and disincentives, with a view to preventing or abating harm to the environment, restoring or enhancing environmental quality, and implementing international obligations in these regards; and
- (c) adopt measures necessary to ensure that raw materials, non-renewable resources, and energy, are conserved and used as efficiently as possible, and that used materials are reused and recycled to the maximum extent possible while non degradable materials are disposed of in the most effective and safe way.¹¹⁸

The above measures are relevant to the realisation of the right of women to a healthy and sustainable environment in that they are deserving responses to the challenges which women often face in the context of domestic and toxic waste disposal in Africa.

Also, article 4 of the Bamako Convention stipulates general obligations of states on the importation of hazardous wastes. These include taking appropriate measures to prohibit its importation. In relation to waste generated in Africa, it calls upon states to impose unlimited liability on generators, ensure its maximal reduction, and provide adequate and environmentally sound disposal facilities.¹¹⁹ Parties are requested to apply precautionary measures so as to prevent the release of a substance that may 'cause harms to humans and the environment without waiting for scientific proof'.¹²⁰ They also have an obligation to 'promote clean production methods applicable to entire product life cycles'.¹²¹

5 Implementation

This section analyses the measures being taken in the implementation of article 18 of the Maputo Protocol. The discussion will highlight constitutional, legislative, administrative, and judicial measures, as well as their attendant implementation challenges.

5.1 Constitutional and legislative measures

An analysis of state reporting on legislative measures taken on this wide range of issues under article 18 of the Maputo Protocol offers insight into the extent of implementation of article 18(e) of the Maputo Protocol. In reporting to the African Commission, states sometimes argue that their general constitutional provision on the right of everyone to the environment is inclusive of women's interests. For instance, in a range of reports, reference was made to general constitutional provisions such as section 24 of the Constitution of South Africa,¹²² section 73 of the Constitution of Zimbabwe,¹²³

118 African Conservation Convention (n 79) art 13(2).

119 Bamako Convention (n 96) art 4(3) a-e.

120 Bamako Convention (n 96) art 4(3)(f).

121 Bamako Convention (n 96) art 4(3)(g).

122 Republic of South Africa Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa (2015) paras 259-261.

123 Republic of Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Report under the African Charter on Human and Peoples' Rights and 1st, 2nd, 3rd and 4th Combined Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2007-2019) (2019) 97.

section 29 of the Burkina Constitution,¹²⁴ section 24 of the Algeria Constitution,¹²⁵ section 36 of the Lesotho Constitution,¹²⁶ section 38 of the Constitution of the Republic of Seychelles,¹²⁷ and section 11 of the 2005 Sudanese Transitional Constitution.¹²⁸ While sections 46 and 47 of the Constitution of the Democratic Republic of Congo (DRC) are only reported as protecting the interest of women and men in relation to the right to a healthy environment,¹²⁹ it is not so textually reflected in the Constitution. Rather in the case of DRC, the appropriate provision dealing with the right to a healthy environment can be found in section 53 of the DRC Constitution. Based on the sampled reports, there is no constitutional provision on the protection of the environment which specifically refers to women or women's participation. However, the lack of specific mention of women may not necessarily undermine the implementation of article 18 because there is nothing in the provisions relating to the right to the environment, as evidenced by the wording of the Constitution, which specifically exempts women. Also, the provision has not been applied or interpreted as exclusive to women.

There are states with laws that have a bearing on article 18(2)(a) of the Maputo Protocol, though. The National Environmental Management Act of South Africa emphasises the need to recognise the vital role of women in environmental management and development and ensure their participation.¹³⁰ Relevant legislative measures relating to the sustainable use of resources by women are evidenced by legislation enabling equal access to land. For instance, Nigeria's National Land Commission Act¹³¹ and the Land Registration Act¹³² entrench principles of gender equality in access to land and enshrine the rights of women to own land and property. The DRC asserts that sections 39 and 43 of the Forest Code of 2002 (which govern the right of populations dependent on forest resources) puts men and women on an equal footing with regard to participation in the sustainable use and preservation of natural resources.¹³³

Other countries whose land laws require gender equality in the context of sustainable use of natural resources include Kenya's Land Act,¹³⁴ Tanzania's Land Act,¹³⁵ Uganda's Land Act,¹³⁶ Ghana's Land Act,¹³⁷ and Ethiopia's Rural Land Proclamation.¹³⁸ One of the guiding principles and values of Kenya's Land Act is to stop gender discrimination associated with land and property law, customs

124 Burkina Faso 3rd and 4th Periodic Report (2011-2013), submitted 7 August 2015, 57th ordinary session 2015, para 351 (Burkina Faso Report).

125 People's Democratic Republic of Algeria 5th and 6th Periodic Reports on the African Charter on Human and Peoples' Rights 2010-2014 (2015) para 64.

126 The Kingdom of Lesotho Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa (2018) para 172.

127 Republic of Seychelles 3rd Periodic Report under the African Charter on Human and Peoples' Rights, 2006-2019 (2021) para 18(1).

128 Republic of Sudan the 4th and 5th Periodic Reports of the Republic of Sudan in Accordance with art 62 of the African Charter on Human and Peoples' Rights 2008-2012 (2012) para 193.

129 Democratic Republic of Congo Report to the African Commission on Human and Peoples' Rights on the implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th, and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa from 2005 to 2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports) (2017) para 295.

130 National Environmental Management Act 107 of 1998.

131 The National Land Commission Act 2012.

132 The Land Registration Act 2012.

133 Democratic Republic of Congo report (n 129) 58-60.

134 Kenya Land Act 6 of 2012.

135 Tanzania Land Act Chapter 113, 1 May 2001.

136 Uganda Land Act. Amended by the Land (Amendment) Act 2001, The Land (Amendment) Act 2004, The Land (Amendment) Act 2010.

137 Ghana Land Act 1036 of 2020.

138 Ethiopia Rural Land Proclamation 2005.

and practices.¹³⁹ Section 17(2) of the Tanzania Land Act stresses the need to have an equal number of men and women as members of the National Land Advisory Council. The rights of women regarding customary land are recognised by section 27 of the Uganda Land Act. Section 11 of the Ghana Land Act prohibits discriminatory practice on the ground of gender in any decision or practice regarding customary land. In terms of section 3 of the Ethiopia Rural Land Proclamation, all the rights conferred under the instrument apply to both the ‘masculine and feminine gender’. Section 211 of the Constitution of Eswatini provides that gender shall not exclude anyone from equal access to land for normal domestic purposes.¹⁴⁰ The involvement of women in the sustainable use of natural resources is evident from Burkina Faso’s report, which explains that gender and equity are observed to ensure women’s participation in the governance of forests and other natural resources.¹⁴¹ Although this may not always translate into practice, this development is positive as it shows generally that there is no basis in law to deny women access to and control of natural resources including land.

Article 18(2)(b) of the Maputo Protocol (promoting research and investment in renewable energy and appropriate technology) has attracted no specific legislative attention that is visible in the reports of state parties. Some states have legislation and or policy which does not highlight gender issue in the renewable energy sector. Examples are the Ghana Renewable Energy Act¹⁴² and Mauritius Renewable Energy Agency Act.¹⁴³ There are exceptions, as are seen in South Africa White Paper on the Renewable Energy Policy,¹⁴⁴ Tanzania National Energy Policy,¹⁴⁵ Kenya Energy Act,¹⁴⁶ and Rwanda Energy Sector Strategic Plan.¹⁴⁷ However, none of these official documents addresses the potential negative implications of transitioning to renewable energy sources on women working in the energy sector. Also, reports of some states before the African Commission do not indicate any legislation put in place to specifically tackle women’s challenges in the context of renewable energy. This is the position with Uganda,¹⁴⁸ South Africa,¹⁴⁹ Tanzania,¹⁵⁰ DRC,¹⁵¹ Kenya,¹⁵² Namibia,¹⁵³ and Nigeria.¹⁵⁴ The general lack of reporting on the regulatory standards highlighting the protection of women’s interests in research and investment and appropriate technology on renewable energies raises doubts about the commitment of states towards the material details in article 18(2)(b) of the Maputo Protocol.

139 Section 4(2)(f) of Kenya Land Act.

140 Kingdom of Eswatini Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples’ Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa (2021) para 605.

141 Burkina Faso Report (n 124) para 285.

142 Ghana Renewable Energy Act 832 of 2011.

143 The Mauritius Renewable Energy Agency Act 11 of 2015.

144 White Paper on the Renewable Energy Policy of the Republic of South Africa (2003) 38-39.

145 Tanzania National Energy Policy (2015) sec 4(4).

146 Kenya Energy Act 1 of 2019, sec 26(16)(c).

147 Energy Sector Strategic Plan 2018/19-2023/24 September 2018 sec 3.3.3.

148 Republic of Uganda Periodic Report to the African Commission on Human and Peoples’ Rights (2013).

149 South Africa Report (n 122).

150 United Republic of Tanzania 2nd to 10th Periodic Report on the African Charter on Human and Peoples’ Rights, 1992-2006 (2008).

151 Democratic Republic of Congo Report (n 129).

152 Republic of Kenya Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples’ Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ (2020).

153 Republic of Namibia 7th Periodic Report on the African Charter on Human and Peoples’ Rights and the second report under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2020).

154 Nigeria’s 5th Periodic Country Report on the Implementation of the African Charter on Human and Peoples’ Rights in Nigeria (2011).

In terms of article 18(2)(c) of the Maputo Protocol, the Namibia's Access to Biological and Associated Traditional Knowledge Act,¹⁵⁵ shows that the general protections and promotion of traditional knowledge associated with biodiversity or environment is sometimes recognised by law.¹⁵⁶ However, this instrument has no provision for women, a feature that is found in the Protection, Promotion, Development and Management of Indigenous Knowledge Act of South Africa.¹⁵⁷ A similar feature is found in the Kenya Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act.¹⁵⁸ Other measures necessary for protecting women's informed consent and access to benefits derived from their traditional knowledge are not given any particular consideration in the instruments. The non-reference to women and gender in official documents of state parties governing traditional knowledge shows a lack of special legal recognition for the role they play in environmental management.

In contrast with the expectation under article 18(2)(d) and (e) of the Maputo Protocol, the special recognition of women or women-specific measures is not evident in a number of national laws dealing with waste management. For instance, it is not evident in the Environmental Code of Burkina Faso,¹⁵⁹ the Environmental Code of Mauritania,¹⁶⁰ and Uganda National Environment (Waste Management) Regulations.¹⁶¹ Nor do the South Africa National Environmental Management: Waste Act,¹⁶² Egypt Waste Management Law,¹⁶³ the Tanzania Environmental Management (Hazardous Waste Control and Management) Regulations,¹⁶⁴ and the Anti-Littering Act of The Gambia.¹⁶⁵ Doubtless, the implementation of these instruments may positively impact the environment and thereby enhance the realisation of the right of women to a healthy and sustainable environment. For instance, section 32 of the Environmental Code is useful as it requires anyone who produces or keeps wastes harmful to public health or environmental health to ensure its removal. However, instruments of that nature lack the necessary indication on what and how measures are to be implemented in the protection of women's right to healthy and sustainable health. This pattern is reflected in the reports by Uganda¹⁶⁶ and Tanzania.¹⁶⁷ While there is information on laws and general efforts by states to address waste management in the reports by Burkina Faso,¹⁶⁸ South Africa,¹⁶⁹ Egypt,¹⁷⁰ Mauritius,¹⁷¹ The Gambia,¹⁷² and Mauritania,¹⁷³ specific details in relation to women are missing.

155 Namibia Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017 (Namibia Traditional Knowledge Act).

156 Namibia Traditional Knowledge Act (n 155) sec 2(e).

157 South Africa Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019.

158 Kenya Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act 16 of 2016.

159 Burkina Faso Law 006-2013 (on the Code for the Environment).

160 Mauritania Law 2000-045 (on the Environmental Code).

161 Uganda National Environment (Waste Management) Regulations 49 of 2020.

162 South Africa National Environmental Management: Waste Act 59 of 2008.

163 Egypt Waste Management Law No.202 of 2020; as translated by FAOLEX Database.

164 The Environmental Management (Hazardous Waste Control and Management) Regulations, 2019.

165 The Gambia Anti-Littering Regulations, 2007.

166 Uganda Report (n 148).

167 Tanzania Report (n 150).

168 Burkina Faso Report (n 124) para 290.

169 South Africa Report (n 122) paras 148, 506, 509.

170 Arab Republic of Egypt Periodic Report on the African Charter on Human and Peoples' Rights 2001-2017 (2018) 53.

171 The Republic of Mauritius 9th to 10th Combined Periodic Report to the African Commission on Human and Peoples' Rights Implementation of the African Charter on Human and Peoples' Rights paras 166, 412, 413, 419.

172 The Gambia Combined Report of the African Charter on Human and Peoples' Rights for the period 1994 and 2018 and initial report under the Protocol to the African Charter on the Rights of Women in Africa (2018) paras 74, 114, 115.

173 Islamic Republic of Mauritania 10th, 11th, 12th, 13th and 14th Periodic Reports of the Islamic Republic of Mauritania on the Implementation of the Provisions of the African Charter on Human and Peoples' Rights (2017) 44, 66.

5.2 Administrative measures

State reports show a number of administrative actions being taken to ensure the realisation of some of the components of article 18. In line with article 18(2)(a) of the Maputo Protocol, the deliberate involvement of women in environmental decision-making and awareness creation of their role therein and management processes are reported by South Africa¹⁷⁴ and Togo.¹⁷⁵ In particular, the National Programme for Decentralized Environmental Management Action (PNADE) of Togo involves women in transparent decision-making, feasibility review and implementation of actions at all levels.¹⁷⁶ In Zimbabwe, to ensure the full participation of women in the agricultural sector, the government is promoting contract farming in crop and animal production with an emphasis on value addition by female farmers.¹⁷⁷ Kenya supports women's participation and leadership in environmental and natural resource management and governance, citing as examples the provision of environmentally friendly cooking fuel to women in the rural areas under the 'LPG Uptake Promotion' and the Kenya National Domestic Biogas Program.¹⁷⁸ The South African Land Reform Gender Policy aims to create an enabling environment for women to access, own, control, use and manage land and credit facilities.¹⁷⁹ Through its legislation, the DRC has set the rule on microfinance, which benefits women.¹⁸⁰ The Enterprise Seychelles Agency, an institution established by law, is required to consider women in its functions and provide assistance to female entrepreneurs.¹⁸¹ The foregoing shows that women are engaged in matters relating to environmental management and sustainable use of resources. Much still remains, however, to be achieved to ensure engagement at the decision-making level of 'planning, management and implementation' as anticipated under article 18(1)(a).

Regarding article 18(2)(b) of the Maputo Protocol, in DRC, the National Renewable Energy Department, which promotes research and investment in the area of new and renewable energy sources, involves women in those activities.¹⁸² In Nigeria, projects such as the National Clean Cooking Scheme, which is an aggressive drive to reduce cooking with solid sand fossil fuels such as firewood and kerosene, are under implementation.¹⁸³ Similar to Nigeria, the report by Kenya shows the use of environmentally friendly cooking fuel that is women-friendly and available in rural areas.¹⁸⁴ Algeria cites its National Strategy for the Integration and promotion of women, which revolves around the improvement of women's rights in all areas (education and vocational training, health, economy, culture and ICT).¹⁸⁵ In Burkina Faso, gender dimensions and women's participation in the implementation of a national multi-functional platform programme for poverty alleviation (PN-PTFM/LPC) has made it possible for women to access modern energy and create more jobs.¹⁸⁶ The Ministry of Environment and Tourism of Namibia includes gender in the Environmental Impact Assessment to address issues at an early stage of project planning and explore means to reduce adverse impacts on women. It realises that women are disproportionately affected by adverse consequences of developmental processes

174 South Africa Report (n 122).

175 Republic of Togo 6th, 7th and 8th Periodic Reports of the state of Togo on the Implementation of the African Charter on Human and Peoples' Rights (article 62 of the Charter) (2017).

176 Togolese Republic Report (n 175) 176.

177 Republic of Zimbabwe Report (n 123) 97.

178 Kenya Report (n 152) para 282.

179 South African *Land Reform Gender Policy: a gendered analysis of land reform policy and implementation outcome in South Africa* (2006-2008) 32.

180 Law 11-020 of 15 September 2011; Democratic Republic of Congo Report (n 129) para 305.

181 Enterprise Seychelles Agency Act 3 of 2018.

182 Democratic Republic of Congo Report (n 129) paras 300 & 301.

183 Nigeria Report (n 154) 138.

184 Kenya Report (n 152) para 282.

185 Algeria Report (n 125).

186 Burkina Faso Report (n 124) para 344.

through displacement or relocation, loss of livelihood and reduction in access to natural resources, environmental degradation and increased pollution levels.¹⁸⁷ In Cameroon, women participated in designing the ‘Women and Sustainable Energy Programme’. The programme connects women with sustainable electrification solutions through solar energy. The government has promoted women’s participation by designating female mayors in Cameroon’s city councils as project managers.¹⁸⁸ In Lesotho, women retailers are sensitised on the consequences of using non-biodegradable plastic bags and the use of butane gas to reduce pressure on forest resources and ensure well-being as intended by article 18(2)(b).¹⁸⁹ The foregoing activities showcase that states are researching and investing in renewable energies and that concrete actions are being taken in some states to reduce pollution and promote the transition to renewable energies. Also, the focus of programmes of the mentioned states on women aligns with the object of article 18(2)(b) of the Maputo Protocol on the facilitation of women’s access and control of technologies associated with renewable energies. However, necessary measures, including consultation, are yet to be implemented to ensure that transitioning to renewable energies does not adversely affect female workers in the non-renewable energy sector.

Some states’ reports on administrative measures do not exactly reflect the state of affairs or explain how those measures relate to women. For instance, as reported, The Kingdom of Eswatini Strategic Road Map (2019-2023) charts strategies for achieving sustainable development.¹⁹⁰ However, the content of the plan has little reference to the environment or the role of women. Yet, one would expect such a report to indicate the place of women’s indigenous knowledge system in line with article 18(2)(c). A lack of reference to women’s indigenous knowledge signals that women’s contribution in that area is not properly recognised. It also underscores that the key role of women ‘in the generation, conservation, and sustainable use of biological diversity and associated knowledge’ is sometimes ignored. Similarly, it is unlikely that a state that does little to document women’s contribution to indigenous knowledge of the environment will ensure that they benefit from earnings that accrue from the use of such knowledge.

In relation to article 18(2)(d) and (e) dealing with domestic and toxic wastes, states have engaged in general activities, as shown in their reports. The Republic of Seychelles documents that its Ministry of Environment, Energy and Climate Change undertakes measures to promote the protection, preservation, waste management and improvement of the environment. It refers to its Disposal and Waste Management Agency which considers international instruments such as the Basel Convention relating to the regulation of disposal of hazardous toxic waste.¹⁹¹ As reported, DRC promotes hygienic latrines, and waste management systems to fight against disease vectors and pollution, as well as education, information and communication for behavioural change.¹⁹² Algeria adopted financial and tax measures to encourage the development of waste reclamation and use.¹⁹³ While the foregoing information is crucial to the object of article 18(2)(d) and (e), it is without clear reference to how this measure relates to women. This information is general and not disaggregated. No concrete measures toward meeting the specific goals in relation to women as outlined in article 18(2)(d) and (e) were reported. Also, it is not clearly provided what national standards are being implemented or strengthened to address the detrimental effects of ‘toxic, and other hazardous substances and wastes on women’.

187 Namibia Report (n 153) para 30(2).

188 Republic of Cameroon Single Report Comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples’ Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention (2020) para 894.

189 Lesotho Report (n 126).

190 Kingdom of Eswatini Report (n 140) para 192.

191 Republic of Seychelles Report (n 127) para 18.

192 Democratic Republic of Congo (n 129) para 303.

193 Algeria Report (n 125) para 409.

Nor is it elaborated on what incentives are being implemented by different stakeholders to prevent or abate its adverse consequences on women.

5.3 Judicial measures

The reports by states rarely include judicial decisions that are peculiar to women in the context of article 18 of the Maputo Protocol. For instance, the recent reports of Zambia,¹⁹⁴ DRC,¹⁹⁵ Zimbabwe,¹⁹⁶ Algeria¹⁹⁷ and Sudan¹⁹⁸ do not report any case or judicial measures on environmental matters. A possible reason is that there may not be a case yet, specifically on article 18 of the Maputo Protocol.

However, some of the reports, for example, from Nigeria¹⁹⁹ and Kenya,²⁰⁰ make reference to cases on general environmental protection that do not specifically relate to women. Nigeria reports the case of *Gbemre v Shell*,²⁰¹ an action that was successfully brought on behalf of Iweherekan Community Delta State. The community sought a declaration that the constitutionally guaranteed fundamental rights to life and dignity of the human person provided in sections 33(i) and 34(i) of the Constitution of Federal Republic of Nigeria 1999 include the right to a clean, poison-free, pollution-free and healthy environment. The court declared the actions of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant community as a violation of their fundamental right to life (including a healthy environment) and dignity of the human person guaranteed by the Constitution and the African Charter.²⁰² Although instituted by a male litigant, the decision has a positive impact on the benefit of the community as a whole and for the environment. However, the court did not emphasise how the issue affects women in particular despite the general knowledge that women bear a disproportionate share of environmental impact.

Kenya reports on measures being taken to implement the decision of the African Commission in *Endorois*.²⁰³ These include the establishment of a task force to study the decision and examine potential environmental impacts on the surrounding Lake Bogoria.²⁰⁴ However, owing to budgetary constraints, the task force did not complete its mandate, and its term was not extended.²⁰⁵ These cases relate only tangentially to article 18. The subject matter of article 18 has not been a popular subject of litigation in state courts.

194 Zambia 'Initial Report on the African Charter on Human and Peoples' Rights, 1986-2004' (2007) 160.

195 Democratic Republic of Congo (n 135).

196 Republic of Zimbabwe Report (n 129).

197 Algeria Report (n 131).

198 Sudan Report (n 134).

199 Nigeria Report (n 160).

200 Kenya Report (n 158).

201 *Jonah Gbemre v Shell SPDC, NNPC and AGF* (2005) AHRLR 151 (Nig. FHC 2005), (S. No.FHC/B/CS/53/05 Federal High Court Benin Judicial Division. 14 November 2005).

202 Federal Republic of Nigeria's 6th Periodic Country Report: 2015-2016 on the Implementation of the African Charter on Human And Peoples' Rights in Nigeria (2017) 144.

203 *Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya (Endorois)* (2009) AHRLR 75 (ACHPR 2009).

204 Kenya Report (n 152).

205 Kenya Report (n 152) 144.

5.4 Implementation challenges

General and specific challenges inhibit the implementation of article 18 of the Maputo Protocol. General problems do not focus specifically on women and the environment but have implications for their general enjoyment of rights, including the right to a healthy and sustainable environment. For instance, discriminatory cultural practices are listed as a challenge to the general enjoyment of women's rights in Ethiopia,²⁰⁶ Togo,²⁰⁷ Gabon,²⁰⁸ Liberia,²⁰⁹ Senegal,²¹⁰ and the Seychelles.²¹¹ Another example is women's poor representation and participation in decision-making positions and processes, as noted in the Concluding Observations on Gabon,²¹² Liberia,²¹³ and Togo.²¹⁴ The Concluding Observations on Seychelles²¹⁵ and Gabon highlight the lack of gender-disaggregated data.²¹⁶ The implication of these general challenges on women's right to a sustainable environment cannot be overstated. Without the participation of women, for instance; it is difficult for them to engage openly with issues affecting their enjoyment of the right to sustainable environment. They will also not be able to contribute meaningfully to interventions.

Another general challenge, as noted in the Lesotho initial report, is the lack of awareness of human rights, particularly women's rights.²¹⁷ According to the DRC, general difficulties in the implementation of the Maputo Protocol include limited 'purchasing power of consumers', limited investments in agriculture, poor financing, dualistic and unstable land regimes between the law and traditional authority, and deteriorating living conditions in rural areas.²¹⁸ Even if the reference was not explicitly mentioned in the report while citing these challenges, the foregoing areas of concern would touch on access to and sustainable use of natural resources, which are key aspects of article 18(2)(a) of the Maputo Protocol, hence, it is useful to accept the concerns as problematic for the implementation of women right to a sustainable environment.

Specific challenges are, however, mentioned in relation to the environment's discernible lack of adequate information, awareness and framework about the importance of environmental issues are

206 African Commission Concluding Observations and Recommendations on the 5th and 6th Periodic Report of the Federal Democratic Republic of Ethiopia, adopted at its 18th extraordinary session 29 July to 7 August 2015, para 27.

207 African Commission Concluding Observations and Recommendations on the Combined 3rd, 4th and 5th Periodic Report of the Republic of Togo, adopted at its 51st ordinary session 18 April to 2 May 2012, para 36.

208 African Commission Concluding Observations and Recommendations on the Initial and Combined Report of the Gabonese Republic on the Implementation of the African Charter on Human and Peoples' Rights (1986-2012) para 35.

209 African Commission Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights, para 19.

210 African Commission Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of Senegal on implementation of the African Charter on Human and Peoples' Rights' adopted during its 18th extraordinary session 29 July to 7 August 2015 para 51.

211 African Commission Concluding Observations on the Combined Initial to Fifth Periodic Reports of Seychelles CEDAW/C/SYC/CO/1-5, 29 October 2013 para 42.

212 Concluding Observations on Gabon (n 208) para 35.

213 Concluding Observations on Liberia (n 209) para 19.

214 Concluding Observations on Togo (n 207) para 66.

215 Concluding Observations on Seychelles (n 211) para 42.

216 Concluding Observations on Gabon (n 208) para 65.

217 Lesotho Report (n 126).

218 Democratic Republic of Congo (n 129) para 275.

mentioned as areas of concern in the Concluding Observation on Eswatini,²¹⁹ Rwanda,²²⁰ Nigeria,²²¹ and Sierra Leone.²²² Non-regard for environmental standards is listed as a challenge by Gabon.²²³ A major feature of these Concluding Observations is that, although they deal with the environment, women are not the specific focus. Issues raised in the Concluding Observations are, however, relevant to the participation of women in the ‘planning, management and preservation of the environment’ according to article 18(1) of the Maputo Protocol. Similarly, the African Commission notes that ‘inadequate mobilization of domestic resources and budgetary provisional resources’ is a major challenge to the implementation of women’s priority programs in Senegal.²²⁴ Generally, states do not report the paucity of private and public interest-based litigation on environmental matters facing women as a challenge to implementation.

6 Conclusion

Article 18 of the Maputo Protocol can contribute to the enjoyment of the human rights of women in Africa if effectively implemented. Much remains to be done by states to improve the participation of women at higher levels of decision-making in planning, management and preservation of the environment and the sustainable use of natural resources. This is contrary to what is envisaged under article 18(a) of the Maputo Protocol. There is an incremental implementation of some of its components on the promotion of renewable energy sources, which impacts their exposure to household pollution. Despite its significance, it is not clear what concrete steps are being taken by states to promote indigenous knowledge systems of women as required by article 18(c). States have taken general measures to implement article 18(e), but there is little evidence on how these measures have specifically benefitted women. Concrete measures on domestic and industrial wastes with a particular focus on women are rare. The implementation measures are taken on the realisation of article 18 fall short of the expectation of the elements of the provision.

The jurisprudence around the various issues in article 18 remains undeveloped. General awareness about the content of the article is a concern. Also, whereas there have been cases of environmental issues, these are general. It is difficult to see in any of the reviewed countries an application brought by a woman or NGO representative. The subject matter of cases found during the review hardly touched specifically on women’s rights issues. Overall, the various elements of article 18 of the Protocol are not yet tested in the courtroom, despite reported attempts by states to fulfil their obligations under this article on the protection of the right of women to a healthy and sustainable environment in Africa.

There is a need for more awareness about the significance of article 18 at both regional and national levels of environmental governance. The reporting guidelines and engagement should focus on and demand data on implementing all specific aspects of article 18 of the Maputo Protocol. Concluding Observations should clarify what is missing and must be addressed with a clear focus on women and the environment. Also, advocacy around article 18 needs to improve. A possible way to encourage advocacy is to empower women’s rights NGOs to include litigation on the right to environment in their

219 Eswatini Report (n 140).

220 African Commission Concluding Observations and Recommendations on the Combined 11th, 12th, and 13th Periodic Report of the Republic of Rwanda under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on Human and Peoples’ Right on the Rights of Women in Africa, para 42.

221 African Commission Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples’ Rights’ adopted during its 57th ordinary session 4 to 18 November 2015, 130(iii).

222 Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Sierra Leone on the Implementation of the African Charter on Human and Peoples’ Rights adopted during its 19th extraordinary session 16 to 25 February 2016, para 82.

223 Concluding Observations on Gabon (n 208) para 64.

224 Concluding Observations on Senegal (n 210) para 6.

advocacy programs. Also, women's voices should be heard more in environmental decision-making. Some affirmative action that ensures fair representation of women at all levels of environmental governance is required to achieve that end. Doubtless, women have a role to play in advocacy for environmental conservation. For example, Wangari Maathai (the Nobel Peace Prize winner) founded the Green Belt Movement, which by 2019 had planted over 51 million trees in Kenya and mobilised hundreds of women to implement sustainable livelihoods approach into their own management of land and natural resources and advocated for policy measures to incentivise and promote indigenous knowledge systems into environmental conservation.

One practically achievable measure is to develop a register of indigenous knowledge systems at all levels of environmental governance. This will allow for shared best practices and appropriate incentives to be provided. Another measure that can be taken is to create incentives through implementing benefit sharing from the use of indigenous knowledge systems. There is a need for the commissioning of research projects on the effects of toxic industrial waste on women and specific or tailor-made guidelines for their protection. The Maputo Protocol offers great hope for the realisation of women's right to a healthy and sustainable environment, but much remains to be done in order for this hope to translate into lived realities for women in Africa.

Article 19

Right to sustainable development

Ademola Oluborode Jegede and Ndzumbululo Mulaudzi

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:

- (a) introduce the gender perspective in the national development planning procedures;
- (b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
- (c) promote women's access to and control over productive resources such as land and guarantee their right to property;
- (d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
- (e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- (f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

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1 Introduction

A majority of the world's populace are women and girls whose development is excessively affected by poverty, limited access to resources, political exclusion, health system deficiencies, and globalisation.¹ According to a report by the World Bank, as of 2019, women are more likely than men to live in

1 PK Mishra & P Tripathi 'Women and sustainable development goals' (2018) 12 *Journal of Gender Equality and Sensitivity* 29.

poverty in Africa, with female-headed households often experiencing higher levels of poverty.² Women in Africa often have limited access to financial resources and are more likely than men to work in low-paying and insecure jobs, which can contribute to lower levels of wealth accumulation.³ While land ownership is critical to production,⁴ food security and wealth, less than 13 per cent of African women aged 20-49 years enjoy sole ownership of land, compared with 36 per cent of African men.⁵ The representation of women in decision-making and political offices is low in Africa.⁶ Furthermore, disparities in education across gender have limited women's access to exports of products and new technological opportunities associated with globalisation.⁷

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is the first instrument to expressly guarantee the right of women in Africa to sustainable development. Article 19 is important because its different elements respond to the social, political, economic, and cultural factors undermining women's sustainable development. It does so by requiring states to implement measures that equip women in Africa to cope with the challenges affecting their development. Such measures include participation, access to land, access to credit facilities, human development interventions, training and skills development and economic empowerment in Africa.⁸

Neither the International Covenant on Civil and Political Rights, nor the International Covenant on Economic, Social and Cultural Rights (ICESCR), which generally guarantee rights for both women and men, contain a provision on sustainable development. Moreover, the concept of sustainable development does not feature in the Convention on Elimination of all Forms of Discrimination against Women (CEDAW). The idea of sustainable development is not, however, unknown to the United Nations (UN)'s normative standard setting on protecting the environment and development. It is reflected in UN General Assembly Resolutions,⁹ the UN General Assembly Declaration on the Right to Development,¹⁰ the Beijing Platform,¹¹ the UN Millennium Declaration,¹² and the UN Sustainable Development Goals (SDGs).¹³ It furthermore features in the jurisprudence of the International Court of Justice (ICJ).¹⁴

2 World Bank 'Poverty and shared prosperity 2018: piecing together the poverty puzzle' 2019 <https://openknowledge.worldbank.org/handle/10986/30418> (accessed 10 May 2023).

3 Credit Suisse Research Institute 'Global Wealth Report' October 2020 <https://www.credit-suisse.com/about-us/en/reports-research/global-wealth-report.html>. (accessed 10 May 2023).

4 On productive resources, see sec 3.4 of this chapter.

5 I Gaddis, R Lahoti & W Li 'Gender gaps in property ownership in Sub-Saharan Africa' World Bank Group Policy Research Working Paper 8573 (2018).

6 See T Mkali & A Rudman 'Article 9' in this volume.

7 J Maigua, L Maina & C Ndegwa 'Challenges and opportunities in Kenya macadamia nuts industry: a gender perspective' (2017) 6(4) *Bridges Africa* 8. See S Wamahiu & C Musembi 'Article 12' in this volume.

8 Maputo Protocol art 19(a)-(e).

9 For instance, see United Nations General Assembly of Resolution A/RES/70/1.

10 Declaration on the Right to Development: Resolution/ adopted by the General Assembly, 4 December 1986, A/RES/41/128.

11 Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995.

12 United Nations Millennium Declaration, Resolution Adopted by the General Assembly, 18 September 2000, A/RES/55/2 (United Nations Millennium Declaration).

13 Report of the United Nations Department of Economic and Social Affairs on Global Sustainable Development (2015).

14 *Gabčíkovo-Nagymaros Project case, Hungary v Slovakia* ICJ (25 September 1997) 1997 ICJ Reports (*Gabčíkovo-Nagymaros Project*).

In particular, principle 20 of the 1992 UN Declaration on Environment and Development acknowledges that women's full participation is necessary for sustainable development.¹⁵ The same messages are echoed in article 8(1) of the 1986 Declaration on the Right to Development.¹⁶ Resolution 35 of the Beijing Platform similarly indicates the need to focus on women's development by urging all actors to:

ensure women's equal access to economic resources, including land, credit, science and technology, vocational training, information, communication and markets, as a means to further the advancement and empowerment of women and girls, including through the enhancement of their capacities to enjoy the benefits of equal access to these resources, *inter alia*, by means of international cooperation.¹⁷

The UN Millennium Declaration and the Millennium Development Goals (MDGs) commit states to combat poverty, hunger, disease, illiteracy, environmental degradation, and discrimination against women.¹⁸ Several aspects of the MDGs refer to the concerns of women. However, Goal 7 focuses on environmental sustainability without a specific emphasis on the situation of women and other aspects of their sustainable development. This gap was addressed in the UN SDGs, where most SDGs recognise women's equality and empowerment. This is not unexpected as, according to the World Bank, 'gender issues are highly relevant to achieving sustainable development'.¹⁹

The aim of this chapter is to offer a comprehensive analysis of article 19 of the Maputo Protocol by examining its drafting history, relationship with other treaty provisions, the nature and scope of state obligations and implementation measures deployed by states. The chapter concludes with recommendations for strengthening the implementation of article 19 to improve the realisation of the right to sustainable development of women in Africa. The chapter is organised into six sections. Following this introduction, section 2 discusses the drafting history of article 19. Section 3 deals with concepts and linkages with other treaty provisions, while section 4 examines the nature and scope of the obligations imposed on states under article 19. The extent of measures deployed by states to implement article 19 is the focus of section 5 of this chapter. Section 6 concludes the chapter and offers recommendations.

2 Drafting history

In 1995 the African Commission, in collaboration with Women in Law and Development in Africa (WILDAF), organised a Seminar on the situation of African Women and the African Charter on Human and Peoples' Rights.²⁰ It is uncertain whether the need to have a provision on the right to the sustainable development of women specifically featured at the event. However, the need for an additional instrument (Maputo Protocol), which eventually accommodates the right to sustainable development in article 19, was endorsed by the Organization of African Unity (OAU) Assembly of Heads of State and Government in July 1995.²¹

15 Rio Declaration on the Environment and Development, UN Doc A/CONF.151/26 (vol 1) and Declaration on the Right to Development (n 10) art 8(1).

16 Declaration on the Right to Development (n 10).

17 Beijing Platform (n 11) Resolution 35.

18 United Nations Millennium Declaration (n 12).

19 Report of the United Nations Entity for Gender Equality and the Empowerment of Women on Women and Sustainable Goals (25 September 2015) 12.

20 Seminar on the African Woman and the African Charter on Human and Peoples' Rights, Lomé, Togo, 8-9 March 1995, organised in collaboration with WILDAF, as referred to in the 8th Annual Activity Report of the African Commission 1994-1995.

21 Resolution AHG/Res 240 (XXXI), 31st ordinary session OAU Assembly of Heads of State and Government in June 1995.

Article 19 of the Maputo Protocol went through a number of phases before taking its current form under the Maputo Protocol. It is notable that the right to sustainable development was missing in the Nouakchott Draft,²² which emanated from the Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women,²³ and the Kigali Draft,²⁴ the second draft of the Protocol. Article 20 of the Nouakchott Draft and article 21 of the Kigali Draft only provide for 'the right to development', which covered some of the elements of article 19 of the Maputo Protocol. Given the similarities between the initial article 20 of the Nouakchott Draft, article 21 of the Kigali Draft, and the current article 19 of the Maputo Protocol, it can be assumed that it was largely the right under article 21 of the Kigali Draft Protocol that was subsequently renamed as 'the right to sustainable development' under the Maputo Protocol. No reason can be distilled from the drafting history of the instrument for the subsequent rewording of 'the right to development' as the 'right to sustainable development'. A possible rationale is that it reflects the thinking in the late 1980s that development should consider not only the needs of the present but also the future generations.²⁵

The idea and eventual merger of OAU Convention on Harmful Practices (2000) with the then Draft Protocol on women's rights did nothing to shape the formulation of the right to the sustainable development of women.²⁶ However, the Final Draft²⁷ made the first elaborate provisions on the right to sustainable development in article 19 as follows:

1. Women shall have the right to fully enjoy their right to sustainable development.
2. State Parties shall take all appropriate measures to:
 - (a) ensure that women participate fully at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
 - (b) facilitate women's access to land and guarantee their right to property, whatever their marital status;
 - (c) facilitate women's access to credit and natural resources through flexible mechanisms;
 - (d) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
 - (e) ensure that in the implementation of trade and economic policies and programmes such as globalisation, the negative effects on women are minimised.²⁸

22 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997.

23 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

24 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

25 Report on the World Commission on Environment and Development – Our Common Future, UN Doc A/42/427 4 August 1987.

26 OAU Convention on Harmful Practises (2000): Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I. (Merged with Second Draft in Final Draft).

27 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

28 As above.

Proposals were made on the above Final Draft Proposal, first by the Expert Meetings of November 2001²⁹ and subsequently by the Office of the Legal Counsel in 2002³⁰ and the NGO Forum in 2003.³¹ In the Expert Meeting Report of November 2001, except for sub-article 19(d), which was adopted without amendment,³² substantial amendments were made to other aspects of article 19. In terms of the Report, it was agreed that sub-articles 1 and 2 be merged to form a single introduction that reads as follows: 'Women shall have the right to enjoy their right to sustainable development. In this connection, the State Parties shall take all appropriate measures to'.³³

A new sub-article (a) was suggested and accepted, which reads: 'introduce the gender issue in the national development planning procedures'.³⁴ Former sub-article 19(a) was amended as follows: 'ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes'.³⁵ Former sub-article 19(b) was amended to read 'promote women's access to and control over productive resources such as land and guarantee their right to property'.³⁶ Former sub-article 19(c) was amended as follows: 'promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a quality of life and reduce the level of property among women'.³⁷ Former sub-article 19(e) was adjusted to read 'ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes be reduced to the minimum for women'.³⁸

However, Comments by the Office of the Legal Counsel in 2002 did not include any substantive comment on the right to sustainable development, which is featured under article 18.³⁹ Generally, editorial corrections were recommended for article 18(a) and (b). What is noteworthy is that under article 18(d), it was proposed that 'the phrase "extension services" should be defined, otherwise its meaning is obscured'.⁴⁰

The draft with comments by NGO,⁴¹ which featured the right to sustainable development in article 18 was different in key respects when compared to previous versions of the provision. Under the 2003 Draft Protocol, measures to be taken under article 18(a) include the introduction of 'sex equality and gender mainstreaming issue into the national development planning procedure'. Also, 'affirmative action' was deemed a necessary measure to be implemented under article 18(b). The word 'macro and micro enterprises' was added to article 18(d), and 'gender disaggregated data' was included under article 18(e) of the Draft. A reason that is obvious in the document for the introduction of keywords

29 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

30 Comments by African Union Office of the Legal Counsel (AUOLC), CAB/LEG/66.6/Rev.1, 2002 (Comments by the AUOLC).

31 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003.

32 Report of the Meeting of Experts (n 29) para 138.

33 Report of the Meeting of Experts (n 29) para 134.

34 Report of the Meeting of Experts (n 29) para 135.

35 Report of the Meeting of Experts (n 29) para 136.

36 Report of the Meeting of Experts (n 29) para 137.

37 Report of the Meeting of Experts (n 29) para 138.

38 Report of the Meeting of Experts (n 29) para 140.

39 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (as adopted by the Meeting of Government Experts in Addis Ababa on 16 November 2001) CAB/LEG/66.6/Rev. 1. Comments by the AUOLC (n 30).

40 As above.

41 Comments by the NGO Forum (n 31).

under article 18(a) and 18(d) is that the Beijing Platform of Action considers ‘gender equality’ as a driver of sustainable development while ‘macro and micro-economic’ measures may have a negative impact on women.⁴² No reasons are evident in the document for the introduction of ‘affirmative action’ under article 18(b) and ‘gender disaggregated data’ under article 18(e).

In that same year, 2003, the right to sustainable development was featured in the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Addis Ababa Draft),⁴³ which is the fourth draft. The Draft did not embody the changes suggested in the NGO Draft of 2003. Rather, its provisions on article 19 reflect the current version of article 19 of the Maputo Protocol adopted in 2003.

Looking at the wording of article 19(d) of the Maputo Protocol, however, it appears that the call to define ‘extension services’ proposed by the Office of the Legal Counsel in 2002 remains unheeded.⁴⁴ Nonetheless, it seems that the word ‘extension services’ refers to agricultural skills and knowledge development that farmers need in order to be productive in their work. It has been shown that agricultural extension services are generally biased towards men, with agricultural skills and knowledge information often targeting male farmers and rarely tailored to female farmers.⁴⁵ The themes covered under article 19 of the Maputo Protocol, such as the effects of poverty, globalisation, active participation in decision-making, access to resources and gender inequality, resonate with article 14 of CEDAW. They affirm the call in the 2003 Draft Protocol with Markup that provisions of the proposed Protocol should measure up with the Provisions on CEDAW and general international standards.⁴⁶ The similarity with article 14 of CEDAW shows that article 19 is on par with article 14 of CEDAW in terms of its key elements.

3 Concepts and linkages

Article 19(a) to (f) is one of the lengthiest articles of the Maputo Protocol, and it contains key concepts such as ‘sustainable development’, ‘gender perspective’, ‘participation’, ‘productive resources’, ‘access to credit’, ‘indicators of human development’ and ‘globalisation’. The clarification of these concepts and their linkages with other treaty rights is the focus of this section.

3.1 Sustainable development

The term ‘sustainable development’ has grown both in significance and prominence since 1987, when it was first defined by the Report on the World Commission on Environment and Development (WCED) as:

42 Report of the Meeting of Experts (n 29) 17.

43 Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

44 Comments by the AUOLC (n 30).

45 Bias in agricultural extension services was flagged as early as 1970 in the pioneering work of E Boserup *Women’s role in economic development* (1970). See also E Lecoutere, DJ Spielman & BV Campenhout ‘Discussion Paper Women’s empowerment, agricultural extension, and digitalization: disentangling information and role model effects in rural Uganda’ IFPRI Discussion Paper (2019).

46 Report of the Meeting of Experts (n 29).

development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It seeks to reconcile economic development with the protection of social and environmental balance.⁴⁷

Codified definitions of sustainable development in African regional instruments do not exist. The WCED definition, however, shows that sustainable development is linked to the protection of the environment, a reality that intersects with article 18 of the Protocol dealing with the right to a sustainable environment and article 24 of the African Charter on Human and Peoples' Rights (African Charter),⁴⁸ which also refers to sustainability in the context of the environment. In particular, article 22 of the African Charter states:

[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

The African Commission on Human and Peoples' Rights (African Commission) has interpreted article 22 as encompassing the concept of sustainable development in the General Comment 3 on the African Charter on Human and Peoples' Rights.⁴⁹ The ACHPR notes that sustainable development is a fundamental aspect of the right to development, and that states have an obligation to ensure that development is sustainable and does not compromise the rights of future generations.⁵⁰ Furthermore, the African Commission has emphasized that the right to sustainable development is closely linked to the rights to a healthy environment, food, water, and health, which are essential components of the right to development. Hence, development should be participatory and inclusive, taking into consideration the voices and perspectives of marginalised and vulnerable groups such as women in decision-making processes related to development.⁵¹

The connection between a sustainable environment and sustainable development is distilled from the ICJ's exposition in *Gabcikovo-Nagymaros Project*. According to the ICJ, the need 'to reconcile economic development with the protection of the environment is aptly expressed in the concept of sustainable development'.⁵² A similar position is noticeable at the African regional level in *SERAC*.⁵³ In interpreting article 24 of the African Charter or the right to a healthy environment, the African Commission affirmed that states should take 'reasonable and other measures' to prevent pollution and ecological degradation, conserve and ensure ecological and sustainable use of natural resources for development purposes.⁵⁴ These cases show that sustainability is also related to health, well-being, life and general economic, social and cultural development conditions.

3.2 A gender perspective

Article 19(a) calls for the introduction of the gender perspective. In doing so, it acknowledges that the social construction of the role between men and women may constitute an impediment to sustainable development. 'Gender' refers to the social practices of constructing different roles for men and women

47 Report on the World Commission on Environment and Development – Our Common Future, UN Doc A/42/427 4 August 1987.

48 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

49 African Commission on Human and Peoples' Rights, 'The Right to Development in Africa: General Comment 3' 2002.

50 As above.

51 Resolution on Guidelines and Measures for the Promotion and Protection of Sustainable Development in Africa (2003) para 4.

52 *Gabcikovo-Nagymaros Project case, Hungary v Slovakia* ICJ (25 September 1997) 1997 ICJ Reports 7.

53 *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2011) (*SERAC*).

54 *SERAC* (n 53) para 52.

with the purpose of fostering inequalities based on that difference.⁵⁵ Such a construct determines power as well as access to material resources, including land, credit and training.⁵⁶

The United Nations Entity for Gender Equality and the Empowerment of Women (UNEGEE Women) outlines that to achieve sustainable development of women, addressing gender inequalities should be paramount in all the pillars of development: economic, political, social and cultural development.⁵⁷ The call in article 19(a) for the application of gender perspective links to article 4(l) of the Constitutive Act of the African Union (Constitutive Act), which affirms the need to promote gender equality,⁵⁸ and article 3 of the Protocol on Amendments of the Constitutive Act which urges the states to promote gender equality and ensure the effective participation of women in decision-making, especially in the political, economic and socio-cultural areas. A similar commitment to gender perspective is illustrated through the adoption of the Solemn Declaration on Gender Equality in Africa,⁵⁹ and the African Union (AU) Strategy for Gender Equality and Women's Empowerment 2018-2028.⁶⁰ According to Aspiration 6 of the Strategy, for the developmental goals of states to be achievable, such goals must be people driven, 'relying upon the potential offered by people, especially its women and youth and caring for children'.⁶¹ The foregoing reinforces the idea that an inclusive developmental plan is not achievable without gender consideration that targets the well-being of women.

3.3 Participation

Participation simply connotes that people are involved in decisions that affect their lives.⁶² Article 19(b) of the Protocol introduces the concept of the participation of women as an essential element for realising their right to sustainable development. As development policies and programmes feature in the public space, women cannot contribute or be impacted meaningfully in that space unless they enjoy the right to participate in all phases of development policies and programmes. Active participation of women in decision-making and political leadership positions and processes improves women's development and contributes to overall governance quality by increasing accountability and transparency.⁶³

Article 19(b) links with article 9 of the Maputo Protocol, dealing with the right of women to participate in the political and decision-making process. Along a similar line, it connects with article 13 of the African Charter on the right to participation. It is linked to the object of article 29 of the African Charter on Democracy, Elections, and Governance to 'create the necessary conditions for full

55 CL Ridgeway & L Smith-Lovin 'The gender system and interaction' (1999) 25 *Annual Review of Sociology* 191.

56 As above.

57 The report for the United Nations Entity for Gender Equality and the Empowerment of Women on Gender Equality and Sustainable Development (2014) (UNEGE 2014 Report) 10.

58 Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000, done at Lomé, Togo. The Act, which came into force on 26 May 2001.

59 African Union 'Solemn Declaration on Gender Equality in Africa' AU Doc. Assembly/AU/Decl.12 (III) Rev.1 (July 2004) (AU Declaration on Gender Equality).

60 African Union 'AU Strategy for Gender Equality and Women's Empowerment 2018-2028' adopted 20 March 2019 <https://au.int/documents/20190320/au-strategy-gender-equality-womens-empowerment-2018-2028> (accessed 23 June 2023) (AU Gender Strategy).

61 As above.

62 Eldis 'What is participation' <https://www.eldis.org/keyissues/what-participation> (accessed 23 June 2023).

63 OECD 'Gender and sustainable development: maximizing the economic, social and environmental role of women' a Report to the United Nations Commission on Sustainable Development (UNCSD) (2008) <https://www.oecd.org/social/40881538.pdf> (accessed 7 September 2022) 61; see also UN Women 'Facts and figures: women's leadership and political participation' <https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures> (accessed 23 June 2023).

and active participation of women in the decision-making processes and structures at all levels'.⁶⁴ The Preamble to the Solemn Declaration on Gender Equality in Africa reinforces the same position by specifically acknowledging the limited participation of women in the social, economic and political decision-making structures and feminisation of poverty.⁶⁵ The essence of the participation of women in development is underscored in article 14 of CEDAW. It stresses that states are to ensure that women, especially in rural areas, enjoy the right to participate in development planning and stipulates a range of other rights to help address factors that undermine their benefit from development.⁶⁶ While the provisions under article 14 focus on the elimination of discrimination and participation of women in rural areas, article 19 of the Maputo Protocol makes no such distinction. This signifies that article 19(b) of the Maputo Protocol considers that participation is required in the developmental concerns of women in both urban and rural areas in Africa.

3.4 Productive resources

Labour, land and capital are recognised in the literature as factors of production.⁶⁷ In addition, expanding the list to include managerial ability has gained traction.⁶⁸ The understanding is that managerial ability makes a specific contribution to the productive process.⁶⁹ The African Commission's pioneering Resolution 262 on women's right to land and other productive resources reinforces the need for women to access such resources by urging states 'to fully comply with their obligations and commitments to ensure, protect and promote women's right to land and property'.⁷⁰ Hence, women's access to productive resources enunciated under article 19(c) is closely linked to other rights, such as the right to property under article 14 of the African Charter.

What may constitute property rights has been considered in a number of decisions of the African Commission. For instance, in *Malawi African Association and Others v Mauritania*, land was considered 'property' for the purposes of article 14 of the African Charter.⁷¹ In *Endorois*,⁷² traditional land was regarded by the African Commission as constituting 'property' under the Charter.

3.5 Access to credit

The concept of access to 'productive resources' under article 19(c) links to 'access to credit' under article 19(d) of the Maputo Protocol in that property is often required as collateral by financial institutions for women to access credit. The term access to credit demands the removal of obstacles that women entrepreneurs encounter in trying to obtain credit.⁷³ Credit refers to the total amount of funds available

64 African Charter on Democracy and Electoral Governance 2007.

65 Solemn Declaration on Gender Equality in Africa (2004).

66 CEDAW art 14(2).

67 V Papaya 'On production factors' (2017) *Bulletin of the Georgian National Academy of Sciences* 145.

68 B Gentile 'The new factors of production and the rise of data-driven applications' (Forbes, October 2011) 31.

69 DN Chigbo 'Management as a factor of production and as an economic resource' (2014) 4(6) *International Journal of Humanities and Social Science* 162.

70 Resolution on Women's Right to Land and Productive Resources – ACHPR/Res.262(LIV)2013 (Resolution 262) para 2.

71 *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 128.

72 *Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya (Endorois)* (2009) AHRLR 75 (ACHPR 2009) para 187.

73 United Nations Economic Commission for Africa, 'United Nation Economic Commission for Africa African Training and Research Centre for Women' (2001) *Increasing the access of African women to credit: an integrated approach*, Addis Ababa.

to an individual from a financial institution.⁷⁴ In the context of women, literature shows that access to credit entails the integration of specific needs of women in the policies and practices of financial and microcredit institutions, especially poor women and women heads of households.⁷⁵ Although its focus is on rural women, article 14(g) of CEDAW specifies that access of women is required to ‘agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes’. In doing so, it sheds light on what ‘access to credit’ connotes under article 19(c) of the Maputo Protocol. CEDAW General Recommendation 34 stresses that accessing financial services on fair terms is important for the development of rural women’s enterprises.⁷⁶ Hence, a combined reading of CEDAW Recommendation 34 and article 14(g) of CEDAW can offer an interpretive insight into article 19(c) of the Maputo Protocol.

3.6 Indicators of human development

The human development index (HDI) considers three main dimensions to evaluate development: long and healthy life, education, and standard of living.⁷⁷ According to the World Health Organization, due to gender inequity, poverty, and sexual and gender-based violence, women’s health is often at risk in Africa.⁷⁸ They are more likely to die from communicable diseases, maternal and perinatal conditions, and nutritional deficiencies than women in other regions.⁷⁹ Girls and young women are especially vulnerable to early pregnancy and child marriage.⁸⁰ While increased education of women and girls can reduce poverty,⁸¹ educational attainment in sub-Saharan Africa ranks lowest globally, with a gender gap of 85.3 per cent.⁸² Gender roles still affect women’s access to food and their livelihood.⁸³ Ensuring that states consider the indicators of human development under article 19(e) is, therefore, a justifiable component of the right to the sustainable development of women in Africa.

Considering its focus on human development factors, article 19(e) of the Maputo Protocol connects with other articles of the Maputo Protocol, such as article 12 (right to education and training) and article 14 (health and reproductive rights). It also relates to articles 15 (food security), 16 (health) and 17 (education) of the African Charter.

Both the Maputo Protocol and African Charter have no clear provision on ‘standard of living’, but article 11 of the ICESCR guarantees the ‘right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’. What constitutes a gauge of ‘standard of living’ can be deduced from a combined reading of articles 14, 15 and 16 of the Maputo Protocol. A number of general comments produced by the UN Committee on Economic and Social Cultural Rights (CESCR) emphasise that ensuring an adequate standard of living in the context of sustainable development of women requires

74 ‘Credit’ 26 February 2020 <https://corporatefinanceinstitute.com/resources/knowledge/credit/credit/> (accessed 10 May 2023).

75 H Morsy ‘Access to finance: why aren’t women leaning In? Women are self-selecting out of the African credit market’ March 2020 <https://www.imf.org/Publications/fandd/issues/2020/03/africa-gender-gap-access-to-finance-morsy> (accessed 23 June 2023).

76 Committee on the Elimination of Discrimination against Women General Recommendation 34 on the rights of rural women CEDAW/C/GC/34 Distr.: General 4 March 2016 para 67.

77 UNDP Human Development Reports ‘Human Development Index (HDI)’ <https://hdr.undp.org/data-center/human-development-index#/indicies/HDI> (accessed 23 June 2023).

78 WHO ‘Africa women’s health’ <https://www.afro.who.int/health-topics/womens-health> (accessed 23 June 2023).

79 As above.

80 UNDP Human Development Report 2020 *The next frontier Human development and the Anthropocene*.

81 UNDP Human Development Report 2020 (n 80) 41-42.

82 World Economic Forum *Global Gender Gap Report* (2022) 23.

83 World Economic Forum (n 82) 66.

access to food, housing and health care. For instance, the UN CESCR General Comment 4 notes that adequate housing is an important social and cultural right for everyone, including women and should not be subject to any form of discrimination.⁸⁴ It interprets the word 'family' to include female-headed households.⁸⁵ Equally, the importance of food and the need to avoid discrimination is stressed in General Comment 12 on the right to food.⁸⁶ General Comment 14 on the right to health calls for the elimination of discrimination against women, the promotion of their health all through their lifespan, and the reduction of health risks associated with maternal mortality and domestic violence.⁸⁷

3.7 Globalisation

The meaning of the concept of globalisation is nebulous due to its nature. It is a concept used in articulating the process of growing, developing and expanding the business, services and technologies throughout the world.⁸⁸ A fundamental feature of globalisation in Africa is the opening up of the economy and market system of the continent freely and widely to the global market and its forces.⁸⁹ International Labour Organization Declaration further clarifies the constituents of globalisation on Social Justice for fair globalisation as:

the diffusion of new technologies, the flow of ideas, the exchange of goods and services, the increase in capital and financial flows, the internationalization of business and business processes and dialogue as well as the movement of persons, especially working women and men.⁹⁰

The advantages of globalisation include increased world trade and incomes for several of the world's poorest, resulting from opportunities they have been afforded by the freeing of markets and the expansion of trade.⁹¹ However, its negative effects are evident in the implementation of trade and economic policies and programmes. Women of Africa suffer more from globalisation due to their limited participation in formal economic sectors and the labour market, which potentially excludes them from the general benefits of globalisation.⁹² African women are mostly absorbed in informal economic sectors where they engage in small-scale sole business proprietorships and smallholding farming activities,⁹³ a reality which itself is problematic in that it portrays the feminisation of this sector.⁹⁴ Yet, these sectors are not spared from the adverse effects of trade liberalisation associated with

84 CESCR General Comment 4: The Right to Adequate Housing (Art 11(1) of the Covenant) Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23) paras 1, 6.

85 CESCR General Comment 4 (n 84) para 6.

86 CESCR General Comment 12: The Right to Adequate Food (Art 11) adopted at the 20th session of the Committee on Economic, Social and Cultural Rights, on 12 May 1999 (Contained in Document E/C.12/1999/5) para 1.

87 CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12) adopted at the 22nd session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (contained in Document E/C.12/2000/4) para 21.

88 ED Oruonye 'Multinational oil corporations in Sub-Sahara Africa: an assessment of the impacts of globalisation' (2012) 2 *International Journal of Humanities & Social Science* 152.

89 World Council of Churches 'The effects of globalization on culture in Africa in the eyes of an African woman' <https://www.oikoumene.org/resources/documents/the-effects-of-globalization-on-culture-in-africa-in-the-eyes-of-an-african-woman> (accessed 23 June 2023).

90 ILO Declaration on social justice for a fair globalisation, adopted at the International Labour Conference, meeting in Geneva on the occasion of its 97th session Geneva, 10 June 2008.

91 R Martin et al 'Globalization at a critical juncture?' (2018) 11(1) *Cambridge Journal of Regions, Economy and Society* 3.

92 U Efobi, B Tanankem & S Asongu 'Female economic participation with information and communication technology advancement: Evidence from Sub-Saharan Africa' (2018) 86(2) *South African Journal of Economics* 231.

93 JI Uduji & EN Okolo-Obas 'Does corporate social responsibility (CSR) impact on development of women in small-scale fisheries of sub-Saharan Africa? Evidence from coastal communities of Niger Delta in Nigeria' (2019) *Marine Policy* 1.

94 A Simplicio et al 'Globalisation and female economic participation in Sub-Saharan Africa' (2020) 37 *Gender Issues* 61.

globalisation. For instance, due to a lack of collateral security, resource-constrained women are unable to access credit and are therefore exempted from private titling, which is a hallmark of the property regime in trade liberalisation.⁹⁵

The Constitutive Act acknowledges that it will be difficult to attain socio-economic development in Africa without addressing the challenges of globalisation.⁹⁶ The AU Assembly's 2004 Decision on the social dimension of globalisation affirms that exclusion and marginalisation of populations can result from globalisation, which may, in turn, threaten stability.⁹⁷ Earlier, an ILO Report warned that globalisation threatens nationally based systems in Africa.⁹⁸ Therefore, in urging states to address the negative effects of globalisation, article 19(f) of the Maputo Protocol aligns with the aspiration set out in both regional and international instruments to ensure that globalisation does not hinder the development of vulnerable populations.

4 Nature and scope of state obligations

The main provision of article 19 of the Maputo Protocol requires States Parties to undertake certain measures which it lists under article 19(a) to (e). While this constitutes the obligations of states in respect of article 19, there is no specific General Comment on article 19 of the Maputo Protocol to explain these measures. The nature and scope of state obligations under article 19 can be clarified by reference to human rights soft law instruments, which stipulate measures that are relevant to different aspects of its elements. Although the soft law instruments are non binding,⁹⁹ as shown in the discussion under this heading, such reference can offer an interpretive insight into the application of article 19 of the Maputo Protocol. The legal basis for this is that while referring to articles 60 and 61 of the African Charter, the Preamble to the Maputo Protocol notes that international human rights instruments are significant reference points of interpretation.

Article 19(a) calls for the introduction of a gender approach which signifies that states should mainstream a gender approach to the planning and implementation national development agenda. According to the UN Economic and Social Council (ECOSOC), gender mainstreaming requires the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation of, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally, and inequality is not perpetuated.¹⁰⁰

Although it is not focused on sustainable development, CEDAW General Recommendation 37 on Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change showcases key highlights of what gender-based measures entail for states.¹⁰¹ It requires gender-inclusive,¹⁰²

95 S Razavi 'Liberalisation and the debates on women's access to land' (2007) 28(8) *Third World Quarterly* 1479.

96 Constitutive Act of the African Union, adopted by the 36th ordinary session of the Assembly of the Heads of State and Government 11 July 2000, Lome, Togo.

97 Decision on the final report of the Commission on the Social Dimension of Globalisation Doc. Assembly/AU/11 (V) Add.6, Assembly of African Union, 3rd ordinary session, 6-8 July 2004 Addis Ababa, Ethiopia.

98 'The challenge of globalization in Africa: The trade union response' Labour Education 2001/2 No 123, 11.

99 AT Guzman & TL Meyer 'International soft law' (2010) 2(1) *Journal of Legal Analysis* 171.

100 Gender Mainstreaming 'Extract from report of the economic and social council for 1997' (A/52/3, 18 September 1997) <https://www.un.org/womenwatch/daw/csw/GMS.PDF> (accessed 23 June 2023) 2.

101 General Recommendation 37 on Gender-related dimensions of disaster risk reduction in the context of climate change CEDAW/C/GC/37 Distr.: General 7 February 2018.

102 General Recommendation 37 (n 101) para 28.

disaggregated data and monitoring mechanisms to measure baseline and progress¹⁰³ and develop programmes to address structural inequalities.¹⁰⁴ CEDAW Recommendation 34 affirms that the range of states' gender-responsive measures should cover institutional, legal and policy frameworks¹⁰⁵ and be supported by adequate budgets, institutional procedures, accountability frameworks, and effective coordination mechanisms.¹⁰⁶ Consequently, in the context of article 19(a), it is imperative for states to embark upon the reform and/or repeal of domestic legislation policies and programs on national development planning procedures that hinder women's role in the design, implementation, monitoring and evaluation of development-related policies, programmes and legislation.

Article 19(b) requires states to take measures to ensure the participation of women in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes. CEDAW General Recommendation 34 emphasises women's right to participate in and benefit from rural development, economic and social life, political and public life, land and natural resources.¹⁰⁷ Such active and effective participation can be ensured by: establishing quotas and targets for women's representation in decision-making positions, such as parliaments and other governance bodies; involving women organisations in policy formulation, implementation and monitoring through participation in political parties and governing bodies, such as community and village councils; and designing and implementing tools to monitor participation so as to eliminate discrimination.¹⁰⁸ States should also establish decision-making structures that are responsive to women's participation and develop action plans for removing practical barriers to women's participation in community life, implement awareness campaigns on the importance of women's participation, and ensure participatory assessments of projects.¹⁰⁹ In terms of General Recommendation 28, participation of women can be boosted by establishing codes of conduct on principles of equality and non-discrimination for public officials,¹¹⁰ the involvement of the media in public education programmes about the equality of women and men, and ensuring that women are aware of their right to equality without discrimination.¹¹¹ Similarly, CEDAW Recommendation 23 urges states to appoint women to senior decision-making positions and to incorporate ideas and interests of women groups to enhance the public and political life of women.¹¹² Implementing these measures is, therefore, necessary to ensure the participation of women in developing policies and programmes under article 19(b) of the Maputo Protocol. In terms of article 19(c), measures are required of states to ensure that women access and control productive resources such as land and guarantee their right to property. In terms of the African Commission's Resolution on women's right to land and other productive resources, to achieve this purpose, states are urged 'to repeal discriminatory laws and adopt legislative measures to sanction customary practices that limit or have a negative impact on women's access to, use of and control over land and other productive resources.'¹¹³

CEDAW Recommendation 34 further stipulates specific measures to ensure women's access to land and property. Such measures require states to ensure that land acquisitions respect women's

103 General Recommendation 37 (n 101) para 40(b).

104 General Recommendation 37 (n 101) para 44.

105 General Recommendation 34 (n 76) para 36.

106 General Recommendation 34 (n 76) para 36(b).

107 As above.

108 General Recommendation 34 (n 76) para 54(a) & (b).

109 General Recommendation 34 (n 76) para 54(c)-(e).

110 General Recommendation 28 on the core obligations of states parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women para 38(b) & (d).

111 General Recommendation 28 (n 110) para 38(e).

112 CEDAW General Recommendation 23: Political and Public Life Adopted at the 16th Session of the Committee on the Elimination of Discrimination against Women, in 1997 (contained in Document A/52/38) para 26.

113 Resolution 262 (n 70) para 3.

rights and do not cause forced eviction; protect women from the negative impacts of acquisition of land by national and transnational companies for development projects, obtain women's prior consent for projects on their lands or territories and resources; pay compensation where acquisition is inevitable; and implement laws and policies that limit the sale of women land to third states or companies.¹¹⁴ Considering that these measures protect the security of land tenure of women, they are necessary for promoting access of women to credit and reduction of poverty. In that context, CEDAW Recommendation 34 urges states to initiate community-managed and mobile financial services for women who lack collaterals; facilitate their access to formal financial service providers; provide necessary information on financial services and facilities; and initiate financial skills-building programmes.¹¹⁵

Article 19(e) of the Maputo Protocol requires states to consider indicators of human development in development policies and programmes affecting women. These are a long and healthy life; access to healthcare, education, and standard of living; access to food; and access to housing. In relation to healthy life and access to healthcare in a reproductive health context, the African Commission released two general comments on article 14 of the Maputo Protocol, which shed light on the obligation of states to address reproductive health issues of women. In so far as reproductive health can affect the economic development and empowerment of women,¹¹⁶ the General Comments are relevant to article 19(e) of the Maputo Protocol. General Comment 2 on article 14(1)(a), (b), (c) and (f) and article 14(2) (a) and (c) provides that to create enabling environment for reproductive health, states should reform restrictive laws, policies and administrative procedures on family planning/ contraception and safe abortion. They should prevent coercion of women to use specific contraceptive measures because of health conditions, train practitioners, ensure implementation of relevant laws, ensure accountability, grant access to information and education on family planning and allow access to a variety of usages.¹¹⁷ In dealing with the right to self-protection and right to be informed on partners' health status, the General Comment on article 14(1)(d) and (e) of the Maputo Protocol urges states to take measures, including educational programmes, access to information concerning HIV, including through sex education and public awareness campaigns, on available health services responsive to all women's realities in all context'. They are urged to enact and implement appropriate laws, remove barriers, ensure accountability, provide financial resources, and redress wrongs.¹¹⁸

Due to its impact on their livelihood, domestic violence threatens women's economic development and empowerment.¹¹⁹ Thus, interventions in domestic violence are essential to fulfil the rights of women to sustainable development. CEDAW Recommendation 35 on domestic violence against women stipulates measures that should be part of the consideration in ensuring the right to the sustainable development of women. On gender-related violence involving state actors, CEDAW Recommendation 35 suggests measures that include the application of legislation and administrative regulations, investigation, prosecution of claims territorially and extraterritorially, and enforcement of remedies and disciplinary sanctions.¹²⁰ For gender-based violence occasioned by non-state actors, CEDAW General Comment 35 requires legislative, executive and judicial interventions. States are

114 General Recommendation 34 (n 76) para 62.

115 General Recommendation 34 (n 76) para 68 (a)-(c).

116 M Lee & J Finlay *The effect of reproductive health improvements on women's economic empowerment: a review through the population and poverty (POPPOV) Lens* (2017).

117 General Comment 2 on art 14(1)(a), (b), (c) & (f) and art 14(2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa see generally paras 46-63.

118 General Comment 2 (n 117) paras 25-42.

119 R Ouedraogo & D Stenzel 'How domestic violence is a threat to economic development' (2021) <https://blogs.imf.org/2021/11/24/how-domestic-violence-is-a-threat-to-economic-development/> (accessed 23 June 2023).

120 General Recommendation 35 on gender-based violence against women, updating General Recommendation 19 CEDAW/C/GC/35 Distr.: General 14 July 2017 paras 22-23.

required to enact legislation that prohibits violence against women and girls and ensure that domestic law aligns with the provisions of CEDAW.¹²¹ At the executive level, expected measures include allocating an adequate budget, designing focused public policies, and developing and implementing monitoring mechanisms.¹²² Judicial bodies are urged to refrain from gender-based violence, apply criminal law provisions and punitive measures strictly, observe fairness and impartiality in legal procedures, and avoid gender stereotypes or discriminatory interpretations of the law.¹²³ CEDAW General Recommendation 34 calls on states to monitor the health status of pregnant women and new mothers and investment health insurance schemes.¹²⁴ It requires deliberate actions of the states to involve women in the design, plan and strategies related to health, education, employment, and social security.¹²⁵ States are urged to boost women housing through the design and implementation of targeted policies and programmes which take into account the specific needs of women¹²⁶ and protect women from displacement and forced eviction by state and non-State actors.¹²⁷

Article 19(f) obliges states to address the negative consequences of globalisation on women, which is essential to the realisation of their right to sustainable development. In responding to issues of globalisation, CEDAW Recommendation 34 is important to clarify article 19(f) of the Maputo Protocol. It requires state parties to implement macroeconomic policies and encourage developmental assistance that responds to rural women and strengthens their productive capacity.¹²⁸ ILO Recommendation 204 is furthermore relevant to the plight of women working in the informal setting in a globalised world. Hence, it can offer a guide to the obligation of states in relation to article 19(f) of the Maputo Protocol.¹²⁹ Considering that globalisation can limit women's access to productive resources, the protection of land tenure of women, as envisaged by ILO Recommendation 204, is necessary. This instrument urges member states to formulate an appropriate legislative framework that promotes a conducive business and investment environment; supports entrepreneurship, diverse business enterprises, and business models, lifelong learning and skills development; gives access to financial and business services and markets; provides infrastructure and technology; and offers social security coverage.¹³⁰ It urges states to provide means for such persons to obtain recognition of property rights or formalise their access to lands.¹³¹ States are also urged to put in place an integrated policy framework that promotes sustainable development, addresses poverty and promotes inclusive growth.¹³²

5 Implementation

To analyse the trend on the implementation of article 19 of the Maputo Protocol, state reports submitted by member states to the African Commission pursuant to article 26 of the Maputo Protocol and article 62 of the African Charter as well as Concluding Observations of the African Commission are investigated along with other measures that may exist outside the reporting process. The following sections discuss legislative, administrative and judicial measures as well as implementation challenges faced by states.

121 General Recommendation 35 (n 120) para 26(a).

122 General Recommendation 35 (n 120) para 26(b).

123 General Recommendation 35 (n 120) para 26(c).

124 General Recommendation 34 (n 76) para 17(b).

125 General Recommendation 34 (n 76) para 17(b).

126 General Recommendation 34 (n 76) para 80.

127 As above.

128 General Recommendation 34 (n 76) para 11.

129 ILO Recommendation 204 – Transition from the Informal to the Formal Economy Recommendation 204 of 2015.

130 ILO Recommendation 204 (n 129) para 11.

131 ILO Recommendation 204 (n 129) para 13.

132 As above.

5.1 Constitutional and legislative measures

The right to sustainable development in general, and specifically for women, is not expressly guaranteed in any legislation, but some states in Africa have provisions that can be understood as addressing different elements of sustainable development.¹³³

In terms of article 19(a), for instance, section 13(3) of the Zimbabwean Constitution mandates the state to take measures to ensure the protection and enhancement of the right of people, including women, to equal opportunities in development.¹³⁴ Section 17 generally deals with gender balance and requires the state to promote equal representation of men and women in all institutions and agencies of government at every level and full participation of women in all other spheres of Zimbabwean society on the basis of equality with men.¹³⁵ Article 21(3) of the Kenya Constitution imposes the duty on state organs and all public officers to address the needs of women, while article 27(3) stipulates that women and men have the right to equal treatment, including the right to equal opportunities in the political, economic, cultural and social sphere.¹³⁶ Section 187 of the South African Constitution establishes the Commission for Gender Equality, whose role is to 'promote respect for gender equality and the protection, development and attainment of gender equality'. Section 14 of the Constitution of the Democratic Republic of Congo (DRC) stipulates equitable representation of women in national, provincial, and local institutions.¹³⁷ The foregoing shows that there is a normative basis for the implementation of key components of article 19 of the Maputo Protocol.

Regarding article 19(c) of the Maputo Protocol, a major progress in ensuring women's right to sustainable development has been the reform of South Africa's land policy,¹³⁸ which has impacted rural women positively.¹³⁹ The South African White Paper on Land Reform laid the policy framework for the abolition of all laws that discriminated against women in relation to property ownership.¹⁴⁰ Several pieces of legislation have given effect to the White Paper and the Land Reform Gender Policy. The legislation includes the Land Reform (Labour Tenants) Act 1996,¹⁴¹ the Housing Act 1997,¹⁴² the Water Services Act 1997,¹⁴³ and the Land Bank Amendment Act 1998.¹⁴⁴ Section 34 of the DRC Constitution guarantees everyone the right to property, a provision which is reported as ensuring women's access to land.¹⁴⁵ Seychelles guarantees women opportunities to own, access and dispose of the property

133 Africa Renewal 'Report on Africa's Priorities for Sustainable Development' (April 2012).

134 Zimbabwe's Constitution of 2013 sec 13(3); see generally the Republic of Zimbabwe Combined 11th, 12th, 13, and 15th report under the African Charter on Human and Peoples' Rights and 1st, 2nd, 3rd and 4th Combined Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2007-2019) 97 para 10.1.

135 Zimbabwe's Constitution of 2013, sec 17(1)(a)-(c).

136 Kenya Constitution 2010; see also Republic of Kenya 'Combined report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the initial report on the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa' April 2020 (Kenya Report) para 221.

137 Democratic Republic of Congo Report to the African Commission on Human and Peoples' Rights on the implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th, and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa from 2005 to 2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports) (2017) para 305.

138 JK Moeng *Land reform policies to promote women's sustainable development in South Africa* (2011) 102.

139 The International Labour Organisation 'Report on Empowering Women in the Rural Economy' (2019) 3.

140 DL Miller & A Pope 'South African land reform' (2000) 44(2) *Journal of African Law* 173.

141 The Land Reform (Labour Tenants) Act 3 of 1996; South Africa: 2nd Periodic Report, 2003-2014, submitted 10 February 2015, 58th ordinary session, 6 April-20 April 2016 (South Africa Report) para 512.

142 The Housing Act 107 of 1997.

143 The Water Services Act 108 of 1997.

144 The Land Bank Amendment Act 21 of 1998.

145 Democratic of Republic of Congo Report (n 137) para 307.

in line with section 24 of the Constitution, which guarantees the right of everyone to property.¹⁴⁶ Through a number of legislative measures on agrarian reform¹⁴⁷ and rural land governance,¹⁴⁸ Burkina Faso entrenches principles of gender and equity to ensure women's participation in the governance of forests and other natural resources,¹⁴⁹ while section 211 of the Constitution of Eswatini provides that gender shall not exclude anyone from equal access to land for normal domestic purposes.¹⁵⁰

Legislative measures in the interest of women that conforms with article 19(d) are evident in some African states. The South African Land Reform Gender Policy aims to create an enabling environment for women to access, own, control, use and manage land, as well as access credit facilities.¹⁵¹ Through its legislation, DRC has set the rule on microfinance which is beneficial to women.¹⁵² The Enterprise Seychelles Agency (ESA), an institution established by law,¹⁵³ is required to consider women in its functions and provide assistance to female entrepreneurs.¹⁵⁴

Indicators of human development are broad-ranging and have implications on a number of rights covered by other articles of the Maputo Protocol.¹⁵⁵ Therefore it is rare to find one specific legislative measure implementing article 19(e) of the Maputo Protocol in the specific context of sustainable development.¹⁵⁶ Legislation put in place to ensure the implementation of article 19(f) of the Maputo Protocol is rarely specifically reported by the state. Globalisation is used in the South Africa report but only in the context of the negative toll that the free market system and the relaxing of border controls have on organised crime.¹⁵⁷ It does indicate that women are over-represented in the informal job market,¹⁵⁸ as is the case in other states such as Eswatini,¹⁵⁹ Burkina Faso,¹⁶⁰ and DRC,¹⁶¹ a reality that may expose them to the impact of globalisation, as earlier mentioned. DRC, however, has signed a range of ILO instruments and put in place national legislation to protect working women, including those in the informal sector.¹⁶² Section 59(3) of the Eswatini Constitution imposes an obligation on the state to integrate women into the mainstream of economic development, while section 60(3) mandates states to enact legislation for the economic empowerment of citizens.¹⁶³

146 Seychelles '3rd Periodic Report, 2006-2019, submitted 23 April 2021, 69th ordinary session, 15 November-5 December 2021 (Seychelles Report) para 19.1.

147 Burkina Faso Law No 034-2012/AN of 2 July 2012 on Agrarian and Land Reform.

148 Burkina Faso Law No 0034-2009/AN of 24 July 2009.

149 Burkina Faso: 3rd and 4th Periodic Report (2011-2013), submitted: 7 August 2015, 57th ordinary session, 18 November 2015 (Burkina Faso Report) para 285.

150 Kingdom of Eswatini Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa (2021) para 605. Kingdom of Eswatini formerly known as the 'Kingdom of Swaziland'.

151 A Gendered Analysis of Land Reform Policy and Implementation Outcome in South Africa (2006-2008) 32.

152 Law No 11-020 of 15 September 2011; Democratic Republic of Congo Report (n 137) para 305.

153 Enterprise Seychelles Agency Act 3 of 2018.

154 Seychelles Report (n 146) paras 13.2 & 19.1.

155 See discussions on arts 12, 14 & 15 of the Maputo Protocol.

156 Elements which constitute the human development index have been discussed in sec 3.6 of this chapter.

157 South Africa Report (n 141) para 492.

158 South Africa Report (n 141) para 21.

159 Eswatini Report (n 150) para 520.

160 Burkina Faso Report (n 149).

161 Democratic of Republic of Congo Report (n 137) para 166.

162 Democratic of Republic of Congo Report (n 137) para 252.

163 Eswatini Report (n 150) para 606.

5.2 Administrative measures

States are already taking a number of administrative initiatives and measures to implement article 19(a) and (b) of the Maputo Protocol, which indicates that some states are committed to the implementation of certain aspects. For instance, Eswatini tasks the Department of Gender and Family Issues with the mainstreaming of gender into all areas of national development.¹⁶⁴ In addition to adopting a National Gender Policy, initiatives such as the National Programme for the Promotion of Women is operated in DRC to eliminate legal discrimination against women in both the economic and political spaces, deploying strategies such as training, sensitisation, formulation of draft laws, support for women's NGOs and the establishment of new structures.¹⁶⁵ Zimbabwe Gender Commission plays key roles, including the monitoring and investigation of possible violations of gender rights to seek redress.¹⁶⁶ Kenya,¹⁶⁷ Mauritania,¹⁶⁸ and Ethiopia¹⁶⁹ also have gender policies/strategies/action plans to aid the protection of women in private and public spaces. These measures are consistent with articles 19(a) and (b), which call for gender inclusiveness and participation in matters relating to development.

Administrative measures are being taken to implement article 19(c) and (d) of the Maputo Protocol, which demonstrates that some aspects of state obligations in respect of the provision are taken seriously by some states. In Zimbabwe, the policy position is that women should constitute 20 per cent of all those allocated large-scale farming land. Women are also entitled to agricultural land in their own right under existing schemes so that they can exercise control over means of production.¹⁷⁰ However, this figure is inadequate considering that women generally play a bigger role in subsistence farming.¹⁷¹ South Africa implemented the land restitution programme from which female-headed households benefited,¹⁷² while DRC initiated a programme to combat women's poverty by enhancing their right to property and access to land and credit.¹⁷³ In Namibia, programmes to pursue macroeconomic stability include fiscal discipline, which directly benefits women, especially rural women who are vulnerable and extremely poor.¹⁷⁴

A number of states establish structures and programmes that speak to article 19(e) in that they address long and healthy life, education, and standard of living, which constitute essential elements of human development for women. For instance, to respond to the threat that violence poses to women's health, in DRC, the Ministry of Social Affairs, Humanitarian Action and National Solidarity carries out awareness and propagates national anti-sexual violence against women.¹⁷⁵ The National Strategy to Combat Gender-Based Violence and the National Strategy to Combat Infant and Maternal Morbidity in the DRC utilises approaches like community sensitisation and family planning advocacy in the implementation of national development policies and programmes.¹⁷⁶ In Sudan, the government has adopted a national policy of empowering women through girls' education. The objective of the

164 Eswatini Report (n 150) para 42.

165 Democratic of Republic of Congo Report (n 137) para 76.

166 Zimbabwe Report (n 134) para 2.7.

167 Kenya Report (n 136) para 291.

168 Islamic Republic of Mauritania 10th, 11th, 12th, 13th & 14th Periodic Report on the implementation of the African Charter (2017) 50-51.

169 Ethiopia 5th and 6th Periodic Report, 2009-2013, submitted 7 May 2015, 56th ordinary session, 21 April-7 May 2015 (Ethiopia Report) 39.

170 Zimbabwe Report (n 134) 93.

171 FAO 'The role of women in agriculture' ESA Working Paper No 11 – 2 March 2011.

172 South Africa Report (n 141) para 515.

173 Democratic Republic of Congo Report (n 137) para 307.

174 B Ames et al *Macroeconomic policy and poverty reduction* (International Monetary Fund 2001).

175 Democratic Republic of Congo Report (n 137) para 361.

176 Democratic Republic of Congo Report (n 137) para 76.

plan is to raise women's awareness of their rights and means of protecting those rights, in addition to legislation enacted by the state to facilitate and simplify measures of protecting women's rights.¹⁷⁷ Programmes and campaigns are initiated to condemn and curb domestic violence and sexual offences in Eswatini,¹⁷⁸ a trend also found in states such as Zimbabwe,¹⁷⁹ South Africa,¹⁸⁰ the DRC,¹⁸¹ and Nigeria.¹⁸²

To combat female genital mutilation (FGM), a special unit to handle FGM was established in the office of the Director of Public Prosecution in Kenya.¹⁸³ Media sensitises the public on the adverse effects of FGM on women's health in Tanzania,¹⁸⁴ while a renewable five-year action plan to combat FGM was put in place in Cameroon.¹⁸⁵ The foregoing reflects that steps are being taken to improve the livelihood and health of women in the developmental direction of these countries, a trend which is in line with article 19(e) of the Maputo Protocol.

The negative consequences of globalisation under article 19(f) undermine the inclusiveness of women in a modern economy and raise questions as to what steps states may take to address this critical aspect of their right to sustainable development. Measures to strengthen the participation of women in the economy include the establishment of Eswatini's Ministry of Commerce Industry and Trade and Small, Micro, Medium and Enterprise (SMME) Policy to strengthen women's participation in the economy.¹⁸⁶ A similar approach is followed in South Africa, where it is recognised as a critical response to the challenges of unemployment, poverty, socio-economic conditions and inequality for all.¹⁸⁷ The Republic of Benin launched a Microcredit Programme for the Poorest on 27 February 2007 to enable the poorest segments of the population to become economically active, especially women.¹⁸⁸ In addition, it offers grants and low-interest loans to women in the informal sector¹⁸⁹ and encourages women to form savings and credit cooperative associations.¹⁹⁰

5.3 Judicial measures

There has been no reported judicial decision on the right to the sustainable development of women. This is concerning as it means the jurisprudence of the right as guaranteed under article 19 of the Maputo Protocol largely remains untested. However, the review of the reports by states shows that certain aspects of article 19 have been subjected to litigation at the domestic level. This is without any reference specifically to article 19. Considering the multifaceted nature of the right, this sub-section

177 Republic of Sudan the 4th and 5th Periodic Reports of the Republic of Sudan in Accordance with Article 62 of the African Charter on Human and Peoples' Rights 2008-2012 (2012) 40.

178 Eswatini Report (n 150) para 403.

179 Zimbabwe Report (n 134) para 3.4.

180 South Africa Report (n 141) paras 110 & 420.

181 Democratic Republic of Congo Report (n 137) paras 177 & 178.

182 Federal Republic of Nigeria's 6th Periodic Country Report 2015-2016 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria (2017) 172.

183 Kenya Report (n 136) para 246.

184 Report, 1992-2006, submitted May 22, 2008, Session:43rd ordinary session, 7 May-22 May 2008 (Tanzania Report) 19, 32.

185 Republic of Cameroon Single Report Comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention (2020) para 706.

186 Eswatini Report (n 150) para 610-13.

187 South Africa Report (n 141) para 356.

188 Republic of Benin Combined (6th-10th) Periodic Reports on the Implementation of the provisions of the African Charter (2009-2018) and Protocol to the African Charter on the Rights of Women in Africa 59.

189 Benin Periodic Report (n 188) 21.

190 Benin Periodic Report (n 188) 32.

analyses these cases across the various states so as to detail the extent to which they relate to elements of article 19, such as participation, property and the general empowerment of women.

Participation of women in national development initiatives for their sustainable development is a key focus of article 19(a) and (b) of the Maputo Protocol. There are relevant cases from Lesotho¹⁹¹ and Kenya,¹⁹² which showcase the struggles of women and their vindication in certain areas critical to their sustainable development. In Lesotho, the issue in *Molefi Tse'pe v the IEC*¹⁹³ was whether the reservation of 1/3 of seats for women on the local government council constituted discrimination against men in breach of section 18 of the Constitution of Lesotho. The Court of Appeal held that such reservation of seats for women under the Local Government Elections Act 2005 was a justified affirmative action under section 18 as well as Lesotho's international human rights obligations under the African Charter and the Maputo Protocol. Participation and leadership of women in politics allow them to influence development-related decisions, which is crucial to achieving sustainable development; hence, this case is particularly relevant in view of article 19(b) of the Maputo Protocol, which imposes obligations on states to ensure women's participation in every aspect of national development initiatives and processes.

Women's access to property and ownership of it is directly linked to the enjoyment of article 19(c), which deals with land, and indirectly relevant to article 19(d), dealing with access to credit and 19(e) as a key indicator of human development. There are cases from Eswatini,¹⁹⁴ Cameroon,¹⁹⁵ and Namibia¹⁹⁶ that vindicate the right of women to property. In *Mary Joyce Doo Aphane*,¹⁹⁷ an Eswatini law which prohibited women married in community of property from registering property in their own names or in the joint names of themselves and their husbands was struck down by the court on the ground that it was unconstitutional. In *Nouteping*,¹⁹⁸ the High Court in Cameroon was confronted with the question as to whether the sale of a jointly owned real estate property by the husband without the consent of the wife was valid. The Court declared the sale null and void as it is incompatible with the provisions of article 15 CEDAW.¹⁹⁹ The issue before the Appeal Court in the case of *Agness Kahimbi Kashela v Katima Mulilo Town Council* was whether communal land passed to the appellant by her father could be transferred by the State of Namibia to a local authority based on the ground that all communal lands became the property of the State of Namibia. The Court established that the Constitution of Namibia guaranteed the enforcement of customary land rights; hence, it concluded that the appellant had an exclusive right to the use and occupation of the land in question, despite its proclamation as townland. Thus, the appeal was successful. The case shows that in some instances, state organs are not averse to the recognition of the right of women to own and use land.

191 The Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2018) para 27.

192 Kenya report (n 136) para 78.

193 *Molefi Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LeCA 2005) (*Molefi Tse'pe v the IEC*).

194 Eswatini Report (n 150) 21.

195 Tanzania Report (n 184).

196 Republic of Namibia 7th Periodic Report (2015-2019) on the African Charter on Human and Peoples' Rights and the Second Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) paras 76.4 & 76.5.

197 *The Attorney-General v Mary Joyce Doo Aphane* Appeal Case No 12/2010.

198 *Nouteping née Noubissie Julienne v Mr Nouteping Jean-Marie, the Société Coopérative Mutuelle d'Épargne et de Crédit* Judgement No 281/Com of 15 June 2017; Cameroon Report (n 185).

199 *Nouteping* (n 198); Cameroon Report (n 185) para 812.

Jurisprudence relating to the indicators of women's 'human development' under article 19(e) with reference to a long and healthy life, education, and standard of living can be found in cases from South Africa,²⁰⁰ Mauritius,²⁰¹ Uganda²⁰² and Nigeria.²⁰³ In *S v Baloyi*,²⁰⁴ the South African Constitutional Court declined to declare unconstitutional the reverse onus of proving the absence of guilt on a person charged with breach of a family violence interdict (restraining order), a development that shows that courts take serious exception to violence against women. The attitude of the court was equally protective in *S v Chapman* where the Supreme Court of Appeal held that rape constituted 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'.²⁰⁵ Mauritius' Employment Relations Tribunal, in *Mrs SD v The Residence Mauritius Hotel*, ruled that the prohibition and threat of sanctions against an employee who continues to wear Tikka (red dot on the forehead) despite repeated warnings is discriminatory and unconstitutional.²⁰⁶ In Uganda, the Constitutional Court in *Law & Advocacy for Women in Uganda* declared the practice of female genital mutilation unconstitutional and against human rights.²⁰⁷

5.4 Implementation challenges

Many hurdles remain in the implementation of article 19 of the Maputo Protocol. Lack of adequate gender-responsive budgets and participation, which undermines article 19(a) and (b), is a challenge mentioned in the reports of South Africa,²⁰⁸ Eswatini,²⁰⁹ Nigeria,²¹⁰ Cameroon,²¹¹ Mauritania,²¹² and Burkina Faso.²¹³ On the issue of a gender-responsive budget, South Africa indicates that it is missing in the government planning and budgeting cycle. As a result of limited budgets, Eswatini struggles with sensitisation and awareness creation on gender issues.²¹⁴ In Nigeria, inadequate funds have adversely affected the performance of key activities of relevant ministries and agencies responsible for the promotion of security, socio-economic welfare and poverty eradication programmes among women.²¹⁵ Cameroon takes the view that the financial and economic dependence of women predisposes them to vulnerability.²¹⁶ Mauritania acknowledges that it lacks human and financial resources to aid the advocacy and campaigns of institutions and organisations defending women's rights.²¹⁷ The lack of a gender-responsive budget does not only reflect that some states do not adequately take their obligations,

200 South Africa Report (n 141).

201 The Republic of Mauritius 9th to 10th Combined Periodic Report to the African Commission on Human and Peoples' Rights Implementation of the African Charter on Human and Peoples' Rights (2020) 81-83.

202 Republic of Uganda Periodic Report by the Government of Uganda to the African Commission on Human and Peoples' Rights (2013).

203 Nigeria Report (n 182).

204 *S v Baloyi* 2000 (1) BCLR 86 (CC).

205 South African Report (n 141) para 114.

206 Mauritius Report (n 201) 81-83.

207 *Law Advocacy for Women in Uganda v Attorney General* (Constitutional Petition 13 of 2005) [2007] UGSC 71 (5 April 2007); see Uganda Report (n 202) para 15.

208 South Africa (n 141) para 57.

209 Eswatini Report (n 150).

210 Nigeria Report (n 182) para 40.

211 Cameroon Report (n 185) para 100.

212 Mauritania Report (n 168).

213 African Commission Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights adopted during its 21st extraordinary session 23 February to 4 March 2017, para 56.

214 Eswatini Report (n 150).

215 Nigeria Report (n 182).

216 Cameroon Report (n 185).

217 Mauritania Report (n 168).

especially under article 19(a) and (b). It is a gap that has implications on the other elements of article 19 as a gender-responsive budget implicates all the obligations of states towards women.

While participation in development-related decisions may exist in different forms, including political positions, town hall meetings, consultations, focus groups, and public debates, this is either unreported or limited in some states. In its Concluding Observations, the African Commission observes that the report by Cameroon does not show that measures are being taken to improve the political representation of women in decision-making institutions.²¹⁸ A similar concern was made in the report of Burkina Faso²¹⁹ about the unimpressive representation of women in positions of power and authority in Nigeria,²²⁰ Kenya,²²¹ and Liberia.²²² The foregoing constrains the opportunities of women to influence development-related projects and programmes. Participation of women is often limited by cultural practices. The *Tinkhundla* traditional governance system, which excludes political parties, constrains opportunities for participation in general and also specifically for women in Eswatini.²²³ Cultural and societal dynamics hinder the representation of women in political positions in Kenya, in spite of the constitution's two-thirds gender rule.²²⁴ Other challenges include a lack of adequate statistics²²⁵ and a paucity of jurisprudence on women's rights.²²⁶ Entrenched cultural beliefs in most states in Africa signal that the total commitment of states to the implementation of article 19(c) and (d) of the Maputo Protocol is not realised. While there are progressive decisions of courts on issues relating to the provisions in some states,²²⁷ the practical realities for women in other societies and areas are different. For instance, the African Commission noted that the Report of Cameroon does not mention the measures taken concerning the fight against poverty and lack of opportunity for women's access to housing, employment, loans, and revenue-generating activities.²²⁸ There is a general lack of economic empowerment of women in Nigeria,²²⁹ Liberia,²³⁰ and Mauritania.²³¹

Agenda 2063 seeks to advance sustainable development in Africa through a range of measures, including economic diversification, investment in infrastructure, and promotion of good governance.²³² In particular, Agenda 2063 emphasizes the need for sustainable development that is inclusive, equitable, and environmentally sustainable. It calls for a shift towards more sustainable patterns of production and consumption, with a focus on renewable energy, sustainable agriculture, and environmentally friendly technologies.²³³ Furthermore, Agenda 2063 emphasizes the importance of empowering women and

218 African Commission Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Cameroon adopted at its 47th ordinary session 12-26 May 2010, paras 22.

219 African Commission Concluding Observations and Recommendations on Burkina Faso (n 213) para 54.

220 African Commission Concluding Observations and Recommendations on the 5th Periodic Report of Nigeria, 2011-2014 adopted at 57th ordinary session 4 November to 18 November 2015, para 75.

221 African Commission Concluding Observations and Recommendations – Kenya: Combined 8th-11th Periodic Report, 2008-2014 adopted at its 19th extraordinary session 16-25 February 2016, para 39(i).

222 African Commission Concluding Observations and Recommendations – Liberia: Initial and Combined Periodic Reports, 1982-2012, adopted at 17th extraordinary session 19-28 February 2015, para 19.

223 Eswatini Report (n 150) para 157.

224 Kenya report (n 136) para 222; also see Concluding Observations and Recommendations on Kenya (n 228) para 39(ii)

225 Nigeria Report (n 182) para 57.

226 Mauritania Report (n 168).

227 See sec 5.3 of this paper.

228 Concluding Observations and Recommendations on Cameroon (n 218) para 23.

229 Concluding Observations and Recommendations on Nigeria (n 220) para 75.

230 Concluding Observations and Recommendations on Liberia (n 222) para 19.

231 Concluding Observations – Mauritania: 10th, 11th, 12th, 13th & 14th Periodic Report, 2006-2014. Adopted at 23rd extraordinary session 13-22 February 2018, Banjul, Gambia (Concluding Observations on Mauritania) para 72.

232 African Union 'Agenda 2063: The Africa We Want' <https://au.int/en/agenda2063/overview> (accessed 4 April 2023).

233 See African Union 'Agenda 2063: The Africa We Want' (2015) para 6.

youth, and promoting gender equality and social inclusion in all aspects of development. It recognizes that these groups are often marginalized and excluded from decision-making processes related to development, and that their full participation is essential for achieving sustainable development in Africa.²³⁴

Agenda 2063 does not explicitly mention article 19 or the Maputo Protocol, its goals and objectives are in line with the principles and values set forth in article 19. Some specific examples of how Agenda 2063 goals align with article 19 of the Maputo Protocol include gender equality and social inclusion. Agenda 2063 emphasizes the importance of promoting gender equality and social inclusion in all aspects of development, including economic, political, and social spheres. This is also a key principle of article 19, which recognizes the importance of empowering women and ensuring their full participation in all aspects of development.²³⁵

The obligation of states under article 19(e) of the Maputo Protocol to consider indicators of human development relating to women in national developmental policies is also struggling for fulfilment. States such as DRC,²³⁶ Cameroon,²³⁷ Ethiopia,²³⁸ and Nigeria²³⁹ experience security challenges that threaten women's key indexes on development, which shows that there is inadequate consideration of the HDI as indicated under article 19(e). A recurrence of armed conflicts in some parts of the country further challenges the DRC.²⁴⁰ Cameroon indicated that security challenges resulting from the abuses of the *Boko Haram* terrorist group and armed gangs coupled with the economic crisis jeopardise human rights.²⁴¹ A similar reason was given by Ethiopia, which indicated in its report that promoting human rights while protecting citizens from terrorism is a challenge.²⁴² Cultural constraints pose problems for the access and educational development of women in Tanzania.²⁴³ The socio-cultural burden in the DRC is identified as one of the major challenges in combating domestic violence.²⁴⁴ The African Commission noted that the Report of Cameroon does not mention the maternal and reproductive health of women and the prevalence of FGM and forced marriage.²⁴⁵ It expressed similar concerns about Kenya²⁴⁶ and about clandestine excision, which increasingly affects girls of an early age, despite the existence of a law prohibiting FGM in Burkina Faso.²⁴⁷ It also warned that the harmful cultural and traditional practices of *ukuthwala* continue to restrict South African women and children from fully enjoying their rights.²⁴⁸ The high rate of maternal mortality is considered a serious concern in Nigeria.²⁴⁹ The foregoing examples show that state obligations relating to article 19(e) on the consideration of

234 As above.

235 As above.

236 Democratic Republic of Congo Report (n 137).

237 Cameroon Report (n 185).

238 Ethiopia Report (n 169).

239 Concluding Observations and Recommendations on Nigeria (n 220) para 73.

240 Ethiopia Report (n 169) para 15(v).

241 Cameroon Report (n 185) para 1057.

242 Cameroon Report (n 185) para 34.

243 Tanzania Report (n 184) 35.

244 Cameroon Report (n 185) para 798.

245 Concluding Observations and Recommendations on Cameroon (n 218) para 22.

246 Concluding Observations and Recommendations on Kenya (n 221) para 39(ii).

247 Concluding Observations and Recommendations on Burkina Faso (n 219) paras 60-62.

248 Concluding Observations and Recommendations on South Africa: 2nd Periodic Report, 2003-2014 Adopted at 20th extraordinary session June 9 to 18 June 2016, Gambia (Concluding Observations and Recommendations on South Africa) para 23.

249 Concluding Observations and Recommendations on Nigeria (n 220).

human development indicators in the elaboration of development policies and programmes of the Maputo Protocol are not yet effectively discharged in Africa.

Regarding article 19(f) of the Maputo Protocol, according to the African Commission, there is a general lack of rapport in the examined reports. There are exceptions, though. In Mauritania, there is a lack of integration of women as dynamic and inclusive development stakeholders.²⁵⁰ Cameroon's report does not reflect on the situation of women in the informal sector of the economy.²⁵¹ The situation of international economics poses challenges in Burkina Faso to the enjoyment of key rights under the Maputo Protocol.²⁵² In Liberia, inadequate economic opportunities for women remain a challenge.²⁵³ The dearth of consideration of article 19(f) in the reporting process signifies that states are not taking expected measures to address the negative consequences of globalisation on women.

6 Conclusion

The realisation of the multifaceted right to sustainable development for women remains a concern in Africa. The challenge of poverty looms large, as does discrimination. Article 19 seeks to tackle these challenges. However, the normative content of article 19 remains largely untested. Also, state parties hardly report on its specific elements. While the ACHPR aims to cover all provisions of the Protocol in its Concluding Observations, it is possible that some elements of article 19 may not be specifically addressed in all of its reviews of state compliance. This could be due to a variety of factors, such as limitations in available information or resources, or differences in the extent of implementation of article 19 among different states parties.

Even the somewhat disjointed jurisprudence with specific reference to article 19 does not yet exist. For instance, there are no cases testing the adequacy or otherwise of gender perspective in national development planning, women's access to credit and extension services, policies to mitigate the negative effects of globalisation and trade and economic policies and programmes on women. Also, but for a few exceptions, states hardly report on all the elements of article 19 of the Maputo Protocol. The predominant focus of reports by states has been on the property or land rights of women and access to credit facilities. While that is important, other elements are often missing or not properly developed in the reports. A possible reason for this is the overlapping nature of the article with other provisions of the Maputo Protocol. Another factor might be a lack of understanding by states about the reporting expectations on article 19 of the Maputo Protocol.

All in all, there is a need for sensitisation and awareness around the reporting demands of article 19 to give all stakeholders a better understanding. A new reporting guideline which clearly spells out the reporting items of article 19 should be developed to enhance reports by states. Non-state actors working on women's empowerment initiatives in Africa need to be equipped to take on issues of advocacy and litigation relating to article 19. States should take the implementation of all rights in the Maputo Protocol seriously as they are interdependent and impact on the realisation of article 19. Empowerment is required in the economic, political, and social spaces of their private and public lives to achieve sustainable development for African women.

250 Concluding Observations on Mauritania (n 231) para 72.

251 Concluding Observations and Recommendations Cameroon (n 218) para 22.

252 Concluding Observations and Recommendations on Burkina Faso (n 219) para 55.

253 Concluding Observations and Recommendations on Liberia (n 222) para 19.

Article 20

Widows' rights

Crystal Mokoena

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

- (a) that widows are not subjected to inhuman, humiliating or degrading treatment;
- (b) that a widow shall automatically become the
- (c) guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;
- (c) that a widow shall have the right to remarry, and in that event, to marry the person of her choice.

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1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) dedicates its article 20 to widows. This is significant because although African states had ratified several international and regional instruments, none explicitly protected widows' rights. Arguably, protecting women from discrimination on the basis of marital status addresses the situation of widows.¹ However, this generalised prohibition of discrimination has failed to capture the reality of the additional and unique human rights violations that widows suffer, particularly in the African context, exacerbated by the cultural legitimization of such violations. The Protocol thus took a major step towards addressing the lamentable challenge described by the United Nations (UN) as follows:

Absent in statistics, unnoticed by researchers, neglected by national and local authorities and mostly overlooked by civil society organizations (SCOs) – the situation of widows is, in effect, invisible. Yet abuse of widows and their children constitutes one of the most serious violations of human rights and obstacles to development

1 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) art 1.

today. Millions of the world's widows endure extreme poverty, ostracism, violence, homelessness, ill health and discrimination in law and custom.²

The explicit inclusion of widows' rights in the Maputo Protocol is therefore worth acknowledging and celebrating. The Protocol offers hope to widows in Africa as they suffer multiple human rights violations.³ Most bereavement practices that widows must observe constitute a violation of their rights.⁴

While this chapter intends to interpret and analyse article 20 of the Maputo Protocol, it is organised into seven sections. The first being this introduction. The next section considers the drafting history of article 20. Section 3 explores linkages between article 20 and other treaty provisions within the Maputo Protocol and in other human rights treaties. The fourth section discusses concepts and definitions central to understanding the article. Section 5 examines the nature and scope of state obligations concerning widows' rights. The next section takes stock of current measures that states have taken toward implementing article 20, while the concluding section reflects on the state of regional and national jurisprudence around the article and weighs the prospects for its full implementation.

2 Drafting history

The distinct sufferings of African widows brought about by the prevalence of widowhood rites necessitated the inclusion of widows' rights in the Protocol. These rights date back to the 1997 Draft Protocol to the African Charter on Women and Peoples' Rights Concerning the Rights of Women (Nouakchott Draft). Article 7 thereof proscribes the subjection of widows to inhuman and degrading treatment. The Nouakchott Draft also condemns traditional harmful practices against females.⁵ Eliminating harmful practices was already an objective in some treaties before the Maputo Protocol. These treaties include the Draft Organisation of African Unity (OAU) Convention on the Elimination of All Forms of Harmful Practices Affecting the Fundamental Human Rights of Women and Girls (Draft OAU Convention). The Special Rapporteur on the Rights of African Women also flagged the need to eliminate various forms of violence against women, including harmful traditional practices.⁶

The inclusion of widows' rights in the Protocol resulted from the merger of the Draft OAU Convention with the 1999 draft of the Protocol (Kigali Draft). The Draft OAU Convention included widowhood rites as a harmful practice hindering women's rights.⁷ In preparing and finalising the Maputo Protocol, several organisations were consulted, among them the Inter-African Committee on Harmful Traditional Practices Affecting the Health and Welfare of Women and Children (IAC). Since the IAC has worked 'on policy programmes and actions to eliminate Harmful Traditional Practices in

2 UN Women 'International Widows' Day, 23 June' <https://unwomenusa.org/international-widows-day-23-june> (accessed 15 May 2023).

3 GD Torvikey & AP Atupare 'Legal pluralism, gender justice, and right to food in agrarian Ghana' in JB Martignoni, C Gironde, C Golay, E Prügl & D Tsikata (eds) *Agricultural commercialization, gender equality and the right to food* (2022) 197; M Makgahlela, T Sodi, S Nkoana & J Mokwena 'Bereavement rituals and their related psychosocial functions in a Northern Sotho community of South Africa' (2019) 45 *Death Studies* 2.

4 EM Baloyi 'Theological reflections on sex as a cleansing ritual for African widows' (2016) 23 *Alternation* 202; NV Pemunta & MF Alubafi 'The social context of widowhood rites and women's human rights in Cameroon' (2016) 2 *Cogent Social Sciences* 12; M Motsoeneng & MA Modise "'Grieving widows" lived experiences in a rural South African setting' (2020) 30 *Journal of Psychology in Africa* 266; FA Doris 'Widowhood rite: an infringement on the rights of widows in Bongo' (2018) 7 *International Journal of Developing Societies* 1.

5 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

6 F Banda 'Blazing a trail: the African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 73.

7 Draft OAU Convention on the Elimination of All Forms of Harmful Practices, subsequently adopted as Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

the African Region' and internationally,⁸ its contribution to the drafting of article 20 must have been significant. The IAC also often refers to degrading widowhood rites when addressing harmful practices. For instance, in an interview on gender and ageing, several widowhood rites were highlighted among the plights of women in Africa.⁹

The Southern African Development Community (SADC) Protocol on Gender and Development (SADC Gender Protocol), developed in 2008, got much of its influence from the Maputo Protocol. This is affirmed by Forere and Stone, who expound that the SADC Gender Protocol is a duplication of the Maputo Protocol.¹⁰ Article 10, dedicated to widows' rights, is among the clauses almost identical to those of the Maputo Protocol. It closely aligns with article 20 of the Maputo Protocol. In addition to the rights entrenched in the Maputo Protocol, the original SADC Protocol included widows' right to have 'access to employment and other opportunities to enable her to make a meaningful contribution to society'.¹¹ However, this right was omitted in the SADC Protocol amendment, leaving the two protocols virtually identical.¹²

3 Linkages with other treaty provisions

Article 20 closely relates to other provisions of the Maputo Protocol, chiefly the prohibition of discrimination against women and safeguarding their right to equality. Article 2 thus charges all state parties to promote women's equality through, among other means, constitutional protection. This means that widows' right to equality and non-discrimination is thereby made a constitutional right.

Article 2(2) of the Protocol closely identifies with articles 2(f) and 5(a) of CEDAW¹³ in requiring states to adjust 'social and cultural patterns ... with a view to achieving the elimination of harmful cultural and traditional practices'.¹⁴ Further, article 5 of the Maputo Protocol calls on states to eliminate harmful practices that violate the rights of women. This makes the link between articles 2, 5 and 20 even more pertinent, as widowhood rites account for much of the category of harmful cultural and traditional practices.¹⁵ These include but are not limited to the restriction of widows' movement,

8 Inter-African Committee on Traditional Practices (IAC) <https://iac-ciaf.net/about-iac/> (accessed 23 June 2023).

9 I Hoskins 'Speaking out: an interview with Berhane Ras Work, President, the Inter-African Committee' (1998) 24 *Ageing International* 86.

10 M Forere & L Stone 'The SADC Protocol on Gender and Development: duplication or complementarity of the African Union Protocol on Women's Rights?' (2009) 9 *African Human Rights Law Journal* 443.

11 SADC Protocol on Gender and Development (2008), https://extranet.sadc.int/files/2112/9794/9109/SADC_PROTOCOL_ON_GENDER_AND_DEVELOPMENT.pdf (accessed 15 May 2023) art 10(1)(d).

12 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 26.

13 Articles 2(f) & 5(a).

14 Maputo Protocol art 2(2).

15 C Adeyemo 'Widowhood and its harmful practices: causes, effects and the possible way out for widows and women folk' (2016) 3 *World Journal of Educational Research* 385. In a simplified version of the Maputo Protocol, Women in Law and Development in Africa (WiLDAF-West Africa) includes 'widowhood practices that humiliate women' as an example of harmful practices to be eliminated (art 5) [http://www.banfgm.org/IT/IT/La_Campagna_files/Protocol_to_the_African_Charter_on_Human_and_People_s_Rights_on_the_rights_of_women_in_Africa_simplified_pdf%20\(1\).pdf](http://www.banfgm.org/IT/IT/La_Campagna_files/Protocol_to_the_African_Charter_on_Human_and_People_s_Rights_on_the_rights_of_women_in_Africa_simplified_pdf%20(1).pdf) (accessed 15 May 2023).

widow inheritance,¹⁶ compelled wearing of mourning apparel, and sexual cleansing and defacing.¹⁷

Article 20(a), which proscribes the inhumane and degrading treatment of widows, is also related to articles 3 and 4 on the right to dignity and rights to life, integrity and security of the person, respectively. Article 3 of the Protocol indicates that every woman should be afforded dignity ingrained in other human beings. This entails that widows should enjoy the same dignity as any other human being. Subjecting widows to degrading widowhood rites violates their intrinsic worth. It is in this way that articles 3 and 20 are related. Article 4 opens by safeguarding the integrity of every woman, it then prohibits inhumane and degrading treatment, thereby employing the same prohibition language contained in article 20(a) concerning the proscribed treatment of widows.¹⁸ This makes it clear that eradicating inhuman and degrading treatment is a prerequisite to enjoying women's rights generally and widows' rights specifically.

Article 20(b) safeguards widows' rights regarding the guardianship and custody of children. This clause resonates with article 7(c) of the Maputo Protocol, which gives women the same rights as men with respect to children's custody and guardianship in case of dissolution of marriage through divorce or separation. The right to equality and the abolishment of marital power brought about the same rights to widowers and widows, so that both are recognised as having full capacity to care for children should the other one die. Parties to a marriage bear equal rights and status,¹⁹ therefore, this should be maintained even when a marriage is dissolved through death.

The last part of article 20 of the Maputo Protocol echoes the sentiments contained in article 6(a). It affords widows freedom to remarry. Restricting widows' right to marry or subjecting them to forced levirate marriages runs contrary to the provision that marriage should be based on 'free and full consent of both parties'.²⁰ This right draws from several other international instruments including CEDAW,²¹ the Universal Declaration,²² and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²³ Thus, article 20(c) of the Maputo Protocol, read together with these other provisions, acknowledges that outlawing all forced marriages is necessary to secure widows' rights.

The widows' clause (article 20) further relates to article 17 of the Protocol, which is the right to a positive cultural context. Women have a right to reside in favourable cultural environments and to actively participate in shaping cultural policies.²⁴ This right has a bearing on the kind of treatment

16 Widow inheritance is an African cultural practice whereby a relative of the deceased husband takes full responsibility or inherits responsibilities towards the widow and her children. Although this practice was originally intended to provide security for widows, some African patriarchs take advantage of this custom thereby leading to widows suffering abuse in the name of being inherited. See B Perry, L Oluoch, K Agot, J Taylor, J Onyango, L Ouma, C Otieno, C Wong & A Corneli 'Widow cleansing and inheritance among the Luo in Kenya: the need for additional women-centred HIV prevention options' (2014) 17 *Journal of the International AIDS Society* <https://onlinelibrary.wiley.com/doi/full/10.7448/IAS.17.1.19010> (accessed 15 May 2023); AO Ezejiolor 'Patriarchy, marriage and the rights of widows in Nigeria' (2011) 12 *Unizik Journal of Arts and Humanities* 54; ELM Gwako 'Widow inheritance among the Maragoli of Western Kenya' (1998) 54 *Journal of Anthropological Research* 175.

17 P Itsweni & R Tshifhumulo 'Coping strategies employed by young Vhavenda widows in Vhembe in dealing with death and bereavement' (2018) 16 *Gender and Behaviour* 11711; Motsoeneng & Modise (n 4) 264; MA Sossou 'Widowhood practices in West Africa: the silent victims' (2002) 11 *International Journal of Social Welfare* 203.

18 The same formulation is found in art 5 of the Universal Declaration of Human Rights (Universal Declaration) art 7 of the International Covenant on Civil and Political Rights (ICCPR), and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

19 Maputo Protocol art 6.

20 Maputo Protocol art 6(a).

21 CEDAW art 16(1)(b).

22 Universal Declaration art 16(2).

23 ICESCR art 10(1).

24 Maputo Protocol art 17.

that widows would be subjected to. Positive cultural context, as well as allowing women to partake in policymaking, affords them an opportunity to reject harmful practices like degrading widowhood rites. The right to a positive cultural context may be essential in positively shifting the narrative of widows in African communities. As enunciated by Tamale,²⁵ article 17 appreciates culture's positive influence and potential. This comprehension is important for African communities which place great value on their culture in that the same system which is esteemed by Africans (culture) may still be used in evolving practices into positive ones.

4 Concepts and definitions

4.1 Widow

Although the term 'widow' is the subject matter of article 20 of the Protocol, it is not defined therein. Other international and regional human rights instruments are of no help either since they do not deal with widows as a category of rights-holders. Looking into African literature, Sossou defines a widow as 'a woman who lost her husband or partner through death'.²⁶ This definition is affirmed and further clarified by the South African Commission on Gender Equality which defines a widow as 'a woman who has lost her husband by death and has not married again'.²⁷ Regardless of ethnicity, the majority of African widows are impoverished and vulnerable.²⁸

4.2 Widowhood

The South African Commission on Gender Equality has described the concept of widowhood as a term whose meaning is inherently social.²⁹ Its definition, therefore, changes on account of 'geographical situations, culture, race and class'. It thus 'needs to be viewed as both a social and intra-psychic phenomenon.' Widowhood is a socially defined status produced by the often painful transition from married to not being married due to the death of a spouse.³⁰ The International Council of Women considers it as 'the most neglected of all gender and human rights issues'.³¹

4.3 Widowhood rites

'Widowhood rites', just like the terms 'widow' and 'widowhood', is a term whose definition cannot be captured in a legal instrument. Djankpa expounds that widowhood rites are culturally defined as ceremonies that a spouse is expected to undertake in honour of the deceased spouse'.³² Literature indicates, however, that these rites do not necessarily help widows get through their grief. Instead, they

25 S Tamale 'The right to culture and the culture of rights: a critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 58.

26 Sossou (n 17) 202.

27 The Commission on Gender Equality 'Widowhood Rites and Rights Report' Annual Report 2006-07 http://cge.org.za/wp-content/uploads/2021/01/Widowhood_Rites_and_Rights_Research_Report.pdf (accessed 15 May 2023).

28 UN Women 2000 'Widowhood: invisible women, secluded or excluded' (2001) <https://www.unwomen.org/en/digital-library/publications/2001/12/women2000-widowhood-invisible-women-secluded-or-excluded> (accessed 15 May 2023).

29 Commission on Gender Equality (n 27) 2.

30 Commission on Gender Equality (n 27) 2.

31 International Council of Women – Resolution on Widows (2009) https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fprojects.iq.harvard.edu%2Ffiles%2Fviolenceagainstwomen%2Ffiles%2Ficw_resolution_on_widows_sent_to_un_2009.doc&wdOrigin=BROWSELINK (accessed 15 May 2023).

32 GB Djankpa 'Effects of widowhood rites on the psychological distress and life satisfaction of Konkomba widows in the Saboba District, Northern Ghana' PhD Thesis, University of Cape Coast 2021, 2. On file with the author.

are among the most dehumanising practices in Africa, which demean, degrade and violate widows' rights.³³

4.4 Harmful practices

The Maputo Protocol defines 'harmful practices' to mean 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.³⁴ These harmful practices are, according to the joint CEDAW Committee General Recommendation 31 on harmful practices, rooted in social beliefs which view women as inferior to men.³⁵ Some of these practices include; sexual cleansing,³⁶ property grabbing³⁷ and being coerced to drink water used to wash their husbands' corpses.³⁸ It is important to note that the joint general recommendation mentions widowhood practices among what are considered harmful practices.

5 Nature and scope of state obligation

The determination 'to ensure that the rights of women are promoted, realised and protected in order to enable them to fully enjoy all their human rights' demonstrates that states have obligations to assume towards the realisation of the Maputo Protocol. This undertaking resonates with the one in the Preamble to the African Charter on Human and Peoples' Rights (African Charter), which highlights states' duties to 'promote and protect human and peoples' rights'.³⁹ This means that states are responsible for ensuring all the rights in the African Charter are promoted and respected. Such a mandate seems to be also at the heart of the nature and scope of states' obligations, even towards the Maputo Protocol. The African Commission on Human and Peoples' Rights (African Commission) elaborated on this mandate in the Principles and Guidelines on the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Principles and Guidelines on ESCR).⁴⁰ These principles and guidelines refer to obligations 'to respect, defend, promote, and fulfill' as a framework for understanding the nature of state obligations.

The obligation to respect is both a positive and negative duty on states. On the one hand, it calls on state parties to refrain from interfering with the enjoyment of the rights, while on the other, it urges states to take measures to ensure human rights are realised. Although widows' rights are not specifically mentioned in this obligation, the generalised and all-encompassing nature of the Principles and Guidelines on ESCR suggests their inclusion. The positive duty to respect human rights is clearly demonstrated in the Maputo Protocol in its appeal through different provisions to enact legislative measures to safeguard Peoples' Rights. Although article 20 does not specifically call upon states to enact legislation to protect widows, the mandate is expressly included in other clauses which relate to

33 Doris (n 4) 2; Adeyemo (n 15) 385.

34 Maputo Protocol art 1(g).

35 Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on Harmful Practices, CEDAW/C/GC/31-CRC/C/GC/18 (2014).

36 Baloyi (n 4) 202; HP Khosa-Nkatini 'Liturgical inculturation of Tsonga widows' mourning rituals' PhD thesis, University of Pretoria, 2019, 89. On file with the author.

37 B Magudu & L Mohlakoana-Motopi 'Widowhood and vulnerability: the right to gender equality for widows in South Africa' (2013) *Commission for Gender Equality Policy Brief* 3; M Dube 'The ordeal of "property stripping" from widows in a peri-urban community: the case of a selected ward in Binga district, Zimbabwe' (2017) 53 *Social Work* 342.

38 Adeyemo (n 15) 382; MWG Eche 'Widowhood, justice and the rule of law in Africa: Nigerian – Igbo perspective' (2018) 5 *Tansian University Journal of Arts, Management and Social Sciences* 106.

39 Preamble to the Organization of African Unity (OAU); African Charter.

40 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2011).

it. These clauses include articles 2 and 5, which speak against discrimination and harmful practices, respectively.

The Principles and Guidelines on ESCR include an obligation to protect.⁴¹ This entails that states protect the rights of their people from any form of infringement of rights emanating from either public or private spheres. A positive duty is imposed on states to engage in protective measures for the sake of all who live in it. This includes even widows. States are called upon to establish measures to conscientise people of their rights. These may include education and awareness programmes to ensure people have information about the extent to which their rights are protected. Although not specifically included in article 20 of the Maputo Protocol, the obligation to promote widows' rights is essential in the African context where violation of these rights is embedded in cultural practices. General Comment 6 on article 7(d) of the Maputo Protocol clearly highlights states' obligation to raise awareness of widows' rights. It provides that 'states parties should engage in awareness raising, and actively encourage the transformation of discriminatory practices and customs related to marriage, divorce, separation and annulment of marriage, particularly as it relates to discriminatory treatment of women and dispossession from their marital property.'⁴² This obligation closely relates to the duty to protect and promote widows' rights, as enunciated in article 20, as both clauses are interested in the rights of women at the end of a marriage. As such, protecting widows' rights through, among others, eliminating discriminatory practices would automatically lead to achieving the realisation of article 7(d) of the Protocol. The need for awareness raising is reaffirmed by Makunya et al, who indicated that 'it may be illusory' to believe that transformation in African communities could be attained by simply adopting legislative and administrative measures.⁴³

States also have a duty to fulfil human rights. According to the African Commission, this obligation is for states to realise the rights and freedoms they freely undertake under various human rights regimes.⁴⁴ Such a realisation includes the allocation of resources for the actual fulfilment of the rights.⁴⁵ In the case of widows' rights, as enunciated in article 20 of the Protocol, states should ensure that necessary arrangements are put in place to ensure widows are protected. This may include budgetary allocations to educate and conduct awareness campaigns on the issue.

The African Commission on Human and Peoples' Rights has produced several recommendations meant to advance rights within the African Charter. One of these is the Resolution on Economic, Social and Cultural Rights in Africa.⁴⁶ This resolution endorsed the Pretoria Declaration, which urges African states to 'adopt special measures for women and address the economic, social and cultural rights of vulnerable and marginalised groups'. Although the declaration does not expressly refer to widows, its phraseology echoes the sentiments embodied in article 20 of the Maputo Protocol. Widows fit into the specifics as they are vulnerable and marginalised women. Also, the call to address cultural rights relates to article 20, as culture plays an integral part in protecting widows' rights. While this is an obligation for all state parties, it means states have a duty to establish and implement special measures to safeguard widows.

41 ACHPR (n 40) art 7.

42 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): the Right to Property During Separation, Divorce or Annulment of Marriage (art 7(D)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia 19 February-4 March 2020 (African Children's Committee General Comment 6) para 58.

43 TM Makunya et al 'Selected developments in human rights and democratisation in Africa during 2020' (2021) 5 *Global Campus Human Rights Journal* 200.

44 *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).

45 *SERAC* (n 44) para 47.

46 Resolution on Economic, Social and Cultural Rights in Africa (2004) ACHPR/Res.73(XXXVI)04.

Compliance with set obligations is monitored through other measures by reporting to the African Human Rights Commission. Article 62 of the African Charter, as well as article 26 of the Maputo Protocol, employs state parties to submit periodic reports documenting their compliance with the Protocol. State parties are called upon to ‘adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised’.⁴⁷ This is a strategic way for obliging states to comply with the provisions of the Protocol, including article 20. In this way, states are obligated to ensure that African widows’ rights are protected as provided in the Protocol.

6 Implementation

This section is organised in terms of the three specific obligations placed on states by article 20 of the Maputo Protocol: ensuring that widows are protected from inhuman, humiliating or degrading treatment; ensuring that widows are afforded equal rights to custody of their children; and that widows are allowed to remarry based on their full and free consent. The implementation discussion is further subdivided into three themes: legal, policy and institutional implementation.

6.1 Proscription against inhuman, humiliating or degrading treatment

6.1.1 *Legal implementation*

Different states have implemented laws which proscribe inhuman, humiliating or degrading treatment. Malawi, Kenya, Rwanda, Togo and Eswatini are among the countries that have undertaken to combat the inhumane and degrading treatment of widows.⁴⁸ Malawi has enacted various legislation to protect women from harmful practices. These include the Gender Equality Act, 2013, which proscribes the observance of harmful practices.⁴⁹ A harmful practice is defined as ‘a social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to undermine the dignity, health or liberty of any person’.⁵⁰ This definition closely resembles the one given in the Maputo Protocol. It includes the prohibition of degrading widowhood rites. The government of Malawi has also enacted a National Plan of Action against Gender-Based Violence (NPA), which sets out a plan to address violence against women effectively. Among the five priority areas outlined in the tackling of the ‘root causes ... of harmful social norms’.⁵¹ These measures of a Plan of Action against Gender-Based Violence highlight a high level of seriousness in eradicating harmful practices against women, including widows. However, Malawi acknowledges that there is still vast ground to cover to implement the Maputo Protocol fully.⁵²

States like Cameroon, Togo, Eswatini and South Africa have legislation criminalising actions against women’s physical and moral integrity. Although not tailored to the plight of widows, Cameroon’s Penal Code Law 2016/7 offers necessary protection to widows. Togo protects widows through its new penal code, which criminalises all widowhood rites which degrade widows’ treatment.⁵³ Eswatini makes unlawful the act of compelling a woman ‘to undergo or uphold any custom to which she is in

47 Maputo Protocol art 26(2).

48 Republic of Malawi Periodic Report on the African Charter on Human and Peoples’ Rights and the Maputo Protocol May 2015 to March 2019.

49 Gender Equality Act (Malawi) 2013 sec 5.

50 Gender Equality Act (Malawi) 2013 sec 3(a).

51 National Plan of Action to Combat Gender-based Violence in Malawi 2014-2020 <https://files.mutualcdn.com/tfg/assets/files/National-Plan-of-Action-to-Combat-Gender-Based-Violence-in-Malawi-2014-%E2%80%93-2020.pdf> (accessed 17 May 2023).

52 Republic of Malawi Periodic Report (n 48) 72.

53 See Penal Code (Togo) Law 2015-010.

conscience opposed'.⁵⁴ This is implemented through the Sexual Offences and Domestic Violence Act, which makes it a crime to subject women to harmful practices.⁵⁵ The case of *Jennifer Lindiwe Dupont-Shiba v EBC*⁵⁶ is an indication that Eswatini safeguards widows' rights. The court ruled against a chief who unduly influenced people not to vote for the applicant because she was a widow still in mourning attire. Given the country's socio-cultural and patriarchal nature, such a ruling speaks volumes about Eswatini's intention to protect widows' rights.⁵⁷ Like other states that have ratified the Maputo Protocol, Nigeria has a mandate to implement its provisions in its national legislation. The greater part of the Protocol, which includes widows' rights, is implemented in the Gender and Equal Opportunities Bill,⁵⁸ which has not yet been passed into law. Through this Bill, Nigeria intends to incorporate articles 1 to 24 of the Maputo Protocol.⁵⁹ Despite the current status of the Bill, Nigeria has indicated its intention to protect widows' rights through the Violence Against Persons (Prohibition) Act, 2015,⁶⁰ which states:

A person who subjects a widow to harmful traditional practices commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N500, 000 or both.⁶¹

This is a clear indication that harmful widowhood rites are outlawed in Nigeria. Vast literature,⁶² however, documents how Nigerian widows still suffer various widowhood rites. Writing on the subject of widows before the Maputo Protocol came into effect, Ewelukwa lamented the lack of laws conferring rights on widows in Nigeria. The article highlighted the need to eradicate degrading rites.⁶³ Given that the Maputo Protocol bridges the gap in widows' protection, Nigeria has to fully incorporate it into its laws.

In addition to different legislation, some countries have constitutional protection for widows against inhumane and degrading treatment. These include the Constitutions of Kenya, Rwanda, and Eswatini, which proscribe inhuman and degrading treatment against everyone.⁶⁴ This provision has been highlighted in the Kenyan 2020 Periodic Report to cover widows as envisaged by article 20 of the Maputo Protocol.⁶⁵

54 Constitution of Eswatini, 2005 sec 28(3).

55 Sexual Offences and Domestic Violence Act (Eswatini) 15 of 2018 sec 77.

56 *Jennifer Lindiwe Dupont-Shiba v EBC* (2013) Case 1342/13.

57 Eswatini-UNICEF (2020) <https://www.unicef.org/eswatini/media/1246/file/World%20children's%20day%20newsletter-2020.pdf> (accessed 15 May 2023).

58 Gender and Equal Opportunities Bill 2016, Nigeria.

59 Nigeria's 6th Periodic Country Report 2015-2016 on the Implementation of the African Charter and the Maputo Protocol in Nigeria (August 2017) 143.

60 The Act is applicable in the federal territory and in a handful of states. The majority of states are yet to adopt it, and the Northern (Muslim) states have indicated that they will not. (C Onyemelukwe 'Legislating on violence against women: a critical analysis of Nigeria's Recent Violence Against Persons (Prohibition) Act, 2015' (2016) 5 *DePaul Journal of Women, Gender and Law* 46.

61 Violence Against Persons (Prohibition) Act, 2015 of Nigeria sec 15(1).

62 ON Aihie 'Attaining gender equality for sustainable development in Nigeria through counselling intervention' (2021) 24 *Rivers State University Journal of Education* 96; FC Amadi & AE Gabriel-Whyte 'The Violence against Persons (Prohibition) Act 2015: introduction legislative asset or liability?' (2018) 5 *Unimaid Journal of Public Law* 152.

63 UU Ewelukwa 'Post-colonialism, gender, customary injustice: widows in African societies' (2002) 24 *Human Rights Quarterly* 474, 485.

64 Constitution of Kenya, 2010 art 29(f); Rwanda's Constitution of 2003 (with Amendments through 2015) art 14; Constitution of Eswatini, 2005 sec 12.

65 Combined Report of the 12th & 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2015-2020 69.

Any widowhood rites in Rwanda which are degrading in nature should be rendered unconstitutional, therefore, invalid as envisaged by the supremacy clause.⁶⁶ The proscription of harmful practices on women was also implemented in Kenya. The Constitution of Kenya, 2010 states that any customary law that is contrary to the Constitution is invalid.⁶⁷ Crafted similar to the Kenyan provision are sections 30⁶⁸ and 31⁶⁹ of the Constitution of the Republic of South Africa, 1996 (South African Constitution), which prohibit any cultural practice contrary to the Constitution. Section 2 of the South African Constitution invalidates any law or conduct contrary to the Constitution. This includes all harmful practices performed on widows. Moreover, article 16(1) of the Constitution of Zimbabwe, 2013 (as amended) provides as follows: ‘The State and all institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans’. It is apparent that demeaning and degrading widowhood rites are contrary to the Constitution. Hence, any such practices should be outlawed. Kenya has gone further in its protection of widows than most African countries. It outlawed and made it ‘an offence to force a woman to commit a sexual act for a cultural or religious reason’.⁷⁰ Such acts are understood to include sexual cleansing and widow inheritance, which are done in compliance with different cultures in Kenya.⁷¹

Despite all these efforts, it is somewhat disappointing that as of 2014 – eight years since the Sexual Offences Act of 2006 was enacted in Kenya – no arrests or prosecutions had been made under section 29 criminalising sexual acts justified as cultural or religious.⁷² This clearly indicates the limitation of law as a tool for social transformation. Lesotho’s constitutional protection from discrimination also falls short on account of an exemption clause that permits discriminatory customary laws in personal law matters such as marriage and inheritance.⁷³ Since most marriages in Lesotho are governed by customary law, this leaves women in general, and widows in particular, vulnerable.⁷⁴ Lesotho’s law allows widows to remarry. This has been the legal position since the Marriage Act 10 of 1974 was promulgated. A widow’s freedom to remarry is, however, qualified by a requirement that she registers any property of the previous marriage for the purposes of safeguarding the children’s interests.⁷⁵ Although there is no legal restriction on a widow’s choice of marriage partner, customary law usually prescribes whom she may marry. Due to the constitutional exemption given to customary law, prescriptions on widows’

66 Rwanda’s Constitution of 2003 (with amendments through 2015) art 3.

67 Constitution of Kenya 2010 art 2(4).

68 Section 30 provides:

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

69 Section 31 provides:

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

70 Sexual Offences Act 3 of 2006 (Kenya) sec 29.

71 Implementing the Protocol on the Rights of Women in Africa: Analysing the Compliance of Kenya’s Legal Framework (2014) <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/333065/ml-implementing-protocol-womens-rights-africa-010314-en.pdf;jsessionid=27F4D469EFBAC9A2F3C44E777BAA157D?sequence=1> (accessed 23 June 2023).

72 Oxfam, Dechert LLP & The Circle ‘Implementing the Protocol on the Rights of Women in Africa: analysing the Compliance of Kenya’s Legal Framework’ (2014) 30 <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/333065/ml-implementing-protocol-womens-rights-africa-010314-en.pdf> (accessed 15 May 2023).

73 Constitution of Lesotho, 1993 sec 18(4).

74 N Ansell, F Hajdu, L Blerk & E Robson “‘My happiest time’ or ‘my saddest time’? The spatial and generational construction of marriage among youth in rural Malawi and Lesotho’ (2017) 43 *Transactions of the Institute of British Geographers* 5.

75 Marriage Act 1974 (Lesotho) sec 24.

marriage partners are observed in Lesotho. This entails that widows who were married customarily still do not have the liberty to choose their own spouses in case of remarriage. Such a state of affairs significantly hampers the implementation of article 20 of the Maputo Protocol.

6.1.2 Policy implementation

The government of Malawi has also enacted a National Plan of Action against Gender-Based Violence (NPA), which sets out a plan to address violence against women effectively. Among the five priority areas outlined in the tackling of the 'root causes ... of harmful social norms'.⁷⁶ These measures of a Plan of Action against Gender-Based Violence highlight a high level of seriousness in eradicating harmful practices against women, including widows. However, Malawi acknowledges that there is still vast ground to cover for fully implementing the Maputo Protocol.⁷⁷ Cameroon adopted a National Gender Policy in 2014 to help achieve gender equality in all spheres of government. The policy advances widows' rights, among others. Degrading widowhood rites are also prohibited in Kenya's Vision 2030.⁷⁸ The Vision challenges Kenya to be intentional in coining ways to 'prohibit retrogressive cultural practices and social ills ...'.⁷⁹ Such a mandate coerces Kenya to outlaw any practices which are demeaning to widows.

6.1.3 Institutional implementation

Different institutions implement article 20(a) of the Maputo Protocol. In South Africa, the Commission for Gender and Equality recently conducted a study on the experiences of widows in different cultures.⁸⁰ It found that widows often suffer inhuman and degrading rites and are discriminated against. This is despite South Africa's highest law prohibiting discrimination and inhumane and degrading treatment of any human being.⁸¹ Since most of the discriminatory and inhuman treatment of widows takes place through observance of cultural widowhood rites, it, therefore, follows that there is a lack of alignment between the Constitution and cultural practices. This is despite a clear caution of ensuring that customary law aligns with the Bill of Rights and other constitutional provisions.⁸² Based on this, it is clear that mere constitutional inclusion of a right does not guarantee desired results unless followed by intentional implementation of the right.

Burkina Faso demonstrates a level of seriousness in its commitment to protecting widows. It has the Association of Widows and Orphans, which aims to protect widows.

In a bid to curb harmful and degrading practices emanating from widowhood rites, Cameroon also set up observatories in specific locations.⁸³ These are mostly through civil society organisations (CSOs) that advocate for the humanisation of widowhood rites.⁸⁴ This entails discarding all the harmful

76 National Plan of Action to Combat Gender-based Violence in Malawi (n 51).

77 Republic of Malawi Periodic Report (n 48) 83.

78 Vision 2030 is Kenya's development blueprint. See The Presidency Kenya Vision 2030 Sector Progress Project Updates June 2018 <http://vision2030.go.ke/wp-content/uploads/2018/09/Kenya-Vision-2030-Sector-Progress-Project-Updates-June-2018.pdf> (accessed 15 May 2023) 36.

79 The Presidency Kenya Vision 2030 (n 78).

80 Commission for Gender Equality 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: monitoring the implementation of the Maputo Protocol 2019/2020' https://static.pmg.org.za/211130CGE_Report_SADC_Protocol_2020.pdf at 58 (accessed 15 May 2023).

81 South African Constitution secs 9 & 12(1)(e).

82 South African Constitution sec 39(3).

83 Single Report comprising the 4th, 5th & 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention 2015-2019 (2020).

84 L Bongben 'Widows campaign to humanising rites' *Cameroon Postline* 27 December 2013 <https://cameroonpostline.com/widows-campaign-to-humanising-rites/%E2%80%8B> (accessed 15 May 2023).

practices and consolidating useful ones. Cameroon has also implemented programmes for family protection by raising awareness of harmful socio-cultural practices.⁸⁵ All this is an indication that Cameroon condemns degrading widowhood rites and classifies them within the prohibited harmful practices.⁸⁶

In Kenya, different programmes are put in place to advance widows' rights. These include programmes that cater for widows' welfare, like the National Government Affirmative Action Fund and the Women Enterprise Fund.⁸⁷ Although these are not specifically for widows, they are for marginalised groups. Kenya also has the Thamini Loan Product for Widows, a loan facility that assists widows.⁸⁸

Rwanda also helps safeguard widows' rights through social security programmes. It has programmes to assist women widowed as a result of the genocide, like, the Rwanda National Association of Genocide Widows-AVEGA AGAHAZO.⁸⁹

Most state parties to the Maputo Protocol condemn the inhuman, humiliating and degrading treatment of widows and acknowledge that culture bears a negative effect on widows' rights. For instance, Angola acknowledged that widows suffer multiple challenges due to culture.⁹⁰ However, since most of the challenges identified are related to inheritance, Angola only implemented programmes in that area. The measures did not address other concerns relating to article 20 or how the cultural challenges might be overcome. By contrast, states such as Burkina Faso, Malawi, and Cameroon did not just mention the ill-treatment of widows but indicated in their reports what attempts they had made in dealing with those challenges.⁹¹

Burkina Faso recognises widows among the selected group of women who should enjoy special protection.⁹² It considers widows a highly vulnerable category of women. This is affirmed by Okolo, Reidpath and Allotey, who similarly indicate that widows in Burkina Faso 'are the most vulnerable in the society, and rank amongst the poorest'.⁹³ Their study on socio-economic inequalities in access to healthcare reveals deplorable statistics on widows.

Although several state parties expressly prohibit harmful practices on widows, as discussed above, there is no record of enforcement of those laws. Practices such as female genital mutilation have seen more action in terms of enforcement.⁹⁴ Despite the prevalence of degrading widowhood rites in Africa,

85 Cameroon Periodic Reports 2020 (n 83) 152.

86 RI Danpullo 'The Maputo Protocol and the eradication of the cultural woes of African women: a critical analysis' (2017) 20 *Recht in Afrika – Law in Africa* 10.

87 Kenya Combined Report (n 65) 85.

88 Ministry of Public Service, Gender and Affirmative Action Launch of Thamini Loan Product for Widows <http://www.psyg.go.ke/?p=3971> (accessed 15 May 2023).

89 Republic of Rwanda the Combined 11th, 12th and 13th Periodic reports of the Republic of Rwanda 2009-2016 on the implementation status of the African Charter on Human and Peoples' Rights and the initial report on the implementation status of the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa, African Commission on Human and Peoples' Rights, adopted at the 61st ordinary session (1-15 November 2017).

90 Republic of Angola 6th and 7th Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Protocol on the Rights of Women in Africa 2011-2016 at 67.

91 Burkina Faso Periodic Report on the African Charter on Human and Peoples' Rights and the Maputo Protocol May 2015 to March 2019 at 86; Malawi Periodic Report (n 48) 100-101; Cameroon Periodic Reports 2020 (n 83) 152.

92 Combined Periodic Report Burkina Faso (n 91) 86.

93 CO Okolo, DD Reidpath & P Allotey 'Socioeconomic inequalities in access to health care: examining the case of Burkina Faso' (2011) 22 *Journal of Health Care for the Poor and Underserved* 675.

94 J Muthumbi, J Svanemyr, E Scolaro, M Temmerman & L Say 'Female genital mutilation: a literature review of the current status of legislation and policies in 27 African countries and Yemen' (2015) 19 *African Journal of Reproductive Health* 36.

most cases involving widows have to do with inheritance. Given these, the following questions may be asked: Does this suggest that since the adoption of the Maputo Protocol, there have been no violations of widows' rights except with respect to inheritance? Does it perhaps suggest a lack of zeal for standing up to the socio-cultural forces that threaten widows' rights?

6.2 Widows' right to guardianship and custody of children

The Maputo Protocol also affords widows the same rights as widowers in guardianship and custody of children.⁹⁵ This has brought significant change in African communities where widows used to be disregarded in custody-related issues.⁹⁶ Despite this, widows in some cultures are still denied custody of their children.⁹⁷ The situation becomes exacerbated for those refusing to follow the inhumane widowhood rites. An example of this is seen in the Luo tribe of Tanzania,⁹⁸ where a widow is banished from her marital home and is denied custody of her children if she refuses to undergo cleansing (sexual intercourse with a designated member of her husband's lineage) or resists levirate marriage.⁹⁹ Writing on the Zimbabwean situation, Dube and Phethlo-Thekisho highlighted that despite the Protocol's provisions, widows often lose custody over their children as in-laws use these to take control of the deceased's property.¹⁰⁰ In such instances, neither the rights of the widows nor the children are considered. The Talensi widows of Ghana experience a similar fate. They are forced to forfeit not only their husbands' assets but custody and guardianship over their children if they refuse to enter into levirate marriages.¹⁰¹ Danpullo demonstrates that the payment of the bride price has a bearing on the custody of children.¹⁰²

Notwithstanding the aforementioned, different states are moving towards protecting women, which includes safeguarding their custody rights over their children. The following discussion indicates some measures taken by states to implement article 20(b) of the Protocol.

6.2.1 Legal implementation

Lesotho embarked on a review of its Children's Protection and Welfare Act 7 of 2011 to allow women equal custody of their children. This helps advance even Lesotho widows' custody rights. Mauritania also has a law that safeguards women's custody rights. Its Personal Status Code accords priority to mothers in matters of child custody.¹⁰³ It, therefore, means that widows' right of custody is covered through the Personal Status Code in Mauritania, as mothers include even those who are widowed. This provision supports article 20(b) of the Maputo Protocol, which indicates that widows automatically

95 Maputo Protocol art 20(b).

96 NH Msuya 'Challenges surrounding the adjudication of women's rights in relation to customary law and practices in Tanzania' (2019) 22 *Potchefstroom Electronic Law Journal* 2.

97 RIC Ehumadu 'Depriving widows inheritance rights by husbands' relatives in Nigeria' (2022) 16 *Bichi Journal of Education* 65; MT Ba-an, L Bedzra, JA Adjuri & SK Segbefia 'Assessing the infringement of widows rights during widowhood rites practices in Talensi And Nabdam in the upper East Region of Ghana' (2022) 1 *CITYA WISESA: Journal of Multidisciplinary Research* 34.

98 Although the Luo tribe is predominantly in Kenya, they are also found in Tanzania. See JB Shetler 'Historical memory as a foundation for peace: network formation and ethnic identity in North Mara, Tanzania' (2010) 47 *Journal of Peace Research* 640.

99 NH Msuya 'Harmful cultural and traditional practices: a roadblock in the implementation of the convention on the elimination of discrimination against women and the Maputo Protocol on women's rights in Tanzania' PhD thesis, University of KwaZulu Natal, 2017 at 121. On file with the author.

100 M Dube & N Phethlo-Thekisho 'The psychosocial plight of widows in the Binga District, Zimbabwe' (2019) 31 *Southern African Journal of Social Work and Social Development* 11.

101 Ba-an et al (n 97) 34.

102 Danpullo (n 86) 100.

103 Personal Status Code 2001 (Mauritania) arts 123, 126.

have the right to the custody of their children. Although the Personal Status Code came into force before the Protocol, Mauritania can still use it to buttress widows' rights.

6.3 Widows' right to remarry

The Protocol grants widows a right to remarry and marry a person of their choice, should they decide to do so. It was essential for the Protocol to expressly expound on the subject due to its prevalence and relevance in Africa. It emanated from an understanding that restrictions were placed on widows' marital freedom. African widows are often coerced into levirate marriages.¹⁰⁴ The rationale behind this is usually to proscribe them from leaving the family with any inheritance. The practice not only tramples on widows' freedom of expression but also on several other rights, such as human dignity and bodily integrity. It also infringes on women's freedom from exposure to sexually transmitted diseases, including HIV.¹⁰⁵ It is on account of this context that the Maputo Protocol safeguards the right to remarry. This right aligns with article 6(a) of the Protocol on full and free consent as the basis for a valid marriage.

A study conducted in South Africa by the Commission for Gender Equality confirmed that widows are usually coerced into marrying one of their deceased spouse's relatives.¹⁰⁶ It is further indicated that widows suffer discrimination as they are subjected to demeaning practices which widowers do not experience.¹⁰⁷ Following is an indication of how different states implement legal measures to protect widows' right to remarry.

6.3.1 Legal implementation

The South Africa Constitution, 1996, expressly proscribes discrimination on the grounds of marital status.¹⁰⁸ This means the country had already committed, before the Maputo Protocol, to do away with laws and practices that unfairly discriminate against widows. Since equality is not only a right contained in the South African Constitution but also a foundational value, legislation had to be enacted to give effect to it, namely the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). It is, therefore, not surprising that South Africa did not enact specific legislation to deal with discrimination against widows as the Maputo Protocol envisages. The Constitution and PEPUDA, among other legal frameworks, still maintain their relevance in ensuring that widows enjoy their rights and are not unfairly discriminated against. Owing to these realities and more, the Commission for Gender Equality pronounced itself as follows:

South Africa has adopted sophisticated rights-based legislation with explicit reference to gender equality. An important challenge remains in making these rights accessible to all women by the provision of information and the development of the knowledge and skills that women require to avail themselves of the mechanisms inherent in the legal remedies.¹⁰⁹

The above is true for the implementation of article 20 of the Maputo Protocol. South Africa has sufficient legislation and policy frameworks to safeguard widows' rights as enunciated in the Protocol. For instance, PEPUDA also outlaws 'any practice including traditional, customary, or religious

104 Doris (n 4) 5; Ezejiolor (n 16) 151; ME Baloyi 'Critical reflections on polygamy in the African context' (2013) 40 *Missionalia* 173.

105 Maputo Protocol art 14(d).

106 Commission for Gender Equality (n 80) 59.

107 Commission for Gender Equality (n 80) 58.

108 South African Constitution sec 9(3).

109 Commission for Gender Equality (n 80) 53.

practice which impairs the dignity of women and undermines equality between women and men'.¹¹⁰ The Commission on Gender Equality Act 39 of 1996 (Gender Equality Act) further places a mandate on the Commission to monitor and report on compliance with different international and regional instruments relating to it.¹¹¹ This includes monitoring and ensuring compliance with the Maputo Protocol. Despite all these, widows in South Africa still suffer multiple human rights violations. According to research, the main cause of the infringement of widows' rights is the prevalence and observance of cultural practices.¹¹² The imposed cultural practices necessitate strict observance of widowhood rites, even where these are degrading and inhuman. South Africa, thus, needs an alignment of traditional practices with the legal framework.

Since the issues the Maputo Protocol addresses are not new, some states may find that although they have not yet domesticated the Protocol, its contents may be traceable in the country's legislation. To add to this, countries that follow a monist approach do not need to domesticate the Protocol for it to be effective in their jurisdictions. For instance, since Namibia follows a monist approach,¹¹³ all provisions of the Maputo Protocol find application within the country. This includes provisions on widows' rights. Although Namibia has no independent legislation dedicated to widows,¹¹⁴ article 20 of the Maputo Protocol is directly applicable to Namibia. The right to remarry safeguarded in the Protocol also finds its applicability in Eswatini through the Constitution, which gives room for free and consensual marriages between spouses.¹¹⁵ This means forced levirate marriages are against the law in Eswatini. Cameroon also has similar laws on the protection of widows' rights. Its Penal Code prohibits forced marriages.¹¹⁶ Burkina Faso also joins the list of those which shun forced marriages. Its Criminal Code criminalises levirate marriages imposed on widows by family members.¹¹⁷ All these align with article 20(c) of the Maputo Protocol, which affords widows freedom to remarry. Widowhood rites which force widows to be married by particular individuals infringe the Maputo Protocol.

Despite the express provision of widows' rights to remarry a person of their choice, research indicates that several states overlook these rights. Some cultures in Ghana require widows to marry their deceased husbands' brothers or relatives.¹¹⁸ This is done without any regard to their wishes because her family is considered bound by the bride wealth paid to the widow's family at the time of marriage to the deceased. This resonates with Danpullo's argument that achieving the realisation of widows' rights necessitates an eradication of the negative effects of marriage payments.¹¹⁹ The fact that marriage payments were made at the commencement of marriage is taken to mean that the widow may be treated as part of the deceased's property to be inherited upon his death or as giving his lineage absolute say over her life even after he has died.¹²⁰ In some cultures, the only way to avoid

110 PEPUDA sec 8(d).

111 Gender Equality Act sec 11(1)(h).

112 GT Baloyi 'When culture clashes with individual human rights: a practical theological reflection on the dignity of widows' (2017) 38 *Verbum et Ecclesia* 4; M Manala 'African traditional widowhood rites and their benefits and/or detrimental effects on widows in a context of African christianity' (2015) 71 *Theological Studies* 1; L Phillips 'Culture vs the Constitution: the suffering of Zulu widows' (2019) *Farmer's Weekly* 6.

113 SK Witting & MP Angula 'Leveraging international law to strengthen the national legal framework on child sexual abuse material in Namibia' (2020) 53 *Comparative and International Law Journal of Southern Africa* 5; N Ndeunyema 'The Namibian Constitution, international law and the courts: a critique' (2020) 9 *Global Journal of Comparative Law* 272.

114 The Republic of Namibia 7th Periodic Report (2015-2019) on the African Charter on Human and Peoples' Rights and the Second Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 126.

115 Constitution of Eswatini sec 27(2).

116 Penal Code Law 2016/7 (Cameroon) sec 356.

117 Burkina Faso Criminal Code art 234; Burkina Faso Periodic Report (n 91).

118 Ba-an et al (n 97) 34; Doris (n 4) 5.

119 Danpullo (n 86) 108.

120 Danpullo (n 86) 109.

forced levirate marriages is to refund the bride price. The Ugandan case of *Mifumi v Attorney General and Kenneth Kakuru*,¹²¹ which outlawed the mandatory refund of the bride price, is a step in the right direction, although it did not make explicit reference to widows' rights under the Maputo Protocol. Bride price aggravates the plight of widows. Court cases pronouncing on widows' rights are needed in order to safeguard their interests, as stated in article 20 of the Protocol.

6.4 Jurisprudence relating to article 20

Very few cases dealing with widows' rights have been reported in Africa despite the prevalence of violations of widows' rights. Addadzi-Koom confirms this by stating that despite the Protocol having existed for over a decade, very few cases have been reported on it.¹²² Those that have been reported mainly relate to inheritance rights, which are dealt with in article 21 of the Maputo Protocol. Furthermore, the few cases available on widows' rights were not influenced by the Maputo Protocol as they were decided before the coming into effect of the Protocol. An example of this is the Ugandan case of *Maliyam Adekur v James Opaja and Attorney General*.¹²³ The petitioner averred that the wife's inheritance violated the rights of the widow as it infringed some provisions of the 1995 Constitution of Uganda. Sadly, the Constitutional Court did not have the opportunity to pronounce substantively on the matter as the case was dismissed on a preliminary objection of wrongfully joining the second respondent in the matter. Without trivialising court procedures, the case may be symbolic of the regard paid to widows' rights as formalities take up attention, leaving the crucial matter unresolved. The *Okonkwo v Okagbus* case from Nigeria is one of many cases that, despite coming before the Maputo Protocol, denounced some cultural customs that were unfavourable to widows and their children. The case challenged the marrying of a woman for a deceased man and expounded that such a practice was contrary to public policy and also failed the repugnance test. It is through such decisions that the Maputo Protocol included a clause on the protection of widows.

7 Conclusion

After carefully evaluating widows' rights as protected in article 20 of the Maputo Protocol, it is clear that the provision came as a much-needed remedy for the challenges facing widows in Africa. Although some states already had legislation and policies catering for widows directly or indirectly, these were mostly generalised. Article 20 of the Protocol deals in detail with the specific challenges faced by widows in Africa, emphasising the state's obligation to do away with harmful widowhood rites. Various states have implemented article 20 of the Protocol into their domestic laws. However, there is still much to be done to ensure the law is implemented. The low incidence of reported cases of violation of widows' rights is far from comforting. Rather, it testifies to the work that still needs to be done to make rights real for widows in Africa.

In an endeavour to address the identified gap, states may mandate CSOs to identify, advise and report on degrading widowhood rites in various locations. These would be effective as CSOs – especially community-based ones – would be aware of different cultural practices taking place in different societies and aware of laws regulating those practices. In this way, more detailed reporting on article 20 may be considered. Such reporting may have an additional section specifically indicating efforts by different CSO in the promotion of widows' rights. The African Commission will need to be intentional and specific on the need for state reports to indicate specific measures undertaken to promote widows' rights as well as cases heard relating to the advancement of these rights. Also, since it is clear from the discussion advanced in this chapter that violation of widows' rights mainly emanates

121 *Mifumi v Attorney General and Kenneth Kakuru* (2010) UGCC 2 (26 March 2010).

122 ME Addadzi-Koom 'Of the women's rights jurisprudence of the ECOWAS Court: the role of the Maputo Protocol and the due diligence standard' (2020) 28 *Feminist Legal Studies* 155.

123 *Maliyam Adekur v Joshua Opaja and the Attorney General* (Constitutional Petition 1 of 1997) (1997) UGCC 4 (13 June 1997).

from practices justified as cultural, educational programmes may be initiated to encourage individual and collective critical reflection on those practices in relation to human rights generally, and widows' rights specifically. States could facilitate the creation of safe platforms for such reflection. Those platforms must be inclusive, participatory, and accessible to widows. The platforms could function as a filtering mechanism so that only those practices that are truly about appropriately honouring the deceased while safeguarding the widow's dignity are retained, in accordance with articles 17 and 20 of the Maputo Protocol, the latter being about guaranteeing women the right to a positive cultural context.

Article 21

Right to inheritance

Zahara Nampewo

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

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1 Introduction

This chapter provides a comprehensive guide to article 21 of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in terms of its meaning and implications in improving women's rights in Africa. It traces the legal, political, and economic foundations of the article, normative standards developed, and institutional efforts made by regional mechanisms under the African human rights system and African states.

Article 21 is double-pronged, combining two sub-sections. The first sub-section is specific to widows, guaranteeing them the right to an equitable share in the inheritance of the property of their deceased husbands. The second sub-section assures the equal right of women and men to inherit from their parents.

The approach of this provision is to tackle gender inequality in inheritance by focusing on both men and women, with a particular focus on widows. It should be noted, however, that the inequality in inheritance rights mostly affects women and girls due to deeply entrenched patriarchal characteristics of socio-economic, cultural and religious practices. In fact, the inheritance regime lies at the heart of women's subordination. In several respects, women are considered or treated as legal minors or have unequal status or entitlement to inheritance shares, which impacts their ability to acquire and enjoy productive resources.¹

1 Human Rights Watch 'You will get nothing. Violations of property and inheritance rights of widows in Zimbabwe' (24 January 2017) <https://www.hrw.org/report/2017/01/24/you-will-get-nothing/violations-property-and-inheritance-rights-widows-zimbabwe> (accessed 15 May 2023).

Inheritance is conceptualised broadly to mean intergenerational transfers of property that occur at different moments in life cycles upon death to those entitled to succeed it.² It is a major means for the transfer- or exclusion from the transfer- of adults' accumulated physical capital. In many African societies, inheritance is one of the most common means by which physical property is transferred from one generation to another, and it has emerged as a key area in the struggle for realising women's land, housing and property rights.³

In many African customs, men traditionally owned all family property, which was passed on through the male line from father to male linear descendants. This left women out of the equation of property ownership at family level.⁴ Most times, this discrimination was based on the belief that a woman does not need to inherit property as she is being cared for either by her own or her marital family.⁵ Furthermore, married women were formerly seen as legal minors who could not enter into contracts without the consent of their husbands. Although this practice has long since been abandoned, it followed patriarchal assumptions whereby the male is seen as the natural protector and congregator of family property, while leaving property in the hands of women was seen as individualising it.⁶ Under customary law, communal ownership and use rights were usually vested in lineages or clans, and while rights to use the land would be conferred upon both males and females, through custom, the males exercised control over the land.⁷ These indigenous systems of accountability of land rights however were greatly distorted by colonial interventions which reallocated and formalised ownership of land mostly to the benefit of men, leaving women in a more precarious position than before.

The discussion on inheritance – especially as it relates to land – is important because land has for a long time been recognised as a primary source of wealth, social status, and power, providing the basis for shelter, food, and economic activities.⁸ Inequalities in property rights are most evident in regard to land because the major mode of land acquisition in most sub-Saharan African countries is inheritance. Access to resources such as water and to services such as sanitation and electricity, as well as the ability to make long-term investments, are often conditioned upon access to rights in land.⁹ In many sub-Saharan African countries, the idea of women inheriting land is seen as a threat to the continuity of clan land, since marriage in many communities is exogenous.¹⁰

Women generally do not have independent property rights. especially in regard to customary laws which often infer that women are to access assets through their fathers, husbands or adult sons. As a result, women who are orphaned, unmarried, separated, divorced or widowed can be significantly disadvantaged, as are the children who grow up in households headed by divorced, separated, single (never married) or widowed women. Women in polygamous unions may be even more vulnerable. Even women who have property access through relationships are disadvantaged by not having independent

2 E Cooper 'Inheritance and the intergenerational transmission of poverty in sub-saharan Africa: policy considerations, Chronic Poverty Research Centre' (2010) *University of Oxford, Working Paper* 159, 2.

3 Cooper (n 2) 2.

4 V Bennett et al 'Inheritance law in Uganda: the plight of widows and children' (2006) 7 *Georgetown Journal of Gender and the Law* 451.

5 AM Richardson 'Women's inheritance rights in Africa: the need to integrate cultural understanding and legal reform' (2004) 11 *American University Washington College of Law Human Rights Brief* 3.

6 Human Rights Watch (n 1) 7.

7 CS Rabenhorst & A Bean *Gender and property rights: a critical issue in urban economic development* (2011) <https://www.urban.org/sites/default/files/publication/27491/412387-Gender-and-Property-Rights.PDF> (accessed 15 May 2023).

8 J Muhindo *Compulsory land acquisition in Uganda. An analysis of the Proposed Amendment of Article 26 of the Constitution*, ACODE Briefing Paper 47 (2017) 8.

9 Cooper (n 2) 6.

10 J Asiimwe 'Making women's land rights a reality in Uganda: advocacy for coownership by spouses' (2014) 4 *Yale Human Rights and Development Journal* 171.

property rights.¹¹ Thus, without independent and direct property rights, or fair rules on inheritance to be precise, many women are in a precarious position, able to gain access to resources only through their linkage to a male person.

Furthermore, the position of inheritance of property for women worsens in case of spousal death. To be a widow is to be an outcast.¹² Too often, when a woman loses her husband, she is also cast out of her family, forced out of her home, stripped of all her property, and separated from her own children.¹³

In fact, in a bid to consolidate and 'protect' family property, widow inheritance was a common practice in many parts of the continent. Here, widowed women were often 'inherited' as wives by male relatives of their deceased spouse, and the ability of a widow to keep the property that she shared with her deceased husband was dependent on remaining within his family through levirate marriage.¹⁴ This worsens women's generally already disadvantaged position in almost all spheres – socially, economically and politically. For instance, women generally have lower levels of education and employment, which ideally are alternative routes to economic empowerment and secure property rights. Therefore, considering the predominance of inheritance as a mode of acquisition of property for women, it should be protected from restraints and restrictions emanating from the socio-cultural set up of African society. Article 21 of the Maputo Protocol attempts to do just that.

While it is well understood that some customary and religious laws can be discriminatory, statutory laws can also be problematic for women and girls. Most countries in Africa have a pluralistic legal order where customary law operates in interaction with statutory and religious laws.

However, when provisions of these legal frameworks conflict, indigenous customary law often retains an advantage over the other legal systems, on account of being long embedded in social and cultural norms. Some countries' constitutions further embed this supremacy of customary law by exempting inheritance and other family law matters from the Constitution's non-discrimination clause. For example, section 15(4)(c) and (d) of Botswana's Bill of Rights accommodates 'negative customary practices' when it exempts devolution of property upon death from its non-discrimination clause. Additionally, the country's Administration of Estates Act states that every person belonging to an ethnic group, which essentially applies to every native citizen of Botswana, will have their property devolved according to the customs and practices of their particular ethnic group. According to the patrilineal system of marriage that most Batswana follow, a married woman belongs to her husband's ethnic group. Most of the property owned or acquired by the couple in the course of the marriage belongs to the husband and will pass to the eldest son when his father dies. A woman retains, in theory, the right to certain property, such as her ploughing fields, which are intended to pass to her daughter upon her death. Application of such laws may lead to the perpetuation of inequality between men and women when these customs promote practices which are antithetical to the ideals of the Maputo Protocol.¹⁵

Although the provisions of statutory law are supposed to prevail in the event of a conflict with customary law, the reality is that statutory law will be poorly implemented and possibly completely ignored.¹⁶ This unfortunately works to disfavour women's inheritance rights because it disallows fair

11 Cooper (n 2).

12 Bennett (n 4) 457.

13 Uganda Law Reform Commission 'A Study Report on the Reform of the Law of Domestic Relations.' (2000) Publication 2, 243-306.

14 FA Akiiki & O Crankshaw 'The impact of customary laws on inheritance: a case study of widows in urban Uganda' (2011) 3 *Journal of Law and Conflict Resolution* 7, 10-11.

15 Cooper (n 2) 11.

16 Cooper (n 2) 19.

and equal protection of women's property rights by extending the gender hierarchy in societal norms which preclude women from inheriting property.¹⁷

Another problem with statutory law is regarding intestate succession. In many of the commonwealth countries whose legal systems are based on early English common law and which form the majority of African states, wives could only receive a stipulated portion of their deceased husband's estate.¹⁸ It restricted ownership of land and the matrimonial home to the customary heir and in instances where there was more than one wife, all the wives shared in the scheduled portion allotted to the spouse.¹⁹

Application of statutory inheritance law faces further challenges of prohibitive procedural requirements for registration and formalisation of marriages. These technicalities are often used to exclude women married under customary marriages or even those in cohabitation. Without an official record of marriage, a widow who needs to make a claim to property that was held in the marriage has to first jump the preliminary hurdle of proving that she was indeed married to her deceased husband.²⁰ This is not always easy because the widow is cast upon the mercy of witnesses, often including in-laws who have the greatest incentive to deny the existence of the marriage, yet best positioned to provide confirmation of it. It should also be noted that there is a high level of ignorance of the right to marital property to begin with. Additionally, inheritance is often viewed as a private matter, which explains the hesitation national entities often display in 'interfering' with the issue.²¹

Customary norms manifest throughout the structures and institutions of society, including formal law and the court system. Their influence is not contained in the informal sphere.

Religious laws add further complexities to inheritance rights. Islamic (Sharia) law entitles women to inherit property, but the share of inheritance is invariably smaller than that of males. In general, a male under the Quran takes double the share of a female in a similar degree of relationship to the deceased. The sons take two times the share of daughters. Where daughters are the only surviving heirs, they can only inherit up to two-thirds of the estate; never the entire estate. Sons are not similarly restricted; they take the entire estate. Furthermore, where a man dies leaving a wife and children, the widow receives one-eighth of the net estate; where there are no children, the widow receives one-quarter of the estate.²²

As a consequence, women inherit less, especially where polygamy exists since the co-wives have to split the portion designated for 'wife' among themselves.²³ In polygamous marriages, all the widows

17 M Matheson & A Heinze 'Reevaluating African women's inheritance rights in indigenous customary law and statutory national law' (2019) 5 *Brigham Young University BYU Scholars Archive* 2-4.

18 International Justice Mission 'Property grabbing from Ugandan widows and the justice system' (2012) https://pulte.nd.edu/assets/172925/property_grabbing_for_ugandan_widows_and_the_justice_system.pdf%22%3Eproperty_grabbing_for_ugandan_widows_and_the_justice_system.pdf (accessed 15 May 2023).

19 Succession Act of Uganda 1972.

20 Human Rights Watch (n 1).

21 UNHABITAT, Progress Report on removing discrimination against women in respect of property & inheritance rights, <https://staging.unhabitat.org/content.asp?cid=3983&catid=491> (accessed 15 May 2023).

22 MA Jadeed *The inheritance rights of Muslim women in Kenya: reality or rhetoric* http://erepository.uonbi.ac.ke/bitstream/handle/11295/154363/Moza_The%20Inheritance%20Rights%20of%20Muslim%20Women%20in%20Kenya%20-%20%20Reality%20or%20Rhetoric.pdf?sequence=4, p 13 (accessed 15 May 2023). For more, see also; UN-Women & Office of the UN High Commissioner for Human Rights (OHCHR) (2013) *Realizing women's rights to land and other productive resources* (New York & Geneva: UN-Women & UN-OHCHR) <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Realizing-womens-rights-to-land-and-other-productive-resources-2nd-edition-en.pdf> (accessed 15 May 2023).

23 Under Sharia law, women (wives) can only inherit one-eighth of the net estate of their deceased husband when there were children and one-fourth if there were none. On the other hand, men inherit a fourth of their wife's estate where there are children and a half where there are none. See Jadeed (n 22).

share $\frac{1}{8}$ of the estate if there are children, or one quarter of the estate, if there are no children. Even worse, women hesitate to claim even these entitlements stipulated under Islamic law, out of fear of causing family strife or for lack of awareness.²⁴

Regrettably, limitations of access to property rights through, *inter alia*, restricted inheritance implicates the enjoyment of many human rights of women such as the right to live free from discrimination, the elimination of harmful traditional practices where women in a disadvantaged and poor position cannot negotiate out of precarious social conditions, the right to housing, right to health and the right to an adequate standard of living including the ability of women to provide for their day-to-day needs and those of their families, and to weather some of life's most difficult challenges.

With this in mind, the adoption of a comprehensive protocol on women's rights is an unequivocal acknowledgment that women's rights, including inheritance rights matter.²⁵

This chapter is organised into seven sections. Following this introduction, the second section addresses the drafting history of article 21. The third section relates article 21 to other relevant provisions in the Maputo Protocol and in other human rights treaties. Section 4 discusses the concepts that are core to the content of article 21. The fifth section analyses the nature and scope of the obligation placed on states. The sixth section reviews state practice in implementation of article 21, making reference to relevant Concluding Observations of the African Commission on Human and Peoples' Rights (African Commission or Commission) and other treaty bodies. The concluding section gives an assessment of the progress made in realising inheritance rights and makes appropriate recommendations.

2 Drafting history

Article 21 of the Maputo Protocol is unique in its articulation of widows' right to inheritance as well as gender equality in inheritance rights for both men and women. As aforementioned, it focuses on two aspects of inequality in inheritance, one being that suffered by widows, and the other, the negative experiences of inequality for both men and women. Additionally, it not only touches on inheritance of property per se, but it extends further rights to widows when it includes guarantee of a widow's right to remarry and, in that regard, to marry the person of her choice. Never before in an international instrument has such express attention been given to widows as is given in the Maputo Protocol's articles 20 and 21.²⁶

The wording and weight of article 21 as reflected in the Maputo Protocol did not just happen and neither was there automatic consensus among the drafters. It went through several adjustments, which reflects the importance that was attached to inheritance during the development of the Protocol. This section will trace the journey of this provision as it evolved through various drafts of the Protocol.

The version of the Maputo Protocol that was discussed in Nouakchott in Mauritania in 1997 did not provide for a specific and stand-alone provision on inheritance.²⁷ Article 2 of the same carried a general equality provision requiring equal treatment for men and women in all circumstances. It therefore commenced with a broad basis for gender equality. The draft provision also addressed the issue of property division following marriage annulment (Clause 7). It went further to protect the right of the surviving party to live in the matrimonial home upon the passing of their spouse. In this sense therefore, the provision as reflected in 1997 was more general, providing for rights for both women and

24 Jadeed (n 22).

25 International Justice Mission (n 18).

26 For discussion of art 20 on widows' rights, see C Mokoena 'Article 20' in this volume.

27 Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

men with regard to property except in brief passing where it stated that a widow shall have the right to inherit her husband's property. This early version of the Protocol gave greater emphasis to transfer of property at annulment of marriage than to inheritance.

The next draft of the Maputo Protocol was discussed in Kigali in 1999.²⁸ Just like the earlier draft, the 1999 version provided for rights to property for parties upon annulment of marriage in Clause 8. Clause 9 also reflected the same position as the 1997 draft where it allowed both widows and widowers to have the right to inherit each other's property, and for widows to continue living in the matrimonial home. Generally, both the 1997 and 1999 drafts of the Maputo Protocol still clamped together the aspect of annulment of marriage as well as inheritance. Inheritance in itself was yet to be recognised as a stand-alone element of property devolution and in fact the position got worse before it got better.

The draft Organisation of African Unity (OAU) Convention on the Elimination of All Forms of Harmful Practices Affecting the Fundamental Human Rights of Women and Girls,²⁹ later merged with the Draft Protocol, contained only 13 articles, none of which addressed inheritance. Even the definition of harmful practices under article 1 was limited to 'attitudes, behaviours or practices that affect life, health and bodily integrity of women'. This definition was limiting in that it omitted indirect effects that can be caused by harmful practices such as unequal inheritance between genders.

It was therefore a relief when the final version of the Protocol specifically focused on inheritance as a stand-alone right without merging it with annulment of marriage. It further integrated elements of equality for both men and women with emphasis on widows. The Meeting of Experts held in Addis Ababa, Ethiopia in November 2001 to discuss the draft Protocol³⁰ added protection of widows' rights to the matrimonial home even upon remarriage.

It is clear from the above therefore that article 21 evolved from simple clauses that amalgamated marital property and inheritance. In the end, the final provision is a strong stand-alone guarantee of rights to property received through inheritance for both men and women. Furthermore, it specifically assures widows of secure and continuous access to and control of the matrimonial home even upon remarriage.

3 Linkages with other treaty provisions

While the significance of having article 21 cannot be denied with regard to protecting inheritance rights especially for women, the provision stands to benefit from other complementary rights. The article should be read together with provisions on non-discrimination, the right to dignity as well as equality in marriage. The United Nations Committee on the Elimination of Discrimination against Women, the United Nations Committee on Economic, Social and Cultural Rights and the United Nations Human Rights Committee have explicitly recognised equality in marriage over the management of property, including land.³¹

28 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

29 Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

30 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

31 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation 21 on Equality in Marriage and Family Relations, 1994 A/49/38(SUPP)/4733/E.

Similarly, the right to an adequate standard of living is linked to article 21. The UN Special Rapporteur on the Right to Food articulated this linkage as

the right to food requires that states refrain from taking measures that may deprive individuals of access to productive resources on which they depend when they produce food ... and that they seek to strengthen people's access to and utilisation of resources and means to ensure their livelihoods, including food security...³²

He also observed that 'there remain laws and social customs such as those ensuring that the land of a deceased husband belongs to his sons, not to his widow, despite the flagrant violation of women's rights to which this leads' and 'as a result, women still represent a significant minority of the total number of titleholders ...'³³

Particular mention goes to article 20 of the Maputo Protocol which provides for the rights of widows. It is common practice customarily for widows to receive a smaller share of their husband's property at his death than would widowers and sons. In some instances, widows are granted limited and controlled rights and receive only income from the deceased's property.³⁴ Often rights of widows do not reflect the principle of equality in marriage, especially in regard to ownership of property acquired during marriage. The existence of article 20 therefore complements article 21 in a special way.

Thus, a holistic reading of the Protocol together with other relevant human rights instruments is just as important in guaranteeing the full enjoyment of the right to inheritance for both women and men, and particularly for women in marital circumstances.

4 Concepts and definitions

4.1 Equality and non-discrimination in inheritance: pronouncements at the African regional level

The starting point for women's equal right to inherit can be inferred from rights to equality and non-discrimination. At the regional level, the right to property is guaranteed under article 14 of the African Charter on Human and Peoples' Rights (African Charter). The treaty further guarantees that the enjoyment of this right shall be without distinction of any kind including sex.³⁵ The African Charter makes no specific mention of inheritance. It however requires states to ensure the elimination of every discrimination against women.³⁶

The Principles and Guidelines on Implementation of Economic, Social and Cultural Rights in the African Charter make mention of the right to property with a focus on protection from forced eviction, protection from historical land injustices and the prevention of unfair exploitation of natural resources.³⁷ However, the focus in this instrument is on land as a key asset for most people on the African continent. The Guidelines underline the obligation on states to ensure equitable and non-discriminatory access to land and housing especially by women. They further mandate states to take measures to modify or prohibit harmful social, cultural or other practices that prevent women and

32 UN-Women & OHCHR (n 22) 21.

33 UN-Women & OHCHR (n 22) 27.

34 UN-Women & OHCHR (n 22) 21.

35 African Charter art 2.

36 Article 18 African Charter.

37 Principles and Guidelines on Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC_E.pdf?sequence=1&isAllowed=y (accessed 15 May 2023) para 55.

other members of vulnerable and disadvantaged groups from enjoying their right to property.³⁸ One limitation of these Guidelines in regard to inheritance is the fact that the protection mandate imparted upon states is confined to matters such as protection from forced eviction, historical land injustices and unfair exploitation of natural resources. While these addresses recognised historical challenges, it suffers two shortcomings. First, it fails to address land injustices that arise from relations in the private sphere of family. Second, the exclusive focus on land eclipses concerns around other forms of property. The context of inheritance brings up both of these dimensions. The Guidelines therefore fall short of addressing the issue of inheritance in general, and as a specific violation of women's property rights.

Over the years, however, there have been some more specific pronouncements on inheritance, specifically on widow's rights. African Commission Resolution 262³⁹ urges states to, *inter alia*, ensure widows' right to inheritance, including the right to inherit the movable and immovable property of their husbands, as well as their right, irrespective of matrimonial regime, to continue to live in the matrimonial house. This instrument is significant as a basis for promoting gender equality and protection of widows from unfair inheritance practices. It should be noted however that the resolution, just like the aforementioned Guidelines, adopts a specific approach focused on land and housing, rather than a broader mandate to protect women's access to and control over all forms of property.

So far, no General Comment has been issued on the matter of inheritance. The closest that the African Commission has come to enacting an instrument under the Maputo Protocol on the right to property is General Comment 6. Adopted in March 2020, General Comment 6 focuses on the right to property during separation, divorce or annulment of marriage as laid out under article 7(d) of the Maputo Protocol.⁴⁰ This does not take care of inheritance triggered only upon a spouse's death and not annulment of marriage. To the commission's credit though, General Comment 6 does address other property besides land and housing. The General Comment, however, provides no specific pronouncement on division of property received as inheritance, and does not therefore address the concerns of article 21.

38 As above para 55(h).

39 African Commission Resolution on Women's right to land and productive resources, ACHPR/Res. 262 (LIV) 2013 (African Commission Resolution 262).

40 General Comment 6 on the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol): the Right to Property During Separation, Divorce or Annulment of Marriage (art 7(d)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia in February 2020.

4.2 Equality and non-discrimination in inheritance: pronouncements at the international level

General Comment 28 of the Human Rights Committee highlights the significance of conferring equal property and inheritance rights upon men and women. In the context of giving effect to article 23 of the International Covenant on Civil and Political Rights (equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution), it specifies that '[w]omen should... have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses'.⁴¹

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the most comprehensive instrument at international level with regard to women's rights. It provides an extensive definition of discrimination.⁴² It further recognises that many abuses of women's rights emanate from society and culture and compels governments to take appropriate measures to correct these abuses. CEDAW requires governments:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁴³

CEDAW contains general clauses that accord women equal rights with men before the law⁴⁴ as well as specific clauses on equal rights in marriage.⁴⁵ Article 2 obliges states to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women'. Article 16(h) specifically prescribes the same rights for spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration'.⁴⁶ However, CEDAW does not contain a specific provision on inheritance.

The UN Committee on Elimination of Discrimination against Women (CEDAW Committee) has attempted to plug this gap by elaborating on discrimination in the area of property rights so as to include a concern about inheritance:

There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.⁴⁷

The Committee also stated that in countries undergoing agrarian reform or land redistribution 'the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed'.⁴⁸

41 Human Rights Committee, General Comment 28, Equality of rights between men and women (art 3) (29 March 2000).

42 CEDAW art 2.

43 CEDAW art 5.

44 CEDAW art 15(1).

45 CEDAW art 16.

46 CEDAW art 16(h). See UN-Women & Office of the UN High Commissioner (n 22) 20.

47 As above. See also CEDAW Committee General Recommendation 29, paras 49, 52-53.

48 UN-Women & Office of the UN High Commissioner (n 22) 21.

The CEDAW Committee further cites unequal inheritance rights as a contributing factor to women's lack of economic and political advancement, vulnerability to domestic abuse and HIV/AIDS.⁴⁹ Additionally in General Recommendation 21 (1994) on equality in marriage and family relations, the CEDAW Committee underscored that 'the right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.'⁵⁰

Despite the strong inference to property rights guaranteed in CEDAW, it should be noted that there is a difference in terminology with the Maputo Protocol. Whereas CEDAW in General Recommendation 21 refers to 'equal' rights to property, the Maputo Protocol refers to 'equitable' rights to the same. The language of equality essentially means equal amounts to or equal opportunity to access property. The CEDAW Committee has suggested that the term 'equitable' could result in less favourable treatment, and has ruled that it is incompatible with the Convention's standard of equality.⁵¹ Despite the variance in terminology between the two treaties, it is clear that both are concerned about women's restricted property rights, as well as relatively limited access to education, employment and other opportunities, which ideally constitute alternative routes to economic empowerment and secure property rights. The mandate to guarantee women greater access, whether that is tagged 'equal' or 'equitable' at least signals a strengthening of state obligation towards this social group. Considering the predominance of inheritance as a mode of acquisition of property for women, the language in both CEDAW and the Maputo Protocol guarantees a strong position for property rights through inheritance. The inclusion of the adjectives in the texts of both instruments demand that a lot more should be done to protect women from restraints and restrictions emanating from the socio-cultural set up of African society beyond merely improved access.

The UN Committee on Economic, Social and Cultural Rights (CESCR) has also weighed in on this issue of property rights. In its General Comment 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights,⁵² the CESCR Committee stated that 'women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so'.⁵³ The UN Human Rights Committee has also stated that 'the capacity of women to own property ... may not be restricted on the basis of marital status or any other discriminatory ground' and that states parties must ensure that the 'matrimonial regime contains equal rights and obligations for both spouses with regard to ... the ownership or administration of property, whether common property or property in the sole ownership of either spouse'.⁵⁴

The right to adequate housing is one with close nexus to inheritance and property rights and in fact, the UN Special Rapporteur on the Right to Adequate Housing has made great strides focusing on

49 See CEDAW Committee General Recommendation 28 on the core obligations of states parties under art 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (16 December 2010) CEDAW/C/GC/28 (2010) para 22.

50 General Recommendation 21 on equality in marriage and family relations, adopted at the 13th session (1994) A/49/38SUPP/4733/E(1), para 26. The CEDAW committee has not had the opportunity to rule on any individual complaint dealing with inheritance to property. The complaint of Cristina Muñoz-Vargas y Sainz de Vicuña relating to inheritance of a nobility title in Spain was ruled inadmissible because Spain had not yet ratified CEDAW at the time the alleged violation took place. See the CEDAW Committee, Communication 7/2005, 39th session (23 July-10 August 2007).

51 CEDAW Committee General Recommendation 28 (n 49) para 22.

52 CESCR Committee General Comment 16 the equal right of men and women to the enjoyment of all economic, social and cultural rights (art 3 of the Covenant) 11 August 2005 E/C.12/2005/4.

53 CESCR Committee General Comment 16 (n 52) para 28.

54 UN Human Rights Committee (HRC), CCPR General Comment 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add.10.

this issue especially as it relates to women's right to equality under international human rights law.⁵⁵ The loss of security of tenure that is experienced by most women following the death of a spouse is an example of gender-based inequality and discrimination. The Guidelines for the implementation of the right to adequate housing (2020) developed by the Special Rapporteur on the right to adequate housing, urge states in Guideline 9 to recognise the independent right of women to security of tenure, irrespective of their family or relationship status. This would ensure protection of women in circumstances of widowhood. Additionally, the Special Rapporteur interrelates issues of land, property and inheritance to other human rights, such as the rights to water and to health, in order to provide a more comprehensive and indivisible analysis of women's right to adequate housing.⁵⁶ Providing a wide application of the right to adequate housing ensures that other interrelated rights such as property and inheritance enjoy legal enforcement through a diverse range of legal and policy frameworks, and provide avenues for redress where violations occur.

From the above discussion, it is clear that regional and international laws do provide for property rights but largely follow a broad approach with limited reference to inheritance. Only the Maputo Protocol is very specific in providing a stand-alone provision on the right to inheritance. However, credit should also be given to some instruments other than the Maputo Protocol, which have attempted to highlight widows' plight. These include the UN General Assembly Resolution 65/189 which designates 23 June as a day for reflection on widows and their circumstances.⁵⁷ Additionally, the 2002 UN Madrid International Plan of Action on Ageing⁵⁸ notes widows' exposure to the risk of poverty and widowhood rites. The chapter commenting on article 20 addresses these broader challenges in greater detail.

5 Nature and scope of state obligations

The Maputo Protocol outlines obligations that guide states parties in fulfilling their mandate under the instrument. Article 2 is key as an introductory provision. It sets the standard in prohibiting all forms of discrimination against women. It calls upon states parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. It sets out the nature and scope of state obligations to include integration of the principle of equality between women and men in national constitutions and other legislation and ensure their effective application. Of particular relevance in the context of inheritance is the call on states to take measures such as public education to modify social and cultural patterns of conduct of men and women so as to eliminate harmful practices which are based on assumptions as to the inferiority or superiority of either of the sexes or on role stereotyping.⁵⁹

Additionally, the Protocol calls on states to provide for appropriate remedies to any woman whose rights or freedoms have been violated.⁶⁰ This goes hand in hand with the duty to report periodically on progress made in implementing the Protocol at national level,⁶¹ as well as the need to allocate adequate budgets.⁶²

55 UN Special Rapporteur on the Right to Adequate Housing, Report on Women and the right to adequate housing (2012) A/HRC/19/53.

56 UN Special Rapporteur on the Right to Adequate Housing, Women and the right to adequate housing, Final report (2006), E/CN.4/2006/118.

57 Resolution adopted by the General Assembly on 21 December 2010 on the report of the Third Committee (A/65/449): International Widows' Day A/RES/65/189.

58 <https://www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf> (accessed 15 May 2023).

59 Maputo Protocol art 2(2).

60 Maputo Protocol art 25.

61 Maputo Protocol art 6(1).

62 Maputo Protocol art 26(2).

As a starting point, it is remarkable to note that no reservations have been entered on article 21.⁶³ This is a clear sign that the right is undisputed – at least in principle – by all state parties.

6 State practice/implementation

With regard to the aforementioned obligations, state practice indicates an increasing number of countries that have recognised women's equal rights to property in their constitutions and national laws, thus complying with human rights standards and obligations under the protocol. Constitutional provisions that prohibit discrimination, including in customary law and practice, constitute best practice in implementing gender equality in property rights and specifically inheritance. Many African countries' constitutions make good examples. For instance, Mozambique addressed gender discrimination in property ownership and inheritance laws by amending its Constitution as well as its land and family laws.⁶⁴ Uganda's Constitution prohibits in very concrete terms any 'laws, cultures, customs and traditions' which harm women and undermine their status.⁶⁵ On this premise, gender-discriminatory provisions of customary law remain explicitly illegal under Ugandan constitutional law. The Constitution also protects every person's right to individually or collectively own property.⁶⁶ However, that has not stopped the continued existence of gender discriminatory practices against women through customary law. Additionally, Malawi's Constitution is unique in that it makes specific mention of women's property rights.⁶⁷ Furthermore, more recent constitutions, such as that adopted in Kenya in 2010 and in Zimbabwe in 2013, include a gender-sensitive dimension that improves women's rights. Section 17 of Zimbabwe's Constitution not only promotes full gender balance in Zimbabwean society but further calls on the state and all institutions and agencies of government at every level to take practical measures to ensure that women have access to resources, including land, on the basis of equality with men.⁶⁸

Similarly, Kenya's Constitution protects every individual's right to property.⁶⁹ Specifically, article 40(2)(b) prohibits parliament from enacting laws that limit the enjoyment of this right through any grounds of discrimination, including sex, marital status, belief and culture. This provision implies that women, like men, have a right to own property of any kind, and culture and traditions cannot be used to deprive them of this right.

Another aspect of implementation is the enactment of national laws that conform to the principles in the Maputo Protocol. In 2011 Malawi passed the Deceased Estates (Wills, Inheritance and

63 42 out of the 55 African countries have ratified the Maputo Protocol leaving 13 countries yet to join the treaty. See, <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 15 May 2023).

64 Article 36 of Mozambique's Constitution amended in 2004 provides for the principle of gender equality. It guarantees that both men and women shall be equal before the law in all spheres of political, economic, social and cultural life. See also, Cooper (n 2) 11.

65 Constitution of Uganda, 1995 art 33.

66 As above arts 26 & 27.

67 RS Sikwese 'Women's economic rights: removing barriers to women's access to justice in Malawi' in Goal 16 of the Sustainable Development Goals: Perspectives from judges and lawyers in Southern Africa on promoting rule of law and equal access to justice (2016) 22 <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Sikwese.pdf> (accessed 16 May 2023). Section 24 of the Constitution of Malawi, 1994, provides that: '(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status ... (2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as: (a) sexual abuse, harassment and violence; (b) discrimination in work, business and public affairs; and (c) deprivation of property, including property obtained by inheritance'.

68 Constitution of Zimbabwe 2013, sec 17(1)(c).

69 Constitution of Kenya, art 40(1).

Protection) Act. This Act repealed the Wills and Inheritance Act, which posed many challenges for widows. The Act is deemed a milestone in addressing the predicament of women and children in as far as the administration of deceased estates is concerned.

Uganda has also taken similar strides by repealing its old Succession Act of 1972, an Act that was rooted in patrilineal practices under customary and Islamic law. Although the Act recognised women's right to inherit from their husbands, inequalities in inheritance rights were not addressed and still restricted women's rights to land and matrimonial property as well as limited percentages to the deceased's estate. The Act legitimised devolution of the residential holding to the oldest male descendant and further limited a widow's right to occupy her home by requiring that she remain chaste for the rest of her life. The law also permitted an overlap between customary practices and Sharia law. The repealing of this law was prompted by a successful judgment given by the Constitutional Court in the case of *Law and Advocacy for Women in Uganda v Attorney General*⁷⁰ which nullified several sections of it. The Succession (Amendment) Act 2022 remedies these gender inequalities by aligning intestate inheritance law to the Constitution. The 2022 Act was enacted purposely to recognise and accord equal rights to men and women under the law, among other reforms. It re-defines the distribution of estates of intestates (persons who die without a will) and provides for the duration of probate and letters of administration. Among the changes made through the amendment is the use of gender-neutral language. It replaces words such as 'a married woman' with spouse; uses 'persons' instead of 'man', and inserts 'or her' after 'his'. It refers to both parents and not just 'father', and it takes account of both sons and daughters. Additionally, the Amendment also substituted the words 'customary heir', which only recognised the males, to 'customary heir or heiress' to include even women.⁷¹ The amendment also revised the percentage shares for the distribution of property of an intestate by increasing the percentage share of the spouse from 15 per cent to 20 per cent where an intestate is survived by a spouse, lineal descendant, a dependent relative and customary heir.⁷² The Act however fails to recognize any property interest for persons that did not conclude what is termed as a legally formalised marriage despite the number of years of cohabitation.

In Sierra Leone, equality in matters of inheritance is now provided for through the Devolution of Estates Act of 2007, but this does not apply to property held under customary law.⁷³ Ghana's Intestate Succession Law of 1985 also provides for the spouse and children of a person who died intestate (that is, without a will) to inherit most of the property of their deceased spouse or parent.⁷⁴

In Rwanda, both the Constitution and accompanying legislation safeguard women's rights to inherit land. A 1999 revision of the civil code stipulates an equal inheritance right for all children, but also guarantees that married women can inherit from their husbands.⁷⁵ In actual sense therefore, women not only have inheritance rights in their birth family as daughters but have in addition an equal share in marital property.

Provisions allowing discrimination through customary and personal law matters (such as inheritance) continue to persist in some countries in Africa upon which precedents restricting inheritance

70 Constitutional Petition 13/2006 & 05/2006 (Uganda).

71 Section I(a) Succession (Amendment) Act 2022 (Uganda).

72 Constitution of Uganda, 1995 sec 27(a).

73 UN Women & OHCHR 2013 (n 22).

74 As above.

75 K Vanhees 'Property rights for women in Rwanda: access to land for women living in de facto unions' Masters Dissertation, University of Ghent, 2014.

rights have been issued by courts.⁷⁶ The Zimbabwean case of *Magaya v Magaya*⁷⁷ is an example. The brief facts of this case are that Magaya, an unmarried daughter was appointed by court as heir to his estate, but this was contested by her younger half-brother. The Supreme Court ruled that Ms. Magaya could not inherit a municipal house, because customary law did not permit women to own property on land. In other words, the court ruled that customary law took precedence over the non-discrimination provision of the Constitution. The Zimbabwe Constitution at that time exempted discrimination arising from the application of customary law in such matters of personal law. Such a court decision shows the disastrous consequences that can follow from discriminatory and contradictory provisions in a plural legal system. It should be noted however that this decision was passed before the adoption of the Maputo Protocol. Additionally, the Zimbabwe Constitution of 2013 put an end to this exemption and the case is no longer good law in Zimbabwe. However, the effect of this judgment is important to illustrate the negative effect of such provisions on inheritance rights if retained in law.

On the other hand, where constitutions carry progressive provisions of equality, it is easier to enforce rights such as inheritance in courts. A case in point is the Tanzanian case of *Ndossi v Ndossi*.⁷⁸ Here, a widow retained her right to her deceased husband's estate after she challenged her brother-in-law, who had been appointed administrator. The court rooted its decision in the Tanzanian Constitution as well as the anti-discrimination principles in CEDAW. A similar decision was reached in *Ephrahim v Holario Pastory*.⁷⁹ The South African case of *Nonkululeko Letta Bhe v Magistrate Khayelitsha*⁸⁰ is another landmark decision. While making reference to articles 2(1)(a), 21 and 25 of the Maputo Protocol, among other international and regional conventions, the Constitutional Court ruled unconstitutional the Black Administration Act which regulated customary intestacy and allowed the discriminatory practice of male primogeniture.

In the words of Deputy Chief Justice Langa:

The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.⁸¹

He then went on to say:

In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom... In conclusion, the official system of customary law of succession is incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny.⁸²

Other progressive decisions affirming gender equality and the right to inheritance for widows are evidenced in the decisions of *Re the Estate of Andrew Manunzyu Musyoka*,⁸³ where the court held that Kamba customary law of Kenya was discriminatory in so far as it sought to deny the applicant her

76 V Knobelsdorf 'Zimbabwe's Magaya decision revisited: women's rights and land succession in the international context' (2006) 15 *Columbia Journal of Gender and Law* 749.

77 1999 (1) ZLR 100 (S).

78 Civil Appeal 13 of 2001 (Unreported), High Court of Tanzania.

79 High Court of Tanzania at Mwanza (PC) Civil Appeal 70 of 1989; [1990] LRC (Const) 757.

80 *Nonkululeko Letta Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) para 48.

81 Para 91.

82 Paras 95 & 97.

83 Succession Cause 303 of 1998.

inheritance rights on grounds of sex. The practice barred married daughters from inheriting from their fathers' estates, except in instances where the daughter in question was divorced and had taken the step of returning the bride price to her husband's family. The court held that the customary law in question was repugnant to justice and good morals.⁸⁴ It relied on section 40 of the Law of Succession Act which confirms that all children whether male or female are beneficiaries and should have a share in the deceased's estate, as well as the non-discrimination clause of the constitution.⁸⁵ The court went on to say that Kenya, as signatory to a number of international conventions and regional agreements was under an obligation to observe the doctrines of anti-discrimination contained therein. The decision came earlier than the Maputo Protocol and thus did not make any specific reference to it. It is however noteworthy that it relied on CEDAW and the African Charter on Human and Peoples' Rights in ensuring elimination of discrimination of women in inheritance rights.

In 2012, the Botswana High Court ruled that the Constitution took precedence over Ngwaketse customary law in *Mmusi v Ramantele*.⁸⁶ Here, Ngwaketse customary law favoured inheritance by the next closest male in the absence of a direct linear male heir. The Botswana High Court, relying on national and international instruments prohibiting discrimination on grounds of gender, ruled in favour of a female heir. It based its decision on the understanding that customary law should not be repugnant to the written law, morality, humanity, or natural justice. According to the Customary Law Act, customary law in relation to any particular tribe or tribal community, is law in so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.⁸⁷

This ruling fundamentally changed the way women's inheritance rights function today in Botswana.⁸⁸ The court also cited articles 2 and 3 in the African Charter which prohibit discrimination on the basis of sex and further maintains that '(a) Every individual shall be equal before the law [and] (b) Every individual be entitled to equal protection of the law.'⁸⁹

Other notable decisions include the Ugandan case of *Herbert Kolya v Erikiya Mawemuko Kolya*⁹⁰ which prohibited the practice of husbands bequeathing the matrimonial home to their legal heir without taking care of the interests of the widow. In *Adong Simon v Opolot David*,⁹¹ the Uganda Court of Appeal decided that a widow has a right to dispose of land she inherited from her deceased husband in light of the equality provisions in Uganda's Constitution.⁹² The case of *Best Kemigisha v Mable Komuntale*⁹³ not only affirmed the right of a widow to inherit the property of her deceased husband, but in this case,

84 It should be noted that this case was decided before Kenya's Constitution of 2010 where the standard under which customary law was judged was the repugnancy test, rather than the constitutionality test.

85 The relevant section then was sec 82(3) of the 1963 Constitution (as amended in 1997). Section 82(3) defined discrimination as; '*affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe. Place of origin or residence or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons another such description.*' Since the 2010 Constitution, the relevant clause is art 27 on equality, and art 2 which makes it explicit that the application of customary law is subject to the constitution.

86 (2012) 2 BLR 590 HC (Bots).

87 Section 2, Customary Law Act Cap 16.

88 It is both remarkable and perplexing that the court made no reference to the personal law exemption clause contained in art 15(4)(c) of the Constitution.

89 T Masengu 'Customary law inheritance: lessons learnt from *Ramantele v Mmusi and Others*' (2015) University of Cape Town Working Paper 6.

90 High Court Civil Suit 150/2016 (Uganda).

91 Soroti Civil Appeal 46 of 2013 (Uganda).

92 Article 31(1) of Uganda's Constitution entitles men and women to equal rights in marriage, during marriage and at its dissolution.

93 HCCS 5/1998 (Uganda).

extending to the properties of a kingdom. The queen contested the Toro custom which precluded her from administering the property of the kingdom upon the demise of her husband, the king. The court held that this restriction was repugnant to the principles of natural justice and good conscience and therefore null.⁹⁴

Other cases to note include the Zimbabwean case of *Chiminya v Estate (Late Dennis Mhirimo Chiminya)*⁹⁵ which protected the rights of a widow married under an unregistered customary law union for 42 years. The court held that an unregistered customary law union is recognised for inheritance and proprietary right purposes. Similarly, in *Ukeje v Ukeje*,⁹⁶ the Supreme Court of Nigeria unanimously protected the right to inheritance of a female child from her late father's estate despite the fact that she was born outside marriage. The Supreme Court of Ghana has guaranteed equal rights to both male and female children. In *Fianko v Aggrey*, it stated that 'the children of a deceased person both male and female have a right to inherit their deceased mother's property; this is regardless of whether the woman came from a matrilineal or patrilineal family'.⁹⁷

Additionally, in *King NO v De Jager*,⁹⁸ the South African Constitutional Court ruled that a clause in a private will limiting the inheritance of property to only male descendants is unconstitutional or otherwise void as against public policy. The import of this case lies in the horizontal application of the non-discrimination clause of the Constitution to restrict a person's right to exercise private property rights, when such exercise of property rights contradicts the Constitution's values. It is generally worth noting that most of the progressive cases discussing inheritance rights in Africa rely on CEDAW much more than the Maputo Protocol. There is therefore a gap and an opportunity to create further awareness within the legal fraternity about the Protocol and its potential for developing the jurisprudence of equality across the continent.

The African Court on Human and Peoples' Rights has also weighed in on the issue of inheritance rights. Its 2018 ruling in *APDF*⁹⁹ marked the first time that the African Court found violations of the Maputo Protocol on rights of women, and specifically inheritance rights. The parties challenged the 2011 Family Code of Mali for violating the right to equitable inheritance enshrined in article 21(2) of the Maputo Protocol. The applicants submitted as follows:

In adopting the impugned law, the Malien state violated Article 21 of the Maputo Protocol which provides that a widow shall have the right to an equitable share in the inheritance of the property of her husband ... Women and men shall have the right to inherit, in equitable shares, their parents' properties.¹⁰⁰

The applicants further referenced the Committee on the Elimination of Discrimination against Women which declared that practices which do not give women the same share of inheritance as men constitute a violation of CEDAW.¹⁰¹ In this instance, Mali's Islamic law applied in matters of inheritance, giving women only a half of the portion of what their male counterparts receive. The

94 Similar rulings can be found in *Elizabeth Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC); *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC); *South African Human Rights Commission v President of the Republic of South Africa* (2005 (1) SA 580 (CC); *Shibi v Sithole* 2005 (1) SA 580 (CC); *Ndabahweje Pauline v Babirye Rosemary* (Civil Appeal 95 of 2001 (Uganda); and *Juliet Kalema v William Kalema* CA 95/2003.

95 HC 4201 of 2014 [2015] ZWHHC 272 (11 March 2015).

96 (2014) 11 NWLR (PT.1418) 384,

97 (2007-2008) SC. GLR 1135, 1145.

98 2021 (5) BCLR 449.

99 *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (2018) 2 AfCLR 380 (APDF).

100 APDF (n 99) para 98.

101 APDF (n 99) para 99.

court affirmed that, irrespective of current cultural and religious practices, Mali had committed to eliminating discrimination against women, and the Family Code sanctioned discriminatory practices that undermine the rights of women. The court noted that in matters of inheritance a predominant place is accorded to the rights of the woman and the child, given that the widow and the children born out of wedlock have the same rights as the others and that these guarantee equality of treatment for women and for children without any distinction.¹⁰² The Court therefore found that the Malien state had violated article 21(2) of the Maputo Protocol.¹⁰³ The Court subsequently ordered Mali to amend its Family Code so as to bring it into line with international human rights standards.¹⁰⁴ It also ordered it to inform and educate its population as to these rights and obligations.¹⁰⁵

Overall, there has been progress with regard to implementing article 21 of the Maputo Protocol across parts of the African continent. There are some key institutions and actors which have been at the heart of breathing life into the Maputo Protocol and implementing article 21. They include the courts, law and policy makers such as ministries of gender, parliaments and agencies in charge of law reform.

However, some challenges remain which need to be overcome mostly regarding reconciling the different inheritance positions within conflicting customary, religious and national laws. Additionally, states have to find ways to address prohibitive procedural requirements for registration and formalisation of marriages which are often used to exclude women from inheriting their spouses' property. Both the African Commission and CEDAW, in their engagement with state reports, have expressed concern over two extremes: state failure to implement a universal marriage registration system altogether, and rigid, punitive formal registration requirements that fail to take account of practical limitations such as inadequate decentralisation of services.¹⁰⁶

It is notable though, that the right to inheritance has not attracted much specific attention in the African Commission's engagement with states. There was little mention, if any, of inheritance equality in state reporting. This is partly because separate and systematic reporting under the Protocol is not yet a uniform state practice, with most states reporting under the African Charter. This in a way hinders the impact of the regional human rights instruments to enforce specific rights such as inheritance equality through the mechanism of state reporting, key being the African Commission and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).

Article 62 of the African Charter mandates states parties to report on the legislative, policy, institutional and other measures which have been taken to implement the Maputo Protocol in the specific

102 *APDF* (n 99) para 110.

103 *APDF* (n 99) paras 115 & 135(v) & (vii).

104 *APDF* (n 99) para 135.

105 As above.

106 See, eg, Concluding Observations and Recommendations on the Combined 2nd and 3rd Periodic Reports of Botswana 2011-2015, African Commission on Human and Peoples' Rights, adopted at the 26th extraordinary session (16-30 July 2019) para 17; Concluding Observations and Recommendations on the Combined 1st to 9th Periodic Report of Eswatini on implementation of the African Charter on Human and Peoples' Rights 2001-2020, and the initial report to the Maputo Protocol, African Commission on Human and Peoples' Rights, adopted at the 69th ordinary session (15 November-2 December 2021) para 50. See also CEDAW Committee Concluding Observations on 4th Periodic Report of Côte d'Ivoire (30 July 2019), UN Doc CEDAW/C/CIV/CO/4 (2019) para 51; 6th Periodic Report of Gabon (11 March 2015), UN Doc CEDAW/C/GAB/CO/6 (2015) paras 44 & 45; Combined 4th and 5th Periodic Reports of The Gambia (28 July 2015) UN Doc CEDAW/C/GMB/CO/4-5 (2015) para 49; 6th and 7th Periodic Reports of Ghana (14 November 2014) UN Doc CEDAW/C/GHA/CO/6-7 (2014) para 40; 6th Periodic Report of Zimbabwe (10 March 2020) UN Doc CEDAW/C/ZWE/CO/6 (2020) para 50; 8th Periodic Report of Kenya (22 November 2017) UN Doc CEDAW/C/KEN/CO/8 (2017) para 32; 8th Periodic Report of Mauritius (14 November 2018) UN Doc CEDAW/C/MUS/CO/8 (2018) para 37; 8th Periodic Report of Senegal (1 March 2022), UN Doc CEDAW/C/SEN/CO/8 (2022) para 42(b).

countries. However, a quick scan by the author through state reports as well as concluding observations and recommendations indicates a light touch on this right. Focus on issues affecting women include marital rape and domestic violence,¹⁰⁷ HIV, sexual and reproductive health rights including elimination of maternal mortality.¹⁰⁸ The closest that the African Commission has come to including the right to inheritance is in its references to the duty to eliminate harmful traditional practices which affect the rights of vulnerable persons such as women.¹⁰⁹ Even Nigeria, a country which regularly submits its periodic reports, does not feature specific reporting on the right to inheritance.¹¹⁰ This position is no different under the African children's rights mechanism. The majority of state reporting and the Concluding Observations to state reports considered by the African Children's Committee interpret article 21 on harmful social and cultural practices largely to mean protection against female genital mutilation, child marriage and child marriage.¹¹¹ Equal right to inheritance between boys and girls in state reports and Concluding Observations features minimally.

Nevertheless, the African Commission has attempted to mitigate this issue by giving special focus to the general duty on states to eliminate discrimination against women and children as provided under article 18(3) of the African Charter. This provision calls on state parties to eliminate discrimination against women and children and further protect their rights as stipulated in international declarations and conventions.

7 Conclusion

Inadequate protection of inheritance rights remains a key obstacle to the enjoyment of property especially for women in African societies. This is mostly because of customary and religious norms that restrict women's right to hold and transact in property in their own right. While a majority of African constitutions outlaw gender discrimination, the practice under both formal and customary law explicitly contradicts these ideals. This is compounded by institutional barriers which limit women's access to courts and fair adjudication when violations of women's inheritance rights occur.

The adoption of a comprehensive protocol on women's rights – the Maputo Protocol – was a landmark gain for women's rights and in particular on aspects such as inheritance. It was an unequivocal acknowledgment that women's rights, including inheritance rights matter and in fact, never before in an international instrument has such express attention been given to widows.

107 See for instance Concluding Observations and Recommendations on the 6th to 8th Combined Report of Mauritius on implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 60th ordinary session (8-22 May 2017) para 78 & 80.

108 See African Commission Concluding Observations on the Combined 8th to 11th Periodic Report of Kenya 2008-2014, adopted at the 19th extraordinary session 16-25 February 2016) Banjul, The Gambia.

109 See for instance Concluding Observations and Recommendations on the 5th Periodic Report of Nigeria 2011-2014, African Commission on Human and Peoples' Rights, adopted at the 57th ordinary session (4-18 November 2015); para 74 mentions the existence of harmful traditional practices which affect the rights of most vulnerable persons like women and children; para 75 also refers to traditional prejudices in a similar light. See also Concluding Observations and Recommendations on the 2nd Periodic Report of South Africa 2003-2014, African Commission on Human and Peoples' Rights, adopted at the 58th ordinary session (6-20 April 2016), where the Commission mentions traditional practices, para 33.

110 The African Commission acknowledges that Nigeria is one of the State parties to the African Charter which submits its Periodic Reports regularly in conformity with art 62 of the African Charter. See African Commission Concluding Observations Nigeria 2015 (n 109) para 12.

111 See Concluding Recommendations on the 1st Periodic Report of Cameroon on the status of implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 28th ordinary session (21 October-1 November 2016) para 25. See also Concluding Recommendations on the initial report of Benin on the status of implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 33rd ordinary session (18-28 March 2019) para 50.

Article 21 of the Maputo Protocol has inspired implementation of inheritance rights across the continent, through adoption of progressive national laws and constitutions. Many judicial decisions have been passed by courts that affirm the right of parties to equitable inheritance. Resultantly, it is clear that there is progress with regard to implementing article 21 of the Maputo Protocol and some of the key actors at the heart of this include courts, law and policy makers and agencies in charge of law reform. The African Commission and the African Court have also played a part in advancing the implementation of article 21 as evidenced by the jurisprudence emanating from national courts on interpretation of this and other sections of the Protocol. However, some challenges remain arising from a combination of customary, religious and statutory norms and practices that disfavour women in the area of inheritance.

Going forward, steps need to be taken to ensure full ratification of the Maputo Protocol for those countries that have not yet done so. States should also take initiative to examine and align their national laws with the provisions of the Maputo Protocol and specifically article 21. National constitutions should explicitly recognise human rights and gender equality in all domains, including security of tenure in land and housing, and prohibit discrimination in property and inheritance matters.¹¹² Additionally, domestic laws which are discriminatory towards women should be repealed or amended. In particular, national legislation should prohibit discrimination against women and girls in inheritance and explicitly allow females to inherit property and land equally with males.

Furthermore, these reforms should ensure harmonisation of plural legal systems to ensure that all justice mechanisms, including religious and customary mechanisms, respect, protect and fulfil equality in property rights for all individuals, especially women's rights to land and housing, and that the relevant authorities are held accountable when they fail to do so.¹¹³ Legislation should also state that national laws shall have supremacy over customary and religious laws and practices that discriminate against women and girls in inheritance matters.

Enforcement of laws should strengthen institutional structures, including customary and statutory institutions, to ensure effective implementation of laws, policies and programmes related to women's rights to land and other productive resources. States should undertake adequate allocation of resources and increase the human capacity, financial, legal, technical and other resources needed to ensure that enacted legislation serves its purpose. Part of institutional strengthening should target formal and informal avenues of justice that protect property rights. All persons, including women and girls should be able to access low-cost or free legal aid and other legal services in their own language. Courts and legal services should aim to be gender-responsive in terms of physical accessibility, travel distance and opening hours.¹¹⁴

All these efforts should go hand in hand with general sensitisation, awareness raising and legal literacy campaigns specifically on rights to property and inheritance. Religious and customary justice authorities should be equipped with information and training on gender issues and other relevant support to effectively protect women's rights and inheritance rights within the scope of their jurisdiction.

112 UN Women & OHCHR 2013 (n 22) 39.

113 UN Women & OHCHR 2013 (n 22) 46.

114 UN Women & OHCHR 2013 (n 22) 51.

Article 22

Special protection of elderly women

Lilian Chenwi

- The States Parties undertake to:
- (a) provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;
- (b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

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1 Introduction

An ageing population is a global and challenging phenomenon. Hence, over the years, the problems, needs and rights of the elderly have come into sharp focus.¹ International frameworks on ageing have been developed, with ongoing discussions on additional human rights standards.² At the African regional level, treaties with specific provisions on the elderly and a treaty dedicated to the rights of the elderly have been adopted. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is one of these treaties. Its article 22 on the rights of elderly women, is a notable novelty in the Protocol, supplementing the general provision on the elderly in the African Charter on Human and Peoples' Rights (African Charter).³ The general provision on the elderly in the African Charter is conflated with the rights of women, children and persons with disabilities in article 18 that primarily deals with the family. The explicitness in the Maputo Protocol is also significant because elderly women's rights are implied under existing United Nations (UN)

1 F Mégret 'The human rights of older persons: a growing challenge' (2011) 11(1) *Human Rights Law Review* 37-66; RKM Smith *International human rights law* (2020) 211.

2 Within the United Nations (UN), the elderly received attention (initially, incidentally) in 1948 (UN 'Report of the World Assembly on Ageing' UN Doc A/CONF.113/31 (1982) 1). The feasibility of further instruments and measures on ageing at UN level is under consideration (Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons' (OEWGA), <https://social.un.org/ageing-working-group/index.shtml> (accessed 22 February 2022). The OEWGA was established by Resolution 65/182: Follow-up to the Second World Assembly on Ageing, General Assembly, UN Doc A/RES/65/182 (2011).

3 Article 18(4).

human rights treaties.⁴ The protection of elderly women in Africa has subsequently been reinforced in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (Protocol on the Rights of Older Persons).⁵

Recognition of the intersection between age and gender in article 22 is significant because women experience ageing differently from men. Their situation is exacerbated by various intersectional factors including age discrimination, gendered disadvantages and ageist stereotypes.⁶ This necessitates the integration of gender in policies and programmes on the elderly and consideration of their specific needs.⁷ However, the intersection between ageing and gender has received less attention and is unevenly incorporated in decision-making and policy discussions.⁸ This is concerning since women comprise the majority of the elderly.

Worldwide, the ageing population is increasing (a billion in 2020, expected to increase to 1.4 billion by 2030 and 2.1 billion by 2050), with Africa witnessing a rapid increase.⁹ In Africa, there were over 62 million elderly persons in 2021. This number is expected to increase steeply, reaching 103 million by 2030 and over 203 million by 2050.¹⁰ Though the breakdown of the elderly by gender is not available for many countries in the region, elderly women will continue to be the majority, as life expectancy is generally higher for them.¹¹ The importance of paying attention to the intersection between old age and gender, and the vulnerabilities of women, has thus been emphasised.¹²

The African Commission on Human and Peoples' Rights (African Commission) recognises women and the elderly among vulnerable and disadvantaged groups.¹³ Generally, the elderly in Africa face many challenges including poverty, food insecurity, lack of social security, inadequate social welfare services, marginalisation, abuse, violence and more responsibilities to care for family members.¹⁴ Elderly women are a more vulnerable sub-group within the elderly. They have lower levels of education, are

4 For example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted 18 December 1979, entered into force 3 September 1981, UN Doc A/34/46, does not explicitly refer to the elderly. Its implicit recognition was confirmed in CEDAW Committee General Recommendation 27 on older women and protection of their human rights, UN Doc CEDAW/C/GC/27 (2010).

5 Adopted 31 January 2016, not yet in force (with nine ratifications – Angola, Benin, Burundi, Ethiopia, Kenya, Lesotho, Malawi, Rwanda and Togo, and 14 other signatories as at March 2023) art 9 & generally.

6 On intersection between gender and ageing, see C Mahler 'Human rights of older women: the intersection between aging and gender' UN Doc A/76/157 (2021) paras 5-15.

7 African Union (AU) Policy Framework and Plan of Action on Ageing 2002 (2003) 22.

8 Mahler (n 6) paras 6 & 12.

9 Smith (n 1) 233; WHO 'Ageing and health' (4 October 2021) <https://www.who.int/news-room/fact-sheets/detail/ageing-and-health> (accessed 22 February 2022); United Nations Development Fund (UNDP) *New threats to human security in the anthropocene: demanding greater solidarity* (2022) 97; United Nations Department of Economic and Social Affairs (UNDESA) 'World population ageing 2019: Highlights', UN Doc ST/ESA/SER.A/430 (2019) 1; Mahler (n 6) para 5.

10 AU Policy on Ageing (n 7) 5 & 6; World Health Organization (WHO) 'Assessing the impact of Covid-19 on older people in the African Region: a study conducted by the World Health' (2021) 1 & 5; I Doron, B Spanier & O Lazar 'The rights of older persons within the African Union' (2016) 10 *Elder Law Review* 6.

11 Doron et al (n 10) 5 ('The lifespan of African women in 2050 is predicted to be 70.8 years – higher than that of men, at 67 years'); UNDESA (n 9) 9 (globally, women at age 65 are expected to live another 18 years, while men at the same age add on average an additional 16 years to their lives); Mahler (n 6) para 5; C Stein & I Moritz 'A life course perspective of maintaining independence in older age' WHO/HSC/AHE/99.2 (1999) 4-5; UN 'World Assembly report' (n 2) 51.

12 WHO (n 10) 9.

13 ACHPR Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights (2011) para 1.

14 AU 'Social policy framework for Africa' First session of the AU Conference of Ministers in Charge of Social Development (27-31 October 2008), CAMSD/EXP/4(I) (2008) para 69 (adopted January 2009 by AU Executive Council 'Decision on the First Session of the African Union Conference of Ministers in charge of Social Development' Doc.EX.CL/477(XIV), Decision Ex.CL/Dec.473(XIV) (14th ordinary session 2009) para 2); AU Policy on Ageing (n 7) 5 & 6; Doron et al (n 10) 17; R Kihumba 'The rights of older people: One of the most neglected areas in advancing human rights in Africa' (2018)

usually poorer than older men and do not typically own property.¹⁵ Following the death of their spouse, they face property disputes and, because of belief systems and socio-economic changes, are denied access to decent shelter.¹⁶ Many of them, due to spending most of their lives undertaking home care or informal work without direct financial income, lack professional training and are not able to earn a salary, resulting in them lacking pension or financial resources of their own to live on during old age.¹⁷ This is exacerbated by age and gender discrimination in various spheres including employment.¹⁸ Their abuse and neglect have been confirmed in various studies.¹⁹ Primary healthcare systems are generally not geared to address their health needs.²⁰ Elderly women thus have multifaceted needs. Understanding their needs is important for understanding the rationale for the special protection afforded to them under article 22 of the Maputo Protocol.

This chapter provides a guide to understanding article 22 of the Maputo Protocol. Section 2 of the chapter briefly explains the drafting history related to article 22. Section 3 then focuses on the meanings of the concepts of 'elderly women' and 'special protection'. It also considers the nature and scope of state obligations as well as other relevant treaty provisions and policy frameworks that reinforce or expand on the rights of elderly women and related state duties. Section 4 considers the implementation measures undertaken by states. Section 5, the conclusion, also highlights the role of other actors in the implementation of article 22.

2 Drafting history

African regional efforts to address challenges resulting from ageing commenced in 1999 when issues affecting older persons were considered at a session of the Organization of African Unity's Labour and Social Affairs Commission.²¹ Subsequent efforts resulted in the adoption of the Maputo Protocol incorporating article 22 on elderly women, and the Protocol on the Rights of Older Persons.

The content of article 22 of the Maputo Protocol goes beyond earlier drafts. Both the 1999 draft²² and 2000 draft²³ included a vague provision on elderly women and placed elderly women and women with disabilities (WWDs) into one provision, with a sentence on them having 'the right to specific measures of protection commensurate with their physical and moral needs'.²⁴ The vagueness, it has

<https://www.acdhhs.org/2018/07/rights-older-people/> (accessed 30 May 2022); DM Chirwa & CI Rushwaya 'Guarding the guardians: a critical appraisal of the Protocol to the African Charter on the Rights of Older Persons in Africa' (2019) 19 *Human Rights Law Review* 53.

15 Doron et al (n 10) 14-15.

16 AU Policy on Ageing (n 7) 14.

17 Doron et al (n 10) 13, 15 & 17-19. Also, the elderly have operated as society's first line of defence when confronted with HIV/AIDS, with the consequence of them having to continue working to care for younger generation (M Maboreke 'Empowering women – Building national capacity to combat HIV/AIDS' Special Address at the Lecture-Cum-Roundtable Discussion, Accra, Ghana (16 June 2001) 7.

18 Chirwa & Rushwaya (n 14) 76; WHO (n 10) 67; J Dhembha & B Dhembha 'Ageing and care of older persons in Southern Africa: Lesotho and Zimbabwe compared' (2015) 13 *Social Work & Society* 2.

19 Doron et al (n 10) 10. In South Africa, for example, research established that 60% of the elderly experience physical and economic abuse, with emotional and economic abuse prevalent among elderly women.

20 See the example of older persons living in community settings in South Africa in G Kelly, L Mrengqwa & L Geffen "'They don't care about us": older people's experiences of primary healthcare in Cape Town, South Africa' (2019) 19 *BMC Geriatrics* 1-14.

21 Kelly et al (n 20) 7.

22 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

23 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, CAB/LEG/66.6 (final version of 13 September 2000) (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

24 Kigali Draft (n 22) art 6; Final Draft (n 23) art 22.

been argued, was deliberate to allow states leeway to act in accordance with prevailing conditions in their respective territories.²⁵ Further discussions resulted in subsequent drafts addressing elderly women in a separate provision, distinct from that on WWDs.²⁶

Hence, article 22 focuses on elderly women and their vulnerability to violence (including sexual violence) and intersectional discrimination.²⁷ The concept of special protection in article 22 is informed by the vulnerabilities of elderly women and the discrimination they face. Consideration was first given, in a 2001 draft, only to ‘physical and moral needs’ of the elderly (as used in article 18(4) of the African Charter), but subsequently expanded to ‘physical, economic and social needs’.²⁸ The explicit reference to violence was informed by the fact that acts of violence are obstacles to achieving equality, development and peace, and states’ obligation ‘to take special measures to eliminate violence against women, particularly those in vulnerable situations’ established by the Beijing Platform for Action.²⁹

3 Concepts

3.1 Elderly women

Old age goes beyond chronological age to include other determinants.³⁰ It is based on social assumptions and constructs, is context and purpose sensitive, and varies between and within states.³¹ Hence, considering other determinants, ageing is ‘the process of progressive change in the biological, psychological and social structure of individuals’.³² However, generally or for statistical purposes, ‘chronological age related to retirement and pension is used as the threshold for old age’, including in the context of women.³³

The Protocol on the Rights of Older Persons, drawing from relevant UN and AU frameworks, defines older persons as ‘those persons aged sixty (60) years and above’.³⁴ The Maputo Protocol defines women as ‘persons of [the] female gender, including girls’.³⁵ Elderly women, therefore, refer to persons of the female gender aged 60 years and above. However, some flexibility in the interpretation and application of this definition, taking into account domestic and functional variations, is necessary so as to not exclude elderly women that qualify as older persons in local contexts. The ‘elderly’ is a

25 Nsibirwa (n 23) 49-50.

26 Draft Protocol to the African Charter on Human and Peoples’ Rights of Women in Africa, as adopted by the Meeting of Governments Experts in Addis Ababa on 16 November 2001, CAB/LEG/66.6/Rev.1 (2001) 18 (art 21) (Revised Final Draft); Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft), arts 22 & 23; Maputo Protocol, art 22.

27 One of the grounds on which women face multiple forms of discrimination is age (CEDAW Committee General Recommendation 27 (n 4) paras 1 & 2).

28 Comments by the Office of the Legal Counsel on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the Meeting of Governments Experts (16 November 2001). See Comments by African Union Office of the Legal Counsel (AUOLC), CAB/LEG/66.6/Rev.1, 2002. This was made on the then art 21 that glossed elderly women and WWDs into one provision.

29 Revised Final Draft (n 26) 18.

30 Human Rights Council ‘Normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons’ Report of the UN High Commissioner for Human Rights, UN Doc A.HRC/49/70 (2022) para 5; Office of the High Commissioner for Human Rights (OHCHR) ‘Normative standards in international human rights law in relation to older persons: Analytical Outcome Paper’ (2012) 6-7, <https://social.un.org/ageing-working-group/thirdsession.shtml> (accessed 23 June 2023).

31 Mahler (n 6) para 7.

32 Stein & Moritz (n 11) 3.

33 Mahler (n 6) paras 7 & 8.

34 Protocol on the Rights of Older Persons art 1.

35 Maputo Protocol art 1(k).

heterogeneous group, comprising people who are major contributors to the development of society and those in need of care and support.³⁶ Hence, 'elderly women' is a heterogeneous group.

3.2 Special protection

The obligation to protect rights requires states to take positive measures³⁷ (legislative and other measures, including the provision of effective remedies) to ensure third parties (state and private actors) do not violate rights.³⁸ In the context of special measures, 'protection' means 'protection from violations of human rights emanating from any source, including discriminatory activities of private persons, to ensure the equal enjoyment of human rights and fundamental freedoms'.³⁹ Protection also 'indicates that special measures may have preventive (of human rights violations) as well as corrective functions'.⁴⁰ The special protection (or special measures) concept is thus used in international human rights law when requiring additional protection for vulnerable or disadvantaged individuals and groups. Elderly women require special protection as they face multiple and intersectional discrimination.

Special protection measures serve the important function of correcting inequality and discrimination in the enjoyment of rights.⁴¹ Though they may be seen to have the effect of favouring a specific group or persons, such preferential treatment is legitimate and justifiable if aimed at securing their adequate advancement to enable rights enjoyment, reducing or suppressing conditions that perpetuate discrimination, and achieving substantive equality.⁴² In requiring special protection for elderly women, article 22 thus obligates states to meet the dimensions of substantive equality (redress disadvantage, address prejudice, stereotyping, stigma and violence, enhance voice and participation, and accommodate difference and achieve structural change⁴³).

Special protection measures are temporary in nature, thus 'should be discontinued after their intended objectives have been achieved'.⁴⁴ However, article 22 is crafted in a way that allows for temporary, short-term and long-term measures; that is, it does not explicitly limit the measures states are expected to take.

36 UN General Assembly 'Follow-up to the Second World Assembly on Ageing' Report of the Secretary-General, UN Doc A/64/127 (2019) para 6.

37 All human rights impose a combination of positive (take appropriate measures to ensure a right) and negative (refrain from interfering with a right) duties (African Commission 'ESCR principles and guidelines' (n 14) para 4; I Bantekas & L Oette *International human rights law and practice* (2020) 79.

38 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, Communication 155/96, (2001) AHRLR 60 (ACHPR 2001) para 46; African Commission 'ESCR principles and guidelines' (n 13) para 7.

39 Committee on the Elimination of Racial Discrimination General Recommendation 32 on the meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, UN Doc CERD/C/GC/32 (2009) para 23.

40 As above.

41 L Chenwi 'Protection of the economic, social and cultural rights of older persons and persons with disabilities in the African regional system' in DM Chirwa & L Chenwi *The protection of economic, social and cultural rights in Africa: international, regional and national perspectives* (2016) 189.

42 African Commission 'ESCR principles and guidelines' (n 13) paras 34-35; General Recommendation 25, on art 4, para 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, CEDAW Committee, UN Doc HRI/GEN/1/Rev.7 at 282 (2004) paras 18-19; General recommendation 23 on political and public life, CEDAW Committee, UN Doc A/52/38/Rev.1 at 61 (1997) para 15.

43 S Fredman 'Substantive equality revisited' (2016) 14(3) *J•CON* 712, 713 & 727 where the four dimensions are explained.

44 African Commission 'ESCR principles and guidelines' (n 13) para 35; M Bossuyt 'The concept and practice of affirmative action' (17 June 2002) UN Doc E/CN.4/Sub.2/2002/21 (2002) paras 46, 60, 68 & 106.

3.3 Nature and scope of state obligations

In requiring special protection for elderly women, article 22 outlines state obligations to:

- (a) provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;
- (b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

Measures adopted must be ‘deliberate, concrete and targeted’ towards meeting the needs of the elderly. This is in line with the African Commission’s interpretation of the obligation to take steps, which is an immediate obligation.⁴⁵ Hence, as required by article 22, specific measures adopted should be proportionate to the elderly’s needs. Ensuring elderly women’s freedom from violence includes a duty to not take or threaten to take acts against the elderly that cause or could cause economic, physical, psychological and sexual harm to them, or not impose arbitrary restrictions on, or deprivation of, their fundamental rights.⁴⁶ It also includes a duty to protect them from third parties’ acts that cause harm to them.⁴⁷ Elderly women are, therefore, ‘entitled to all rights and respect’ and ‘should not be prevented from living a full life because of age’.⁴⁸

Though the African Commission has not elaborated specifically on the nature of article 22 obligations, it has elaborated on the obligations of states to protect rights, and in relation to some of the rights of the elderly.⁴⁹ For example, to ensure equality and non-discrimination in the enjoyment of rights, states have to recognise and take steps to combat intersectional discrimination based on sex/gender and age.⁵⁰ Related regional standards require states to eliminate social and cultural stereotypes that marginalise elderly women, adopt corrective measures in areas where discrimination exists in law and practice, and enforce measures and initiatives aimed at eradicating all forms of discrimination.⁵¹ On the right to health, the African Commission has clarified that states should ‘[e]nsure that the health needs of the elderly are protected, through training for health personnel, and the strengthening of social support systems and health education for [them] on nutrition and exercise/mobility’.⁵² The African Commission has also recognised that discrimination based on age prevents women from realising their right to self-protection and protection from HIV infection, and underscored older women’s right to be informed of their health status.⁵³ On social security, states’ social protection systems should cover old age as one of the principal branches of social security (adoption of ‘appropriate measures’ establishing ‘social security schemes that provide benefits to older persons, starting at a specific age, to be prescribed by national law’).⁵⁴

45 African Commission ‘ESCR principles and guidelines’ (n 13) para 18.

46 This is in line with the definition of violence against women in Maputo Protocol, art 1.

47 This is in line with the state’s duty to protect rights.

48 AU ‘Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (simplified)’ version made by K Kouste (Women in Law and Development in Africa – West Africa 2005), https://www.peacewomen.org/assets/file/Resources/NGO/hr_protocoltotheafricancharteronhumanandpeoplesrightsontherightsofwomeninafrica_2003.pdf (accessed 23 June 2023).

49 See sec 3.4 below, identifying other relevant provisions.

50 African Commission ‘ESCR principles and guidelines’ (n 13) para 38.

51 Protocol on the Rights of Older Persons art 3.

52 African Commission ‘ESCR principles and guidelines’ (n 13) para 67.

53 General Comment 1 on art 14(1)(d) & (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, African Commission (6 November 2012) paras 4 & 15.

54 African Commission ‘ESCR principles and guidelines’ (n 13) para 82.

On access to employment and professional training for elderly women, considering that many undertake unpaid care and homework, states should take necessary specific measures to, *inter alia*, 'recognise the economic value of care giving and other household work' and adopt national budget systems 'that record the value of women's unpaid contributions to society'.⁵⁵ Also, states should ensure appropriate work for elderly women that takes into consideration their medical and physical abilities, experience and skills, and eliminate discrimination in the workplace.⁵⁶

Furthermore, states have a positive obligation to amend or repeal domestic laws that are contrary to the protections required under article 22. The African Court on Human and Peoples' Rights (African Court) confirmed this in the *PALU Vagrancy Opinion*.⁵⁷ Although article 22 was not implicated in the case, in finding vagrancy laws to be incompatible with the right to protection of the family under article 18 of the African Charter (a provision that article 22 supplements), the Court held that 'arrests and detentions under vagrancy laws may result in the forcible removal of the suspected "vagrants" from their families' and, as a result, 'other family members that rely on those arrested under vagrancy laws, most notably ... the elderly ... may suffer from the deprivation of financial and emotional support', rendering them more vulnerable.⁵⁸ It then affirmed that states have a positive obligation to repeal or amend vagrancy (and related) laws, within a reasonable time but in the shortest time possible to ensure compliance with the Maputo Protocol and other regional human rights standards.⁵⁹ This is in sync with the state obligation under article 8(6) of the Protocol, to take all appropriate measures to ensure 'reform of existing discriminatory laws and practices in order to promote and protect the rights of women'.

Also of relevance is *APDF and IHRDA v Mali*, in which the African Court found the application of religious and customary law that grants a woman half of the inheritance a man receives to violate the right to an equitable share in the inheritance of property in article 21(2) of the Maputo Protocol.⁶⁰ As the practices were discriminatory and undermine women and children's rights, the court also found a violation of the right to non-discrimination in article 2 of the Maputo Protocol and article 16(1) of CEDAW, and a violation of Mali's obligation to eliminate harmful practices or traditions towards women in, *inter alia*, article 2(2) of the Maputo Protocol and article 5(a) of CEDAW.⁶¹ Hence, the protection of elderly women includes a duty to eliminate domestic laws and practices that violate their inheritance rights.

The duty of states to eliminate customary laws that allow for unfair gender discrimination against elderly women in the division of property in divorce was affirmed in the South African case of *Gumede*.⁶² The Court in confirming South Africa's international obligation to repeal such laws and practices cited the Maputo Protocol though not article 22, but speaking in the context of dignity and equality rights.⁶³ The implicated customary law unjustifiably and discriminatorily allowed for a marital property system

55 As above, para 59.

56 Protocol on the Rights of Older Persons art 6.

57 *Pan African Lawyers Union (PALU)*, Request 001/2018, Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa (4 December 2020) (*Vagrancy Opinion*).

58 *Vagrancy Opinion* (n 57) para 104.

59 *Vagrancy Opinion* (n 57) para 155.

60 *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v Mali*, Application 046/2016, Judgment (11 May 2018) paras 108-112. The court also found a violation of the right to non-discrimination and best interest of the child principle with reference to the African Charter on the Rights and Welfare of the Child (African Children's Charter).

61 *APDF and IHRDA v Mali* (n 60) paras 120-125 & 135(vii). A violation of African Children's Charter art 1(3) & 21, was also found in this regard.

62 *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) (*Gumede*).

63 *Gumede* (n 62) para 20.

that rendered women extremely vulnerable, stripped them of their dignity and rendered them poor and dependent.⁶⁴ The case affords special protection to elderly women, as the applicant was an elderly woman.⁶⁵

Generally, regional and domestic pronouncements that require states to eliminate laws and practices that discriminate against women in terms of property and inheritance rights⁶⁶ would have implications for elderly women, since they are often subjected to discriminatory property and inheritance laws.⁶⁷ Pertinently, the African Commission has underscored states' duty to ensure elderly women do not face discrimination, enjoy their right to equal sharing of joint property deriving from marriage, and are provided with effective access to justice during divorce proceedings.⁶⁸ It also emphasised states' duty to include qualitative and quantitative data disaggregated by age when reporting on measures to ensure women's right to property.⁶⁹

3.4 Linkage to other related provisions

3.4.1 Other Maputo Protocol provisions

Article 22 should be read together with the general obligation clause, article 26(1) of the Maputo Protocol, which is of overarching applicability⁷⁰ and provides clarity on implementation measures required. States are obliged to adopt 'legislative and other measures' aimed at 'full realisation of the rights' in the Protocol. Article 26(2) also imposes a general obligation on states to 'provide budgetary and other resources for the full and effective implementation of the rights' of elderly women. In addition, article 2 of the Protocol reinforces the obligation of states to ensure elderly women are protected from discrimination. Article 24 of the Protocol, requiring special protection of poor women and women head of families including those from marginalised groups and provision of an environment suitable to their needs and condition, is also relevant, considering that elderly women face continuous marginalisation and poverty, and many of them head their households. Furthermore, provisions requiring states to eliminate harmful practices (article 5), ensure respect for dignity (article 3), the rights to health (article 14), property (article 7) and inheritance (article 21), widows' rights (article 20), and prohibit all forms of violence against women (article 4) are relevant, as these are among the key areas in which rights abuses concerning the elderly in Africa take place.⁷¹

3.4.2 Other international treaties

At the African regional level, in addition to guaranteeing rights for 'all' and requiring states to recognise and give effect to them, the African Charter guarantees the right of the elderly to 'special measures of protection in keeping with their physical and moral needs' in article 18(4). Also relevant is article 18(3), requiring states to eliminate discrimination against women and ensure protection of their rights.

64 *Gumede* (n 62) paras 36 & 49.

65 S Omondi, E Waweru & D Srinivasan *Breathing life into the Maputo Protocol: jurisprudence on the rights of women and girls in Africa* (2018) 96.

66 See Z Nampewo 'Article 21' in this volume.

67 HelpAge International 'Protecting the rights of older people in Africa' (April 2008) 2, <https://www.helpage.org/silo/files/protecting-the-rights-of-older-people-in-africa.pdf> (accessed 14 July 2022).

68 General Comment 6 on the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (art 7(D)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia in February 2020 (African Commission General Comment 6) paras 54 & 56.

69 African Commission General Comment 6 para 63.

70 This is in line with the African Court's interpretation of a similar obligation clause, art 1 of the African Charter (see *Thomas v Tanzania*, Application 005/2013, Judgment on Merits (20 November 2015) para 136).

71 See generally, HelpAge International (n 67) elaborating on the key areas.

The obligation to protect elderly women is reinforced in article 9 of the Protocol on the Rights of Older Persons, requiring their protection, through legislative and other measures, from violence, sexual abuse, gender discrimination and abuse related to property and land rights, and protection of their right of inheritance.⁷² As the main regional treaty on the elderly, other provisions in it are applicable to elderly women, some of which elaborate on state duties in relation to aspects of article 22 of the Maputo Protocol. On elderly women with disabilities, article 22 should be read alongside relevant provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.⁷³ Particularly, its article 30, which places an obligation on states to ensure through legislative and other measures that the elderly with disabilities fully enjoy their rights and on an equal basis with other older persons, are protected from neglect and violence and have access to social protection programmes, appropriate services that respond to their needs and appropriate sexual and reproductive health services and information.

At the UN level, CEDAW, for example, is relevant.⁷⁴ The CEDAW Committee has elaborated on the rights of elderly women and their correlating state obligations under CEDAW. These include state obligations to ensure elderly women's protection from violence and discrimination, participation in paid work without discrimination based on age and gender, their right to dignity and access to appropriate social and economic benefits such as adequate non-contributory pensions.⁷⁵

3.4.3 Policy frameworks

The AU Policy on Ageing accentuates the duty of African states to develop policies on ageing, including recommendations on actions to be undertaken. It requires that states develop, review and revise legislation and policies to ensure that elderly women 'receive equitable treatment from customary and statutory laws' in the areas of property, land, inheritance and social security, among others, and their specific concerns are included in gender policies and programmes.⁷⁶ States should also '[e]nsure that social security and social programmes address the situation of older women whose employment has often been interrupted by maternity and family responsibilities'.⁷⁷

At the international level, relevant frameworks include the Vienna International Plan of Action on Ageing, which outlines principles and recommendations aimed at strengthening the capacities of states to deal with ageing.⁷⁸ Also, the UN Principles for Older Persons,⁷⁹ which African states are required to incorporate into their domestic laws,⁸⁰ outlines rights of the elderly in relation to independence, participation, care, self-fulfilment and dignity.

72 Protocol on the Rights of Older Persons art 9.

73 Adopted 29 January 2018, not yet in force (with five ratifications – Angola, Burundi, Kenya, Mali and Rwanda, and 10 other signatories as at March 2023).

74 CEDAW has been ratified by 52 African states as of March 2023.

75 See generally CEDAW Committee General Recommendation 27 (n 4).

76 AU Policy on Ageing (n 7) 8, 14-15 & 22.

77 AU Policy on Ageing (n 7) 18.

78 Vienna International Plan of Action on Ageing, adopted in 1982 at the First World Assembly on Ageing, endorsed by General Assembly resolution 37/51 on question of ageing, UN Doc A/RES/37/51 (3 December 1982).

79 UN Principles for Older Persons, adopted by General Assembly resolution 46/91 of 16 December 1991.

80 Protocol on the Rights of Older Persons Preamble & art 2(2).

4 Implementation

Though many African states do not have national legislation or policy specifically on the elderly,⁸¹ some (as seen below) have adopted legislative and other measures aimed at protecting the elderly and realising their rights. States that have reported specifically on the implementation of article 22 of the Maputo Protocol include Kenya, Seychelles, Zimbabwe, Angola, Burkina Faso, Malawi, Lesotho, Eswatini, Namibia, and South Africa. These states are used below as illustrative examples of implementation measures and challenges. Even when states do not report on the Maputo Protocol but on the African Charter, the African Commission, to its credit, has inquired about the elderly.

The African Commission has expressed concern over the lack of specific legislation on the elderly in, for example, Malawi,⁸² indicating that programme and policy measures alone are inadequate. Though it applauded Malawi for taking measures to protect the elderly, including the adoption and implementation of a National Policy on Older Persons, the state's failure to enact a draft Bill for older persons into law was an issue of concern. The African Commission thus called on Malawi to enact the law.⁸³

The African Commission's concern over the lack of legislation in Kenya⁸⁴ propelled the state to take further steps in ensuring the protection of the elderly. In reporting on article 22, Kenya referred to legislative and policy measures, including the adoption of a National Policy on Older Persons and Ageing and the Care and Protection of Older Members of Society Bill, and mandating its National Gender and Equality Commission to monitor and promote mainstream issues of the elderly in governance structures to achieve substantive equality and inclusion at all levels.⁸⁵ This reflected progress from its previous position of lack of specific legislation on the elderly.⁸⁶ Disbursement of grants to the elderly was among other measures reported under other provisions of the Protocol and African Charter.⁸⁷ The African Commission, in its concluding observations on the previous report, commended Kenya for its cash transfer programme that provided the elderly a monthly stipend of Ksh 2000 to protect beneficiaries against poverty, and its pilot programme for health cover under the National Health Insurance Fund for the elderly (inpatient and outpatient) that benefit from cash transfer (the pilot programme involves '500 beneficiaries who are spread across all Counties').⁸⁸

The impact or adequacy of measures is unclear in some cases due to scant reporting. Seychelles, for example, only referred to the establishment of the National Council for the Elderly, aimed at promoting management of the care of the elderly and other matters concerning them, to improve their quality of

81 HelpAge International Global Network 'Southern African expert meeting on older persons' (30 May 2018), https://www.chr.up.ac.za/images/campaigns/2018/AgeWithRights/files/southern_africa_meeting_presentations/gus_trigo.pdf (accessed 23 June 2023).

82 Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of Malawi 2015-2019, African Commission on Human and Peoples' Rights, adopted at the 70th ordinary session (23 February-9 March 2022) para 55.

83 Combined Report of Malawi (n 82) paras 26, 42, 55 & 69.

84 Concluding Observations and Recommendations on the Combined 8th to 11th Periodic Report of Kenya 2008-2014, African Commission on Human and Peoples' Rights, adopted at the 19th extraordinary session (16-25 February 2016) paras 43 & 59. Kenya's draft Older Persons Bill and National Policy on Older Persons were both pending adoption at the time.

85 Republic of Kenya Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the initial report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) paras 307 & 308.

86 African Commission Concluding Observations Kenya (2016) (n 84) paras 43 & 59.

87 Kenya Report (n 85) paras 136-140, 279, 307.

88 African Commission Concluding Observations Kenya (2016) (n 84) para 20.

life.⁸⁹ The state also briefly referred to special protection for the elderly (income support for travel)⁹⁰ and adoption of legislation (Employment Act of 1995) that addresses consequences of discrimination based on age or gender in the workplace.⁹¹ As of September 2022, the African Commission had not published its observations on the report, but Seychelles' information on the elderly is underprovided.

The African Commission raised concern over lack of information on implementation measures and their impact in, for example, Zimbabwe.⁹² On article 22, Zimbabwe referred to its Older Persons Act 1 of 2012 providing for the wellbeing of the elderly and creating an Older Persons Fund. Zimbabwe's Constitution also guarantees elderly persons the right to 'care, assistance, health care and medical assistance' from the state, and 'financial support by way of social security and welfare'.⁹³ However, the government cited significant economic challenges severely hampering its efforts to fulfil this right.⁹⁴ Malawi faces similar challenges hampering its efforts to implement human rights related programmes.⁹⁵ The African Commission found Zimbabwe's social safety net programmes to be commendable and acknowledged the prevailing challenges.⁹⁶ Nevertheless, states have a duty to make effective use of limited resources.

The African Commission has called on states to allocate adequate resources and facilities to older persons. For example, this call was made to Eswatini, as limited financial and human resources and facilities had been dedicated to the elderly, with the African Commission also requesting the state to improve access to healthcare facilities and build necessary capacity to facilitate effective communication with the elderly.⁹⁷ Eswatini has adopted a Social Development Policy for the provision of social-development services, and provides elderly grants (for persons 60 years and older) and free healthcare services in government facilities to elderly persons.⁹⁸ However, the state faces the challenge of lack of a regulatory framework to monitor disbursement of the grants to the elderly so that only qualifying persons receive it.⁹⁹ Another challenge is elderly abuse and neglect.¹⁰⁰ The state also recognised the need for more educational campaigns amongst the elderly on their rights.¹⁰¹

89 Seychelles: 3rd Periodic Report 2006-2019 (2021) 47.

90 Seychelles Report (n 89) 49.

91 Seychelles Report (n 89) 33.

92 Concluding Observations and Recommendations on the Combined 11th to 15th Periodic Report of Zimbabwe, African Commission on Human and Peoples' Rights, adopted at the 69th ordinary session, (15 November-5 December 2021) para 50.

93 Combined 11th to 15th Periodic Report of Zimbabwe 2007-2019, African Commission on Human and Peoples' Rights, adopted at the 65th ordinary session (21 October-10 November 2019) part C paras 11.1 & 11.4.

94 Zimbabwe Report (n 93) part C para 11.11.

95 African Commission Concluding Observations Malawi (2022) (n 82) paras 28.

96 African Commission Concluding Observations Zimbabwe (2021) (n 92) paras 31 & 34.

97 Concluding Observations and Recommendations on the Kingdom of Eswatini's Combined 1st to 9th Periodic Report on the implementation of the African Charter on Human and Peoples' Rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa, ACHPR 70th ordinary session: 23 February-9 March 2022, paras 42 & 74.

98 Kingdom of Eswatini Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa (2022) part B paras 525, 625-628.

99 Eswatini (2022) (n 98) para 629. The development of a Social Grants Regulatory framework was underway para 630.

100 Concluding Observations and Recommendations Eswatini (n 98) para 631. The elderly can apply for protection orders in cases of abuse under the Sexual and Domestic Violence Act, 2018.

101 Eswatini (2022) (n 98) para 631.

Another implementation challenge identified by the African Commission is the inadequacy of measures aimed at fighting poverty among the elderly, for example, in Burkina Faso.¹⁰² On article 22, Burkina Faso has taken measures aimed at providing assistance to the elderly, protecting them and improving their situation, such as the establishment of private reception centres to care for them especially those that are victims of social exclusion.¹⁰³ The African Commission commended Burkina Faso for, *inter alia*, preparing a Bill on the rights of the elderly and providing subsidies to organisations towards addressing their specific needs. However, the measures were inadequate. Considering that the specific needs of the elderly are not taken into account in relation to economic, social and cultural rights, the African Commission recommended adoption of a system that provides benefits to the elderly to fight poverty among them.¹⁰⁴

A further implementation gap relates to variance between domestic law and regional standards on classification of the elderly. Some states have a higher age threshold for accessing social benefits, resulting in exclusion of the elderly that have no other source of income. Lesotho, for example, reported adoption of legislative and other measures aimed at protecting elderly women.¹⁰⁵ However, only those 'aged 70 years and above who are not earning a pension or social grant from consolidated fund' can access social grants under the state's universal old age pension.¹⁰⁶ Additional implementation challenges included:

- that many elderly women who live alone end up being targeted for rape, robbery and other violent crimes;
- a lack of specific reporting mechanism for elderly women to report cases of abuse;
- delays in dealing with reported cases of abuse with some elderly women dying before obtaining justice (due to a general backlog of cases in the Lesotho courts);
- a lack of resources to provide financial assistance (social grants) to elderly women below 70 years that are not in a position to earn an income due to ill health
- violence and fatal attacks against elderly women by the community based on allegations of their involvement in witchcraft; and
- that elderly women are being forced to take on child care responsibilities.¹⁰⁷

The African Commission was concerned over the lack of specific legislation on the elderly, attacks on the elderly, childcare burden placed on them, their poor quality of life, lack of awareness on dementia affecting them, and lack of care facilities and homes for the elderly in Maseru even though the country has two institutions of this type.¹⁰⁸ The African Commission thus called on the state to, *inter alia*, enact legislation on the elderly that is in line with the Protocol on the Rights of Older Persons, protect them from violence and discrimination, ensure universal pension for them 'starts at the age of 65 or ideally 60', provide more facilities to cater for them and their needs, raise awareness on issues of the elderly, and respect of their rights.¹⁰⁹

102 Concluding Observations and Recommendations on the Combined 3rd and 4th Periodic Report of Burkina Faso 2011-2013, African Commission on Human and Peoples' Rights, adopted at the 21st extraordinary session (23 February-4 March 2017) para 31.

103 Combined 3rd and 4th Periodic Report of Burkina Faso 2011-2013, African Commission on Human and Peoples' Rights, adopted at the 57th ordinary session (4-18 November 2015) paras 354 & 357-360.

104 African Commission Concluding Observations Burkina Faso (2017) (n 102) paras 12, 24 & 31.

105 The Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa' (2018) paras 515-521.

106 Lesotho (2021) (n 105) para 516.

107 Lesotho (2021) (n 105) paras 522-526.

108 Concluding Observations and Recommendations on the Combined 2nd to 8th Periodic Report of Lesotho, African Commission on Human and Peoples' Rights, adopted at the 68th ordinary session (14 April-4 May 2021) para 52.

109 African Commission Concluding Observations Lesotho (2021) (n 108) para 73.

Namibia has also made provision for pension for the elderly, unlimited access to public health facilities and free medical assistance, and free funeral services for the deceased elderly persons.¹¹⁰ In South Africa as well, the elderly have access to old age pension, from age 60.¹¹¹ The state also has specific legislation on the elderly (Older Persons Act) that provides a framework for the empowerment and protection of the elderly and promotion and maintenance of their rights and needs, including making abuse (physical, sexual, psychological and economic) of the elderly an offence punishable in law.¹¹² The African Commission commended the state for measures taken to protect the elderly and facilitate their access to social assistance.¹¹³ However, stereotypes and other perceptions undermine the full realisation of their rights, requiring the state to develop a proactive sensitisation policy to reduce or eliminate the stereotypes/perceptions.¹¹⁴

Monitoring implementation is marred by the lack of disaggregated statistics on the elderly in state reports. For example, the African Commission has raised concern over the lack of disaggregated statistical data for older persons in Malawi's report, requesting the state to include such data in its subsequent report.¹¹⁵ Malawi's report on article 22, though highlighting the state's strategies to protect the elderly, which includes implementation of old age gender-sensitive and inclusive programmes, was scant.¹¹⁶ South Africa has also been called to provide adequate disaggregated data on, *inter alia*, gender and age, due to lack of adequate disaggregated data in its state report.¹¹⁷ Lack of comprehensive disaggregated data (including gender-disaggregated data) and failure to provide additional information on issues raised during presentation of the states' report was also a concern in relation to Rwanda.¹¹⁸ Rwanda's reporting on article 22 was brief, highlighting programmes on provision of housing facilities and food to the elderly, a law allowing for the inheritance of property that will benefit elderly women, provision of legal aid services to the elderly where needed, and provision of assistance to the elderly to acquire community-based health insurance funded by the state, among other measures.¹¹⁹ The state's reporting on the elderly under article 18 of the African Charter was also deficient.¹²⁰ The African Commission commended the state for the housing facilities and community-based health insurance measures and for including the crime of rape or harassment committed on an elderly person in its

110 Republic of Namibia 7th Periodic Report on the African Charter on Human and Peoples' Rights and the second report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) sec A para 27, sec B para 84 & sec C para 32.

111 Republic of South Africa Combined 2nd Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa (2015) part C para 525.

112 South Africa (2016) (n 111) part C paras 523-524.

113 Concluding Observations and Recommendations on the Combined 2nd Periodic Report under the African Charter on Human and Peoples' Rights and the initial report under the Protocol to the African Charter on the Rights of Women in Africa of South Africa, African Commission on Human and Peoples' Rights, adopted at the 20th extraordinary session (9-18 June 2016) para 18.

114 African Commission Concluding Observations South Africa (2016) para 55.

115 African Commission Concluding Observations Malawi (2022) (n 82) paras 43 & 55.

116 Republic of Malawi 2nd to 3rd Periodic Report on the implementation of the provisions of the African Charter and the Protocol to the African Charter on the Rights of Women in Africa, 2015-2019 (2020) para 247.

117 African Commission Concluding Observations South Africa (2016) (n 113) paras 39 & 55.

118 Concluding Observations and Recommendations on the Combined 11th to 13th Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa of Rwanda, African Commission on Human and Peoples' Rights, adopted at the 64th ordinary session (2019) paras 30-31.

119 Republic of Rwanda the 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the implementation status of the African Charter on Human and Peoples' Rights and the initial report on the implementation status of the Protocol to the African Charter on Human and Peoples' Rights and the rights of women in Africa (2017) part B, paras 118-122.

120 As above, paras 145-152.

Penal Code.¹²¹ However, the African Commission called on Rwanda to provide more information on the rights of the elderly in its subsequent periodic report.¹²²

Where disaggregated data is provided, it has generally been to a limited extent. For example, on article 22, Angola has provided for the rights of the elderly to housing, economic security, family and community life, and to active participation in community life, through legislative measures.¹²³ The report provides some disaggregated statistics to show elderly women beneficiaries. The state reported on policies and programmes to assist and protect the elderly, especially those living ‘in absolute vulnerability’ (through the Assistance Programme for the Elderly) and those ‘experiencing family abandonment, negligence or lack of means of subsistence, of whom 534 ... are women’ (through hosting them in care homes for the elderly).¹²⁴ Social protection has been provided to ‘37,391 elderly women in the community, out of a total of 67,984 elderly’ through the states’ Social Support Programme.¹²⁵ The elderly, including women, have also received assistance in terms of developing income-generation activities.¹²⁶ In article 18 of the African Charter, the state referred to assistance with food and non-food items to the elderly in the community.¹²⁷

Generally, most measures adopted by states are in line with article 22 of the Maputo Protocol, but inadequate in some instances. The challenge remains in translating the measures into concrete benefits for elderly women, which can be realised with effective implementation of the measures and monitoring of their impact. Weak implementation of laws and policies is identified in state reports as a major challenge to implementation.¹²⁸ Also, making the elderly (especially elderly women) visible, through accurate disaggregated statistics, remains a challenge.

5 Conclusion

Article 22 of the Maputo Protocol departs from the approach in the African Charter in not conflating elderly women with WWDs and children, and not limiting the rights of elderly women to a provision on the family. While it takes a step forward in terms of the protection of elderly women and outlines distinct state obligations, it is not detailed enough. It should therefore be read with other relevant treaty provisions, especially the Protocol on the Rights of Older Persons. Gaps remain in terms of practical implementation of measures adopted, resulting in discrimination and abuse against elderly women and violation of their rights. Disaggregated data by gender and age of beneficiaries of measures and programmes adopted in response to article 22 is relevant to ensure proper monitoring of implementation. An additional challenge is that of measures that are inadequately tailored to the needs of elderly women, partly on account of resource constraints (financial and human). Both preventive and protective measures should be adopted and practices that disadvantage elderly women should be removed. Overall, an ageing and gender perspective should be mainstreamed into domestic laws and policies. Also critical is awareness raising on the rights and needs of elderly women, ratification and domestication of the Protocol on the Rights of Older Persons, and alignment of national definition of ‘elderly’ with regional standards.

121 African Commission Concluding Observations Rwanda (2019) (n 118) para 77.

122 African Commission Concluding Observations Rwanda (2019) (n 118) para 56.

123 6th and 7th Periodic Report of Angola on implementation of the African Charter on Human and Peoples’ Rights and initial report on the Protocol on the Rights of Women in Africa 2011-2016, African Commission on Human and Peoples’ Rights, adopted at the 62nd ordinary session (25 April-9 May 2018) part C para 117. See also part B para 112.

124 Angola (2018) (n 123) part C paras 118-120. See also part B para 115.

125 Angola (2018) (n 123) part C para 121.

126 Angola (2018) (n 123) part B paras 114 & 116, part C 122.

127 Angola (2018) (n 123) part B para 116.a.

128 See eg, Malawi (2020) (n 116) para 142.

While the primary responsibility for implementation of article 22 rests with states, other actors have a role to play. The African Commission is a relevant actor through its reporting process as seen above. The African Commission can also play an enforcement role through its complaints procedure if presented with an opportunity to decide on the rights of elderly women. Other mechanisms within the African Commission for advancement of the rights of elderly women include its Working Group on the Rights of Older Persons and Persons with Disabilities, mandated to, *inter alia*, ensure ‘proper mainstreaming’ of the rights of the elderly ‘in the policies and development programmes of Member States’ and identify ‘good practices to be replicated in Member States’.¹²⁹ Also, the Special Rapporteur on Women in Africa has a role in monitoring implementation and has recently called on states to ensure that gender mainstreaming efforts at national level are ‘comprehensive and inclusive of all categories of women especially ... elderly women’,¹³⁰ thus pointing to an implementation gap in this respect. In addition, the African Court has a role to play through its interpretive mandate, in cases of violations of the rights of elderly women if presented with an opportunity to substantively address states’ compliance with their obligations in relation to elderly women.¹³¹ Other non-state actors such as civil society organisations (CSOs) and individuals (including elderly women) and society at large have a role to play. Elderly women can initiate measures on eliminating barriers to their rights enjoyment.¹³² CSOs can monitor practical implementation, identify gaps and assist with implementation of social protection programmes. Society should respect the rights of elderly women and treat them with dignity.

129 Resolution 143 on the transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa, African Commission (27 May 2009) ACHPR/Res.143(XXXV)09. The group comprises five members (two Commissioners of the African Commission and three experts in the field).

130 Special Rapporteur on Rights of Women in Africa (MT Manuela) ‘Inter-session Activity Report (May-November 2021)’, African Commission (69th ordinary session 15 November-5 December 2021) para 25 (Recommendation 6).

131 Maputo Protocol, art 27. This interpretive mandate is reaffirmed in Protocol on the Rights of Older Persons art 22(4) & (5).

132 This is in line with position reiterated in African Commission ‘Statement of the Working Group on the Rights of Older Persons and Persons with Disabilities in Africa of the African Commission on Human and Peoples’ Rights, on the occasion of the 27th International Day of Older Persons’ (1 October 2017), <https://www.achpr.org/news/viewdetail?id=25> (accessed 30 May 2022).

Article 23

Special protection of women with disabilities

Lilian Chenwi

- The States Parties undertake to:
- (a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;
- (b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

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1 Introduction

Disability is a global challenge, giving rise to a global commitment to ensuring realisation of the rights of persons with disabilities (PWDs) and equalisation of opportunities for them.¹ The number of PWDs are increasing dramatically due to various factors, including health conditions and demographic trends. They are considered ‘the world’s largest minority’, with an estimated 1.3 billion people (16 per cent of the world’s population) living with disabilities worldwide.² Disability is more prevalent among women than men, with women representing more than half of all PWDs.³ In Africa, about 80 million people live with some kind of disability.⁴ However, there is a general lack of up to date data on PWDs in the continent, and especially on women and girls with disabilities (WGWGs). This contributes to their

1 See generally, AH Eide & B Ingstad *Disability and poverty: a global challenge* (2011).

2 World Health Organization ‘Disability: key facts’ (7 March 2023), <https://www.who.int/news-room/fact-sheets/detail/disability-and-health> (accessed 1 April 2023). See also I Bantekas & L Oette *International human rights law and practice* (2020) 589; United Nations Department of Economic and Social Affairs (UNDESA) ‘Factsheet on persons with disabilities’, <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> (accessed 23 June 2023).

3 Global Call to Action against Poverty (GCAP) ‘Leave no women behind – Africa report: situation of women and girls with disabilities’ (2021), <https://gcap.global/wp-content/uploads/2021/03/Africa-Regional-Study-on-LNWB-final.pdf> (accessed 23 June 2023) 6 & 10.

4 T Falola & N Hamel *Disability in Africa: inclusion, care and the ethics of humanity* (2021) 406. UN Women East and Southern Africa ‘Mapping of discrimination against women and girls with disabilities in East & Southern Africa’ (2020) 5, <https://africa.unwomen.org/en/digital-library/publications/2020/04/mapping-of-discrimination-on-disabilities-in-esar> (accessed 2 September 2022) places the figure at 84 million.

nvisibility (worldwide, WGWDs make up more than half of all PWDs and nearly 20 per cent of all women, with the prevalence rate being 19.2 per cent for women compared to 12 per cent for men).⁵ Historically, aspects relating to WGWDs have been neglected in international and national laws and policies on disability.⁶ Over the years, a commitment to ensuring all PWDs have equal access to social and economic opportunities⁷ has intensified. International frameworks on disabilities or provisions on disabilities, including aspects relating to WGWDs, have been adopted, requiring a shift from just viewing disability as an individual impairment to focusing on measures aimed at creating enabling environments that accommodate all persons in their diversity and promote inclusiveness. Among them is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Its article 23, requiring special protection of women with disabilities (WWDs), is a notable novelty in the Protocol, supplementing the general provision on PWDs in the African Charter on Human and Peoples' Rights (African Charter).⁸ The protection of WWDs has subsequently been reinforced through the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities).⁹ Just over a year after the Maputo Protocol entered into force, the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) was adopted, with a provision on WGWDs.¹⁰

Article 23 of the Maputo Protocol recognises the intersection between disability and gender and the importance of considering the needs of WWDs. This is important because disabilities negate the enjoyment of rights by a significant number of women in Africa.¹¹ Generally, PWDs in Africa are the poorest of the poor and face structural barriers in education, employment and the environment, systematic discrimination, rights violations and prejudice in various spheres.¹² The consequence is their exclusion from family, community and political life.¹³ WGWDs are disproportionately affected.¹⁴ They face multiple and intersecting forms of discrimination.¹⁵ In Africa, they are chronically and multidimensionally poor, and face persistent discrimination, stigma, marginalisation and routine rights violation. They are also vulnerable to human trafficking and exploitation and have difficulties accessing education (due to exclusion, inaccessible buildings or learning materials not adapted to their needs). Difficulties in accessing education, in turn, have negative consequences for their employment prospects.

5 GCAP (n 3) 6, 8, 10 & 25; as stated by UN Women East and Southern Africa (n 4) vii & 3, this translates to one in five women having a disability. A 2011 report showed that moderate and severe disability was highest in Africa (both for men and women) compared to other regions, but prevalence of women with disabilities within Africa was higher than men: 60 and above age group at 54.3 per cent for women compared to 52.1 per cent for men; 15-59 years age group at 21.6 per cent for women compared to 16.4 per cent for men; and 0-14 age group at 6.5 per cent for women compared to 6.4 per cent for men (see WHO and the World Bank *World Report on Disability* (2011) 30; UN Women East and Southern Africa (n 4) 13 & 65).

6 General Comment 3 on women and girls with disabilities, CRPD Committee (25 November 2016), UN Doc CRPD/C/GC/3 (2016) para 3.

7 Eide & Ingstad (n 1) 2.

8 Article 18(4).

9 Adopted 29 January 2018, not yet in force (with five ratifications – Angola, Burundi, Kenya, Mali and Rwanda, and 10 other signatories as at March 2023) art 27 & generally.

10 Article 6.

11 See generally, Z Nampewo 'Gender, disability and human rights in Africa' in O Yacob-Haliso & T Falola (eds) *The Palgrave handbook of African women's studies* (2021) 2307-2321.

12 T Shakespeare, A Mugeere, E Nyariki & J Simbaya 'Success in Africa: people with disabilities share their stories' (2019) 8 *African Journal of Disability* 1; Protocol on the Rights of Persons with Disabilities, Preamble; African Union (AU) 'Social policy framework for Africa' First Session of the AU Conference of Ministers in Charge of Social Development (27-31 October 2008), CAMSD/EXP/4(I) (2008) para 72. The Social Policy Framework for Africa was adopted in January 2009 by the AU Executive Council (Decision on the First Session of the African Union Conference of Ministers in charge of Social Development, Doc.EX.CL/477(XIV), Decision Ex.CL/Dec.473(XIV) (14th ordinary session 2009) para 2).

13 AU Social policy framework (n 12) para 72.

14 Shakespeare et al (n 12) 1.

15 General Comment 3 (n 6) paras 2 & 3; GCAP (n 3) 6.

They also have difficulties accessing health and other social services, including social protection (due to stigma, infrastructural limitations or defects, problems of coverage and adequacy, and other challenges). Finally, WGWDs have limited access to food and housing and face barriers to participation in decision-making, among other challenges.¹⁶ Age, gender and type of disability exacerbates WWDs' marginalisation, stigma and invisibility, leading to violence and multiple discriminations.¹⁷ Domestic laws are ineffective due to the depth of negative attitudes and stigma towards them.¹⁸ WWDs in Africa have varying needs due to the diverse nature of classes of disability. Understanding their needs is relevant to appreciate the rationale for special protection for them and for fulfilling their needs.

This chapter provides a guide to understanding article 23 of the Maputo Protocol. Section 2 of the chapter briefly explains the drafting history related to article 23. Section 3 explains the concepts of WWDs and 'special protection' that are incorporated in article 23. It also considers the nature and scope of state obligations and other relevant treaty provisions that reinforce and elaborate on what is required of states in relation to protection of WWDs. Section 4 considers implementation measures that states have undertaken. Section 5, the conclusion, highlights the role of other actors in implementation of article 23.

2 Drafting history

Article 23 goes beyond earlier drafts of the Maputo Protocol in terms of its content, though not detailed enough. The Kigali Draft¹⁹ and Final Draft²⁰ included a vague provision on WWDs, placing them into one provision with elderly women and with a single statement on them having 'the right to specific measures of protection commensurate with their physical and moral needs'.²¹ This vagueness has been seen as deliberate 'so that states have leeway to act according to the prevailing conditions in their separate territories'.²² Further discussions resulted in subsequent drafts addressing WWDs in a separate provision, distinct from that on elderly women.²³ As regards the needs of WDDs, initially, only two categories of needs were considered – 'physical and moral need' – but was subsequently expanded to 'physical, economic and social needs'. Also, 'disability' (in the singular, instead of 'disabilities') was initially used, which the Organisation of African Unity Office of the Legal Counsel flagged for

16 GCAP (n 3) 6-7 & 14-24 (capturing the lived experiences of WGWDs, using Kenya, Mali and Ghana as case studies). Abuse and discrimination was established in *Z v Tanzania*, Communication 24/2014, CRPD Committee (19 September 2019), UN Doc CRPD/C/22/D/24/2014 (2019) (concerning a Tanzania woman with albinism).

17 GCAP (n 3) 15.

18 As above.

19 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda.

20 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, CAB/LEG/66.6 (final version of 13 September 2000) (2000 Draft), reproduced in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

21 Kigali Draft (n 19) art 6; 2000 Draft (n 20) art 22. Non-governmental organisations (including African and women organisations) and various other interested parties participated in discussions leading to these and subsequent drafts (Nsibirwa (n 21)) 41; F Banda 'Blazing a trail: the African Protocol on women's rights comes into force' (2006) 50(1) *Journal of African Law* 72-74.

22 Nsibirwa (n 20) 49-50.

23 Draft Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, adopted by the Meeting of Governments Experts in Addis Ababa on 16 November 2001, CAB/LEG/66.6/Rev.1 (2001) 18 (art 21) (2001 Rev.1 Draft); Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia on 28 March 2003, MIN/WOM.RTS/DRAFT.PROT(II) Rev.5 (2003) arts 22 & 23; Maputo Protocol, art 22.

review.²⁴ The explicit reference to violence in article 23 was informed by the particular vulnerability of WWDs to violence, the fact that acts of violence impede achievement of equality, development and peace, and states' obligation 'to take special measures to eliminate violence against women especially those in vulnerable situations established by the Beijing Platform for Action.'²⁵

3 Concepts and definitions

3.1 Women with disabilities

Disability is an evolving concept, and there are various types of disabilities.²⁶ The concept 'WWDs' should not be viewed as a unitary status but an intersectional one. Disability intersects with gender, age, race and other constructs of otherness, resulting in negative outcomes for WWDs.²⁷ Also, WWDs are not a homogeneous group.²⁸ Based on the definition of women in the Maputo Protocol as 'persons of female gender, including girls',²⁹ the term WWDs includes girls with disabilities (GWDs). Also, drawing from the definition of PWDs in the Protocol on the Rights of Persons with Disabilities,³⁰ WWDs refers to women and girls

who have physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments', which in interaction with environmental, attitudinal and other barriers hinder their full and effective participation in society on an equal basis with others.³¹

Hence, the term includes different types of impairments and allows for accommodation of more expansive interpretations. An African context to PWDs is evident in the explicit recognition of those with a developmental disability and environmental and attitudinal barriers, compared to the CRPD definition of PWDs.³²

Furthermore, a shift from viewing WWDs as mere objects of charity or passive members of society or as just a medical problem requiring medical or rehabilitation intervention to fix it is evident in the above definition, read together with article 23 and other relevant provisions of the Maputo Protocol. The definition recognises barriers in society as disabling and WWDs as full and effective participants in society. In addition, WWDs are placed within a human rights framework - they are viewed as holders of rights and able to claim the rights on an equal basis with others, with states parties required to protect WWDs and remove barriers that inhibit realisation of their rights and their inclusion as full and effective participants in society. The above is reflective of aspects of both the social and human rights approaches to disability.³³

24 Comments by the Office of the Legal Counsel on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted by the Meeting of Governments Experts on 16 November 2001).

25 2001 Rev.1 Draft (n 23) 19.

26 L Chenwi 'Housing for persons with disabilities in South Africa' (2021) 21(3) *International Journal of Housing Policy* 324.

27 See, eg, J Moodley & L Graham 'The importance of intersectionality in disability and gender studies' (2015) 29(2) *Agenda* 24-33, establishing in the South African context, how disability intersects with gender (in addition to age and race) to result in negative outcomes in employment, education and income for PWDs particularly black WWDs.

28 General Comment 3 (n 6) para 5.

29 Maputo Protocol, art 1(k).

30 Protocol on the Rights of Persons with Disabilities, art 27 & generally.

31 Protocol on the Rights of Persons with Disabilities, art 1.

32 L Chenwi 'Protection of the economic, social and cultural rights of older persons and persons with disabilities in the African regional system' in DM Chirwa & L Chenwi *The protection of economic, social and cultural rights in Africa: international, regional and national perspectives* (2016) 182.

33 For further reading on the different approaches to disability, see UNDESA, Division for Social Policy and Development 'Toolkit on disability for Africa' (18 November 2016) <https://www.un.org/development/desa/dspd/2016/11/toolkit-on-disability-for-africa-2/> (accessed 1 April 2023), see module on 'Introducing the United Nations Convention on the Rights of Persons with Disabilities' 5-8.

3.2 Special protection

The obligation to protect rights requires states to take positive measures³⁴ (legislative and others, including the provision of effective remedies) to ensure third parties (state and private actors) do not violate rights.³⁵ In the context of special measures, ‘protection’ means ‘protection from violations of human rights emanating from any source, including discriminatory activities of private persons, to ensure the equal enjoyment of human rights and fundamental freedoms’.³⁶ Protection also ‘indicates that special measures may have preventive (of human rights violations) as well as corrective functions’.³⁷ ‘Special’ in this legal context does not mean ‘favoured’ but ‘unique’. The concept of special protection (or special measures) is thus used in international human rights law when requiring additional protection for vulnerable or disadvantaged individuals and groups.³⁸ Special measures include measures that are referred to in some countries as affirmative action or measures, or positive action.³⁹ Affirmative action should be consistent with the goal of remedying situations of disadvantage or exclusion of a group. WWDs require special protection as they face multiple and intersectional discrimination.⁴⁰

Special protection measures serve the important function of correcting inequality and discrimination in the enjoyment of rights.⁴¹ Hence, though they may be seen to have the effect of favouring the specific group or persons, such preferential treatment is legitimate and justifiable if aimed at ‘securing the adequate advancement of members of vulnerable and disadvantaged groups’ to enable rights enjoyment, reducing or suppressing ‘conditions that perpetuate discrimination’, and at achieving substantive equality.⁴² In requiring special protection for WWDs, article 23 thus obligates states to meet the dimensions of substantive equality (redress disadvantage, address prejudice, stereotyping, stigma and violence, enhance voice and participation, and accommodate difference and achieve structural change).⁴³

Special protection measures are temporary in nature, thus ‘should be discontinued after their intended objectives have been achieved’.⁴⁴ However, article 23 of the Maputo Protocol is crafted in a way that allows for temporary, short-term and long-term measures; that is, it does not explicitly limit

34 All human rights impose a combination of positive (take appropriate measures to ensure a right) and negative (refrain from interfering with a right) duties (Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples’ Rights, African Commission (24 October 2011) para 4; Bantekas & Oette (n 2) 79.

35 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, Communication 155/96, (2001) AHRLR 60 (ACHPR 2001) para 46; African Commission ‘ESCR principles and guidelines’ (n 34) para 7.

36 General Recommendation 32 on the meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, CERD Committee (24 September 2009) UN Doc CERD/C/GC/32 (2009) para 23.

37 As above.

38 Though the Protocol on the Rights of Persons with Disabilities does not use ‘special protection’ terminology in the provision on the women and girls with disabilities (art 27 – reference is made to ‘specific measures’), the Protocol considers ‘the right to *special measures of protection* in keeping with their physical or moral needs’ as informed by the African Charter (Preamble; emphasis added).

39 General Recommendation 32 (n 36) para 12.

40 The African Commission seems to conflate multiple and intersectional discrimination (African Commission ‘ESCR principles and guidelines’ (n 34) para 1(l)). However, CRPD Committee, in the context of WGWDs, provides distinct definitions for the concepts – multiple discrimination as ‘a situation in which a person experiences discrimination on two or more grounds, leading to discrimination that is compounded or aggravated’ and intersectional discrimination as ‘a situation where several grounds interact with each other at the same time in such a way as to be inseparable’ (General Comment 3 (n 6) para 4(c)).

41 Chenwi (n 32) 189.

42 African Commission ‘ESCR principles and guidelines’ (n 34) paras 34-35.

43 S Fredman ‘Substantive equality revisited’ (2016) 14(3) *J•CON* 712, 713 & 727 where the four dimensions are explained.

44 African Commission ‘ESCR principles and guidelines’ (n 34) paras 35.

the measures states are expected to take to temporary specific measures. Considering the temporal nature of special measures and the multifaceted nature of disability, an integrated approach that focuses attention on the needs and rights of PWDs as those of ordinary people caught at a physical and social disadvantage is also important.

3.3 Nature and scope of state obligations

Article 23 of the Maputo Protocol, in requiring special protection for WWDs, outlines distinct state obligations to

- (a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;
- (b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

The obligation to protect WWDs in article 23 is broadly phrased, encompassing the protection of their rights in general. That is, not limited to the identified rights in the provision. For example, though article 23 is silent on their right to healthcare or reproductive services, states have a duty to protect these rights as seen below. Article 23 is yet to be elaborated on in case law, and there is scarcity of regional jurisprudence on the rights of WWDs and correlating state obligations. The African Commission on Human and Peoples' Rights (African Commission) has clarified the obligations of states in relation to some economic, social and cultural rights (ESCR) of PWDs, thus relevant to WWDs. It has also elaborated on state obligations in the context of mental health patients in *Purohit and Moore v Gambia (Purohit)*,⁴⁵ confirming the multiple and intersecting violations that PWDs experience. The impugned legislation was found to be inconsistent with the rights to be free from discrimination, be heard, challenge one's detention, be detained in humane conditions, review a determination of insanity and the right to health. The pronouncements were not in relation to article 23 of the Maputo Protocol but rather the African Charter. However, as they related to PWDs and considering the Protocol is supplementary to the Charter, the pronouncements are relevant to understanding states' obligations concerning WWDs under article 23.

Specific measures adopted must be 'deliberate, concrete and targeted' towards meeting the needs of WWDs. This is in line with the African Commission's interpretation of the obligation to take steps, which is of an immediate nature.⁴⁶ In *Purohit*, the African Commission, with reference to the right to health, accentuated states' obligation to take 'concrete and targeted steps, while taking full advantage of [their] available resources' to ensure full realisation of rights without discrimination.⁴⁷ Though many African states are affected by poverty and lack of resources, this alone, as held by the African Commission, does not absolve them of this obligation.⁴⁸ The African Commission did not articulate what would constitute sufficient steps in fulfilling this obligation but held that because the right to health is fundamental to the survival of persons with mental disabilities and their integration into society, their right to proper health care should never be denied.⁴⁹ This could be interpreted to mean that the African Commission would hold a state to a higher standard of accountability even where resources are demonstrably lacking, if an aspect of a right alleged to have been violated affected the survival of the claimant. Hence, as required by article 23 of the Maputo Protocol, specific measures

45 *Purohit and Moore v Gambia*, Communication 241/2001 (2003) AHRLR 96 (ACHPR 2003), concerning a challenge to the legislative regime for mental health patients in the Gambia.

46 African Commission 'ESCR principles and guidelines' (n 34) para 18.

47 *Purohit* (n 45) para 84.

48 *Purohit* (n 45) para 84.

49 African Commission 'ESCR principles and guidelines' (n 34) para 85.

should be proportionate to the rights and needs of WWDs and ensure non-discrimination in the enjoyment of their rights.

On the right to health of PWDs, the African Commission has also expressed in its ESCR principles and guidelines that states have to

- ensure accessible health facilities for WWDs;
- provide specific and needed health services for persons with intellectual, psychosocial and physical disabilities (including access to dignified and humane care and treatment);
- ensure prisoners with intellectual and psychosocial disabilities obtain the necessary medical treatment and care;
- ensure integration of mental health care into community health care systems;
- support PWDs to live independently in the community (rather than in institutions);
- ensure the rights of persons with intellectual, psychosocial, and physical disabilities that are institutionalised; and
- ensure WWDs have access to ‘information centres on HIV/AIDS, tuberculosis and other related infectious diseases’.⁵⁰

Also, the African Commission has held that discrimination based on disability prevents women from realising their right to self-protection and protection from HIV infection and emphasised the right of women with physical and mental disabilities to be informed of their health status.⁵¹

Specific measures aimed at facilitating access to employment, professional and vocational training for WWDs should, *inter alia*, promote employment opportunities and career advancement for WWDs (including assistance in finding, maintaining and returning to employment), and ensure their effective access to general technical and vocational guidance programmes.⁵²

To facilitate effective participation in decision-making, states have to provide necessary financial and political support.⁵³ WWDs’ right to participate in decision making can only be limited ‘on objective and reasonable criteria established by law’.⁵⁴ In *Purohit*, the African Commission found no objective bases within the legal system of the state to exclude persons with mental disabilities from political participation.⁵⁵ It also clarified that legal incapacity may not necessarily mean mental incapacity, and the former can only be invoked with reference to a law that conforms to internationally acceptable norms and standards.⁵⁶ Domestic case law has also addressed the question of the participation of WWDs, specifically their representation in elective bodies. For example, the Kenyan case of *Njoroge v Independent Electoral Boundaries Commission*⁵⁷ confirms that PWDs cannot be excluded from elections based on their disability. Reference was made in the case to article 23 of the Maputo Protocol, among other provisions in the Protocol and other treaties, which the court noted with appreciation, adding that the instruments should be read ‘in line with the Constitution of Kenya and in light of the claim of the petitioners’.⁵⁸ State duty to ensure the right of WWDs to participate in decision-making in article 23 was also mentioned in *National Gender and Equality Commission v Independent Electoral and Boundaries*

50 African Commission ‘ESCR principles and guidelines’ (n 34) paras 3 & 67.

51 General Comment 1 on art 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, African Commission (6 November 2012) paras 4 & 15.

52 African Commission ‘ESCR principles and guidelines’ (n 34) para 59.

53 As above para 29.

54 *Purohit* (n 45) paras 75-76.

55 *Purohit* (n 45) para 76.

56 *Purohit* (n 45) para 75.

57 *Njoroge v Independent Electoral Boundaries Commission (IEBC)* [2013] eKLR.

58 *Njoroge* (n 57) 7 & 17.

*Commission*⁵⁹ and *Director of Public Prosecutions, Western Cape v Prins*⁶⁰ to support the contentions in the cases, but the provision was not elaborated on by either court.

States' obligation to ensure WWDs are not discriminated against based on disability includes an obligation to take reasonable accommodation measures. This is drawn from the definition of 'discrimination based on disability' as 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others, of all human and peoples' rights in the political, economic, social, cultural, civil or any other field' and includes 'denial of reasonable accommodation'.⁶¹ Reasonable accommodation refers to 'necessary and appropriate modifications and adjustments where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human and Peoples' Rights'.⁶² Hence, states have to 'recognise and take steps to combat intersectional discrimination' based on sex/gender and disability.⁶³ As held in *Purohit*, condemning a person described as a lunatic to automatic and indefinite institutionalisation is contrary to the rights to equality and non-discrimination.⁶⁴ In the case, the African Commission linked the right to non-discrimination to human dignity, holding that dignity 'is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination'.⁶⁵ It found the use of terms like 'lunatic' and 'idiots' in the challenged legislation to describe persons with mental disabilities to be dehumanising and a denial of their human dignity.⁶⁶ It also held that at the heart of the right to dignity is the right to enjoy a decent life.⁶⁷ Hence, state measures should aim at ensuring WWDs have a decent life. In the context of children (thus girls) with disabilities, the African Court on Human and Peoples' Rights (African Court) in *PALU Vagrancy Opinion* (endorsing the UN Committee on the Rights of the Child's position) held that 'particular attention must be paid to *de facto* discrimination and disparities, which may be the result of a lack of a consistent policy'.⁶⁸

The African Commission has further elaborated on state obligations in relation to the rights to education, housing, property and social security of PWDs, thus applicable to WWDs. On education, states are required to work towards inclusive education through maximisation of 'academic and social development'. They have to ensure the provision of 'inclusive, quality and free primary education and access to inclusive quality secondary and tertiary education' without distinction to children with disabilities (CWDs) (thus includes GWDs) and 'effective individualised support measures' in academic and social development environments, with the goal of full inclusion.⁶⁹ On housing, and in the context of evicted persons who are wounded and sick, states are required to pay 'special attention' to the health needs of WGWDs and ensure they receive necessary medical attention and care 'to the fullest extent practicable and with the least possible delay' and have access to social and psychological services.⁷⁰ On property, the African Commission has emphasised states' duty to ensure WWDs do

59 *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & Another* [2013] eKLR paras 29-30.

60 *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (10) BCLR 1049 (SCA) para 1.

61 Protocol on the Rights of Persons with Disabilities, art 1.

62 Protocol on the Rights of Persons with Disabilities, art 1.

63 African Commission 'ESCR principles and guidelines' (n 34) para 38.

64 *Purohit* (n 45) paras 44 & 54.

65 *Purohit* (n 45) para 57.

66 *Purohit* (n 45) para 59.

67 *Purohit* (n 45) paras 49, 57 & 61.

68 *Pan African Lawyers Union (PALU)*, Request 001/2018, Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa (ACTHPR 4 December 2020) (*PALU Vagrancy Opinion*) para 125.

69 African Commission 'ESCR principles and guidelines' (n 34) para 71.

70 African Commission 'ESCR principles and guidelines' (n 34) para 79.

not face discrimination, enjoy their right to equal sharing of joint property deriving from marriage, and are provided with effective access to justice during divorce proceedings.⁷¹ States have to include quantitative and qualitative data disaggregated by disability, among other factors, when reporting on measures to ensure women's right to property.⁷² On social security, states' social protection systems should cover disability as one of the principal branches of social security, providing adequate income support to PWDs.⁷³ To ensure timely social security benefits and physical accessibility to social security services, '[p]articular attention' must be paid to PWDs.⁷⁴

Furthermore, states have a positive obligation to amend or repeal domestic laws that are contrary to the protections required under article 23. This was confirmed in *PALU Vagrancy Opinion*.⁷⁵ Though article 23 was not implicated in the case, in finding vagrancy laws to be incompatible with the right to protection of the family under article 18 of the African Charter (which article 23 supplements), the African Court held that 'arrests and detentions under vagrancy laws may result in the forcible removal of the suspected "vagrants" from their families' and, as a result, 'other family members that rely on those arrested under vagrancy laws, most notably ... the disabled may suffer from the deprivation of financial and emotional support', with the arrest accentuating their vulnerability.⁷⁶ It then affirmed states' positive obligation to 'repeal or amend' vagrancy and related laws, 'within reasonable time' but 'in the shortest time possible' to ensure compliance with the Maputo Protocol and other regional human rights standards.⁷⁷ This obligation is further in sync with the state obligation under article 8(6) of the Protocol to take all appropriate measures to 'reform of existing discriminatory laws and practices to promote and protect the rights of women'.

3.4 Linkages to other treaty provisions

3.4.1 Other Maputo Protocol provisions

Article 23 should be read together with the general obligation clause, article 26(1) of the Maputo Protocol, which is of overarching applicability⁷⁸ and provides clarity on the implementation measures required. Article 26(1) obliges states to adopt 'legislative and other measures' aimed at 'full realisation of the rights' in the Protocol. Hence, under article 23, states must adopt legislative and other measures. Article 26(2) also imposes a general obligation on states parties to 'provide budgetary and other resources for the full and effective implementation of the rights' of WWDs. As evidenced from the African Commission's *Purohit* decision and recommendation on Zimbabwe,⁷⁹ even where resources are inadequate, effective use of resources is required. In addition, the obligation of states to ensure WWDs are protected from discrimination based on age is reinforced in article 2 of the Maputo Protocol. Also, since WWDs are poor and marginalised, article 24 is relevant, as it requires special protection of poor women, including those from marginalised groups, and the provision of an environment to them that is suitable to their needs and condition. Likewise, provisions requiring states to respect the dignity

71 General Comment 6 on art 7(d) of the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa: The right to property during Separation, divorce or Annulment of marriage, African Commission (4 March 2020) paras 54 & 56.

72 General Comment 6 (n 71) 63.

73 General Comment 6 (n 71) para 82.

74 General Comment 6 (n 71) para 82.

75 *PALU Vagrancy Opinion* (n 68).

76 *PALU Vagrancy Opinion* (n 68) para 104.

77 *PALU Vagrancy Opinion* (n 68) para 155.

78 This is in line with the African Court's interpretation of a similar obligation clause, art 1 of the African Charter (see *Thomas v Tanzania*, Application 005/2013, Judgment on Merits (20 November 2015) para 136.

79 See secs 3.3 above & 4 below.

(article 3) and the integrity and security of women (article 4), eliminate harmful practices (article 5), and ensure rights to property (article 7) and health (article 14) are relevant.

3.4.2 Other treaty provisions

At the African regional level, in addition to guaranteeing rights for ‘all’ and requiring states parties to recognise and give effect to them, the right of PWDs to ‘special measures of protection in keeping with their physical and moral needs’ is provided for in article 18(4) of the African Charter. In *Purohit*, the African Commission reiterated this, holding that ‘as a result of their condition and by virtue of their disabilities, mental health patients should be accorded special treatment which would enable them not only attain but also sustain their optimum level of independence and performance’.⁸⁰ Also of relevance to WWDs is article 18(3)’s obligation on states to eliminate discrimination against women and protect their rights. Furthermore, article 23 obligations have been reinforced in article 27 of the Protocol on the Rights of Persons with Disabilities. The provision requires states to, *inter alia*:

- eliminate barriers that thwart the participation of WWDs in society and barriers in the labour market;
- protect WGWDs from discrimination based on disability;
- protect WWDs from – and provide them with psychosocial and rehabilitation and support against – sexual and gender-based violence;
- develop programmes aimed at overcoming their social and economic isolation;
- ensure their access to income-generating opportunities;
- adopt and implement specific measures to ensure their full participation in sports, culture and technology; and
- integrate disability-inclusive gender perspectives in legislation, plans, policies, programmes, budgets and other activities.

As the main regional treaty on the rights of PWDs, other provisions in the Protocol on the Rights of Persons with Disabilities are applicable to WWDs. Also of importance is its safeguard clause (article 36), requiring that interpretations of the Protocol not derogate from principles and values in other relevant instruments and that, in the event of a conflict, preference be given to interpretations that favour rights of PWDs and protect their legitimate interest. Other regional treaties with provisions relevant to WGWDs (which the Protocol on the Rights of Persons with Disabilities cites in its Preamble) are the African Youth Charter,⁸¹ African Charter on Democracy, Elections and Governance,⁸² and African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.⁸³ Regarding WWDs that are elderly, article 23 should be read alongside relevant provisions of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons,⁸⁴ especially its article 13, in terms of which states have a duty to protect the rights of elderly WWDs through legislative and other measures and ensure they have access to assistive devices and specialised care commensurate with their needs.

At the UN level, CRPD, which has been widely ratified by African states⁸⁵ and is recognised in the Preamble to the Protocol on the Rights of Persons with Disabilities, guarantees the rights for persons with disabilities with correlating state obligations. It recognises that WGWDs ‘are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment,

80 *Purohit* (n 45) para 81.

81 Adopted 2 July 2006, entered into force 8 August 2009.

82 Adopted 30 January 2007, entered into force 15 February 2012.

83 Adopted 23 October 2009, entered into force 6 December 2012.

84 Adopted 31 January 2016, not yet in force (with nine ratifications – Angola, Benin, Burundi, Ethiopia, Kenya, Lesotho, Malawi, Rwanda and Togo, and 14 other signatories as at March 2023).

85 Ratified by 51 African states and signed by one other as at March 2023.

maltreatment or exploitation' and 'are subject to multiple discrimination'.⁸⁶ States, therefore, have an obligation to take appropriate measures to ensure their full and equal enjoyment of rights and their empowerment, development and advancement.⁸⁷ The CRPD Committee has elaborated on states' obligations in relation to women and GWDs under article 6 of the CRPD and with reference to general principles in article 3 of the Convention.⁸⁸ The principles include respect for inherent dignity, equality, non-discrimination and full and effective participation, which are also echoed in article 23 of the Maputo Protocol. Overall, the committee emphasised states' obligations to take all appropriate measures (legislative, administrative, educational, cultural, political, linguistic and other measures) to ensure full and equal enjoyment of rights by WDDs and achieve and promote their advancement and empowerment. Measures could be temporary or long term. The committee further underscored states' obligations to respect, protect and fulfil the rights of WWDs and in relation to specific rights (including those explicitly captured in article 23 of the Maputo Protocol).

4 Implementation

As seen below, states have adopted constitutional, legislative and other measures aimed at protecting the rights of persons (including women) with disabilities. Many state reports to the African Commission are on measures taken with reference to article 18(4) of the African Charter. However, some have reported specifically on article 23, such as the latest reports of Lesotho, Kenya, Seychelles, South Africa, Burkina Faso, Zimbabwe, Angola, Malawi, Eswatini and Namibia, referred to below as illustrative examples.

The African Commission has applauded Rwanda for the progress made in supporting the rights of PWDs and in ensuring they not only benefit from but can contribute to national development.⁸⁹ Particularly, programmes have been put in place to facilitate access to education by WGWDs, strategies and guidelines have been developed for mainstreaming disability in the health system at the community level, and gender promotion and promotion of WWDs is highlighted in policy on modalities of recruitment, appointment and nomination of public servants.⁹⁰ In addition, the government has a principle of '[n]o one left behind' aimed at facilitating access to employment and other social programs for PWDs, has established a National Council for Persons with Disabilities to deal with issues affecting PWDs, and ensures representation of PWDs in parliament (one representative of PWDs in the Parliament's Chamber of Deputies).⁹¹ Though Rwanda has adopted constitutional, legislative and other measures aimed at protecting PWDs and facilitating disability mainstreaming, including the adoption of the Law to Protect the Rights of Persons with Disabilities, financial, capacity, structural and ideological challenges to implementing the Maputo Protocol remain; hence, the state's recognition of the need for relentless efforts to ensure sustainability and improvement of achievements.⁹²

The African Commission has expressed concern over the lack of specific disability law at the domestic level that is in line with relevant regional standards. In Lesotho, for example, where this

86 CRPD, Preamble & art 6.

87 As above art 6.

88 General Comment 3 (n 6).

89 African Commission Concluding Observations and Recommendations on the Combined 11th to 13th Periodic Report of Rwanda, adopted at its 64th ordinary session 24 April to 14 May 2019, para 78.

90 As above. It should however be noted that CRPD Committee has raised concern over accessibility of health care facilities and public health education in remote areas and exclusion of refugees with disabilities from health care coverage in Rwanda. Concluding Observations on the initial report of Rwanda, CRPD Committee (3 May 2019), UN Doc CRPD/C/RWA/CO/1 (2019) para 45.

91 African Commission Concluding Observations on Rwanda: 11th to 13th Periodic Report (n 89) paras 15 & 25.

92 Republic of Rwanda the 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the implementation status of the African Charter on Human and Peoples' Rights and the initial report on the implementation status of the Protocol to the African Charter on Human and Peoples' Rights and the rights of women in Africa (2017) paras 123-126 & 130.

gap existed, the African Commission called on the state to ensure its draft Disability Bill complies with standards in the Protocol on the Rights of Persons with Disabilities.⁹³ Lesotho reported on constitutional, legislative (acknowledging the absence of a disability-specific law) and administrative (including plans to counter poverty faced by WWDs through, *inter alia*, social grants) measures to give effect to article 23.⁹⁴ It also noted challenges that WWDs face such as discrimination based on disability and gender, forced sterilisation, inadequate infrastructure that reasonably accommodates them, stagnant or ineffective law enforcement of cases of PWDs, and inability of WWDs that have graduated from vocational programme to start their own businesses due to non-provision of start-up kits.⁹⁵ The challenges point to failure of the state to implement article 23 effectively. The African Commission called on the state to raise awareness on issues of disability and on how to mainstream the rights of PWDs.⁹⁶ Another implementation concern related to the insufficiency of special schools for CWDs.⁹⁷ This affects GWDs' education right, which should be protected in terms of, among others, article 23. The African Commission called on Lesotho to provide more special schools for CWDs.⁹⁸ Lesotho was commended for its provision of health services to PWDs without waiting for payment, provision of sign language in courts, and ongoing efforts to make legislation accessible to PWDs.⁹⁹

Though Malawi has domestic disability law (Disability Act) and policies (like the National Action Plan on Persons with Albinism and the National Disability Mainstreaming Strategy and Implementation Plan 2018-2023) to address issues affecting PWDs, the African Commission was concerned that the law was still under review, requesting the state to enact it into the law.¹⁰⁰ Furthermore, a major challenge to the implementation of Maputo Protocol provisions in Malawi, identified by the state, is the implementation of domestic laws and policies.¹⁰¹ Also, the lack of disability-friendly justice services, including sufficient officers trained on the needs of WGWDs, has resulted in them experiencing exclusion and denial of access to justice.¹⁰²

Implementation gaps also exist in Kenya despite some commendable measures adopted. Kenya has policies, programmes, plans and institutional measures aimed at ensuring the inclusion of persons with disabilities in society and learning institutions, including in regular schools.¹⁰³ Specifically, the National Policy for Persons with Disabilities, the Disability Policy and Guidelines for the Public Service, the National Plan of Action on the Rights of Persons with Disabilities 2015-2022, the Sector Policy for Learners and Trainees with Disability, and Education Assessment and Resource Centres for assessment of children with special needs and promotion of their inclusion in regular schools.

93 African Commission Concluding Observations and Recommendations on the Kingdom of Lesotho's Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa adopted at its 68th ordinary session 14 April to 4 May 2021, paras 52 & 73.

94 The Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2018) paras 527-530.

95 Lesotho (2018) (n 94) paras 531-533.

96 Lesotho (2021) (n 94) para 73.

97 Lesotho (2021) (n 94) para 53.

98 Lesotho (2021) (n 94) para 74.

99 Lesotho (2021) (n 94) para 26.

100 African Commission Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of Malawi 2015-2019, adopted at its 70th ordinary session 2022, paras 42 & 55.

101 Republic of Malawi 2nd to 3rd Periodic Report on the Implementation of the Provisions of the African Charter and the Protocol to the African Charter on the Rights of Women in Africa, 2015-2019 (2020) para 142.

102 Malawi (2020) (n 101) para 250.

103 Republic of Kenya Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) para 309.

However, Kenya faces implementation challenges related to access to housing, basic services, buildings and transport, and the existence of multiple forms of discrimination against WGWDs.¹⁰⁴ Relevant to addressing these challenges is the state's National Gender and Equality Commission, mandated 'to monitor and promote mainstream issues of disabilities ... in governance structures in order to achieve substantive equality and inclusion at all levels'.¹⁰⁵ In reporting on other rights in the African Charter and Maputo Protocol, Kenya referred to policy and other measures taken to protect the rights of PWDs and facilitate their participation in political and cultural life.¹⁰⁶

The impact of measures in some contexts is unclear due to underreporting on article 23. Seychelles, for example, scantily reported on legislative and other measures adopted to ensure equality in benefits and rights between women and men with disabilities and equal access to free health care, social protection and schooling.¹⁰⁷ They include the Disabled Person's Act (to serve in the best interest of PWDs), Exceptional School of Seychelles (to cater for the educational needs of PWDs) and Vocational Training Center (to prepare PWDs to enter the working world). In reporting on other rights, the state referred to general legislation (Employment Act) that addresses the consequences of discrimination based on gender or disability in the workplace.¹⁰⁸ It has also provided income support for travel for PWDs.¹⁰⁹ The African Commission has yet to issue its observations on the report at the time of writing. However, the information is not detailed enough to provide a full picture on the implementation of article 23.

In addition to underreporting, non-disaggregation of information makes it difficult to monitor and understand the extent of WWDs that have benefitted from measures directed at PWDs. Burkina Faso, for example, reported with limited information on article 23, indicating adoption of legislative and institutional measures, and the disability card system that provides benefits in the areas of housing and living conditions, education, health, social welfare, employment, vocational training, social integration, communication, transportation, sports and leisure, and culture and arts.¹¹⁰ The information is, however, not disaggregated; hence, the extent of representation of WWDs among the beneficiaries is unclear. Notwithstanding, the African Commission commended Burkina Faso for having the measures in place.¹¹¹ Rwanda also provided limited statistics when reporting on article 23, specifically statistics of GWDs *vis-à-vis* males at different levels of education, reflecting progress in promoting education for GWDs.¹¹² The African Commission also expressed concern over the lack of adequate disaggregated data on gender, age, type of disability and other elements that are important in formulating policies for PWDs in relation to South Africa.¹¹³ It thus recommended that South Africa provides such data in its subsequent report.¹¹⁴

104 Kenya (2020) (n 103) para 309.

105 Kenya (2020) (n 103) para 307.

106 Kenya (2020) (n 103) paras 78, 122, 127 & 131-135. See also Concluding Observations and Recommendations on the Combined 8th to 11th Periodic Report of Kenya, African Commission (19th extraordinary session, 2016) para 20, commending Kenya on some measures adopted.

107 Seychelles: 3rd Periodic Report, 2006-2019, African Commission (69th ordinary session, 2021) 47-48.

108 Seychelles (n 107) 33.

109 Seychelles (n 107) 49.

110 Burkina Faso 3rd and 4th Periodic Report on the implementation of the African charter (2011-2013) (2015) paras 354-356.

111 African Commission Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso 2011-2013 adopted at its 21st extraordinary session, 2017, para 12.

112 Rwanda: 11th to 13th Periodic Report (n 92) part B para 125.

113 African Commission Concluding Observations and Recommendations on the 2nd Periodic Report of South Africa' adopted during its 20th extraordinary session, 2016, para 39.

114 South Africa (2016) (n 113) para 55.

Furthermore, the African Commission raised concern over provision of inadequate information on PWDs or on the actual implementation of measures that have been put in place in relation to Zimbabwe. The African Commission was concerned that the state did not provide information on measures taken to combat discrimination and stigmatisation for PWDs and how measures, policies and strategies put in place to protect their rights have been effectively implemented especially in the rural areas.¹¹⁵ On article 23, Zimbabwe referred to provisions in its constitution requiring the state to ensure PWDs, including WWDs are protected from exploitation and abuse, realise their full potential, participate in social and other activities, and are provided state-funded education and training where required.¹¹⁶ The state also referred to administrative, policy and institutional measures, including collaborative initiatives to ensure WGWDs have access to quality health and are given equal treatment and disability awareness training of health workers.¹¹⁷ The state cited 'significant economic challenges' it is facing, which severely hamper effective provision for the rights and welfare of PWDs.¹¹⁸ The African Commission, though noting that limited resources affect Zimbabwe's ability to ensure enjoyment of the rights in the Maputo Protocol, called on Zimbabwe to adopt legislative and other measures to combat discrimination and stigmatisation against PWDs, adopt and effectively implement appropriate policies and support programmes to protect their rights, and establish adequate budgetary and material resources to address inequality and other challenges faced by PWDs which restrict their full enjoyment of rights.¹¹⁹ Hence, states have to ensure the effective use of resources, and limited resources would not absolve a state from its article 23 obligations.

Discrimination against WWDs and their subjection to cultural, social and economic disadvantages are a challenge in Namibia, impeding their access to education, training and employment.¹²⁰ Programmes or campaigns to raise awareness on disability and the rights of PWDs is thus a key feature in the state's implementation measures.¹²¹ The state has also adopted disability-specific legislation (National Disability Council Act) and policy (National Disability Policy), among other measures.¹²² Similarly, constitutional and comprehensive legislative measures exist in South Africa to address discrimination based on disability and advance social inclusion.¹²³ The African Commission has commended South Africa for the measures adopted, including its provision of disability grants and free health care services for PWDs and its adoption of a framework for mainstreaming disability issues into policies, plans, programmes and activities of local government.¹²⁴ However, full realisation of rights of PWDs is undermined by stereotypes and other perceptions; hence, the African Commission called on South Africa to develop a proactive sensitisation policy to reduce or eliminate the stereotypes/perceptions.¹²⁵

Limited resources (human and financial) and facilities dedicated to PWDs have also been a concern in Eswatini, with the African Commission recommending that the state allocates adequate resources

115 African Commission Concluding Observations and Recommendations on the Combined 11th to 15th Periodic Report of Zimbabwe adopted during its 69th ordinary session, 2021, para 49.

116 Zimbabwe: Combined 11th to 15th Periodic Report, 2007-2019, African Commission, 65th ordinary session, 2019, part C paras 11.2 & 11.3.

117 Zimbabwe (n 116) part C paras 11.6-11.10.

118 Zimbabwe (n 116) part C para 11.11.

119 Concluding observations on Zimbabwe: 11th to 15th Periodic Report (n 115) paras 34 & 63.

120 Republic of Namibia 7th Periodic Report on the African Charter on Human and Peoples' Rights and the second report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) para 33.

121 Namibia (n 120).

122 Namibia (n 120) sec B para 84.

123 Republic of South Africa Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2015) paras 526-532.

124 Concluding Observations on South Africa: 2nd Periodic Report (n 113) para 18.

125 Concluding Observations on South Africa: 2nd Periodic Report (n 113) para 55.

and facilities to PWDs.¹²⁶ The African Commission was also concerned about restricted access to healthcare for PWDs and limited communication capacity.¹²⁷ It thus called on the state to continue to support accessibility for PWDs through adequate resource provision, improve access to healthcare facilities for PWDs, and build the necessary capacity to facilitate effective communication with them.¹²⁸ Eswatini has adopted constitutional, legislative and other measures affording protection to WWDs but their effective implementation remains a challenge. The measures include disability-specific legislation to promote and protect rights of PWDs (Persons with Disability Act), policy providing strategies to promote and protect rights of PWDs (National Disability Policy), plan to ensure mainstreaming of disability in planning, implementation and monitoring of programmes (National Disability Action Plan, 2018-2022), and skills training for WWDs.¹²⁹ However, the Act is not fully operationalised due to the non-establishment of key institutions provided for under the Act.¹³⁰

States have generally not adequately addressed discrimination against WWDs. In addition to the aforementioned examples where discrimination is persistent, it is also a concern in Angola despite having legislative and other measures in place. On article 23, Angola referred to the adoption of legislative frameworks that guarantee the rights of PWDs.¹³¹ Their practical application/impact is however unclear. A social protection measure has also been put in place (Social Support Programme) under which 12 457 WWDs (out of 27,684 persons) have benefitted from compensation and technical aids.¹³² A critical implementation challenge identified by the state is ‘multiple discrimination’ that women and CWDs face, with the state taking measures to guarantee equal enjoyment of rights.¹³³ Generally, the state acknowledged the existence of various challenges, particularly cultural ones, in fulfilling women’s rights, but which could be addressed through adoption of different programmes and plans.¹³⁴ Hence, the state is falling short in terms of meeting its article 23 obligations in some respects.

Generally, some implementation measures are in line with article 23, while others are inadequate. In some cases, the legislative measures are general (that is, they address disability generally as opposed to adopting a specific law on PWDs that comprehensively addresses their rights and needs). The African Commission has thus called on some states, as seen above, to enact specific laws on PWDs, and to ensure the enacted law accords with standards in relevant regional treaty law. Effective implementation of adopted measures remains a challenge, and lack of disaggregated data contributes to the invisibility of WWDs. Underreporting on implementation of article 23 is a challenge, limiting effective monitoring.

One of the aspects that states have underreported on is sexual abuse against WWDs with reference to article 23 (with some state reports addressing violence in general). It is, however, evident from CRPD Committee’s observations that some African states are falling short on implementation of their obligation to ensure WWDs are free from violence including sexual abuse. The CRPD Committee’s

126 Concluding Observations and Recommendations on the Kingdom of Eswatini’s Combined 1st to 9th Periodic Report on the implementation of the African Charter on Human and Peoples’ Rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa, ACHPR 70th ordinary session: 23 February-9 March 2022, paras 42 & 74.

127 Concluding Observations and Recommendations Eswatini (n 126) para 42.

128 Concluding Observations and Recommendations Eswatini (n 126) paras 42 & 74.

129 Kingdom of Eswatini Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples’ Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa (2021) paras 632-639.

130 Eswatini Periodic Report (2021) (n 129) para 641.

131 Republic of Angola 6th and 7th Report on the Implementation of the African Charter on Human and Peoples’ Rights and Initial Report on the Protocol on the Rights of Women in Africa 2011-2016 (2017) para 123.

132 Angola (n 131) part C para 121.

133 Angola (n 131) part C para 125.

134 Angola (n 131) part C paras 126-127.

observations are instructive as a similar obligation is contained in the CRPD, requiring state parties to ensure PWDs are free from violence and abuse. For example, regarding Rwanda, CRPD Committee raised concern over, *inter alia*, prevalence of violence, abuse and neglect against PWDs particularly women, lack of effective measures to monitor and prevent sexual, gender-based and other forms of violence in communities, refugee camps, institutions and homes where PWDs live, and absence of ‘dedicated mechanisms for identifying, investigating and prosecuting’ perpetrators.¹³⁵ On South Africa, CRPD Committee raised concern over, *inter alia*, lack of measures to prevent and tackle violence, ‘including rape and other forms of gender-based sexual violence’ and abuse against WGDs and to protect women and girls with intellectual and psychosocial disabilities from all forms of violence and abuse, and the absence of ‘dedicated mechanisms for identifying, investigating and prosecuting instances of exploitation, violence and abuse against’ PWDs.¹³⁶ Recently, CRPD Committee raised concern about the omission of provisions on the elimination of violence against WWDs, including conjugal violence, in Tunisia’s law on the elimination of violence against women (Law No. 2017-58 of 11 August 2017) and the fact that staff who respond to reports of violence against women are not trained to work with WWDs.¹³⁷ CRPD made recommendations towards addressing these implementation gaps.

5 Conclusion

UN and African regional frameworks have been developed aimed at creating enabling environments that accommodate all persons in their diversity and promote inclusiveness. At the national level, some states have adopted specific laws on PWDs recognising this shift, while others are yet to do so. The intersection between gender and disability has been recognised in both international and domestic frameworks. article 23 of the Maputo Protocol underscores the importance of ensuring a gender perspective in state interventions relating to PWDs. It departs from the approach in the African Charter in not conflating WWDs with elderly women and children under a provision on the family. Furthermore, regional and domestic jurisprudence has sought to protect the rights of PWDs, underscoring non-discrimination or exclusion on basis of disability, states’ obligation to protect PWDs and ensure their rights, the need for domestic laws to be consistent with their rights and needs, and the multiple and intersecting violations that PWDs experience. Gaps, however, remain in terms of its practical implementation, resulting in persistent discrimination, violence and abuse against WWDs and violation of their rights. Measures are thus required to ensure adequate protection of WWDs and improvement of their situation. In addition to the adoption of specific legislation on PWDs that incorporates a gender perspective (where such is lacking), states should ratify and domesticate the Protocol on the Rights of Persons with Disabilities. This is likely to trigger greater inclusion of the concerns of PWDs and WWDs in domestic laws and policies. Publication of disaggregated data by gender on PWDs, including as beneficiaries of state measures, is relevant to ensuring proper monitoring of the implementation of article 23. States should educate society as whole on the needs and rights of WWDs as part of efforts to, *inter alia*, eliminate the stigma associated with disability, address discrimination, abuse, violence and ensure they are treated with dignity. Also, there is a need for African states, as part of specific measures required under article 23, to develop ‘an intersectional lens in criminal justice systems to ensure greater criminal accountability for violence that WWDs face daily’.¹³⁸

135 Concluding Observations on Rwanda: Initial report (CRPD) (n 90) paras 29-30.

136 CRPD Committee Concluding Observations on the Initial Report of South Africa (23 October 2018), UN Doc CRPD/C/ZAF/CO/1 (2018) paras 10, 11 & 30-31.

137 CRPD Committee Concluding Observations on the Combined 2nd and 3rd Reports of Tunisia (24 March 2023), UN Doc CRPD/C/TUN/CO/2-3 (2023) paras 27-28.

138 See generally, A Johnson & S Nabaneh ‘The invisible woman: limits to achieving criminal accountability for violence against women with disabilities in Africa’ in A Budoo-Scholtz & EC Lubaale (eds) *Violence against women and criminal justice in Africa: volume II, sexual violence and vulnerability* (2022) 259-301.

Though primary responsibility for implementation of article 23 rests with states, the African Commission, African Court, civil society organisations (CSOs), WWDs and other individuals have a role to play. The role of CSOs and individuals includes respecting the rights of WWDs and raising awareness of their needs, with the primary responsibility still resting with states. The African Commission, as seen from the preceding sections, is a relevant actor in monitoring and enforcement of article 23 through its reporting and complaints procedures. Another relevant mechanism within the African Commission is its Working Group on the Rights of Older Persons and Persons with Disabilities, established in 2009 and mandated to, *inter alia*, ensure proper mainstreaming of the rights of PWDs in state policies and development programmes and identify good practices to be replicated by states.¹³⁹ Also, the African Commission's Special Rapporteur on Women in Africa can monitor implementation and has called on states to ensure that gender mainstreaming efforts at national level 'are comprehensive and inclusive of all categories of women especially ... women with disabilities',¹⁴⁰ thus recognising an implementation gap in this respect. In addition, the African Court has a role in ensuring the implementation of article 23, especially in cases of violations if presented with an opportunity, as it has jurisdiction over matters of interpretation arising from the application or implementation of the provision.¹⁴¹ Such an opportunity is necessary, as there is a need to further develop jurisprudence, specifically on article 23 of the Maputo Protocol, as evident from the case law considered in this chapter. The overall goal should be the realisation of the rights and needs of WWDs.

139 Resolution 143 on the transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa, African Commission (27 May 2009) ACHPR/Res.143(XXXV)09. The group comprises five members (two Commissioners of the African Commission and three experts in the field).

140 Special Rapporteur on Rights of Women in Africa 'Inter-session Activity Report (May-November 2021)', MT Manuela, African Commission (69th ordinary session 15 November-5 December 2021) para 25 (Recommendation 6).

141 Maputo Protocol, art 27. This interpretive mandate is reaffirmed in Protocol on the Rights of Persons with Disabilities, arts 34(4) & (5).

Article 24

Special protection of women in distress

Johanna Bond

- The States Parties undertake to:
- (a) ensure the protection of poor women and women heads of families including women from marginalised population groups and provide an environment suitable to their condition and their special physical, economic and social needs;
 - (b) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

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1 Introduction

Article 24 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is entitled: 'Special protection of women in distress'. There is very little academic writing on the importance, significance, or implementation of article 24. Therefore, this chapter aims to shed some light on the meaning of article 24 and explore how the article might be used more effectively to advance women's rights within states that have ratified the Protocol. To date, scholars and activists have not fully explored the potential of article 24, which functions as a 'catch-all' provision protecting women from marginalised groups or other women who require special consideration of 'physical, economic, and social needs'.

Beginning in the 1980s, researchers increasingly found that poverty around the world was becoming 'feminized.'¹ By the time the African Union (AU) adopted the Maputo Protocol in 2003, it was widely recognised that, worldwide, women were more likely to live in poverty than men.² This held constant

1 VM Moghadam 'The feminization of poverty in international perspective' (1998) 5 *Brown Journal of World Affairs* 225; RE Figura 'An end to poverty through microlending: an examination of the need for credit by poor, rural women and the success of microlending programs' (2002) 8 *New England Journal of International & Comparative Law* 157.

2 Figura (n 1) 157.

regardless of how poverty was measured. In low- and middle-income countries, women were more income-poor than men and lagged in metrics of well-being, such as health, nutrition, and education.³

In sub-Saharan Africa in the early twenty-first century, the incidence of poverty was greater than anywhere except for parts of South Asia.⁴ Africa led the world in both the depth of poverty and vulnerability to poverty.⁵ As elsewhere, women in Africa were more likely to live in poverty and experience poverty differently than men, particularly in rural areas. Lacking marriage, property, and inheritance rights under statutory and customary law, African women were excluded from property ownership (despite doing the vast majority of agricultural labour), evicted from their homes and land upon widowhood, and limited in their ability to undertake or benefit from paid work outside the home.⁶ Gendered division of labour meant that women and girls spent hours on time-intensive tasks, such as collecting food, water, and fuel, completing agricultural labour, and taking care of children and household tasks. As a result of this 'time poverty,' African women and girls struggled to attend school or participate in income-generating activities.⁷ Moreover, poverty had harmful consequences for women's dignity and physical and mental health. African women and girls living in poverty were at higher risk of gender-based violence (GBV) and maternal morbidity and mortality, harms that, in turn, perpetuate poverty.⁸

Two decades after the Maputo Protocol was adopted, African poverty still has a female face. In 2020, for every 100 men between the ages of 25 and 34 living in extreme poverty in sub-Saharan Africa, there were 127 women.⁹ COVID-19 further reversed gains made by African women. During the COVID-19 pandemic, 'women [bore] the brunt of job losses and comprise[d] the majority of frontline health workers, many of whom are under-protected and under-paid.'¹⁰ Progress by women's land rights campaigns stalled as advocacy efforts were interrupted, the implementation of property law reforms halted, and movement limitations left women farmers vulnerable to land grabbers.¹¹ Rates of GBV spiked.¹² School closures disrupted the education of millions of girls, placing them at higher risk of

- 3 M Buvinic 'Women in poverty: a new global underclass,' (1998) *Foreign Policy* <https://publications.iadb.org/publications/english/document/Women-in-Poverty-A-New-Global-Underclass.pdf> (accessed 10 May 2023).
- 4 HM McPerson 'Poverty among women in Sub-Saharan Africa: A review of selected issues' (2010) 11 *Journal of International Women's Studies* 51.
- 5 McPerson (n 4) 51.
- 6 S Fredman 'Women and poverty – a human rights approach' (2016) 24 *African Journal of International & Comparative Law* 496-97; McPerson (n 4) 53.
- 7 McPerson (n 4) 54.
- 8 McPerson (n 4) 55-57.
- 9 United Nations Secretary General 'Despite gains, poverty 'still has a woman's face' Secretary-General tells high-level meeting on gender equality' *Women's Empowerment in Africa* (8 February 2020) <https://www.un.org/press/en/2020/sgsm19962.doc.htm> (accessed 10 May 2023).
- 10 W Byanyima 'Overcoming COVID-19 will require tackling inequality' (7 April 2021) *World Economic Forum* <https://www.weforum.org/agenda/2021/04/overcoming-covid-19-will-require-tackling-inequality/> (accessed 16 May 2023).
- 11 'How COVID-19 is affecting land rights in africa' (21 April 2020) International Land Coalition <https://africa.landcoalition.org/en/newsroom/how-covid-19-affecting-land-rights-africa/> (accessed 16 May 2023); 'Implications of COVID-19 to women's livelihood and tenure rights' oxfam & international land coalition https://oi-files-cng-prod.s3.amazonaws.com/panafrica.oxfam.org/s3fs-public/file_attachments/COVID-19,%20women%20and%20land%20rights.pdf (accessed 10 May 2023).
- 12 R Warah 'The invisible pandemic: COVID-19's toll on african women and girls' (1 July 2021) <https://www.one.org/africa/blog/invisible-pandemic-gender-based-violence/> (accessed 10 May 2023); CM Roy et al 'Impact of COVID-19 on gender-based violence prevention and response services in Kenya, Uganda, Nigeria, and South Africa: a cross-sectional survey' (January 2022) 2 *Frontiers in Global Women's Health* 1 <https://www.frontiersin.org/articles/10.3389/fgwh.2021.780771/full> (accessed 10 May 2023).

female genital mutilation (FGM), child marriage, teenage pregnancy, food insecurity, and poverty. Experts project that many of these school-age girls will not re-enrol.¹³

As of 2022, United Nations (UN) Women estimated that 62.8 per cent of the world's extremely poor women and girls live in sub-Saharan Africa and another 5.1 per cent live in Northern Africa and Western Asia.¹⁴ In absolute numbers, this translates to hundreds of millions of people. Moreover, between 2021 and 2030, the number of women and girls living in extreme poverty in sub-Saharan Africa is expected to increase from 249 million to 283 million.¹⁵ In early 2022, experts predicted that 41.2 per cent of women and girls in sub-Saharan Africa would live below national poverty lines that year. A similar percentage is estimated to live on less than USD \$1.90 (ZAR34.25) per day, with 68.3 per cent and 86.7 per cent of sub-Saharan African women and girls living on less than USD \$3.20 (ZAR57.68) and \$5.50 (ZAR99.14), respectively.

Many of these individuals live in households headed by women. Research on the feminisation of poverty also revealed that in the later part of the 20th century, the percentage of households headed by women rose worldwide, and that female-headed households (FHHs) are more likely to be poor.¹⁶ In Africa, recent studies have found that 23-26 per cent of all African households are headed by women, accounting for 18-21 per cent of the continent's population.¹⁷ These FHHs are more likely to be single adult households. They are frequently headed by widows (38 per cent), divorced women (17 per cent), and women who have never married (14 per cent), although approximately 31 per cent are married (often with non-resident husbands).¹⁸ Some debate exists around the economic well-being of FHHs compared to male-headed households (MHHs) due to the heterogeneity of FHH size and composition, as well as the head's marital status.¹⁹ However, controlling for the economies of scale experienced by larger MHHs, recent studies have found that sub-Saharan African households led by widowed, divorced, and never-married women tend to be poorer than households led by men.²⁰

In addition to experiencing poverty differently than men, African women also experience detention differently. In particular, incarcerated women who are pregnant or nursing have unique health concerns and are faced with serious challenges accessing healthcare and childcare while in prison.²¹ Access to antenatal and postnatal healthcare is often limited or non-existent.²² Despite having particular nutritional needs, pregnant and nursing women often receive the same food as other inmates, which

13 Byanyima (n 10); R Warah 'Africa's lost girls' (7 March 2022) *International Politics and Society* <https://www.ips-journal.eu/topics/democracy-and-society/africas-lost-girls-5773/> (accessed 10 May 2023); Human Rights Watch 'Impact of Covid-19 on children's education in Africa' (26 August 2020) <https://www.hrw.org/news/2020/08/26/impact-covid-19-childrens-education-africa#> (accessed 11 May 2023).

14 UN Women 'Poverty deepens for women and girls, according to latest projections' (1 February 2022) <https://data.unwomen.org/features/poverty-deepens-women-and-girls-according-latest-projections> (accessed 10 May 2023).

15 UN Women 'Covid-19 is driving women and girls deeper into poverty' (17 October 2020) <https://data.unwomen.org/features/covid-19-driving-women-and-girls-deeper-poverty> (accessed 10 May 2023).

16 Buvinic (n 3); Moghadam (n 1); Figura (n 2) 162; Ede'o et al 'Feminisation of multidimensional urban poverty in sub-Saharan Africa: evidence from selected countries' (2020) 32 *African Development Review* 632.

17 C Brown & D van de Walle 'Headship and poverty in Africa' (2022) 35 *World Bank Economic Review* 1038 <https://doi.org/10.1093/wber/lhaa024>; Moghadam (n 1) 229; A Milazzo & D van de Walle 'Women left behind? Poverty and headship in Africa' (2017) 54 *Demography* 1119 <https://read.dukeupress.edu/demography/article/54/3/1119/167708/Women-Left-Behind-Poverty-and-Headship-in-Africa> (Africa-wide, 26% of all households are currently headed by women, comprising 21% of Africa's population) (accessed 10 May 2023).

18 Brown & Van de Walle (n 17) 1126.

19 Brown & Van de Walle (n 17) 1039-1040.

20 Brown & Van de Walle (n 17) 1041, 1054.

21 Allen & Overy LLP, *Women in Prison Africa Regional Initiative* (2019).

22 Allen & Overy (n 21) 21-22.

is frequently insufficient in quantity and nutritional value.²³ In some facilities, women must give birth inside the facility unattended, with transfer to a hospital provided only in cases of complications. In other facilities, women are taken to outside facilities to give birth, but may be restrained during labour and returned to prison within days.²⁴

Physical safety is also a concern for pregnant or nursing prisoners. The Special Rapporteur on Prisons and Conditions of Detention has expressed concern about the lack of specific facilities for women and children separate from those for male detainees. The Rapporteur specifically noted that '[p]risons are not a safe place for pregnant women, babies and young children and it is not advisable to separate babies and young children from their mothers'.²⁵

As mentioned above, this chapter elucidates the meaning of article 24. Because article 24 has rarely been interpreted by entities such as the African Commission, this chapter discusses the meaning of the obligations under article 24 and identifies missed opportunities to offer guidance on the meaning of and context for the article. This chapter is organised into seven sections. Following this introduction, the second section addresses the drafting history of article 24. The third section describes the concepts and definitions that are helpful in interpreting the meaning of article 24. Section 4 explores linkages between article 24 and other provisions in the Maputo Protocol and in other human rights treaties. Section 5 analyses the nature and scope of a state party's obligations under article 24. The sixth section discusses state practice in the implementation of article 24, while referring to relevant Concluding Observations of the African Commission on Human and Peoples' Rights (African Commission or the commission). The concluding section assesses the progress made in realising the rights protected under article 24 and makes modest recommendations.

2 Drafting history

The drafting history of specific legal provisions often clarifies the meaning of the legal provisions in question. In the case of article 24, however, there is little information available. The legislative history of the Maputo Protocol indicates that article 24 was added in 2003 after much of the treaty had already been drafted. The earliest legislative history we have for the Maputo Protocol is from 1997 (Nouakchott Draft).²⁶ At this time, the draft Protocol did not include language concerning 'special protection of women in distress'. These early conversations about the substantive content of the Maputo Protocol, however, included provisions prohibiting the death penalty for pregnant women. Article 5 of the Nouakchott Draft (1997) states that states parties to the Protocol shall 'never sentence pregnant women to death'. This provision foreshadows the final text of article 24, which ensures 'the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity'.

In November 1999, language was added to the draft to provide special protection for elderly women and women living with disabilities.²⁷ Despite these additions in the Kigali Draft,²⁸ there was no mention

23 Allen & Overy (n 21) 21-22.

24 M Ackerman *Women in pre-trial detention in Africa* (2014) 29 https://acjr.org.za/resource-centre/WomenInPreTrial.Detention_V2.pdf (accessed 10 May 2023); Allen & Overy (n 21) 21.

25 *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa* (2012) 12, 14.

26 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

27 The first suggestions for inclusion of special protection for elderly women and women with disabilities is in the November 1999 Agreements, where attendees at the Kigali conference agreed that these provisions should be included in the Protocol. See Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda.

28 As above.

of the provisions now found in article 24. When the provisions relating to special protection for elderly women and women with disabilities were added in 2001, they were combined in a single proposed article that also included the following underlined language, which is now found in article 24:²⁹

State Parties shall undertake to: (a) provide protection to elderly women, *poor women and women head of families* and take specific measures commensurate with their physical economic and social needs.

Drafters later split this proposed article into two articles dealing separately with elderly women and women with disabilities. The language concerning 'poor women and women head of families' was cut from the provision regarding elderly women in January 2003 when drafters marked up the November 2001 draft language. The current article 24 language was drafted and proposed during the second meeting of experts held in March 2003, and the final article 24 language was accepted at the March 2003 ministerial meeting.

3 Concepts and definitions

Article 24 is perhaps the most under-utilised substantive provision in the Maputo Protocol. Article 24 has two provisions: The first section, section (a), includes broad language designed to protect poor women, women heads of households, women from marginalised groups, and other women needing special 'physical, economic, and social' care. The second provision, section (b), includes more specific language concerning the dignity rights of women in detention, including 'the right of pregnant or nursing women or women in detention.'

Article 24 requires states to undertake to 'ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs ...'. This language largely focuses on sub-groups of women who are particularly marginalised for reasons such as poverty, ethnicity, disability, and other aspects of identity that might require special protection.

Three concepts are central to the meaning and importance of article 24: distress, vulnerability, and dignity. 'Distress' appears in the heading of the article, which is titled 'special protection for women in distress.' Article 24 endorses the notion that, although all women may be subjected to discrimination or subordination, particular women need extra protection because of some vulnerability beyond gender that might cause distress. Poor women, for example, are explicitly mentioned in the article and are subject to the distress that arises from a lack of food, shelter, clean water, and health care.

Although not explicitly mentioned in article 24, vulnerability is at the heart of the protections provided by article 24. The article identifies sub-groups of women such as poor women, women heads of families, women from marginalised population groups, and pregnant or nursing women who are detained by the state, as particularly vulnerable and in need of special protection by the state. Article 24 categorises these groups of women on the basis of vulnerability.

Finally, article 24 uses the word 'dignity' only once, but the concept of dignity undergirds the entire article. Sub-section (b) requires states parties to ensure that incarcerated pregnant or nursing women are treated with dignity. Sub-section (a) also suggests that dignity is the underlying concern with respect to the treatment of vulnerable women and requires states to 'provide an environment suitable to their condition and their special physical, economic, and social needs'. This suggests that the state must prioritise dignity in its interactions with and attempts to protect vulnerable groups of women.

29 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts). My emphasis.

The focus on marginalised groups of women implicitly invites intersectional analysis. Intersectionality theory ‘posits that aspects of identity, such as race and gender, are mutually constitutive and intersect to create unique experiences of discrimination and subordination’.³⁰ Intersectionality theory grew out of critical race feminism and, in particular, the scholarly work of Kimberlé Crenshaw, and it is important to locate its origins in Black feminist thought. In recent years, intersectionality has gained traction in international human rights discourse, including in UN human rights treaty bodies and in regional human rights bodies. Although most reporting states have not explored article 24 through an intersectional lens, the language of the provision invites states to consider special protections for marginalised groups of women. The focus on marginalised groups of women is in itself intersectional analysis. The language of article 24 recognises that women are differently positioned with respect to other aspects of identity, such as wealth, ethnicity, and physical, economic, and social needs.

None of the periodic reports of states parties to the Maputo Protocol or the African Commission’s Concluding Observations explicitly invoke intersectionality, however. Because intersectional analysis is still a relatively new concept in human rights discourse, this is unsurprising. Article 24 offers an opportunity to encourage states to analyse how different groups of women may experience human rights violations differently based on their membership in other marginalised groups.

In one case in South Africa, the Constitutional Court used an intersectional lens when it decided that the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) was unconstitutional because it did not include domestic workers in the definition of ‘employee’.³¹ The applicants argued that because domestic workers are primarily Black women, the exclusion of domestic workers constitutes discrimination on the basis of both race and gender. The applicants also requested that the court use an intersectional framework for its analysis, which it did noting that ‘[t] here is nothing foreign or alien about the concept of intersectional discrimination in our constitutional jurisprudence’.³² Interestingly, the Court recognised South Africa’s obligations under article 13 of the Maputo Protocol but it did not mention article 24. Article 24’s focus on marginalised groups of women, poor women, and women heads of families would seem to make it highly relevant to the Court’s intersectional analysis of domestic workers. Article 24 remains largely unexplored as a tool for intersectional analysis among courts, reporting states, and the African Commission.

The language of article 24 suggests that drafters hoped to provide added protection to particularly vulnerable groups of women. Article 24 combines a focus on ‘distress’ and ‘marginalization’ with a requirement that states parties treat all women, particularly those who are vulnerable, with dignity. The article specifically mentions poor women, women heads of families, women from marginalised population groups, women with special physical, economic, and social needs, and detained pregnant or nursing women. As such, the article targets women who may need special state protection based on their socio-economic or other status.

4 Linkages to other treaty provisions

Article 24’s broad language of distress and vulnerability follows more specific provisions in the Maputo Protocol that expressly address the rights of older women and women with disabilities. Because the preceding articles address the specific rights of older women and women with disabilities, article 24 acts as a ‘catch-all’ for other groups of marginalised or vulnerable women. When states do report on article 24, the focus is often on conditions of confinement for detained pregnant or breastfeeding women, or women detainees generally. Because article 24(b) specifically references detained women, states tend to zero in on this more specific language of article 24.

30 J Bond *Global intersectionality & contemporary human rights* (2021) 2.

31 *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC).

32 *Mahlangu* (n 31).

It should be noted, however, that article 24, as mentioned above, is preceded by specific provisions on older women and women with disabilities. Drafters added article 24 *after* article 22 on elderly women and article 23 on women with disabilities. The drafters did not intend for article 24 to be subsumed by the two preceding articles. In fact, by intentionally adding article 24 toward the end of the drafting process, the drafters clearly intended to expand coverage beyond the rights of elderly women and women with disabilities. Article 24's expansive focus on marginalised groups of women and women in distress does just that. It creates a catch-all provision that focuses on the rights of women with 'special physical, economic and social needs'. When activists, state representatives or members of the African Commission interpret article 24 as limited to the rights of detained women or focus exclusively on the rights of older women (article 22) or women with disabilities (article 23), they miss an important opportunity to bring attention to the rights of other marginalised groups of women.

Articles 15 and 16 of the Maputo Protocol, which address the right to food security and the rights to adequate housing, respectively, overlap slightly with article 24. Article 24's broader focus on women who need special protection from the state explicitly includes poor women. Because living in poverty often means living without adequate food and housing, any effort by the state to address those basic human needs would also provide the type of protection envisioned in article 24. Similarly, article 19 of the Maputo Protocol provides protection for the right to sustainable development, which overlaps to some extent with article 24's focus on poor women and other groups of vulnerable women. As a result, any poverty alleviation efforts undertaken by states to fulfil article 19 may also help satisfy state obligations under article 24.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons) includes a provision that addresses the needs of older women. Article 9 of the Protocol on the Rights of Older Persons requires states parties to protect older women from GBV, land rights and property abuses, and inheritance discrimination.³³ Similarly, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities) also provides special protection for women with disabilities.³⁴ Article 27 of that Protocol offers wide-ranging protection for women and girls with disabilities. Although neither the Protocol on the Rights of Older Persons nor the Protocol on the Rights of Persons with Disabilities has entered into force, together they suggest that there is a trend toward greater protection for specific groups of women who may be particularly susceptible to 'distress' based on age, disability, or other factors.

The African Charter on the Rights and Welfare of the Child provides additional interpretive guidance on the special protection that should be afforded girl children and the children of detained mothers. Article 21 of the Charter offers special protection against 'customs and practices discriminatory to the child – on the grounds of sex or other status.' This provision is intended to offer protection to children who are 'in distress' or 'particularly vulnerable' by virtue of gender discriminatory practices. In article 30, the Charter also protects children of imprisoned mothers, which is closely related to the substantive content included in article 24 of the Maputo Protocol.

5 Nature and scope of state obligations

States that agree to be bound by human rights obligations agree to respect, protect, and fulfil those human rights. A state's obligation to respect human rights requires that the state not act in a way that interferes with the enjoyment of that right. The obligation to protect rights, like those in article 24, requires states to take action to guarantee the enjoyment of the rights. Finally, the obligation to fulfil a particular human right requires that the state take affirmative steps to ensure and promote the

³³ Protocol on the Rights of Older Persons, art 9.

³⁴ Protocol on the Rights of Persons with Disabilities, art 27.

enjoyment of the right. In the context of article 24's broad language, states assume a duty to provide expansive protection of the rights of vulnerable or marginalised groups of women.

According to the language of article 24, states must address socio-economic disparities that predominantly affect women, particularly women who are also marginalised based on some additional factor such as ethnicity, disability, pregnancy, or incarceration. Article 24, therefore, requires that states invest financial resources in protecting vulnerable groups of women. For example, a state attempting to comply with article 24(a) might create and promote income-generation programs or vocational training that will offer employment opportunities for economically marginalised women. Because the scope of article 24 is quite broad, states have considerable flexibility in demonstrating compliance with the terms of the provision.

In the case of pregnant or nursing women, states may attempt to comply with article 24(b) by creating non-carceral alternatives to detention, deferred sentencing programmes for pregnant or nursing women, or programmes that provide dignified residential options for detained women to live with their children. Each of these initiatives would constitute progress toward the fulfilment of article 24(b), but each requires a state's financial and programmatic commitment. Article 24 incentivises states to create and invest in programs like this that address the needs of the most vulnerable groups of women.

Because there have been few official interpretations of the language in article 24, this chapter also explores how states themselves have interpreted their obligations under article 24. The next section explores the invocation and implementation of article 24 in domestic jurisprudence, regional jurisprudence, state reporting under the Maputo Protocol, the Concluding Observations offered by the African Commission in response to states' reports, and other interpretive guidance for article 24. The analysis reveals that article 24 is rarely invoked by reporting states or by the African Commission itself. As such, it represents a missed opportunity for advocacy on behalf of vulnerable groups of women in the region.

6 Implementation

6.1 Domestic jurisprudence

Typically, state efforts to implement a particular human rights provision offer guidance concerning how governments interpret their obligation under the provision. For their part, national governments in the AU often look to the Commission for interpretive guidance on specific provisions of human rights treaties. In the case of article 24, however, there have been relatively few state efforts to specifically implement article 24 and few authoritative interpretations of article 24 from the Commission. This section begins by exploring article 24's relevance to states' domestic jurisprudence in the contexts of incarcerated women, GBV, and domestic workers. The focus then shifts to regional jurisprudence and the reports that states must submit to the Commission in compliance with their reporting obligations under the Protocol. Finally, the section explores the extent to which article 24 surfaces in the Commission's Concluding Observations in response to state reports.

Although it happens infrequently, courts in states that have ratified the Protocol may cite to relevant provisions of the Protocol in domestic jurisprudence. Article 24, in particular, rarely – if ever – surfaces in national court deliberations and decisions. Kenyan judges and plaintiffs, for example, frequently cite to provisions of the Protocol, typically in support of cases alleging constitutional violations. Those cases cite to the Protocol's many provisions but do not include any citations to article 24. The cases involve: FGM, forced eviction, safe abortion, division of property in divorce, equality before the law,

women's leadership positions, sexual and GBV, children's inheritance, widow eviction, and the right to participate in political and decision-making processes.³⁵

States have interpreted their obligations under article 24 in a variety of ways. Article 24 has rarely, if ever, been discussed by domestic courts even when the courts are considering issues that are highly relevant to article 24's terms. A number of national courts have considered issues related to 'women in distress' generally or to issues specifically mentioned in article 24, such as the treatment of pregnant or breastfeeding women who are held in detention facilities. Some of these decisions reference other provisions in the Protocol but fail to mention article 24. The national court decisions can be divided into three broad categories, each of which includes cases that could have mentioned article 24, but did not.

6.1.1 Detention and birth, pregnancy, and breastfeeding

In *MAO v Attorney General*, the Kenyan High Court ruled that health care facilities could not detain women after giving birth on account of failure to pay the medical expenses related to childbirth.³⁶ The court found that the right to dignity under the Maputo Protocol's article 3 and other instruments prohibits detention under these circumstances. Although article 24 requires states parties to 'ensure the right of pregnant or nursing women or women in detention by providing them with an environment suitable to their condition and the right to be treated with dignity,' the court did not mention this provision in its decision regarding the dignity of women in childbirth. In another Kenyan case involving a hospital's alleged violation of the right to dignity before, during, and after childbirth, the court determined that the hospital had violated the plaintiff's right to dignity, among other rights, but did not cite article 24.³⁷

Other courts also declined to invoke article 24 in cases in which the subject matter concerned women in detention. In Malawi, for example, a court awarded damages to pregnant schoolgirls who had been falsely imprisoned in violation of their constitutional right to dignity. Although the court recognised the additional harm that incarceration causes to pregnant people, it did not mention article 24 or the Protocol more generally.³⁸ Two other cases in Malawi address the incarceration of pregnant and breastfeeding women and cite to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules). Neither court, however, mentioned article 24 of the Protocol despite its relevance in both cases.³⁹

35 See, eg, *MAO & Another v Attorney General & 4 others* [2015] eKLR; *JOO (also known as JM) v Attorney General & 6 others* [2018] eKLR; *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others*; *Kenya National Commission on Human Rights & 3 others* (Amicus Curiae) [2020] eKLR.

36 *MAO v Attorney General* (2015) eKLR; see also, Center for Reproductive Rights 'Kenyan High Court: Maternity hospital illegally imprisoned women, violated human rights' <https://reproductiverights.org/kenyan-high-court-maternity-hospital-illegally-imprisoned-women-violated-human-rights/> (accessed 12 May 2023).

37 *JOO* (n 35).

38 *ON v Attorney General*.

39 In *R v Victor* (Criminal Review 2 of 2020) [2020] MWHC 4 (27 March 2020), a pregnant woman who was convicted of theft and sentenced to six months of hard labour successfully appealed her sentence. The court cited the Bangkok Rules but did not mention art 24 of the Protocol. In the second case, *EL v Republic* (Criminal Case 36 of 2016) [2016] MWHC 656 (19 January 2016), a mother was convicted and sentenced to nine months for breastfeeding while being HIV-positive. The High Court set aside her conviction and ordered her immediate release, citing to the Bangkok Rules regarding the treatment of women in detention.

6.1.2 Gender-based violence

The South African case of *Tshabala v S* involved female rape victims who the court recognised as members of a neighbourhood ‘inhabited by the marginalised and vulnerable members of our society’.⁴⁰ This mention of the victims as marginalised and vulnerable could have triggered the special protection offered by the Protocol’s article 24. However, the Constitutional Court only mentioned the Protocol in a survey of relevant international instruments, without explicitly mentioning article 24. Although the *Tshabalala* Court and other courts have not typically relied on article 24 in situations involving GBV, the article offers some protection from the distress associated with GBV.

Another example involves a case from Uganda in which the court determined that article 6 of the Protocol was violated along with other national and international laws when a young rape victim was forced into an arranged marriage by her family and without her consent.⁴¹ GBV victims often need precisely the kind of ‘special protection’ that article 24 offers. As mentioned, however, article 24 is rarely invoked by activists or jurists in connection with the vulnerability and special needs of victims of GBV.

6.1.3 Domestic workers

In another South African case, *Mahlangu v Minister of Labour (Mahlangu)*, the Constitutional Court recognised that domestic workers are often single parents and the financial heads of their families. The complaint challenged the failure of COIDA to cover domestic workers. Although article 24 provides explicit protection for ‘poor women and women heads of families,’ the court does not mention article 24 in its decision. The *Mahlangu* decision is highly significant for its embrace of intersectionality, which refers to the recognition that discrimination operates across multiple axes of, for example, race, gender and poverty simultaneously. With regard to intersectionality, the court noted:

Multiple axes of discrimination are relevant to the case of domestic workers. Domestic workers experience racism, sexism, gender inequality and class stratification ... The application of an intersectional approach helps us to understand the structural and dynamic consequences of the interaction between these forms of multiple discrimination.⁴²

In many ways, article 24’s focus on marginalised groups of women invites intersectional analysis, as was pointed out in section 3 above. The article addresses subcategories of women who need special protection based on ‘physical, economic, and social needs’ as well as other ‘marginalised population groups.’

6.2 Regional jurisprudence

As of early 2022, there have been no regional decisions that specifically cite article 24 of the Protocol, even though at least two cases address subject matter that falls within the purview of article 24. The ECOWAS Community Court of Justice addressed the unlawful detention of female plaintiffs, finding a violation of multiple articles of the Protocol, but without mentioning article 24.⁴³ Similarly, in late 2019, the ECOWAS Court of Justice found that Sierra Leone’s prohibition on pregnant schoolgirls

40 *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC) para 5.

41 *Uganda v Nakoupuet* (Criminal Case 109 of 2016) [2019] UGCOMM 13 (13 February 2019).

42 *Mahlangu v Minister of Labour* (n 31).

43 *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017) 10. See also, ‘ECOWAS Court makes first pronouncement on Maputo Protocol: rules in favour of plaintiffs in case of Dorothy Njemanze’ <https://www.ihrda.org/2017/10/ecowas-court-makes-first-pronouncement-on-maputo-protocol-rules-in-favour-of-plaintiffs-in-case-of-dorothy-njemanze-3-ors-v-federal-republic-of-nigeria/> (accessed 12 May 2023).

attending school was discriminatory and violated articles 2 and 12 of the Protocol. Although pregnant schoolgirls fall within article 24's general categories of 'women in distress' or the more specific obligation to treat pregnant women with dignity, the Court of Justice did not apply article 24 in this case, perhaps because the litigating lawyers did not rely on article 24 in their arguments.⁴⁴

6.3 States' reports under the Maputo Protocol

States that have ratified the African Charter and the Maputo Protocol are required to periodically report to the African Commission on their progress in implementing the terms of the Protocol. Many reporting states group articles 20 to 24 together and report on those articles jointly. Because many countries address articles 20 to 24 together, they combine a discussion of widows' rights (article 20), the right to inheritance (article 21), special protection of elderly women (article 22), special protection of women with disabilities (article 23), and special protection of women in distress (article 24). Despite the specific requirements of each of the five articles, in many cases, reporting countries address only elderly women and women with disabilities, who are covered by the Protocol's articles 22 and 23 respectively. Malawi's Periodic Report (2015 to 2019), for example, includes a discussion of articles 20 to 23, focusing on widows and women with disabilities, but fails to address article 24.⁴⁵ In contrast, some countries specifically address article 24 in their periodic reports. The reports, however, rarely elaborate on the reporting country's interpretation of 'women in distress.' Examples from states' reports are grouped along substantive lines below.

6.3.1 Elderly women and women with disabilities

Many reporting countries group articles 20 to 24 together and report on these articles collectively. Those reports often focus on elderly women and women with disabilities. Burkina Faso, for example, in its 2011 – 2015 initial report, mentions that '[a]s a result of their status as highly vulnerable people, some women enjoy social protection from government and its partners ... [t]hey include: women living with a disability; widows; older women; [and] women in distress'.⁴⁶ The report then includes several paragraphs addressing people with disabilities and several paragraphs addressing 'older persons'. It does not address the particular challenges of women with disabilities or elderly women. The report also fails to elaborate on its passing reference to women in distress. In another example, Zimbabwe's Combined Periodic Report for 2007-2019 includes a section entitled 'articles 20 to 24: Rights of Specially Protected Women's Groups'.⁴⁷ This sub-section, however, only addresses the rights of elderly women and women with disabilities. It does not mention women in distress or any other groups of marginalised women.

6.3.2 Widowhood

A small number of reports that group articles 20 to 24 together focus on the rights of widows. Cameroon's Combined Periodic Report for 2015-2019, for example, includes a section for these articles

44 *Women Against Violence & Exploitation in Society (WAVES) & Child Welfare Society Sierra Leone (CWS-SL) (On behalf of pregnant adolescent schoolgirls in Sierra Leone) v Sierra Leone* Judgment No ECW/CCJ/JUD/37/19 (12 December 2019) See also, Equality Now 'Nine ways the Maputo Protocol has protected and promoted the rights of women and girls across Africa' https://www.equalitynow.org/news_and_insights/9_ways_maputo_protocol/ (accessed 12 May 2023).

45 Republic of Malawi Periodic Report on the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on the Rights of Women in Africa, May 2015-March 2019.

46 Burkina Faso 3rd and 4th Periodic Report within the Framework of the Implementation of art 62 of the African Charter on Human and Peoples' Rights 2011-2015 para 354.

47 Republic of Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Report under the African Charter on Human and Peoples' Rights and 1st, 2nd, 3rd and 4th Combined Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2007-2019) (2019) 98.

entitled ‘The rights of vulnerable groups benefiting from special protection.’⁴⁸ The report, however, dedicates this section to an extensive discussion of the rights of widows. The report does not discuss other marginalised groups or mention ‘women in distress.’

6.3.3 Detention

Because article 24 offers the specific example of women in detention, many reporting countries include information concerning pregnant, nursing, or other women in detention in their discussion of article 24. Some reports, such as the Eswatini initial report from 2012 to 2018 emphasise government efforts to ensure the breastfeeding women or mothers in detention ‘be afforded an environment which is suitable for bonding and breastfeeding.’⁴⁹

In a review of all state reports filed in compliance with the reporting obligations of the Maputo Protocol, it was common for reporting countries to discuss conditions of detention for pregnant or breastfeeding women. South Africa’s report cross-references the Bangkok Rules in describing its efforts to protect the rights of detained women.⁵⁰ Namibia’s 2015 to 2019 Periodic Report notes that ‘the rights for pregnant and nursing women in detention are protected’ and details government efforts to ensure the rights of detained mothers and pregnant women.⁵¹ This focus is likely the result of the more specific reference to detained women in article 24(b) compared to the more general language concerning vulnerable or marginalised women in article 24(a).

6.3.4 Psychological needs and trauma from gender-based violence

Some countries interpret ‘women in distress’ to include women who face mental health challenges or women who are recovering from trauma, including gender-based violence. The Periodic Report for Eswatini states, ‘The Ministry of Health (Psychiatric Centre) provides counselling and treatment to women who are in stressful situations to prevent them from developing mental illness.’⁵² Similarly, Rwanda’s 2009 – 2016 Periodic Report notes in reference to article 24, ‘women victims of violence of any kind are given special protection including psycho-social, legal and medical assistance from gender desks as well as at Isange One Stop Centres.’⁵³

6.3.5 Minorities and marginalised groups

Kenya’s Periodic Report from 2015-2020 addressed article 24 in a section entitled ‘Rights of Specially Protected Women’s Groups’.⁵⁴ Kenya’s report is one of the few reports that specifically addresses marginalised groups of women. It states:

48 Republic of Cameroon single report comprising the 4th, 5th, and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples’ Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention (2022) p 152.

49 Kingdom of Eswatini formerly known as the ‘Kingdom of Swaziland,’ Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th Periodic Report on the African Charter on Human and Peoples’ Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa, 2001-2019, paras 327, 646.

50 Republic of South Africa Combined 2nd Periodic Report under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2015) 268.

51 Republic of Namibia 7th Periodic Report on the African Charter on Human and Peoples’ Rights and the Second Report under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2020) para 34.1-34.3.

52 Kingdom of Eswatini (n 49) para 646.

53 Republic of Rwanda the 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the Implementation Status of the African Charter on Human and Peoples’ Rights and the Initial Report on the Implementation Status of the Protocol to the African Charter on Human and Peoples’ Rights and the rights of women in Africa (2017) para 127.

54 Republic of Kenya Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and

Article 56 of the Constitution provides that the state should put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life; are provided special opportunities in education and economic fields; are provided special opportunities for access to education; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure. Article 100 advocates for promotion of representation of marginalized groups. The article states that parliament shall enact legislation to promote the representation in parliament of women; Persons with disabilities; youth; ethnic and other minorities; and marginalised communities.⁵⁵

By recognising women from marginalised communities, Kenya's report captures the spirit of article 24, which explicitly refers to 'women from marginalised population groups.' Kenya's report also recognises that article 24's reference to marginalised women invites an intersectional analysis. The report states:

In addressing intersectional discrimination, the government will strengthen measures to support evidence generation on the extent, effects and gender implications of different inequalities, ensure compliance with constitutional and legal provisions against discrimination and develop targeted measures to deal with intersectional inequality.⁵⁶

Kenya's recognition of the intersectional nature of article 24 is significant and may provide a model for other countries to incorporate intersectionality into reporting on article 24 in the future.

6.3.6 Poverty

Article 24 requires that states undertake to 'ensure the protection of poor women ...' Some reporting countries address women's poverty in terms of social protection provided by the government. Angola's report, for example, describes the government's Social Support Programme and notes that the programme has supported numerous female-headed families, 'deprived and dependent women,' women 'affected by accidents and natural disasters, women with disabilities, elderly women, 'vulnerable women with chronic disease,' and other groups of women affected by poverty.⁵⁷ Similarly, Lesotho's 2001 – 2017 Periodic Report describes the government's financial relief for poor people, which 'includes women who are in distress for various reasons.'⁵⁸ Lesotho's Ministry of Social Development provides subsidies for medical and other needs of pregnant and nursing mothers living in poverty.⁵⁹

South Africa's Periodic Report from 2003-2014 also includes an extensive discussion of government programs aimed at combatting women's poverty and the report notes the 'feminized character of poverty.'⁶⁰ In connection with its discussion of article 24 and women's poverty, South Africa's report also describes its 'sanitary dignity campaign' for indigent women and girls. The government acknowledges that indigent women and girls face many challenges managing menstruation without proper supplies, including a large number of missed school days among school-aged girls.⁶¹ Article 24's

Peoples' Rights and the initial report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2020) paras 305-316.

55 Republic of Kenya (n 54) para 306.

56 Republic of Kenya (n 54) para 311.

57 Republic of Angola 6th and 7th Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Protocol on the Rights of Women in Africa 2011-2016 (2017) para 121.

58 The Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2018).

59 The Kingdom of Lesotho (n 58) para 535.

60 Republic of South Africa Combined 2nd Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa 2003-2014 (2015) para 533.

61 Republic of South Africa (n 60) paras 543-546.

language is broad enough to encompass issues such as South Africa's sanitary dignity campaign and, indeed, focuses on human dignity at its core.

6.4 The African Commission's Concluding Observations

In response to the periodic reports of states parties, the African Commission issues Concluding Observations that typically include:

- (1) the positive aspects of the state's compliance with norms in the African Charter and the Maputo Protocol;
- (2) the ongoing challenges or areas of concern in the state's efforts to comply; and
- (3) recommendations as to how the state should approach future compliance and reporting.

In its Concluding Observations, the African Commission rarely mentions article 24, although it does discuss some of the substantive rights embodied in article 24's expansive language. For example, in the Commission's Concluding Observations to Angola, it recommends that the state 'increase[s] the number of health centres in order to reduce the high maternal and child mortality rate, with emphasis on providing free, adequate and available services to rural women and women from indigenous communities.'⁶² The Commission's reference to rural women and women from indigenous communities suggests that it is urging the government of Angola to carefully consider special protection for rural women or 'women from marginalized population groups' as article 24 requires.

In a number of Concluding Observations, the African Commission specifically mentions the conditions of confinement for detained women. For example, in its Concluding Observations to Benin, the Commission expresses concern 'about the welfare of women and children who are particularly vulnerable and live in precarious conditions in prisons.'⁶³ Similarly, in its Concluding Observations to Kenya, the commission commends the state on its efforts to provide child care for the children of female inmates and its efforts to facilitate visits for children to the prisons.⁶⁴

In the case of Liberia, the Commission's Concluding Observations include a general recognition that some women are more vulnerable than others due to poverty, rurality, and other factors. The Commission notes, '[w]omen in rural areas are disproportionately affected by lack of access to adequate health services, education, economic opportunities, social benefits and access to justice'.⁶⁵ The Commission implicitly recognised that rurality and poverty can create the kind of distress and vulnerability that is at the heart of article 24.

6.5 Other interpretive guidance

The African Commission has adopted general comments designed to guide states parties in implementing the Maputo Protocol. To date, the African Commission has released six General Comments, the first three of which address provisions of the Maputo Protocol. None of these General Comments, however, addresses article 24.

62 African Commission Concluding Observations on the Cumulative Periodic Reports (2nd, 3rd, 4th and 5th) of the Republic of Angola adopted at its 12th extra-ordinary session 30 July to 4 August 2012, Recommendation XVI.

63 African Commission Concluding Observations and Recommendations on the 2nd Periodic Report of the Republic of Benin, 13-27 May 2009 para 31.

64 African Commission Concluding Observations and Recommendations on the 8th and 11th Periodic Report of the Republic of Kenya para 15(vi).

65 African Commission Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights para 19.

The African Commission's Special Rapporteur on Women in Africa has addressed the content of article 24 but only in general terms. In the May – November 2021 Inter-Session Activity Report, the Rapporteur recommends that states parties '[e]nsure that national gender mainstreaming efforts are comprehensive and inclusive of all categories of women especially those in rural communities, elderly women, *women in distress*, and women with disabilities.'⁶⁶ The Special Rapporteur does not elaborate on the meaning of 'women in distress' although this appears to be a reference to the content of article 24.

7 Conclusion

The language of article 24 is broad, encompassing a wide range of rights that extend to women 'in distress.' The provision has been under-utilised in advocacy and scholarship related to women's rights under the Maputo Protocol. Despite the fact that it is rarely invoked, article 24 has great potential to facilitate intersectional analysis that will highlight how different groups of women experience marginalisation based on gender and other aspects of identity that make them particularly vulnerable, including poverty.

As a result of the grouping of articles in states' reports, articles 20 (widows' rights), 21 (inheritance), 22 (elderly women), and 23 (women with disabilities) often receive more extensive treatment than article 24 in states' reports. Similarly, the African Commission's Concluding Observations often devote little discussion to article 24. It is rarely mentioned in national or regional jurisprudence. As such, the treatment of article 24 to date represents a missed opportunity to address the intersectional rights violations of women from marginalised groups.

Civil society organisations (CSOs) have an opportunity to advocate for more comprehensive implementation of article 24. CSOs should consider how article 24 might be used in human rights litigation to support claims of rights violations. In appropriate cases, CSOs might use article 24 in briefs on behalf of a complainant or *amici curiae* briefs to argue for the kind of 'special protection for women in distress' encompassed in article 24's broad language. In addition, CSOs and the Commission should raise awareness of the expansive meaning of article 24. Public education designed to bring attention to the potential of article 24 to protect vulnerable groups of women is greatly needed.

66 Special Rapporteur on Rights of Women in Africa 'May-November 2021 Inter-Session activity report of Honourable Commissioner Maria Teresa Manuela' p 8.

Article 25

Remedies

Matilda Lasseko-Phooko

- The States Parties undertake to:
- (a) Provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised have been violated;
 - (b) Ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

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1 Introduction

Where a violation of the rights and freedoms enshrined in the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) occurs, a right to a remedy for that violation arises.¹ This implies a state obligation to ensure that access to remedies is made available to victims of violations in form, as an enforceable right, and in substance by ensuring that there are processes and procedures to enable equal access to the mechanisms before which rights violated can be vindicated.² This aspect of state conduct, in addition to the domestication of international treaties, demonstrates

1 AA Agbor 'Pursuing the right to an effective remedy for human rights violation in Cameroon: the need for legislative reform' (2017) *Potchefstroom Electronic Law Journal* 1.

2 The African Charter on Human and Peoples' Rights (African Charter) has no free-standing justiciable right to a remedy. However, it contains several clauses that speak to this. Article 7(1) of the African Charter provides every individual the right to have his cause heard. Musila argues that this clause establishes the right to a remedy and a reciprocal obligation to provide viable avenues of redress, see GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 447-448. Similar guarantees are found in other international treaties: art 8 of the Universal Declaration on Human Rights; art 2(3)(a) of the International Convention on Civil and Political Rights (ICCPR); art 6 of the Convention on the Elimination of Racial Discrimination (CERD); art 14(1) of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT); arts 6 & 39 of the UN Convention on the Rights of the Child (CRC); of international humanitarian law as found in art 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV) 8 art 91

states' willingness to make good on its ratification of the treaty.³ It speaks to state accountability where citizens' rights are violated.⁴

This chapter considers the measures and processes that member states must put in place to ensure that women have recourse to appropriate national institutions to vindicate a violation of their rights as contained in the Maputo Protocol. It further considers what the appropriate remedies are to enable reparation of harm suffered at an individual level and to effect change in the social, cultural, or political system that created or sustained conditions that aided the violation.

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has directed that meeting the obligation to provide remedies requires state measures that clarify the operational aspects needed to ensure that the equality guarantees of the Convention on the Elimination of Discrimination Against Women (CEDAW) are realised. Thus, it involves clarifying how cases of discrimination against women are to be resolved, damages awarded or other effective remedies given for violations of its provisions.⁵ In the same vein, article 25 of the Maputo Protocol provides for a right to remedies (redress) while conversely creating a right to a process by which victims can claim redress before competent authorities (remedy).⁶ In this way, article 25 of the Maputo Protocol provides both a procedural right to a remedy, not limited to judicial in nature and a substantive right to redress for rights violations.⁷

Articulating the required remedies (individual and systematic gendered redress) and the availability of and access to judicial, extra-judicial and quasi-judicial avenues and procedures for claiming, assessing and ordering the redress (remedy) by states under article 25 is central to the realisation of all substantive rights in the Maputo Protocol. However, where rights and remedies are available, women still need to be empowered to claim their entitlements. The reality for many African women is that their access to remedies is hindered by social, cultural and economic factors that undermine their access to institutions and mechanisms established in law.⁸ Therefore, measures must be taken to dismantle the root causes of gender inequality, such as gender stereotypes and gender roles, also present in the processes by which women seek justice as well as in the remedies that are awarded following the violation of a substantial right.

This chapter is organised into six sections. Section 2 considers the drafting history of article 25. Section 3 proceeds to unpack the meaning and content of the provision as a right ancillary to other substantive provisions in the Maputo Protocol. Section 4 examines the nature and scope of the

of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 9 and arts 68 & 75 of the Rome Statute of the International Criminal Court; arts 12 & 13 of the European Convention on Human Rights (ECHR) and arts 11 & 25 of the American Convention on Human Rights (ACHR).

3 A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: the effect of the absence of a women's rights committee on the enforcement of the of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* at 322.

4 Agbor (n 1) 2.

5 Concluding Observations on the Combined initial, 2nd and 3rd Periodic Report of Tajikistan, Committee on the Elimination of Discrimination Against Women (2 February 2007) UN Doc CEDAW/C/TJK/CO/3 (2007) para 11.

6 E Desmet 'The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation: a landmark or window-dressing? An analysis with special attention to the situation of indigenous peoples' (2008) 24 *South African Journal on Human Rights* 90. Desmet clarifies the relationship between the procedural element and the substantive elements of the right to remedies and reparations as follows: "The term "remedy" (singular) refers to the procedural side of access to justice whereas "reparation" is the umbrella term for the various forms of substantive relief, such as restitution and compensation ie forms of remedies'.

7 D Shelton *Remedies in international human rights law* (2016) 1. See also Agbor (n 1).

8 See the detailed discussion on the transformational aim of the Maputo Protocol with respect to enabling women's access to justice, equality before the law and equal treatment before the law in CN Musembi 'Article 7' in this volume.

obligations imposed on states under article 25. Section 5 then considers state practice in complying with this provision. In conclusion, the discussion assesses the challenges to the implementation of article 25 and provides some recommendations to state and non-state actors.

2 Drafting history

The Nouakchott Draft did not include a provision on remedies.⁹ Neither did the Kigali Draft¹⁰ nor the Final Draft, of 13 September 2000.¹¹ A proposal to include a provision dealing with remedies was only considered at the first Meeting of Experts held in November 2001. In the deliberations, the insertion of a new clause was proposed. This new clause, article 23, included two sub-sections. The first subsection related to the state obligation to ensure implementation of the Maputo Protocol by submitting state reports on the realisation of the rights. The second subsection stipulated remedies for non-compliance.¹² The wording of this draft provided for the right to an 'effective' remedy for a violation determined by 'a competent authority provided for by the legal system of the State'.¹³ The first Meeting of Experts could not agree on the inclusion of this clause but opted to keep it for further consideration.¹⁴

In the continuing drafting process, the combined clause titled 'Monitoring and Compliance' retained both sub-sections suggested at the first Meeting of Experts. A coalition of non-governmental organisation (NGOs) involved in the drafting process made submissions on the draft 'Monitoring and Compliance' clause. In the submissions, they suggested the addition of the following to the monitoring clause, '[a]ny procedures or remedies that arise under or pertaining to the provisions of the African Charter shall be equally applicable to the provisions of the Protocol'.¹⁵

Article 26 of the African Charter on Human and Peoples' Rights (African Charter) creates an obligation on state parties to establish independent courts and other appropriate national institutions 'entrusted with the promotion and protection of the rights and freedoms guaranteed by the *present* Charter'. Article 26 is inextricably linked to article 7 of the African Charter and, read together, they are the remedies provisions of the African Charter.¹⁶ A narrow interpretation of article 26 of the African Charter is that the application of courts and other institutions established by state parties to enable the protection of rights in line with this clause are applicable to rights guaranteed only in the African Charter. The narrow interpretation of article 26 would mean that already existing mechanisms in national states established and improved over the years in compliance with article 26 of the African

9 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

10 Document on file with the author.

11 Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

12 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 24.

13 As above.

14 Final Draft (n 11) para 25.

15 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003. A note to elaborate on this suggested amendment indicated the NGOs intention was to ensure that in clear terms women receive no less protection for their rights in the Maputo Protocol than are contained in the African Charter.

16 R Murray 'Article 26: independence of the courts and establishment of national institutions' in *The African Charter on Human and Peoples' Rights: a commentary* (2019) 566.

Charter are not applicable to the rights of women guaranteed in the Maputo Protocol.¹⁷ With the proposed amendment, the NGOs appear to have been looking to ensure that if any member state adopts this narrow interpretation of article 26, the amended provision in the Maputo Protocol will cure the consequences of the exclusion.

The second Meeting of Experts was held in March 2003 to finalise the draft for submission to the Meeting of Ministers.¹⁸ The Meeting of Ministers did not accept this suggested change. However, deliberations on this clause resulted in the decision to separate the monitoring and remedies provisions. In the Addis Ababa Draft (2003), the monitoring and implementation aspects are covered under article 26; while the remedies in the event of non-compliance are guaranteed under article 25. The wording approved at this meeting changed from requiring that states make available 'effective' remedies to requiring 'appropriate' remedies to any woman whose rights or freedoms has been violated.¹⁹

3 Concepts and definitions

Once member states ratify the Maputo Protocol, they incur a legal obligation to comply with the provisions thereof. Where a breach occurs, a new obligation arises to cease the breach and conform to the obligations and concurrently to remedy any harm caused.²⁰ The remedies provision in treaties is the countervailing requirement that individuals have the opportunity to obtain redress in the domestic system for the violation.²¹ In the context of women's rights it seeks to provide some legal or other material consequence for those who violate the rights of women.²²

3.1 Right to remedies as an ancillary right

The ECHR contains a comparable provision in article 13. It provides that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before national authority notwithstanding that the violation has been committed by persons acting in official capacity'. Similar to the Maputo Protocol it can be argued that the right to a remedy would only arise once it is proven that a violation of a right contained in the Maputo Protocol has occurred. In other words, that the right to a remedy under article 25 will only attach when a claim has been successfully proven. Avoiding this circular argument, the European Court of Human Rights (European Court) has held that this is not the meaning to be ascribed to article 13. Given that the literal meaning requires that the claim is first lodged for a violation to be found, the European Court has ruled that the right to an effective remedy is for anyone who claims that their rights or freedoms have been violated.²³ This interpretation would logically, similarly, apply to article 25.

17 See the discussion in sec 5.1 of this chapter relating to the state practice in reporting on measures taken in compliance with art 25(b) of the Maputo Protocol. Some member states fail to recognise the applicability of state institutions available to the protection and promotion of rights in both the African Charter and the Maputo Protocol. Information provided to the African Commission in state reports is in these instances limited to complaints specific to the African Charter with no indication of the mandate of these bodies with respect to complaints filed by women relating to women's rights.

18 Summary of the proceedings of the second Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Women in Africa, Expt/Prot.Women/Rpt(II), Addis Ababa, Ethiopia, March 2003, para 1.

19 A coalition of NGOs offering commentary during the drafting process suggested the use of 'appropriate' in the clause introduced ambiguity to the provision because determining whether a remedy would be appropriate would be a subjective determination creating room for ambiguity in application of the provision. Comments by the NGO Forum (n 15).

20 Shelton (n 7) 13. See also A Byrnes 'Article 2' in MA Freeman et al (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a Commentary* (2013) 83.

21 K Reid *A practitioner's guide to the European Convention on Human Rights* (2004) 477.

22 Byrnes (n 20) 83.

23 *Silver v United Kingdom* (1983) Series A no 61 para 113; European Court on Human Rights *Guide to article 13 of the Convention on Human Rights* (2021) 8 https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf (accessed 20 May 2023).

Moreover, article 13 of the ECHR has been determined, by the European Court, to have no independent existence separate from the substantive clauses of the Convention and its Protocols when a claim arises.²⁴ This is also the case with respect to article 25 in that substantive redress under sub-section 25(a) can only be claimed in combination with, or in the light of, an alleged violation of one or more substantive rights in the Maputo Protocol before a mechanism as established under sub-section 25(b). In other words, as the right to remedy is a secondary right dependent on the breach of a primary substantive right, to rely on article 25 of the Maputo Protocol an applicant must have an actionable claim under a substantive provision of the Maputo Protocol.²⁵ This interpretation requires that the national authorities established by state parties for the vindication of violations under the Maputo Protocol should also have the competence to determine an appropriate remedy for the violation.²⁶

Remedies and access to remedy are provided for in the ICCPR under article 2(3)(a) and (b).²⁷ In addition to this, article 2(3)(c) of the ICCPR creates an obligation on state parties to enforce the remedies granted by the relevant authorities.²⁸ Unlike the approach of the European Court, the Human Rights Committee (HRC) has determined that article 2(3) cannot be found to have been violated in the absence of a corresponding finding that there was a violation of another right under the Convention.²⁹ In terms of the HRC's ruling, an allegation of the violation of any substantive rights is not sufficient for the right to remedies to accrue under the ICCPR. However, three members of the HRC noted a dissenting opinion. The dissenting view endorsed the approach of the European Court that a claim of a violation is sufficient to trigger the application of the right to a remedy. The dissenting view noted that the majority view, requiring a finding of a violation before a right to remedies occurs, would render article 2(3) useless.³⁰ They suggested the following:

What Article 2 intends is to set forth that whenever a human right recognized by the Covenant is affected by the action of a State agent there must be a procedure established by the State allowing the person whose right has been affected to claim before a competent body that there has been a violation. This interpretation is in accordance with the whole rationale underlying the Covenant, namely that it is for the state parties thereto to implement the Covenant and to provide suitable ways to remedy possible violations committed by state organs.

Nonetheless, the HRC clarified that the right to remedies in article 2(3) is an obligation that attaches to all the other treaty provisions.³¹

24 Reid (n 21) 478. See also *Zavoloka v Latvia* European Court on Human Rights Judgment 7.7.2009 [Section III] July 2009, para 35(a).

25 L Zegveld 'Remedies for victims of violations of international humanitarian law' (2003) 85 *International Review of the Red Cross* 503.

26 E Evatt 'Reflecting on the role of international communications in implementing human rights' (1999) 5(2) *Australian Journal of Human Rights* 20-43.

27 UN Human Rights Committee (HRC) General Comment 31 (80) the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para 8; see also N Lerner *The UN Convention on the Elimination of All Forms of Racial Discrimination* (2015) 65. Lerner explains that art 6 of CERD also provides for redress and remedy. The first section of the article provides for the guarantee of access to remedies through competent tribunals and other national state institutions. The second section guarantees reparation or satisfaction when the victim of the act of racial discrimination has already suffered damage as a result of it.

28 A Conte & R Burchill *Defining civil and political rights: the jurisprudence of the United Nations Human Rights Committee* (2009) 36.

29 *Kall v Poland* Communication 552/1993 UNHR Committee (14 July 1997) UN Doc CCPR/C/60/D/552/1993 (1993) (Dissenting Opinion) para 3.

30 As above.

31 UN Human Rights Committee (HRC) General Comment 29 States of emergency art 4, 24 July 2001, CCPR/C/21/Rev.1/Add.11, para 14.

On the sub-regional level, the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court) has determined claims for the enforcement of a violation of article 25 of the Maputo Protocol in conjunction with violations of other substantive rights.³² This approach is similar to that taken in the European Court in that an allegation of a violation of a substantive right is sufficient to trigger the applicability of the rights under article 25.

3.2 Judicial, legislative, administrative, or other authorities

An independently enforceable right to access judicial remedies is captured in article 8 of the Maputo Protocol.³³ In comparison, article 25 presents a guarantee for the realisation of the substantive rights in the Maputo Protocol through competent authorities established by the state that can rule on the violation and award remedies.³⁴ There is a procedural element to article 8 of the Maputo Protocol that relates to access to judicial avenues of domestic remedies.³⁵ However, article 25(b) creates the obligation on state parties to put in place a procedure that allows women whose rights have been affected to make a claim that the violation has occurred and have this claim determined. This obligation requires state parties to put in place any appropriate avenue to redress for claims in respect of rights in the Maputo Protocol, including but not limited to judicial bodies.³⁶ In this regard, the ECOWAS Court has determined that the right to remedy under article 25 enables claimants to appeal to a competent authority, judicial or administrative, and obtain a decision materialised on facts.³⁷

The Southern Africa Development Community (SADC) adopted a treaty that addresses the protection of women's rights. The SADC Protocol on Gender and Development (SADC Protocol) mirrors the provisions on the Maputo Protocol creating a right to a remedy.³⁸ The SADC Protocol obliges state parties to provide for appropriate remedies to any woman whose rights or freedoms have been violated on the basis of gender, and to ensure that a competent, judicial, legislative, administrative or other competent authority determines remedies.³⁹

3.3 Competent authorities

Article 25(b) requires that authorities put in place by state parties are competent authorities. This calls into question the definition of 'competent' as used in the treaties requiring that competent authorities provide remedies for violation of the treaty provisions. Competence means the legal power to make decisions.⁴⁰ The competence of an authority as a remedy is determined by considering its institutional

32 In *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017) (*Dorothy Njemanze*) the petitioner was successful in claiming a violation of *inter alia* arts 8 & 25 of the Maputo Protocol.

33 Article 8 of the Maputo Protocol provides for access to justice and equal protection before the law and benefit of the law. See A Rudman 'Article 8' in this volume.

34 *Adama Vandi v Sierra Leone* Judgment No ECW/CCJ/JUD/32/22 (18 July 2022) para 35.

35 See A Rudman 'Article 8' sec 4.2 in this volume.

36 See EC Cuenca 'Right to effective remedy' in JG Roca & P Santolaya (eds) *Europe of rights: a compendium of the European Convention of Human Rights* (2012) 454 for an analysis of the interaction between art 13 & art 6 of the ECHR reflective of arts 8 & 25 of the Maputo Protocol.

37 *Adama Vandi* (n 34) para 74.

38 M Forere & L Stone 'The SADC Protocol on Gender and Development: duplication or complementarity of the African Union Protocol on Women's Rights?' (2009) 9 *African Human Rights Law Journal* 446.

39 Article 32 of the SADC Protocol on Gender and Development provides:
'States Parties shall:
provide appropriate remedies in their legislation to any person whose rights or freedoms have been violated on the basis of gender; and
ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided by law.'

40 V Engström *Constructing the powers of international institutions* (2012) 6.

effectiveness, being its independence from the respondent authority and remedial effectiveness, being the enforceability of its decisions.⁴¹

The African Commission, with reference to the term as used in article 7(1) of the African Charter, has held that the word competent ‘encompasses facets such as the expertise of the judges and the inherent justice of the laws under which they operate’.⁴² However, as mentioned above, remedy under article 25(b) extends beyond those that are judicial.⁴³ Various arms of government, and judicial, legislative, administrative or other bodies constituted under them, respectively, can have the legal power to determine questions relating to the implementation of human rights and the appropriate remedy for violations.⁴⁴ Competence of these bodies is not only the power of the authority to reach and enforce decisions on claims before it but also providing a framework within which the petitioner and the state can negotiate to settle the dispute informally and cost-effectively.⁴⁵

3.4 Appropriate remedies for violations

The HRC has clarified that remedies are appropriate when they are ‘adapted so as to take account of the special vulnerability of certain categories of person’.⁴⁶ The peculiar vulnerabilities of African women to discrimination in the social and cultural context require that these factors are accounted for when crafting appropriate consequences for rights violations. Addressing structural and systematic discrimination calls for the creative consideration of remedial options. As stated by the United Nations Special Rapporteur on violence against women:

Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation ... reparations should aspire, to the extent possible, to subvert, instead of reinforce, pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience.⁴⁷

4 Nature and scope of state obligations

A claim for a remedy creates an obligation on states to ensure that it takes measures to ensure that victims are able to remedy harm caused by a violation of the Maputo Protocol. This means that processes are in place by which a claim can be considered, the harm arising from the violation can be determined and an award of appropriate redress for the harm suffered can be granted by a competent authority.⁴⁸ This section considers the obligations imposed by article 25 of the Maputo Protocol.

41 K Wellens et al *Remedies against international organisations: basic issues* (2002) 28.

42 *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 62.

43 See sec 3.2.

44 R Masterman *The separation of powers in the contemporary constitution: judicial competence and independence in the United Kingdom* (2011) 124.

45 K Wellens et al (n 41) 209. See also R Cavanagh & A Sarat ‘Thinking about courts: toward and beyond jurisprudence of judicial competence’ (1980) 14 *Law & Society Review* 373.

46 HRC General Comment 31 (n 27) para 15.

47 G Brodsky et al ‘The authority of human rights tribunals to grant systemic remedies’ (2017) 6 *Canadian Journal of Human Rights* 36.

48 Reid (n 21) 483 in discussing art 13 of the ECHR details that there are two separate elements of this provision i) a procedure whereby the substance of complaint under the substantive article may be determined and ii) the provision of adequate redress.

4.1 Redress for violation of rights in terms of article 25(a)

Also termed as redress or reparation, article 25(a) provides for a right to claim appropriate redress depending on the violation of the claim alleged. The CEDAW Committee has found that the state obligation to provide redress is covered by article 2(b) of CEDAW, stating the following:

Subparagraph (b) contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.⁴⁹

According to the UN Basic Principles, reparation needs to be adequate, effective, prompt, and proportional to the gravity of the violation and harm suffered.⁵⁰ The CEDAW Committee describes this requirement as, 'reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights'.⁵¹ Similarly, the African Commission has set out that the overarching goal of reparation 'is to provide healing for victims'.⁵² Importantly, awards of reparation must always be made and implemented without discrimination.⁵³

The jurisprudence of the African Commission is arguably underdeveloped with regard to redress both under the African Charter and the Maputo Protocol. This is due to a focus on assessing domestic remedies for purposes of determining the admissibility of complaints while, when ruling on the merits of complaints before it, neglecting to elaborate on what forms of redress are appropriate to remedy the violations that arose in the complaints before it.⁵⁴ Following a review of the African Commission's jurisprudence, Ssenyonjo observes that after finding violations of the African Charter, the Commission

49 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para 32.

50 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law, Resolution adopted by the General Assembly on 16 December 2005, UN Doc A/RES/60/14 (UN Basic Principles) para 15; see also UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations, 18 October 2013, CEDAW/C/GC/30, para 79; UN Committee on the Rights of the Child (CRC), General Comment 5 General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5; IACtHR, *Loayza Tamayo v Peru*, Judgment of 27 November 1998, Series C, No 42 para 87; IACtHR, *Velásquez Rodríguez v Honduras* (merit) Judgment of 21 July 1989, Series C No 7 para 27; ECOWAS Court, *Djot Bayi v Nigeria*, Communication ECW/CCJ/JUD/01/09, 28 January 2009 paras 45-6.

51 *AT v Hungary* Communication 2/2003, CEDAW Committee (26 January 2005) UN Doc CEDAW/C/32/D/2/2003 (2005) para 9.6(I)(b).

52 African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art 5), adopted during the 21st extra-ordinary session of the African Commission, held in Banjul, The Gambia, from 22 October-5 November 2013 para 10.

53 UN Basic Principles (n 50) para 25.

54 GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 454. For a similar view on the inconsistent practice of offering remedies and awarding damages at the ECHR see T Barkhuysen & ML van Emmerik 'A comparative view on the execution of judgments of the European Court of Human Rights' in T Christou & JP Raymond (eds) *European Court of Human Rights: remedies and execution of judgments* (2005) 5.

seldom required any specific actions or measures to be taken by states to provide remedies.⁵⁵ More recently, the Commission has acknowledged the significance of compensation for violations that is just and adequate or fair and equitable as to be determined by the national laws.⁵⁶

The African Court on Human and Peoples' Rights (African Court) is given the powers under article 27(1) of the Court Protocol to make appropriate orders to remedy a violation, including the payment of fair compensation or reparation where it finds that there is a violation of human rights. The African Court has held that with respect to the determination of reparations, the respondent state should first be internationally responsible for the wrongful act, causation should be established between the wrongful act and the alleged prejudice and where it is granted, reparation should cover the full damage suffered.⁵⁷

The following sub-sections consider the measures states must take to meet its obligations under article 25(a). This discussion highlights the need for gendered restitutive measures, appropriate compensation awards, victim-centred rehabilitation and clear modalities of ordering and enforcing satisfaction.

4.1.1 Gendered restitutive measures

Restitutive measures aim to put the victim back in the position they were in before the violation.⁵⁸ However, this approach may not result in repair of the harm or injury caused by the violation. This is

55 M Ssenyonjo 'Responding to human rights violations in Africa: assessing the role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7 *International Human Rights Law Review* 7. See also Shelton (n 7) 12, where she cites examples of such recommendations in the following cases: *Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995); *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union interafricaine des droits de l'Homme, Les témoins de Jéhovah v Zaire*, Communications 25/89, 47/90, 56/91, 100/93 (Joined), African Commission on Human and Peoples' Rights, 10th Annual Activity Report (2000); *Commission Nationale des Droits de L'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995); *Civil Liberties Organization v Nigeria*, Communication 129/94, African Commission on Human and Peoples' Rights, 9th Annual Activity Report, (2000); *Amnesty International v Zambia*, Communication 212/98, African Commission on Human and Peoples' Rights, 12th Annual Activity Report, (2000); *Rights International v Nigeria*, Communication 215/98, African Commission on Human and Peoples' Rights, 13th Annual Activity Report, (2000); *Forum of Conscience v Sierra Leone*, Communication 223/98, African Commission on Human and Peoples' Rights, Fourteenth Annual Activity Report, (2000); and *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).

56 G Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 681. See Ssenyonjo (n 55) 15 where he cites the following cases as examples: *Odjouriby Cossi Paul v Benin* Communication 199/97, African Commission on Human and Peoples' Rights, 17th Annual Activity Report; *Kenneth Good v Republic of Botswana* Communication 313/05, 28th Activity paras 243-244; *Association of Victims of Post Electoral Violence & interights v Cameroon* Communication 272/2003, African Commission on Human and Peoples' Rights 27th Activity Report, para 138. See also *Embga Mekongo Louis v Cameroon* Communication 59/91, African Commission on Human and Peoples' Rights, Eighth Annual Activity Report, para 2 where after a finding of violation of art 7, the Commission stated that it was 'unable to determine the amount of damages' and thus recommended 'the quantum should be determined under the law of Cameroon'. This can be compared with *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* Communication 323/06, African Commission on Human and Peoples' Rights, Combined 32nd and 33rd Annual Activity Report (2013), where the Commission determined a quantum for damages when it '[r]equest[ed] compensation to each of the victims in the amount of EP 57,000, as requested by the Complainant, for the physical and emotional damages/traumas they suffered'.

57 *Joseph John v United Republic of Tanzania* Application 005/2018 para 101.

58 General Comment 4 (n 52) para 36.

the case where the cause of the violation was systematic in nature.⁵⁹ Thus, a distinction must be made between individual reparations and reparations targeted at systematic failures.⁶⁰

Reparations targeted at systematic failures aim to guarantee non-repetition of the violation.⁶¹ The Maputo Protocol is transformative in nature.⁶² Therefore a remedy arising as a consequence of a violation of the treaty should not aim to return victims to the status *quo ante*.⁶³ Often the facts that result in a complaint are manifestations of the root causes of discrimination against women and account for a specific and compounded form of harm that women experience.⁶⁴ Restitutive measures to address these root causes will not serve their purpose if they merely restore the circumstances that perpetuated the initial violation.⁶⁵ Meeting the requirements of article 25(a) therefore requires that restitutive measures are determined with a gendered lens. The measures should not perpetuate gender discrimination.⁶⁶

An element of this form of transformative order is contained in the *APDF*.⁶⁷ Here the African Court ordered Mali, first to reform its laws in line with the state's human rights obligations; secondly to undertake educational drives with the population and; finally to report back to the African Court within two years on implementation of the orders.⁶⁸ In terms of the second remedy, it, importantly, aims to change the social norms that inform gender bias. Before the African Commission, an instance of this form of remedy targeted at addressing a systematic problem is evident in the order urging the state to ratify the Maputo Protocol.⁶⁹

59 See *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017). Page 8 of the unofficial translation on file with the author. In these cases, the ECOWAS Court found that there were deficiencies in the Nigerian judicial system in responding to complaints by women victims of violence and providing them access to judicial remedies. However, in both cases the court proceeded to only make declarations regarding the human rights violations and award individual compensation to the petitioners. The ECOWAS Court missed opportunities to address systemic root causes of discrimination in the administration of justice in the state that resulted in the violation of the individual petitioners rights. This despite an attempt by the petitioner in the *Dorothy Njemanzi* case for instance to seek remedies targeted at systematic failures such as '[a]n order for the enactment of a law eliminating all forms of violence, including sexual violence against women and the training of the Police, Prosecutors, Judges and other responsible Government Agencies on laws on violence against Women and gender sensitivity and the creation of specialized police Units and Courts dealing with cases of violence against women'.

60 XA Ibanez 'The role of international and national courts: human rights litigation as a strategy to hold states accountable for maternal deaths' in P Hunt & T Gray (eds) *Maternal mortality, human rights and accountability* (2013) 54.

61 Ibanez (n 60) 54.

62 See A Rudman 'Article 8' sec 3.1.1 in this volume for a discussion on the transformative goal of the Maputo Protocol and attaining substantive equality for women in Africa.

63 R Rubio-Marfn & C Sandoval 'Engendering the reparations jurisprudence of the Inter-American Court of Human Rights: the promise of the *Cotton Field* judgment' (2011) 33 *Human Rights Quarterly* 1070.

64 Rubio-Marfn & Sandoval (n 63) 1070.

65 As above.

66 African Commission on Human and Peoples' Rights Guidelines on Combating Sexual Violence and its Consequences in Africa adopted during its 60th ordinary session held in Niamey, Niger from 8-22 May 2017 para 42.

67 *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali (APDF)* (merits) (2018) 2 AfCLR.

68 *APDF* (n 67). Orders: 'x the Respondent State to amend the impugned law, harmonise its laws with the international instruments, and take appropriate measures to bring an end to the violations established; ... xii. Requests the Respondent State to comply with its obligations under art 25 of the Charter with respect to information, teaching, education and sensitisation of the populations. xiii. Orders the Respondent State to submit to it a report on the measures taken in respect of paragraphs x and xii within a reasonable period which, in any case, should not be more than two (2) years from the date of this Judgment'.

69 *Egyptian Initiative for Personal Rights* (n 56) para 275.

4.1.2 Compensation awards

Compensation is a monetary award for material costs and losses as well as moral damages for the harm suffered.⁷⁰ Compensation should be provided for any monetary loss or damage that is proved to have occurred as a result of gross violations of international human rights law and serious violations of international humanitarian law.⁷¹ Where a concrete figure is awarded, compensation awards encompass pecuniary and non-pecuniary damages as well as costs and expenses.⁷² According to the UN, Basic Principles compensation must be fair, adequate, and proportionate to the material, non-material and other harm suffered.⁷³ Damages can include compensation for physical or mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, moral damage and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.⁷⁴

However, compensation awards in instances of human rights violations are often difficult to quantify.⁷⁵ Generally, the theoretical foundations of damages for human rights violations remains underdeveloped as courts have struggled to articulate a clear, consistent, rational, and thought-out reasoning for human rights damages.⁷⁶ The African Commission has developed jurisprudence that indicates its willingness to award compensation as redress for a violation but has in most instances, as mentioned above, stopped at directing that the quantum be determined in accordance with national law.⁷⁷ The CEDAW Committee has taken a similar approach ordering compensation that is ‘commensurate with the gravity of the violation’.⁷⁸

The African Court applies the general principle that there must be a causal link between the violation and the alleged injury and places the burden of proof on the petitioner to provide evidence to justify the claim for reparation.⁷⁹ In determining compensation for material prejudice, the African Court has established that any material prejudice must be proven by supporting documents, and the causal link between the alleged prejudice and the violation found must be established.⁸⁰ On moral damages, the African Court applies a presumption of moral injury suffered by a petitioner as soon as the Court has found a violation of the petitioner’s rights, ‘so that it is no longer necessary to look for evidence to establish the link between the violation and harm’.⁸¹ The Court has held that:

70 UN Basic Principles (n 50) para 20.

71 As above.

72 See eg, Inter-American Court on Human Rights case *González et al (Cotton Field) v Mexico*, Judgement of 16 November 2009, Series C No. 205.

73 UN Basic Principles (n 50) para 37.

74 UN General Principles (n 50) para 20.

75 Ibanez (n 60) 55. See a consideration of compensation in cases of maternal mortality which by their nature are irreparable and any remedy would fail to be proportionate to the gravity of the injury or harm caused.

76 JN Varuhas *Damages and human rights* (2016) 2.

77 See cases cited under n 56 above. For examples of the African Commission deviating from this general approach see *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples’ Rights 57th Annual Activity Report (2016) para 158 where the court quantified damages awarded. See also *Egyptian Initiative for Personal Rights* (n 56).

78 See as examples *X and Y v Russia* CEDAW Communication 100/2016; *LC v Peru* CEDAW Communication 22/2009 para 12(a); *ST v Russia* CEDAW Communication 65 of 2014 para 11(a); *Angela González Carreño v Spain* Communication 47/2012 para 11(a)(i); *VK v Bulgaria* Communication 20/2008 para 9.16(a); *SFM v Spain* CEDAW Communication 138/2018. See also *Ciobanu v Moldova* Communication 104/2016 where the CEDAW Committee gave a more detailed order for compensation yet did not determine the quantum to be awarded.

79 *Kouamé Patrice Kouassi and Baba Sylla v Republic of Côte d’Ivoire* Appl 15/2021 para 149.

80 *Kouamé and Sylla* (n 79) para 154.

81 *Kouamé and Sylla* (n 79) para 158. See also *Oumar Mariko v Republic of Mali* Appl 29/2018 para 184; *Sébastien Germain Marie Aïkoué Ajavon v Benin* (merits and reparations) (2020) 4 AfCLR 133, para 168; *Guehi v Tanzania* (merits and reparations) (2018) 2 AfCLR 477 para 55; and *Lohé Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 346 para 41.

[M]oral prejudice is presumed in cases of human rights violations, and the quantum of damages in this respect is assessed based on equity, considering the circumstances of the case. The Court has thus adopted the practice of granting a lump sum in such instances.⁸²

The African Court has yet to determine a claim for compensation concerning the violation of women's rights in the African Charter or the Maputo Protocol. The African Commission has in two seminal women's rights cases awarded compensation. In a decision adopted in 2011, in awarding compensation in the amount of about USD 1850 to each complainant for violations of the African Charter, the African Commission gave no reason for this determination. In its order, the African Commission merely indicates that the award was 'as requested by the Complainant'.⁸³ In a decision adopted in 2015, the African Commission gave an award of compensation of USD150 000 dollars to the complainant as 'equitable and fair compensation'.⁸⁴ In detailing the factors considered in awarding non-material damages the African Commission noted that it is determined taking into account relevant circumstances including physical, psychological and emotional trauma suffered as a result of both the violation by a third-party and the state's failure to adequately respond to the violation.⁸⁵

The ECOWAS Court has made several orders specifying the quantum of the compensation to be awarded in instances of women's rights violations. However, an assessment of the reasons provided for the determination of the quantum in each case and the reasons provided for the appropriateness of compensation as the suitable redress reveals the challenges experienced in the application of the court's discretion to award compensation. A consistent method that can be cited as authority in this regard has not been developed and the quantification of the compensation appears to be a matter of judicial discretion. The following case discussions, referring to women's rights under the African Charter and the Maputo Protocol, are nonetheless important in considering the application of the obligation to provide redress because they provide an indication of where compensation was found appropriate and what evidence the ECOWAS Court required to quantify the compensation.

In 2008, in *Hadijatou Mani Koraou v Niger*,⁸⁶ the ECOWAS Court awarded individual monetary compensation of approximately USD18 415 to the petitioner, who was sold to a man at the age of 14 and kept as an enslaved person in his household for nine years.⁸⁷ The court held that it did not have enough submission on the calculation of reparations to assist in determining the quantum of compensation.⁸⁸ It nonetheless awarded compensation but made little effort to clarify how it arrived at the quantum awarded. It clarified that the compensation was to remedy the physical, psychological and moral harm suffered over the period of the victim's enslavement.⁸⁹ In *Mani Koraou* a consideration of the facts was sufficient to justify an entitlement to the compensation awarded to the petitioner. In explaining the amount awarded, the Court stated:

To support her reparation request, the applicant did not provide the Court with any calculation hint that would allow it to decide on a specific sum of money in reparation for the alleged harm. The Court concludes that an all-inclusive sum of money can be granted to her...[t]he analysis of the facts clearly shows that the

82 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (reparations) (2015) 1 AfCLR 258 para 55; and *Ingabire Victoire Umuhoza v Rwanda* 2016 (2016) 1 AfCLR 540 para 59; and *Christopher Jonas v Tanzania* (reparations) Appl 11/2015 para 23.

83 *Egyptian Initiative for Personal Rights* (n 56) para 275 (iv).

84 *Equality Now and Ethiopian Women Lawyers Association* (n 77) para 158.

85 As above.

86 *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/C CJ/JUD/06/08 (27 October 2008) (*Mani Koraou*).

87 *Mani Koraou* (n 86) para 14.

88 *Mani Koraou* (n 86) para 95.

89 *Mani Koraou* (n 86) para 96.

applicant was subject to physical, psychological and moral harm due to the nine (9) years during which she was held in slavery. This justifies the allocation of compensation as reparation for the harm suffered.⁹⁰

In 2017, in *Dorothy Njemanze* the ECOWAS Court similarly awarded an amount of approximately 6 million Naira or USD13 780 as damages against the state for violations of the petitioners' rights.⁹¹ The petitioners had been abducted and assaulted sexually, physically, verbally and unlawfully detained in different incidents over a period. The arrests were all carried out as part of routine sweeps by the Abuja Environmental Protection Board and the Society Against Prostitution and Child Labour. The petitioners were arrested and accused of being prostitutes simply because they were found on the streets at night. The first petitioner attempted to lodge a complaint about the unlawful detention with the police, but she was turned away because 'they all looked like prostitutes'.⁹² In this case, the petitioners had made a claim for *inter alia* monetary compensation for 100 million Naira.⁹³ After determining that the state had violated the petitioners' rights, the Court ordered a reduced amount of 6 million Naira. Unfortunately, the judgment does not offer any insight into the reason for the reduced order on damages or why the remedy was appropriate in the circumstances.

In *Mary Sunday*, the ECOWAS Court had another opportunity to clarify the principles applicable in determining compensation claims before it. In this case, the petitioner was successful in claiming a violation of her right to access justice as the state had failed to conduct an adequate investigation into a case of domestic violence. As a result of the physical assault, she sustained extensive injuries that resulted in visible permanent scarring. The Court awarded compensation in the amount of approximately USD30 400 as reparation for the injuries she had sustained. The petitioner had claimed an amount of USD45 900. The Court's reasoning for awarding the compensation was arguably not informed by any evidence put before it. In fact, the Court noted that there was no evidence before it to assess the damage suffered by the petitioner.⁹⁴ The Court further noted that the submission of such evidence would have greatly helped in the quantification of the damage. From the statement made by the Court, it appears to have been swayed by the appearance of the petitioner's injuries in awarding the compensation where it noted:

that no evidence permitting the assessment of the damage suffered by the applicant has been entered in the file. The production of such a piece would have greatly helped her to quantify the damage, even though, during her various hearings, the Court was able to get an idea of the severity of Ms. Sunday's injuries, it [the physical manifestation of the injuries Ms Sunday sustained] has often been present. That being so, the absence of such evidence of damages does not preclude it from ruling on the question of pecuniary compensation, since it has a discretion in that regard.⁹⁵

In *Aircraftwoman Beauty Igbobie Uzezi v Nigeria*,⁹⁶ the ECOWAS Court determined a claim of compensation and awarded approximately USD200 000 in damages. A former aircraftwoman filed the case with the Nigerian Air Force who, after being raped by a superior officer at the base, had suffered various forms of physical and mental torture and ill-treatment at the hands of officers in the Air Force

90 *Mani Koraou* (n 86) paras 95-96.

91 *Dorothy Njemanze* (n 32).

92 *Dorothy Njemanze* (n 32) 5.

93 About USD 232 000.

94 *Mary Sunday* (n 59). Paras 8-9 of unofficial translation on file with the author.

95 As above. See also *Aminata Diantou Diane v Mali* Judgment No ECW/CCJ/JUD/14/18 (21 May 2018). The ECOWAS Court again cited its inherent discretion as the basis for determining the amount of compensation in the absence of evidence to enable the exact computation of damages suffered by the applicant. The Court awarded approximately 22,500 USD in compensation for the damage suffered by the applicant.

96 *Aircraftwoman Beauty Igbobie Uzezi v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/21 (30 April 2021) (*Aircraftwoman*).

intent on punishing her for reporting the rape incident and identifying her rapist.⁹⁷ This persecution culminated in her unlawful dismissal. Again, like in *Mary Sunday* and *Dorothy Njemanze*, the Court did not refer to any evidence before it in quantifying the damages. It determined an all-inclusive amount for all the heads of damages included in the petitioner's claim.⁹⁸ This award represented a departure from the average quantum awarded by the court in the cases discussed above relating to the violation of women's rights. The range of awards in previous cases discussed was between USD18 000 and USD30 000. In the *Aircraftwoman Beauty* case, the USD200 000 awarded far exceeded the average awarded in cases raising women's rights violations. An indication of what may have informed this determination is the observance by that Court that restitution for rape as torture is impracticable, leaving monetary compensation as the only viable option. In determining the quantum of damages, the Court considered 'what amount of money is sufficient to repair or compensate for the trauma of a young teenager just entering adulthood, a trauma that will remain with her for life'.⁹⁹ The Court then cited the psychological effects of rape as a basis for the award.¹⁰⁰

In *EI v Nigeria*, the ECOWAS Court rejected a claim for compensation arising from a violation of the right to a remedy by having a rape case prosecuted over an extensive period of time.¹⁰¹ The petitioner alleged the violation of her right to *inter alia*, remedies. The state, in this case, had failed to conduct a speedy and effective trial after the petitioner had reported a case of rape. The ECOWAS Court found a violation of the right to a remedy and ordered that the state conduct a trial and punish the perpetrator if he is found guilty. The Court dismissed the petitioner's claim for damages. In this regard, the petitioner had claimed a sum of 25 000 000 Naira¹⁰² to compensate for the physical and psychological pain, emotional distress, and post-traumatic stress she had suffered as a result of the violation of her rights.¹⁰³ The Court reasoned that the claim for 'physical and psychological pain, emotional distress and post-traumatic stress' related to the harm arising out of the rape, rather than as a consequence of the failure of the state to effect a speedy trial.¹⁰⁴ In making this determination, the Court relied on the absence of submissions on the damages suffered as a result of the delay in the prosecution and the fact that the petitioner, throughout the case, did not show any special damages suffered as result of the delay in the state conducting a fair trial. Its inference was therefore that the claim for damages was for the rape itself. It determined that until a determination on the rape case was made by the national court, it was not able to award damages for any harm arising from the alleged rape.¹⁰⁵

In this case, the ECOWAS Court arguably failed to apply the principle that a violation of a right results in a claim for reparations, including compensation.¹⁰⁶ That notwithstanding, the point made by the Court, in this case, is that where damages are claimed, the petitioner has the onus to comprehensively clarify the basis of the claim for damages and present evidence of the harm suffered as a result of the violation. This ruling indicates a departure from the approach taken in the cases discussed above. As noted above, in *Mary Sunday* and *Dorothy Njemanzi*, despite the absence of evidence on the harm

97 *Aircraftwoman* (n 96) paras 11-19.

98 *Aircraftwoman* (n 96) para 154.

99 *Aircraftwoman* (n 96) para 152.

100 *Aircraftwoman* (n 96) para 153.

101 *EI v Nigeria* Judgment No ECW/CCJ/JUD/09/22 (25 April 2022).

102 Approximately USD58 000.

103 *EI* (n 101) para 95.

104 *EI* (n 101) para 98.

105 *EI* (n 101) para 96.

106 The ECOWAS Court had at this juncture itself endorsed this principle in 2021 in the case of *Aircraftwomen* (n 96) para 150 where it cited its decisions in other cases endorsing this principle.

suffered or on computation of the quantum of damages, the Court proceeded to invoke its discretion in awarding compensation for violations without giving any further justification for the decision.

4.1.3 *Victim-centred rehabilitation*

Rehabilitation is considered a non-monetary remedy targeted at victims of human rights violations and their family members or communities.¹⁰⁷ Rehabilitation is aimed at providing a means to heal the physical, mental and emotional trauma or harm that has been caused by the violation to the victims and other affected persons, such as family members or the community.¹⁰⁸ Rehabilitation should include medical and psychological care as well as legal and social services.¹⁰⁹ Rehabilitation of victims should aim to restore, as far as possible, their independence, and physical, mental, social, cultural, spiritual, and vocational ability and full inclusion and participation in society.¹¹⁰ Providing this as a form of reparations therefore requires that state institutions tasked with determining claims for damages elaborate on the modalities of how rehabilitation awards are determined by the relevant bodies and under what circumstances rehabilitation will be available as a remedy.

Victim-centred rehabilitation requires that decisions made about the life of the victim must be made with their interests as the primary focus. Their autonomy must at all times be paramount.¹¹¹ Victim-centred rehabilitation where properly applied, ensures that programmes are tailored to each woman's needs and individual circumstances and provide for a possibility for active participation of the victims in their own recovery process.¹¹² Having said that, addressing collective trauma is also a key objective of rehabilitation for human rights violations.¹¹³ Failing to address the collective trauma creates the risk of repetition of the violation.¹¹⁴ Rehabilitation awards should therefore seek to promote individual, family and social healing, recovery and reintegration.¹¹⁵

The African Commission has called for a holistic, integrated and long-term approach to state responsibility for providing rehabilitation for victims of human rights violations. In General Comment 4, the African Commission has indicated examples of services that may be implemented as including medical, physical and psychological rehabilitative services; re-integrative and social services; community reconciliation and community therapy; socio-therapy and social integration; family-oriented assistance and services; and vocational training and education.¹¹⁶

4.1.4 *Modalities of ordering and enforcing satisfaction*

Where restitutive measures and compensation are not appropriate remedies to address an injury or harm arising from the violation of a human right, satisfaction may be considered. Unlike restitution,

107 Shelton (n 7) 1, 394.

108 Shelton (n 7) 349.

109 UN General Principles (n 50) para 21.

110 UN General Principles (n 50) para 40. See also African Commission General Comment 4 (n 52) para 40.

111 International Federation for Human Rights, Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, International Meeting on Women's and Girls' Right to a Remedy and Reparation (2007), Basic Principle D.

112 REDRESS and Transitional Justice Network 'Rehabilitation as a form of reparation: opportunities and challenges' (2010) <https://redress.org/wp-content/uploads/2018/01/Sep-10-Rehabilitation-as-a-Form-of-Reparation.pdf> (accessed 10 October 2022).

113 See *The African Commission on Human and Peoples' Rights v Republic of Kenya* Appl 06/2012 para 44 where the African Court held that 'the Court remains alive to the fact that the notion of "victim" is not limited to individuals and that, subject to certain conditions, groups and communities may be entitled to reparations meant to address collective harm'.

114 REDRESS (n 112) 4.

115 REDRESS (n 112) 4.

116 General Comment 4 (n 52) para 41.

compensation and rehabilitation, satisfaction can more readily result in the systematic changes needed to address violations resulting in individual harm.¹¹⁷ Satisfaction refers to a variety of measures.¹¹⁸ The UN General Principles indicate what some of these measures should include. Effective measures aimed at the cessation of continuing violation are an example of satisfaction.¹¹⁹ Investigations are in themselves a form of satisfaction in that they enable the facts relevant to a violation to be verified and, where appropriate, these facts can be made public. The UN General Principles also identify the location of missing persons abducted or disappeared and identification and reburial of those killed in line with express wishes or cultural rites of the deceased's family or community as another instance of satisfaction.¹²⁰ Moreover, a judicial order that has the effect of restoring the dignity, the reputation and the rights of the victim and of persons closely connected with them has in several cases proven an effective form of satisfaction.¹²¹ Public apologies to the victims are also listed in the UN General Principles as a form of satisfaction and have been claimed in cases of human rights violations by petitioners.¹²² Other forms of satisfaction included in the UN General Principles are the state acknowledging the facts and taking responsibility for violations, bringing those liable for the violations to justice and symbolic tributes such as commemoration sites.¹²³ Giving content to what appropriate redress is, the African Court ruled in *APDF* that declarations of rights can in themselves be appropriate remedies as they are a form of satisfaction for moral injury.¹²⁴

Determination of satisfaction as a form of redress continues to be a challenging aspect of enforcing human rights obligations against states.¹²⁵ When courts order individual remedies for particular claimants such as compensation, modalities for ensuring implementation of that order are theoretically more straightforward than where the court calls for more structural change such as a change in policy, or a reform process.¹²⁶ This notwithstanding, states are required to ensure that reparations awarded in line with article 25 are realised in practice.¹²⁷

4.2 Access to competent national authorities to determine and award remedies in terms of article 25(b)

As mentioned in the introduction article 25(b) calls on member states to have in place institutions with clear processes through which victims can claim and access redress.

117 H Potts 'Accountability and the right to the highest attainable standard of health right' in P Hunt & T Fray (eds) *Maternal mortality, human rights and accountability* (2013) 127.

118 International Commission of Jurists 'The right to a remedy and reparation for gross human rights violations: a practitioners' guide' (2018) xiv.

119 See *Brahim Ben Mohamed Ben Brahim Belgeith v Republic of Tunisia* Appl 017/2021 para 35, where the African Court ordered Tunisia to repeal presidential decrees, as a measure of restitution and put in place a Constitutional Court as a means to ensure non-repetition of the violations complained of at para 139.

120 UN Basic Principles (n 50) para 22.

121 See *African Commission v Kenya* (n 113) where land restitution was awarded to the petitioners. See also *Mgosi Mwita Makungu v United Republic of Tanzania* Appl 6/2016 para 68, where the African Court has held that 'the publication of judgments of international human rights courts as a measure of satisfaction was common practice.' See also *Norbert Zongo* (n 82) para 98; *Reverend Christopher R. Mtikila v Tanzania* (reparations) Appls 9 and 11/2019 para 45; and *Anudo Ochieng Anudo v United Republic of Tanzania* Appl 012/2015 para 95.

122 *African Commission v Kenya* (n 113) para 129 the African Court held that under the circumstances a claim for an apology was not necessary as the judgment was sufficient satisfaction.

123 UN Basic Principles (n 50) para 22.

124 See Shelton (n 7) 396.

125 Ibanez (n 60) 54.

126 S Gloppen 'Studying courts in context: the role of non-judicial institutional and socio-political realities' in L Haglund & R Stryker (eds) *Closing the rights gap from human rights to social transformation* (2005) 297.

127 See R Nekura 'Article 4' in this volume for a discussion relating to the specific obligation to ensure reparations are realised in practice with respect to women victims of violence.

Thus, the primary responsibility for providing avenues for procedural access to justice is that of the state.¹²⁸ Where a treaty provides for a monitoring mechanism, the role of such a regional or international body is subsidiary and becomes relevant where the state has failed in its responsibility.¹²⁹ The African Commission has accepted this rationale, stating that states must be permitted to resolve internal problems ‘in accordance with their own constitutional procedures before accepted international mechanisms can be invoked’.¹³⁰ The African Court has similarly followed this principle in matters before it.¹³¹ Like most regional and international mechanisms the African Commission and African Court require exhaustion of local remedies before a claim is admissible before them.¹³²

Contrary to this approach, the ECOWAS Court does not require the exhaustion of domestic remedies.¹³³ The Supplementary Protocol detailing the jurisdictional competence of the ECOWAS Court does not require this and the Court in its practice and operation, has not either.¹³⁴ This is the case with respect to the East African Court of Justice (EACJ).¹³⁵ As such, but for the EACJ and the ECOWAS Court, in the African regional human rights system, national authorities tasked with the vindication of rights must first be guaranteed and realised at a national level, failing which the citizens of a state that has ratified the treaties that they will be seeking to vindicate can access the sub-regional and regional mechanisms to defend their rights.

This section investigates the types of measures needed to provide access to remedies at the national level. Article 25(b) requires that states provide competent judicial, administrative, or legislative authorities or other competent authorities provided by law to determine a claim for breach of a right. The CEDAW Committee, has pointed out that CEDAW does not expressly provide for a right to a remedy; however, it considers that the procedural part of the right to remedy is implied particularly in article 2(c), by which states parties are required ‘to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination’.¹³⁶

128 AF Bayefsky ‘General approaches to domestic application of international law’ in RJ Cook (ed) *Human rights of women: national and international perspectives* (1994) 354.

129 Ssenyonjo (n 55) 7. See also Shelton (n 7) 59.

130 *Article 19 v Eritrea* (2017) AHLR 73 (ACHPR 2007) para 44.

131 *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314 paras 78-79.

132 Article 56(5) of the African Charter requires that as procedural requirements to access the claims procedure that a complaint is to be sent after local remedies, if any, have been exhausted, unless said procedure has been unduly prolonged. See also, eg, ECHR art 35; ACHR art 46(1)(a). For a comprehensive analysis of the jurisprudence of the African Court on this rule between December 2009 and December 2018 see L Chenwi ‘Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples’ Rights’ (2019) 41 *Human Rights Quarterly* 374-398; H Onoria ‘The African Commission on Human and Peoples’ Rights and the exhaustion of local remedies under the African Charter’ (2003) 3 *African Human Rights Law Journal* 1-24. See CF Amerasinghe *Local remedies in international law* (2004) for a discussion of the local remedies requirement in international law.

133 ST Ebobrah ‘A rights-protection goldmine or a waiting volcanic eruption: competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice’ (2007) 7 *African Human Rights Law Journal* 326.

134 The Supplementary Protocol A/SP1 /01/05 that details the jurisdictional competence of the ECOWAS Court did not include a requirement for the exhaustion of domestic remedies. See also ST Ebobrah ‘Taking children’s rights litigation beyond national boundaries: the potential role of the ECOWAS Community Court of Justice’ in M Killander (ed) *Human rights litigation and the domestication of human rights standards in sub-Saharan Africa* (2007) 167.

135 See *Prof Peter Anyang’ Nyong’o v Attorney General of Kenya* Ref 1 of 2006 EACJ para 21. In determining that the provision in the treaty detailing the jurisdiction of the court did not have this requirement, the court held that ‘article 30 on the other hand, confers on a litigant resident in any Partner State the right of direct access to the Court for determination of the issues set out therein... [w]e therefore, do not agree with the notion that before bringing a reference under article 30, a litigant has to “exhaust the local remedy”’.

136 *KT Vertido v the Philippines* Communication 18/2008 CEDAW Committee (1 September 2010) UN Doc CEDAW/C/46/D/18/2008 (2010) para 8.3; *LC v Peru* Communication 22/2009 (17 October 2011) UN Doc CEDAW/C/50/D/22/2009 (2011) para 8.16.

Article 25(b) requires that member states establish institutions and that procedures for access to these institutions as determined by law. However, it does not pre-determine what those measures should be.¹³⁷ The authorities may be constitutional, legislative, administrative and judicial institutions.¹³⁸ The Inter-American Court of Human Rights (Inter-American Court) has held that national institutions that states are required to establish so as to enable citizens to lodge claims where their rights have been violated must be suitable to address the infringement of a legal right complained of. The African Commission has defined an effective remedy as one which is available without impediments, offers a prospect of success to the woman claimant and can sufficiently repair the harm suffered.¹³⁹

Recognising that a number of institutions may exist in every country, judicial, quasi-judicial and non-judicial, not all are applicable in every circumstance. It is upon the petitioner to determine a mechanism that is adequate to vindicate their violation.¹⁴⁰ In the context of article 25, this means that at the national level, where there are civil and criminal judicial avenues to vindicate rights, women can opt for either of these. In addition, where there are administrative institutions with the power to determine a claim relating to the same violation, the petitioner can opt to utilise the administrative institution rather than any of the judicial mechanisms available. When engaging the local authorities, a victim of violations is not required to engage all available institutions at their disposal.¹⁴¹ In order for victims to make an informed choice between various available institutions, these options must be available in law and in practice.¹⁴² More importantly, there must be clear and known procedures on how to access the various available authorities.¹⁴³

4.2.1 Judicial measures

The availability of courts as an avenue for the judicial vindication of rights violations under the Maputo Protocol is required by member states under article 25(b).¹⁴⁴ To meet the state obligations member states may for instance have in place courts tasked with adjudication of entitlements of rights contained in the Maputo Protocol such as normal courts with jurisdiction to hear matters relating to the violation of human rights, Constitutional Courts, Sexual Offences Special Courts or Domestic Violence Courts.¹⁴⁵

Litigation is a popular avenue to obtain redress for rights violations, although, as already mentioned, not the only avenue.¹⁴⁶ As the nature of litigation and the processes by which cases vindicate human rights violations contained in the Maputo Protocol are evolving on the continent, no two countries have the same procedures for enabling access to judicial institutions to enforce human rights.¹⁴⁷ In addition to that, the more civil society organisations engaging in public interest litigation and victims

137 Cuenca (n 36) 450.

138 D Galligan & D Sander 'Implementing human rights' in S Halliday & P Schmidt (eds) *Human rights brought home: socio-legal perspectives on human rights in the national context* (2004) 30.

139 General Comment 4 (n 52) para 23.

140 *Velázquez Rodríguez v Honduras* IACHR (29 July 1988) Ser C No 4, para 64.

141 *Escher et al v Brazil*, IACHR (6 July 2009) Series C No 200 para 28. See also European Court on Human Rights 'Practical Guide on Admissibility Criteria' Council of Europe (2014) para 66. See also Case of *Jasinskis v Latvia* (Application 45744/08 ECtHR 2018) paras 50-53.

142 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 32.

143 As above, The African Commission has held that such an authority for access to redress cannot be said to be available if it cannot be accessed or used by a victim. This principle was reiterated in *De Jong, Baljet & Van den Brink v The Netherlands* (1984) 8 EHRR 20 para 39. The European Court held that the authority must be available in theory and in practice. See also *Sejdovic v Italy* (Application no 56581/00) [2006] ECHR 86 para 45.

144 Chenwi (n 132) 380.

145 Cuenca (n 36) 451.

146 E Durojaye 'Litigating the right to health in Nigeria: challenges and prospects' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 154.

147 H Duffy *Strategic Human rights litigation: understanding and maximising impact* (2018) 9.

of violations are engaging in human rights litigation before national courts, the more the rules of procedure regulating access to these institutions are developing.¹⁴⁸

From the jurisprudence emanating under the African Charter, a judicial authority that can be shown to be subject to the discretionary intervention of the executive arm of government will not qualify as a 'competent' authority set up in line with article 25(b) in that it does not have the legal power to make the determination.¹⁴⁹ In addition, where the jurisdiction of a body is ousted by constitutional or other legislative provisions, the courts are stripped of the competence to determine the remedies due for violations.¹⁵⁰ The nature of state obligations to enable access to judicial avenues of justice in law and in practice under the Maputo Protocol is comprehensively covered in chapter 9, dealing with article 8 of the Maputo Protocol. However, where the overarching state obligation under the Maputo Protocol is to effect a positive change in the real-life experiences of African women, it warrants emphasis here that such judicial mechanisms must be aimed at addressing the practical hindrances to women's access to justice.

4.2.2 Legislative measures

The first step to implementing article 25(b) is a constitutional clause setting out the ratification and domestication of international treaties. Depending on the states' approach to international treaties, states may elect to enact specific legislation that detail the modalities of enforcing the rights guaranteed under the Maputo Protocol.¹⁵¹ Other states may have separate provisions on enforcing the rights before competent bodies or legislate on the options for redress available to victims for rights violations.¹⁵²

Enforcement of the rights guaranteed in the Maputo Protocol requires that domestic laws are in place. It further requires that rules of procedure or guidelines that enable women to practically file and prosecute a complaint before national institutions set up for this purpose exist.¹⁵³ Once domestic application of the rights in the Maputo Protocol is promulgated into national law, the procedure for accessing remedies for violation of rights contained in the Maputo Protocol, and the remedies that can be accessed through those procedures, must be clarified.¹⁵⁴ Laws and directives that clarify who has

148 Duffy (n 147) 10.

149 Onoria (n 132) 4-6; *Amnesty International v Sudan* (n 42) para 31. See sec 3.3.

150 Onoria (n 132) 10.

151 Tanzania for instance has a Basic Rights and Duties Enforcement Act 33 of 1994 (BRDE Act) in place. While the Constitution empowers the High Court to determine matters relating to human rights, the BRDE Act determines that all cases on the Bill of Rights will have to be heard and determined by the High Court, through the procedure set out by the BRDE Act. For an explanation of the challenges in the BRDE Act see MKB Wambali 'The enforcement of basic rights and freedoms and the state of judicial activism in Tanzania' (2009) 53 *Journal of African Law* 53.

152 Traditionally contained in an 'Enforcement Clause' of the Bill of Rights. For instance sec 38 of the Constitution of the Republic of South Africa, 1996, indicates the remedies available for violation of rights as 'anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights'. On what constitutes relief under sec 38 the court has held in *Fose v Minister of Safety and Security* 1997 (3) SA 786 CC para 69 that, 'I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the rights entrenched in the constitution cannot properly be upheld or enhanced'.

153 Bayefsky (128) 359.

154 DK Agaba 'Implementing legal accountability to reduce maternal mortality and morbidity in Uganda' (2018) 18 *African Human Rights Law Journal* 136 where the specific measure for realisation of remedies in the context of Uganda are discussed. See *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) where the African Commission considered the effectiveness of the judicial remedial avenues available under the Immigration and Deportation Act as remedies under the domestic legal order.

the right to claim the violation and approach an appropriate body to institute proceedings to vindicate these rights are necessary legislative measures that provide access to remedies.¹⁵⁵

4.2.3 Administrative measures

Administrative mechanisms determining claims for violation of rights under the Maputo Protocol are included in the ambit of remedies that fall under the definition of article 25(b). In earlier jurisprudence from the African Commission this was not a clearly established principle. In *Alfred Cudjoe v Ghana*, the Commission, in determining what type of remedy was provided at the domestic level, determined that the rules of procedure on the admissibility of complaints required remedies sought from courts of a judicial nature, thereby excluding proceedings before the Ghanaian Human Rights Commission.¹⁵⁶ This was subsequently clarified when the Commission held that the decisions of administrative authorities would qualify, provided that they have the potential to address the violation complained of based on the application of legal principles and not subject to the discretion of executive power.¹⁵⁷ The Court has determined that administrative measures need to be determined based on the facts of the case bearing in mind the nature of the administrative remedy.¹⁵⁸

National Human Rights Institutions (NHRIs), as administrative bodies, are in many African states a representation of an authority that is tasked with promoting, protecting and offering an avenue for vindication of rights where violations occur.¹⁵⁹ Recognising this critical role, the United Nations has developed criteria by which the independence of NHRIs can be measured in determining the extent to which an NHRI suffices as a measure for procedural access to remedies under the Maputo Protocol in a country.¹⁶⁰

Measures by member states that can speak to administrative measures to realise article 25(b) include empowering laws and directives that clarify the power of NHRIs and their mandate to provide sufficient and effective remedies.¹⁶¹ Such laws and directives should detail the jurisdiction of such bodies, the status of their decisions *vis a vis* other judicial, administrative or legislative authorities such as courts, in remedying a violation, that the complaints before them are determined on legal principles

155 See the African Court decision of *Beneficiaries of the Late Norbert Zongo v Burkina Faso* Application 013/2011 (Judgment on Merits) where the domestic laws excluded NGOs standing to bring claims for damages on behalf of victims of human rights violations in cases before criminal courts as an NGO was not a direct victim.

156 Communication 221/98, African Commission on Human and Peoples' Rights, 12th Annual Activity Report (1998-1999) para 14.

157 *Article 19 v Eritrea* (n 130) para 48, see also *Constitutional Rights Project v Nigeria* (I) (2000) AHRLR 241 (ACHPR 1999) para 10.

158 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (2016) 1 AfCLR 668.

159 S Livingston & R Murray 'The effectiveness of national human rights institutions' in S Halliday & P Schmidt (eds) *Human rights brought home: socio-legal perspectives on human rights in the national context* (2004) 137.

160 Principles relating to the Status of National Institutions (Paris Principles), 20 December 1993 UN General Assembly Resolution 48/134.

161 Specific to the role of NHRIs in determining remedies for human rights violations the Paris Principles provide the following:

'A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality; informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them; hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law; making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

rather than discretionary and clarifying the remedies that the bodies have the power to provide to victims of rights violations.¹⁶² A concern with endowing NHRIs with the function of providing access to remedies for violations is the potential for duplication of the role of judicial bodies.¹⁶³ This can be avoided with clear laws and directives. Such laws and directives should also reflect the overall intention to offer a less complicated avenue for access to remedies than the formal court processes.¹⁶⁴

Other bodies created with the purpose of meeting the state obligations under article 25 may include Constitutionally mandated human rights bodies such as Gender Commissions and Commissions on Administration of Justice, provided that they make the determination of the complaint that is lodged before them based on the application of law and are not discretionary.¹⁶⁵ The African Court has held that a commission of inquiry is a remedy that need not be exhausted to file a complaint before it. The reasoning provided by the court was that the commission of inquiry was a quasi-judicial body and as such was not a remedy that needed to be exhausted before approaching the African Court.¹⁶⁶ This reasoning is relevant for the interrogation of exhaustion of remedies as a procedural requirement of the court.¹⁶⁷ However, a commission of inquiry can be a quasi-judicial remedy that makes recommendations to the state that are aimed at providing victims remedies for violations.¹⁶⁸ They can provide a way to ensure accountability for human rights violations.¹⁶⁹

5 State practice

Given that the right to a remedy under article 25 is subject to the attachment to an alleged violation of another substantive right in the Maputo Protocol, it is possible to consider state practice on the enforcement of the right to a remedy as it attaches to each of those substantive rights. However, this assessment is beyond the scope of this chapter as it is captured in discussions on state practice in enforcing any of these rights in various chapters of this Commentary. This section considers the application of the right to remedies as independently recognised under the Maputo Protocol.

5.1 Access to a remedy to vindicate rights

States reporting on measures undertaken within their jurisdictions that represent steps towards the realisation of the rights enshrined in article 25 are scattered in different parts of states' reports to the African Commission. The differential approach taken by member states indicates that while many states recognise the obligation to provide remedies for violations within their territories, they do not always recognise measures taken in this regard as advancing the right to a remedy under article 25.

162 Agaba (n 154) 139. Also See W Lichuma 'The role of national human rights institutions in monitoring human rights: a case study of the Kenya National Commission on Human Rights' in P Hunt & T Gray (eds) *Maternal mortality, human rights and accountability* (2013) 59 detailing the powers of the Kenya National Human Rights Commission to determine and order compensation where there is a human rights violation. See the discussion on Uganda's NHRI's similar empowering provisions in KC Esom 'The role of national human rights institutions in promoting international law in domestic legal systems: case study of the Uganda Human Rights Commission' in M Killander (ed) *International law and domestic human rights litigation* (2010).

163 GD Beco & R Murray *A commentary on the Paris Principles on National Human Rights Institutions* (2015) 109.

164 R Langer *Defining rights and wrongs: bureaucracy, human rights, and public accountability* (2007) 155.

165 Rwanda's Ombudsman was for instance found to be an inadequate remedy at the domestic level for vindication of rights as it exercised exclusive and discretionary powers in *Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165 para 72.

166 *Woyome v Ghana* (merits and reparations) (2019) 3 AfCLR 235 para 84.

167 FIDH, Admissibility of complaints before the African Court: Practical Guide, https://www.fidh.org/IMG/pdf/admissibility_of_complaints_before_the_african_court_june_2016_eng_web-2.pdf (accessed 5 May 2023).

168 T Probert & C Heyns 'Commissions of inquiry: valuable first steps towards accountability or smokescreens for inaction?' in T Probert & C Heyns (eds) *National Commissions of Inquiry in Africa: vehicles to pursue accountability for violations of the right to life?* (2020) 331.

169 As above.

Some state reports provide insight into measures undertaken to meet the obligations under article 25, but many reports do not record such measures.¹⁷⁰ For instance, Kenya reported having put in place judicial, legislative and administrative measures that advance the right to remedies without categorising these measures as such.¹⁷¹ Like many other African states with similar institutions for access to remedies, it reported on the creation of the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administration of Justice that hold constitutional and legal responsibilities to investigate complaints on human rights violations and afford victims remedies.¹⁷² These measures were listed in Part A of the State Report dealing with the African Charter in response to Concluding Observations and Recommendations received but does not link these to article 25 in Part B dealing with the Maputo Protocol. The National Gender and Equality Commission, for instance, is entrenched in Kenya's 2010 Constitution with the mandate to receive, process and investigate complaints from any person who alleges that their fundamental rights against discrimination and gender equality have been violated and to offer redress for such violations.¹⁷³

This is not peculiar to Kenya. A consideration of the state reports recently filed with the African Commission indicates that states generally do not report on article 25 as a substantive entitlement of the women in their territory, with many reports on the Maputo Protocol ending at measures undertaken to implement article 24.¹⁷⁴

Of the states that have included measures undertaken to implement article 25, there sometimes appears to be a merger of measures undertaken under article 25 and those required under article 8 of the Maputo Protocol. As an example, in 2020 Namibia reported on several measures under article 25. The most relevant to illustrate the conflation between articles 8 and 25 is a collaboration to enable training for a victim-centred approach to investigating and prosecuting gender-based violence cases.¹⁷⁵ While it may appear to be a measure relating to judicial measures for access to a remedy for the violation of article 4 of the Maputo Protocol, it is a measure that should naturally fit into measures to ensure equal access to justice under article 8 of the Maputo Protocol in relation to gender-based

170 Republic of Kenya Combined 12th and 13th Periodic Reports 2015-2020 on the African Charter on human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, April 2020. The report lists measures required under art 25. However, Part B of the State Report ends at measures under art 24.

171 Combined Report of Kenya (2015-2020) (n 170) p 14, para 1 reads, '[t]he Constitution not only recognizes the notion of effective remedies for violations of constitutional rights, but also empowers the judiciary with wide powers to provide redress or relief for violation of rights. Article 22 reads "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened". Article 23 provides the High Court with the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Right. The appropriate remedies which can be ordered by the Court include: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights; an order for compensation; and an order for judicial review. To effectively advance the realization of rights for persons seeking judicial redress and relief, the Chief Justice developed the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The use of the Rules enhance access to justice for all persons seeking to enforce their rights against the State or any other person, whether natural or corporate'.

172 Combined Report of Kenya (2015-2020) (n 170) p 14 para 3.

173 NGEC Investigations, redress and monitoring <https://www.ngeckkenya.org/ThematicAreas/LegalInvestigationsand.Redress> (accessed 23 June 2023).

174 See state reports filed where states end reporting on measures at art 24 of the Maputo Protocol by Republic of Togo 6th, 7th & 8th Periodic Report (2011-2016), Republic of Angola 6th Periodic Report (2011-2016), Republic of Rwanda 11th, 12th & 13th Periodic Report (2009-2016), Democratic Republic of Congo 11th, 12th & 13th Periodic Report (2005-2015), Gambia 2nd Periodic Report (1994-2018), The Kingdom of Lesotho 2nd to 8th Combined Periodic Report (2001-2017), Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Periodic Report (2007-2019) and Cameroon 4th-6th Periodic Report (2015-2019)

175 The Republic of Namibia 7th Periodic Report (2015-2019) on the African Charter on Human and Peoples' Rights and the Second Report Under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) 133.

violence cases. Relevant to the implementation of article 25 would rather be the establishment of an independent administrative institution to redress instances where the trained police officers fail to employ the victim-centred approach to investigating and prosecuting offences resulting in the violation of the victim's rights.

Seychelles reported in its initial report to the African Commission on the Maputo Protocol on the different levels of courts under its Constitution as measures under article 25. It further highlighted the Family Court and the Commission established to investigate and remedy complaints of violations during the 1977 coup experienced in the country.¹⁷⁶ This report was arguably more accurate in capturing the implementation of the obligations under this provision.

Moreover, many states record measures put in place to fulfil the obligations under article 25 as part of their general obligation to promote and protect the rights in the African Charter and the Maputo Protocol. As an example, Rwanda reported on measures under article 25 in the introductory background section of its report. These included the establishment of the National Human Rights Commission, the Office of the Ombudsman and a Gender Monitoring Office.¹⁷⁷ As another example, Zimbabwe reported on the establishment of the Zimbabwe Gender Commission whose functions include the monitoring and investigation of possible violations of rights relating to gender and the securing of redress where rights have been violated and other complementing institutions such as the Zimbabwe Human Rights Commission, the National Peace and Reconciliation Commission, the Zimbabwe Media Commission and the Zimbabwe Electoral Commission as administrative and institutional measures implementing article 2 of the Maputo Protocol.¹⁷⁸ Furthermore, in its introduction section, Angola reported on the establishment and role of the Ombudsman Office.¹⁷⁹

In addition, as mentioned above, measures that are reported on under Part A, dealing with measures implementing the African Charter, may merit an assessment with respect to their applicability and use for the vindication of women's rights but are often not considered in state practice. Gambia, for instance, reported on establishing the Gambia Police Force Human Rights and Complaints Unit, tasked with receiving complaints of human rights abuses by its officials.¹⁸⁰ Similarly, there was a consideration of the complaints mechanism available in the Labour Tribunal and the Office of the Ombudsman with respect to Part A of the report.¹⁸¹ As administrative bodies that provide avenues for access to remedies where there is a violation, a consideration of their mandate with respect to complaints by women under the Maputo Protocol would also be suitably located under Part B, which details the implementation measures for the Maputo Protocol, of the report specific to article 25.

176 Seychelles 3rd Periodic Report (2006-2019) 50.

177 Republic of Rwanda the 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the Implementation Status of the African Charter on Human and Peoples' Rights & the Initial Report on the Implementation Status of the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa (Maputo Protocol) (2009-2016).

178 Zimbabwe Combined Periodic Report (2007-2019) paras 2.7-2.8.

179 Republic of Angola 6th Periodic Report (2011-2016) paras 14-15.

180 Gambia Periodic Report (1994-2018) 32. See also para 67.1 of Namibia's 7th Periodic Report on the African Charter on Human and Peoples' Rights (ACHPR) and the second report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Report (2020) with respect to the mechanism of the Office of the Ombudsman for access to remedies but not noted under art 25 of the Maputo Protocol.

181 Combined Report of Gambia (n 180) 64.

5.2 Access to appropriate gender transformative remedies

Some states have detailed the forms of redress available in their jurisdiction for human rights violations in their state report.¹⁸² A consideration of cases where the provisions of the Maputo Protocol have been enforced within domestic judicial courts indicates the state practice on awarding redress for violations of rights in the treaty.¹⁸³ In *Coalition on Violence Against Women et al v Attorney General et al* the Constitutional Court in Kenya determined a petition alleging the violation of rights under *inter alia*, the Maputo Protocol.¹⁸⁴ The claim arose from sexual violence perpetrated against the petitioners by state and non-state actors during post-election violence. The court ordered compensation to four of the survivors amounting to Ksh4 million, approximately USD 40,000 for each petitioner, as a consequence of finding that the petitioners' rights had been violated.¹⁸⁵ The court also made a declaration that the successful petitioners' rights had been violated.¹⁸⁶ In this case, the petitioners made a claim for other forms of redress such as satisfaction and rehabilitation. The court did not order any structural transformative measures sought by the petitioners as forms of satisfaction.¹⁸⁷ The court also failed to determine a claim for rehabilitation made by the petitioners.¹⁸⁸

In *Center for Health, Human Rights & Development v The Executive Director, Mulago Referral Hospital*, the High Court of Uganda made an order that was in many respects an illustration of the transformative potential of appropriate gendered redress.¹⁸⁹ The petitioners filed a claim seeking declaratory relief and compensation for the violation of their rights. The individual petitioners in the case were a couple. The woman gave birth to two babies at a state hospital. Upon discharge, she was only given one of the babies and informed that the other was born dead. The individual petitioners demanded the dead baby's body and were handed a body by the hospital staff that they disputed was that of their baby. A DNA test confirmed their suspicions. They filed a case with the police of a missing baby and proceeded with the claim before the Court.¹⁹⁰ The Court found a violation of various human rights, including the right to health in the Maputo Protocol.¹⁹¹ The Court made the requested declaratory orders and awarded compensation.¹⁹² However, the court did not stop at this. The Court was at pains to detail the systematic problems in the hospital that put the lives of pregnant women and delivering mothers and their babies lives at risk,¹⁹³ and a bigger problem in the country with respect to access to ante-natal and post-natal healthcare for poor and rural women.¹⁹⁴ It proceeded to order that an investigation

182 Namibia cited the Constitutional provisions entitling citizens to access to remedies including compensation for rights violations in its Initial Report to the African Commission on the Maputo Protocol (2015) para 54.

183 See Equality Now 'Breathing life into the Maputo Protocol: jurisprudence on the rights of women and girls in Africa' (2018).

184 Petition 122 of 2013.

185 Petition 122 of 2013 at para 172.

186 As above.

187 The petitioners for instance sought to 'compel the Attorney General to establish an independent body specifically responsible for monitoring the provision of reparations to victims of SGBV during PEV, analysing and reporting on systemic deficiencies on the provision of effective remedies for SGBV victims, including investigations and prosecutions of the crimes committed against said victims, and periodically reporting to this Honourable Court on the implementation of the Honourable Court's judgment in this case'.

188 The petitioner claimed for the 'creation of a database of all victims of SGBV committed during PEV and to ensure such victims are provided appropriate, ongoing medical and psychosocial care and legal and social services'.

189 *Center for Health, Human Rights & Development & 2 Ors v The Executive Director, Mulago Referral Hospital & Anor* (Civil Suit 212 of 2013) [2017] UGSC 10 (24 January 2017) (*Mulago*).

190 *Mulago* (n 189) paras 2-4.

191 *Mulago* (n 189) paras 63-66.

192 *Mulago* (n 189) para 67(viii).

193 *Mulago* (n 189) para 57.

194 *Mulago* (n 189) para 54.

be conducted by the police and a report provided within six months as a form of restitution.¹⁹⁵ It also ordered that the staff that handled the newborn be held accountable for the movement of the baby, representing satisfaction by holding the individual perpetrator accountable. Further, the hospital was ordered to take steps to address the inefficiencies in the movement of babies in the hospital and file periodic progress reports for two years with the court.¹⁹⁶ The court reserved the right to make further orders regarding the implementation of this last-mentioned order.¹⁹⁷ In addition to requiring reports from the hospital, the court ordered that the NGO that was the institutional petitioner in the claim, acting in public interest, was to periodically monitor the progress at the hospital in addressing the systemic challenges that existed and provide the court with a counter-report to that filed by the hospital.¹⁹⁸ This is a form of satisfaction that goes to ensure that the systematic challenges in the hospital are addressed and the violations are not repeated. More importantly, it demonstrated the possible ways in which authorities adjudicating rights claims can address the challenge of enforcing satisfaction. Rehabilitation was considered in the court order in that the individual petitioners were to be provided psychosocial care and counselling services to enable their healing.¹⁹⁹

While not reported to the African Commission in the state reporting process, there are instances of good state practice in implementing measures to enable access to remedies. The enactment of the Victim Protection Act 2014 in Kenya is to provide clear provisions for avenues for and forms of redress that victims of abuse are entitled to. As a legislative measure, it defines and makes provision for restitution, compensation, rehabilitation and other forms of reparations. Another example is Kenya's Counter Trafficking in Persons Act 2012. It makes provision for the offence of human trafficking, a violation of the Maputo Protocol, and creates an obligation on the state to put rehabilitative measures for victims in place.²⁰⁰ As a form of reparation, the Act specifies the types of measures that can be awarded.

6 Conclusion

The state obligations under article 25(a) and (b) have been elaborated here. It appears from the state reports under the Maputo Protocol and the African Charter that member states in reporting on the compliance with the substantive rights contained in article 1 to article 24 of the Maputo Protocol highlight the judicial measures in place for remedial action.²⁰¹ However, the state obligations created under article 25 of the Maputo Protocol call for access to remedies and access to a variety of institutions before which violations can be vindicated. Enabling access to both judicial and extra-judicial or quasi-judicial processes for access to remedies is key to meeting the obligations in this provision. Judicial

195 *Mulago* (n 189) para 67(i).

196 *Mulago* (n 189) para 67(iii).

197 *Mulago* (n 189) para 67(vii).

198 *Mulago* (n 189) para 67(v).

199 *Mulago* (n 189) para 67(vi).

200 Section 20(2)(j) of the Counter-Trafficking in Persons Act 2014. The Act provides for: 'measures necessary to rehabilitate victims of trafficking in persons and in particular the – (i) implementation of rehabilitative programmes including education and protective programmes for the victims of trafficking in persons; (ii) provision of counselling services and temporary shelter to victims of trafficking in persons; and (iii) establishment of centres and programmes for intervention at various levels of the community'.

201 This practice has developed despite clear guidance from the African Commission on what types of remedies it calls for in the Guidelines on State Reporting on the Maputo Protocol available at <https://www.achpr.org/statereportingproceduresandguidelines>. States are directed to list measures under the categories including remedies. On remedies, the Guidelines indicate that the measures should not be limited to judicial remedies. This guideline asks that state list: 'Remedies (judicial and administrative (extra-judicial)) (What are the available avenues for redress in the event of a breach of the particular rights provided in the Protocol? Have any cases been decided in respect to each of the rights; and if so, have these decisions been implemented?)'.

bodies are the focus of state attention with respect to meeting their obligations to ensure access to remedies.

Article 25 is, in practice, employed in vindicating the violation of any one of the substantive rights in the Maputo Protocol. As such the redress and the remedy to be claimed and obtained where a right is violated must aim to transform the social context that gave rise to the violation. Chapter 9 details the gender transformative aims of article 8 of the Maputo Protocol in ensuring access to justice for women. While that discussion is specific to judicial mechanisms, the transformative goal of the Maputo Protocol requires that all avenues for vindication of women's rights result in substantive equality for women. Measures that are detailed there with respect to judicial mechanisms can similarly be assessed when looking at the quasi-judicial and extra-judicial mechanisms implemented under article 25.

Similarly, the African Commission has articulated that the goal of redress is transformation.²⁰² Redress must occasion changes in social, economic and political structures and relationships in a manner that deals effectively with the factors which allow for gender inequality and the persistence of patriarchal norms. This transformation requires a broad interpretation of state obligations to provide redress, including putting in place legal, administrative and institutional frameworks to give effect to the right to redress.²⁰³ A holistic interpretation of this state obligation requires a state that recognises that rights without remedies, whether judicial, quasi-judicial or extra-judicial, are hollow. In this sense, upon ratification, every attempt by a member state to domesticate or implement substantive rights in the Maputo Protocol must reflect an element of remedial avenues where there is non-compliance. Such a reflection must consider social, cultural, and economic barriers to women exercising their rights under article 25 and intentionally seek to address them when setting up the mechanisms for access to remedies.

Reparations are central to the realisation of the right contained in article 25. Engendering reparations calls for the identification of adequate and transformative remedies.²⁰⁴ Reparations targeted at addressing the systematic failures that result in the violation of women's rights are just as important as those targeted at repairing the harm suffered by the individual. Those preparing claims on behalf of women before competent institutions have an important role to play in ensuring that redress sought from these processes is impactful and articulates the appropriate form of redress, of the options available to victims of rights violations, to ensure transformation of the society.²⁰⁵ For instance, there is a dire need for submissions before the regional and sub-regional institutions discussed with details regarding the computation of claims for compensation or damages that assist the courts in determining these cases. This necessitates the preparation and submission of evidence to support these claims. As noted in the cases from the ECOWAS Court relating to compensation, the Court has decried insufficient evidence on the quantum of the amount claimed or the paucity of submissions before it to enable it to make a more informed determination on compensation and other appropriate remedies. While emphasis before the ECOWAS Court was on damages, many human rights courts or other remedial institutions available in member states are limited to awarding the redress that is articulated in the claim or petition filed before it.²⁰⁶ The role of legal representatives or other actors supporting women in vindicating their rights to articulate transformative remedies cannot be overemphasised.

202 General Comment 4 (n 52) para 8.

203 As above.

204 Rubio-Marfn & Sandoval (n 63) 1070.

205 REDRESS (n 112) 5. Analysing the practice of awarding rehabilitation before the Human Rights Committee, Prof Sir Rodley stated that 'there is little practice on the issue partly because the applicants and NGOs rarely raise it before the HRC'.

206 *Joseph John* (n 57) para 102. See also *Kennedy Gihana and Others v Rwanda* (merits and reparations) (2019) 3 AfCLR 655 para 139; see also *Reverend Christopher Mtikila v Tanzania* (reparations) (2014) 1 AfCLR 72 para 40; *Lohé Issa Konaté* (n 81) para 15(d); and *Elisamehe v Tanzania* (merits and reparations) (2020) 4 AfCLR 265 para 97.

Such determination is central to the realisation of article 25 and, by implication, all other substantive rights of the Maputo Protocol.²⁰⁷

207 Rubio-Marín & Sandoval (n 63) 1076.

Article 26

Implementation and monitoring

Rachel Murray

1. States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.
2. States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

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1 Introduction

As the drafting history of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) shows, one of its aims was to 'locate [the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW)] in African reality',¹ developing an instrument that Africa could own, but premised on the understanding that despite the variety of norms and instruments available at the regional and international levels, violations against women continued.² Consequently, it could be argued that the very *raison d'être* of the Maputo Protocol was to ensure the implementation of international standards of the rights of women, rather than the development of those standards per se. As Viljoen wrote in 2009,

the Maputo Protocol should not be primarily viewed as correcting normative deficiencies in international human rights law dealing with human rights, but rather as a response to the lack of implementation of these norms.³

1 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11.

2 See also F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72-84; R Murray 'Women's rights and the Organisation of African Unity and African Union: the Protocol on the Rights of Women in Africa' in D Buss & A Manji (eds) *International law: modern feminist approaches* (2005) 253.

3 Viljoen (n 1) 17.

The aim of this chapter is to provide an analysis of article 26 and how the Maputo Protocol envisages its provisions to be implemented by states and monitored by supranational bodies. Divided into a further 5 sections, section 2 commences with a discussion of the drafting history of this provision. Section 3 considers what implementation means in the context of article 26, how the concept of implementation has been defined and analysis of the particular requirements of article 26(2). Section 4 focuses on the monitoring mechanism set out in the Maputo Protocol, namely the use of article 62 of the African Charter on Human and Peoples' Rights, as well as the potential use of the communications procedure. Section 5 provides conclusions and recommendations.

2 Drafting history

Perhaps reflective of this approach is the fact that earlier drafts of the Maputo Protocol did not include clauses on implementation and monitoring;⁴ these only appeared in 2001.⁵ At that stage, the article included not only the wording found in article 26(1) of the final Protocol but also the right to a remedy, now found in article 25.⁶ The Report of the Meeting of Experts does not explain why this clause on implementation and monitoring was inserted, other than to state that '[t]he meeting could not obtain a consensus on this proposal ... [and] decided to put the proposal under brackets for further consideration'.⁷ The provision, as we now know it, appeared in the final draft without including a reference to a remedy,⁸ the latter moving to a separate article.

3 Implementation

3.1 Defining implementation

Article 26 requires states to 'ensure the implementation at the national level'. There is extensive academic and practitioner literature attempting to define 'implementation' and what this means in terms of state obligations.⁹ This chapter will take implementation to mean the processes by which measures are taken by the various arms of the state, whether the executive, legislature or judiciary, to respond to international obligations.

4 See eg Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft); Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft); Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63; L Kois 'Article 18 of the African Charter on Human and Peoples' Rights: a progressive approach to women's human rights' (1997) 3 *East African Journal of Peace and Human Rights* 94-95.

5 Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001; Nsibirwa (n 4).

6 See M Lasseko-Phooko 'Article 25' in this volume.

7 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 153.

8 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft) art 26.

9 See Volume 12(1) of the *Journal of Human Rights Practice, Righting Wrongs: The Dynamics of Implementing International Human Rights Decision*; M Wadstei 'Implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women' (1988) 6 *Netherlands Quarterly of Human Rights* 5; A Weiss 'Interpreting Islam and women's rights implementing CEDAW in Pakistan' (2003) 18 *International Sociology* 581; C Hillebrecht 'Compliance: actors, context and causal processes' in W Sandholtz & C Whytock (eds) *Research handbook on the politics of international law* (2017) 27; V Ploton 'The implementation of UN treaty body recommendations' (2017) 14 *Sur: International Journal of Human Rights* 219; A von Staden 'Monitoring second-order compliance: the follow-up procedures of the UN human rights treaty bodies' (2018) 9 *Czech Yearbook of International Law* 329.

It is worth noting that how states receive treaties into domestic law will depend on their constitution and whether treaties are incorporated into domestic law upon ratification, require additional legislation, or, as in practice, a more complex procedural and logistical approach is taken. The monist/dualist debate is discussed in Chapter 1.¹⁰

Implementation, according to the African Commission on Human and Peoples' Rights (African Commission), encompasses various strands: the adoption or amendment of legislation or administrative measures and policies and programmes; the creation of institutions; education and awareness-raising activities of rights; the provision of remedies for any rights violated; the availability of a complaints process; and compliance with judgments from various courts and human rights bodies.¹¹ For example, with respect to the right to property during separation, divorce or annulment of marriage, the African Commission notes that information required to implement this obligation includes:

- (a) The domestic legislation providing for women's rights to marital property, including relevant measures of implementation of such legislation.
- (b) The complaints mechanisms available for women in case of separation, divorce or annulment of marriage and the number of complaints received and the outcomes of those complaints;
- (c) The protection available to women in cases of separation divorce or annulment of marriage; and
- (d) The steps taken to implement judgments by national, regional or international courts and human rights mechanisms.¹²

Litigation can also be used as a tool of implementation to bring the Maputo Protocol before domestic courts¹³ and the national judiciary can cite instruments including the Protocol in their rulings,¹⁴ although they rarely do so.¹⁵ Much has also been written on the supporting role of national human rights

10 See A Rudman 'Introduction' in this volume.

11 State Reporting Guidelines under the Protocol to the Charter of Human and Peoples' Rights on the Rights of Women in Africa. Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of Senegal on implementation of the African Charter on Human and Peoples' Rights 2004-2013, African Commission on Human and Peoples' Rights, adopted at its 18th extra-ordinary session 29 July-7 August 2015, Nairobi, Kenya, para 40. See also Dechert LLP 'Implementing the Protocol on the Rights of Women in Africa: Analysing the Compliance of Kenya's Legal Framework' (2014) The Lawyer's Circle, Oxfam <https://policy-practice.oxfam.org/resources/implementing-the-protocol-on-the-rights-of-women-in-africa-analysing-the-compli-333065/> (accessed 9 May 2023).

12 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (art 7(d)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia 19 February-4 March 2020, para 63.

13 S Ndashe 'Strategic litigation: a tool for domesticating the Protocol?' in R Musa et al (eds) *Breathing life into the African Union Protocol on Women's Rights in Africa* (2006) 51.

14 EJ Powell & J Staton 'Domestic judicial institutions and human rights treaty violation' (2009) 53 *International Studies Quarterly* 149; Y Lupu 'Legislative veto players and the effects of international human rights agreements' (2015) 59 *American Journal of Political Science* 578; C Hillebrecht 'The power of human rights tribunals: compliance with the European Court of Human Rights and Domestic Policy Change' (2014) 20 *European Journal of International Relations* 1100; C Hillebrecht *Domestic politics and international human rights tribunals: the problem of compliance* (2014); Dechert (n 11) para 2.6.3.

15 However, see where the Maputo Protocol was cited: the Constitutional Court of South Africa, *Shibi v Sithole and Others* 2005 (1) SA 580 (CC); the Constitutional Court of Uganda, *Uganda Association of Women Lawyers & Others v Attorney General* [2004] UGCC 1; and the High Court of Kenya, *Josephine Oundo Ongwen v Attorney General & Others* [2018] eKLR. See further S Omondi et al *Breathing Life into the Maputo Protocol. Jurisprudence on the rights of women and girls in Africa* (2018) Equality Now Kenya 'Breathing Life into the Maputo Protocol: Page 1 Jurisprudence on the Rights of Women and Girls in Africa' https://d3n8a8pro7vhm.cloudfront.net/equalitynow/pages/817/attachments/original/1543482389/Breathing_Life_into_Maputo_Protocol_Case_Digest-Jurisprudence_on_the_Rights_of_Women_and_Girls_in_Africa.pdf?1543482389 (accessed 23 June 2023).

institutions, other statutory and constitutional bodies and civil society in encouraging, monitoring, and facilitating the implementation of international standards at the domestic and regional levels.¹⁶

While the extent to which the state is considered to take measures to bring its domestic law in line with its international obligations is often explained as being dependent on ‘political will’, this masks the complexity of what needs to happen at the domestic level.¹⁷ First, the inclusion of ground-breaking provisions for which the Maputo Protocol has been praised, particularly around issues of religion and cultural traditions,¹⁸ may in fact render the implementation of the Protocol more challenging.¹⁹ As Johnson notes, ‘the governments of many state parties are not entirely convinced that modern ideas of women’s rights, as encapsulated in the [Maputo] Protocol, should supersede their traditions and local beliefs’.²⁰

Second, the national mechanisms available to coordinate and ensure the implementation of these international obligations, whether they be legislative, executive or judicial action, are not straightforward.²¹ For instance, amending legislation and bringing specific laws in line with the Maputo Protocol is, as Kane notes, a ‘fairly complex legal process that not only requires judicial measures – laws, decrees, etc. – but also statutory, administrative measures’.²² Measures that require the action of the independent arms of the state, the legislature and the judiciary, raise particular challenges.²³

Furthermore, some monitoring and evaluation mechanisms at national level are likely to be required to ensure that ministries act appropriately.²⁴ The African Commission, as has the United Nations (UN), have encouraged states to create institutions at the national level, whether these are government focal points, and national mechanisms for reporting, implementation and follow-up to coordinate activities among state entities in their response to international and regional human rights bodies. Indeed, the

- 16 For example, NANHRI, *The role of NHRIs in Monitoring Implementation of Recommendations of the African Commission on Human and Peoples’ Rights and Judgments of the African Court on Human and Peoples’ Rights* (NANHRI, Kenya, 2016); MS Carboni ‘National Human Rights Institutions’ role implementing decisions of the Inter-American System’, (2019) 12 *Journal of Human Rights Practice*, Special Issue, 2021; CH Heyns & F Viljoen ‘The impact of the United Nations human rights treaties on the domestic level’ (2001) 23 *Human Rights Quarterly* 483-535; L Miara & V Prais ‘The role of civil society in the execution of judgments of the European Court of Human Rights’ (2012) *European Human Rights Law Review* 528-537; Open Society Justice Initiative (OSJI) *From rights to remedies: structures and strategies for implementing human rights decisions* (Open Society Foundations, New York, 2013); Open Society Justice Initiative *From judgment to justice. implementing international and regional human rights decisions* (OSJI, New York, 2010).
- 17 C Hillebrecht ‘The domestic mechanisms of compliance with international human rights law: case studies from the Inter-American human rights system’ (2012) 34 *Human Rights Quarterly* 966.
- 18 Banda (n 2); K Ebeku ‘A new dawn for African women? Prospects of Africa’s protocol on women’s rights’ (2004) 16 *Sri Lanka Journal of International Law* 85.
- 19 K Davis ‘The emperor is still naked: why the Protocol on the Rights of Women in Africa leaves women exposed to more discrimination’ (2009) 42 *Vanderbilt Journal of Transnational Law* 975.
- 20 A Johnson ‘Barriers to fulfilling reporting obligations in Africa under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ (2021) 21 *African Human Rights Law Journal* 176-203.
- 21 R Murray & C de Vos ‘Behind the state: domestic mechanisms and procedures for the implementation of human rights judgments and decisions’ (2019) 12 *Journal of Human Rights Practice* 22-47.
- 22 I Kane ‘Harmonising the Protocol with national legal systems’ in Musa et al (n 13) 53.
- 23 Murray & de Vos (n 21); S Cardenas *Conflict and compliance: state responses to international human rights pressure* (2007); Hillebrecht (n 17).
- 24 JG Stotsky et al *Strategy, policy, and review and research departments sub-Saharan Africa: a survey of gender budgeting efforts*, International Monetary Fund WP/16/152, <https://www.imf.org/external/pubs/ft/wp/2016/wp16152.pdf> (2016), p 38-39 (accessed 9 May 2023).

Committee on the Elimination of Discrimination against Women (CEDAW Committee) has been particularly active in promoting the idea of specialised national bodies on the rights of women.²⁵

3.2 Article 26(2): budget

Article 26(2) introduces an important, yet often not expressly recognised, dimension to implementation, namely the requirement that states ‘provide budgetary and other resources for the full and effective implementation of the rights herein recognised’.²⁶ Determining how states allocate spending in order to implement rights in the Maputo Protocol requires the content of the rights to be elaborated with ‘increasing precision and clarity’.²⁷ Considerable work has been done at the international level to elaborate the budgetary elements of economic, social and cultural rights, for example, particularly in the context of what is a state’s available resources.²⁸ As there are no ‘specific allocational benchmarks’ in a treaty such as the Maputo Protocol, states should indicate how they have in fact considered what resources are available to specific rights.²⁹ This should be coupled with an objective oversight of compliance.³⁰

The African Commission has provided some elaboration on article 26(2) in its interpretation of other provisions of the Maputo Protocol, asserting, for example, that states

should allocate adequate financial resources for the strengthening of public health services so that they can provide comprehensive care in family planning/contraception and safe abortion. This includes making specific budget allocations under the health budget at national and local levels, as well as tracking expenditures on these budget lines. Information on health expenditures should be available to facilitate monitoring, control and accountability.³¹

In addition, it has also recommended that states should ‘fund and empower public health authorities to provide a comprehensive range of services for the prevention and treatment of every person’s sexual and reproductive health’.³²

25 S Lorion *Defining governmental human rights focal points: practice, guidance and concept*, Danish Institute for Human Rights (2021) <https://www.humanrights.dk/files/media/document/Lorion%20Defining%20GHRFPs%20-%20DIHR%202021%20Final.pdf> chapter 1; UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) Convention-specific Reporting Guidelines of the Committee on the Elimination of Discrimination against Women, 8 July 2008, UN Doc CEDAW/SP/2008/INF/1, 2008; D McBride & A Mazur *Gender machineries worldwide. Background paper to the World Development Report 2012* (World Bank, 2011) 31; R Jahan *Strengthening national mechanisms for gender equality and the empowerment of women: a global study analysis* (UN DAW 2010); Beijing Declaration and Platform for Action (Beijing Platform) paras 201 & 203.

26 M Rusimbi ‘Financing the Protocol: considerations for influencing budgets from experiences in Tanzania’ in Musa et al (n 13) 38.

27 M Dutschke et al *Budgeting for economic and social rights: a human rights framework* (2010) 11.

28 International Covenant on Economic, Social and Cultural Rights (ICESCR) art 2(1).

29 P Alston & G Quinn ‘The nature and scope of state parties’ obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 177 & 181; O De Schutter ‘Public budget analysis for the realization of economic, social and cultural rights: conceptual framework and practical implementation’ in KG Young (ed) *The future of economic social and cultural rights* (2019) 527-623.

30 Alston & Quinn (n 29); De Schutter (n 29).

31 African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) and art 14(2)(a) & (c) of the Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted during the 54th ordinary session of the African Commission held in Banjul, The Gambia from 22 October to 5 November 2013, para 62.

32 African Commission General Comment 1 on art 14(d) & (e) of the Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted during the 52nd ordinary session of the African Commission held in Yamoussoukro, Ivory Coast 9-22 October 2012.

Such an approach has elements of what is known as ‘gender responsive budgeting’, namely the ‘gender-based assessment of budgets, incorporating a gender perspective at all levels of the budgetary process’.³³ This concept is not new, acknowledged in the Beijing Platform, which required states to ensure ‘a gender perspective in budgetary decisions on policies and programmes, as well as the adequate financing of specific programmes for securing equality between women and men’.³⁴

There are a number of other provisions in the Maputo Protocol related to budget and financing. Article 4(2)(i) requires that states ‘provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women’. In addition, article 10(3) establishes that states ‘take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular’. Article 10(3) further implies a ‘hierarchy’ and prioritisation of spending, an unusual provision for a human rights treaty.³⁵ Budoo argues that article 26(2) includes both these provisions in its reference to ‘all necessary measures’ and thereby ‘imposes a general obligation on states to allocate sufficient budgetary resources to realise the women’s human rights protected by the Maputo Protocol’.³⁶

Guidance on gender responsive budgeting can be drawn from other initiatives under CEDAW and Southern African Development Community (SADC).³⁷ These call on states to redistribute resources among various groups in society, ensuring ‘women’s share of incurred tax is commensurate with their share of earned income’.³⁸ It further calls for ‘[p]ublic expenditure [to prioritize] programmes which facilitate gender equality’; ‘Governments [to] prioritize funding for programmes that increase gender equality’; ‘assessing which macroeconomic policies are most conducive to women’s full development and advancement’; and ensuring that women participate on equal terms with men in budget decision making processes’.³⁹ Yet these are complex determinations. For example,⁴⁰ providing funding for women for courses in low-paid and low-skilled jobs such as sewing, rather than training for well-paid and high-skilled jobs such as computer technology, can have immediate benefits for women, but simultaneously reinforce traditional unequal roles (this is in potential breach of for example articles 3 and 5 of CEDAW.) These complexities mean that it is not possible to use one uniform rule or benchmark to distinguish whether a programme improves women’s equality.

33 Council of Europe, ‘Gender Budgeting: Final Report of the Group of Specialists on Gender Budgeting’ (2005) 10 <https://rm.coe.int/1680596143>, 10 (accessed 23 June 2023); D Elson ‘Integrating gender into government’s budget within a context of economic reform’ in D Budlender et al (eds) *Gender budgets make cents: understanding gender responsive budgets* (2002). T Polzer et al ‘Gender budgeting in public financial management: a literature review and research agenda’ (2021) 89 *International Review of Administrative Sciences* 450-466; M Costa et al ‘Women acting for women’ (2013) 15 *International Feminist Journal of Politics* 333-352.

34 Beijing Platform (n 25) para 345; A Budoo ‘Gender budgeting as a means to implement the Maputo Protocol’s obligations to provide budgetary resources to realise women’s human rights in Africa’ (2016) 9 *African Journal of Legal Studies* at 199-219. A Budoo-Scholtz ‘Resource allocation for the realisation of women’s rights: building on previous gender budgeting initiatives in South Africa’ (2023) 31 *South African Journal on Human Rights* 74; R Downes et al ‘Gender budgeting in OECD countries’ (2016) 3 *OECD Journal on Budgeting*.

35 Viljoen (n 1) 31. G Giacca *Economic, social and cultural rights in armed conflict* (2014) 50; Budoo (n 34).

36 Budoo (n 34).

37 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 17: Measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product, 1991, A/46/38.

38 J Huckerby *Budgeting for women’s rights. Monitoring government budgets for compliance with CEDAW. A summary guide for policy makers* (Gender Equality and Human Rights Advocates, 2008) 4-5, 11-12 & 15 <https://www.unwomen.org/sites/default/files/Headquarters/Media/Publications/UNIFEM/BudgetingForWomensRightsSummaryGuideen.pdf>. For the full report on which this is based, see Elson (n 33).

39 As above.

40 Huckerby (n 38) 7.

As an example, and one dimension of gender budgeting that supports the full and effective implementation of the rights under the Protocol, in respect to the right to work, the African Commission's *Principles and Guidelines on Economic, Social and Cultural Rights* also oblige states to

[t]ake the necessary measures to recognise the economic value of care giving and other household work, for example, subsistence and market gardening, cooking, and caring for children and the elderly. In drawing up their national budgets, States should adopt systems that record the value of women's unpaid contributions to society.⁴¹

A similar reference to gender responsive budgeting can be found in the SADC Protocol on Gender and Development⁴² and the SADC *Guidelines on Gender Responsive Budgeting* (SADC *Guidelines*) provide practical guidance for states. For example, they note that gender budgeting 'is about allocating money for activities that eliminate gender barriers to public services and private sector investments', but 'does NOT mean separate women's budgets' and 'is NOT about whether an equal amount is spent on women and men, but whether the spending is adequate to women's and men's needs'.⁴³ Tools are recommended, such as,

a [gender responsive budgeting] related checklist for use by reporting personnel Ministries responsible for gender or their equivalent ... comprising questions on how national budgets are complying with relevant women's rights instruments that can help those who are documenting state party reports to provide a comprehensive situation of the progress of GRB initiatives within SADC Member States.⁴⁴

In an attempt at streamlining, the SADC *Guidelines* specifically link to CEDAW guidance, and the reporting requirements under both CEDAW and the Maputo Protocol, noting:

Such checklist should be applied when producing state party reports on: the SADC Protocol on Gender and Development, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the CEDAW.⁴⁵

Some countries have been highlighted as taking a progressive approach to gender budgeting. Uganda, for example, included guidelines for various ministries on how to implement goals ensuring gender equality in the budget, in combination with data disaggregated on the basis of sex. Progress was monitored through a 'Certificate on Gender and Equity Compliance'.⁴⁶ Pilot schemes in Rwanda focusing on enrolment in primary, secondary and tertiary education, maternity mortality and spending on health, as well as the aim of the authorities to 'match the format of gender budgeting to its program-budgeting approach' were seen as key.⁴⁷ A Gender Monitoring Office examined compliance.⁴⁸ Moreover, Departments of Women, in some countries, can also drive gender responsive budgeting.⁴⁹

41 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, 24 October 2011, para 59(1).

42 Article 15(2).

43 SADC *Guidelines on Gender Responsive Budgeting*, June 2014, https://www.sadc.int/file/3102/download?token=sFO_lhWI (accessed 23 June 2023).

44 SADC *Guidelines* (n 43) 44.

45 SADC *Guidelines* (n 43).

46 Stotsky et al (n 24) 11 & 16.

47 Stotsky et al (n 24) 24-25.

48 As above.

49 Downes et al (n 34).

In other countries, positive examples of gender budgeting include policies to assist poorer women while the role of parliaments has also been identified in ensuring gender budgeting.⁵⁰ Research shows, however, that the success of such, particularly where resources are scarce, depends on ‘sustained effort on the part of governments’, as well as ‘[i]nstitutionalization in government laws’, and the role of the Ministry of Finance to mandate ‘that sectoral ministries and local governments incorporate gender-oriented goals into their plans’.⁵¹

Although not expressly mentioned in article 26(2), and likely to be subject to some resistance,⁵² there is a strong argument for providing the African Commission and the African Court on Human and Peoples’ Rights with the ability to review the budgetary allocations, particularly around priorities as determined by article 10(3), of states as part of their monitoring role.⁵³ In addition, the African Commission could raise awareness among states and other stakeholders of the helpful guidance already available and use the concluding observations to make directed recommendations to states.⁵⁴

4 Monitoring

Article 26 envisages monitoring to be principally through the state reporting process already functioning under article 62. This requires that states submit reports every two years of the legislative and other measures adopted to implement the African Charter thereby mirroring the wording of this Charter.

There is a certain efficiency in not adding a further institutional or bureaucratic layer to monitoring and instead utilising what is already available. Indeed, the Maputo Protocol can exploit the purposes of the state reporting process articulated by the African Commission, such as public accountability, exchange of information, and constructive dialogue with international experts.⁵⁵ Furthermore, given that ‘women’s human rights issues in most African countries usually are shrouded in silence and secrecy’, the mostly transparent nature of the state reporting process, whereby the reports are made available on the African Commission’s website and the oral examination is held in public, offers important visibility.⁵⁶ Yet, such a close reliance on article 62 also carries with it risks that monitoring the Maputo Protocol would incorporate all the failings of the article 62 process.⁵⁷ Thus, the implementation of article 26 was inevitably going to be thwarted by out-of-date reports; reports that describe little more than the constitutional or legislative provisions without indicating their application in practice or any honesty in the challenges faced in their implementation; a cycle of reporting that focuses more on the oral presentation and which tends to neglect follow-up; and the lack of publicly available concluding observations.

50 Stotsky et al (n 24) 38-39.

51 As above.

52 See eg the reservation by Kenya to art 10(3) which provides: ‘States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular’, implying this international scrutiny over financial issues may not be welcome. The reservation reads: ‘The Government of the Republic of Kenya does not consider as binding upon itself the provisions of art 10(3) and art 14(2)(c) which is inconsistent with the provisions of the Laws of Kenya on health and reproductive rights’, see Justice Lucy Asuagbor, Status of Implementation of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa By Justice Lucy Asuagbor, Commissioner, Special Rapporteur on Women in Africa (African Commission on Human and Peoples’ Rights), 60th Meeting, Commission on the Status of Women (2016) sec III.

53 Viljoen (n 1) 31. A Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system* (2013) 263.

54 SADC Guidelines (n 43) 44-45.

55 Johnson (n 20); MD Evans & R Murray ‘The reporting mechanism of the African Charter on Human and Peoples’ Rights’ in MD Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights the system in practice 1986-2006* (2002) 49-75.

56 Johnson (n 20).

57 Viljoen (n 1) 35; Johnson (n 20); K Quashigah ‘The African Charter on Human and Peoples’ Rights: towards a more effective reporting mechanism’ (2002) 2 *African Human Rights Law Journal* 261. R Sigsworth & L Kumalo *Women, peace and security. Implementing the Maputo Protocol in Africa* ISS Paper 295 (ISS, 2016).

Furthermore, the manner of reporting required by the Maputo Protocol raises a number of challenges, including lack of understanding of what the report should contain, and a lack of knowledge of how to report.⁵⁸ It is this last point that civil society organisations have, through the production of Guidelines, attempted to address.

Although not expressly mentioned by the Protocol, the Special Rapporteur on Women in Africa has played a crucial role in practice in monitoring the implementation of the Protocol by state parties. The Special Rapporteur has been specifically tasked by the African Commission '[t]o follow up on the implementation of the African Charter on Human and Peoples' Rights and its Protocol relative to the Rights of Women in Africa by State Parties, notably by preparing reports on the situation of women rights in Africa and propose recommendations to be adopted by the Commission'.⁵⁹ Through inter-session reports to the African Commission sessions, maintaining contact with government departments responsible for gender issues,⁶⁰ involvement in the drafting of the Guidelines, as noted below, and elaboration of the standards in general comments, the Special Rapporteur adds a further dimension to monitoring.

4.1 Guidelines on state reporting

The lack of understanding as to the content of the reports, with some who had ratified the Maputo Protocol submitting reports without any reference to it.⁶¹

Consequently, the Centre for Human Rights at the University of Pretoria supported the African Commission to draft *Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (State Reporting Guidelines)*⁶² which were adopted by the African Commission in November 2009. They require states to submit their article 62 report and to devote a section of that report (no more than 30 pages) to the Maputo Protocol. This section should include:

- A brief description of state institutions, if any, relevant to the Protocol and information on their budgetary allocation.
- General information on gender budgeting.
- Information on gender mainstreaming, including any policy and capacity-building efforts.
- Information on any gender audit of laws or legal reform efforts undertaken from a gender perspective (attach relevant documents).⁶³

Periodic reports should also include reference to the implementation of recommendations in the concluding observations, as well as their publicity, progress and challenges in their implementation, and future plans. Certain 'measures of implementation' are listed as being required with respect to each provision of the Maputo Protocol, including legislation, institutions and education.⁶⁴ The African

58 Johnson (n 20).

59 ACHPR 'Special Rapporteur on Rights of Women' <https://achpr.au.int/en/mechanisms/special-rapporteur-rights-women> (accessed 9 May 2023).

60 See eg Report on Intersession Activities of the Special Rapporteur on Women in Africa, 39th ordinary session African Commission on Human and Peoples' Rights, 11 to 25 May 2006, Banjul, The Gambia.

61 J Biegon 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: a review of the Pretoria gender expert meeting, 6-7 August 2009' (2009) 9 *African Human Rights Law Journal* 618. L Guignard '*La fabrique de l'égalité par le droit Genèse et usages transnationaux du protocole de Maputo sur les droits des femmes de l'Union africaine*' PhD thesis, l'École normale supérieure Paris-Saclay, 2018.

62 Biegon (n 61); Asuagbor (n 52)

63 State Reporting Guidelines (n 9).

64 See above, sec 1.1 (defining implementation).

Commission has also stated that the sections of the reports should take into account relevant General Comments.⁶⁵

The Special Rapporteur on the Rights of Women has organised a series of awareness-raising sessions for states around the *State Reporting Guidelines*⁶⁶ and also provided an overview of the implementation of the Maputo Protocol by states in her inter-sessional reports.⁶⁷

Indeed, the African Commission has called states to account for not following the *State Reporting Guidelines*, such as where they have not provided specific information. For example, in its Concluding Observations on Namibia's 6th Periodic Report and first report under the Maputo Protocol, the African Commission observed:

Namibia did not fully comply with the Guidelines for State Reporting under the Maputo Protocol, in particular the lack of information on whether individuals and organisations working on gender issues were involved in the preparation of the Report and insufficient background information, especially regarding the application of the Protocol in national courts, reservations entered if any, the state institutions, gender budgeting and gender audit of laws.⁶⁸

Questions are asked about the Maputo Protocol during the oral examination of the report, and the subsequent Concluding Observations may refer to the implementation of the Maputo Protocol.⁶⁹ The success of the *State Reporting Guidelines* is evidenced by the fact that, certainly more recently,⁷⁰ the vast majority of the reports, except for a handful which still discusses the Maputo Protocol under article 18(3),⁷¹ now have a separate section dedicated to the Protocol.⁷² In 2022 the African Commission also adopted *Guidelines on Shadow Reporting* which provide additional information for those wishing to submit alternative reports, noting in particular that shadow reports should take into account any

65 African Commission General Comment 2 (n 31) para 63.

66 Guignard (n 61).

67 Asuagbor (n 52).

68 Concluding Observations on Namibia's 6th Periodic Report and first report under the Maputo Protocol, para 29.

69 Concluding Observations and Recommendations on 6th Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011-2013) African Commission on Human and Peoples' Rights, adopted at its 58th ordinary session 6-20 April 2016, Banjul, The Gambia para 33. Concluding Observations and Recommendations on the Combined Periodic Report of Senegal on implementation of the African Charter on Human and Peoples' Rights (2004-2013), African Commission on Human and Peoples' Rights, adopted at its 18th extra-ordinary session, 29 July-7 August 2015, Nairobi, Kenya, para 40.

70 For earlier reports, see Asuagbor (n 52).

71 Benin, Mauritius, Djibouti: Combined Periodic Report from the 6th to the 10th Periodic Reports on the Implementation of the Provisions of the African Charter on Human and Peoples' Rights, 2009-2018 (2018); 9th to 10th Combined Periodic Report of the Republic of Mauritius on the Implementation of the African Charter on Human and Peoples' Rights (January 2016-August 2019) (2019); Republic of Djibouti, Combined Initial and Periodic Report under the African Charter on Human and Peoples' Rights 1993-2013 (2015). The latest report of Seychelles that is published on the African Commission's website addresses only the Maputo Protocol, although this may be that other documents have not been uploaded, see Country Report 2019 Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, 2021, <https://www.achpr.org/states/statereport?id=137>.

72 Republic of Kenya, Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter On Human and Peoples' Rights on the Rights of Women in Africa, April, 2020; Kingdom of Eswatini, Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa, 2021; and one of the earlier reports to have followed the Guidelines: Republic of Malawi, Report to the African Commission on Human and Peoples' Rights. Implementation of the African Charter on Human and Peoples' Rights 1995-2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005-2013 (2015).

general comments, including those on the Maputo Protocol, as well as the *State Reporting Guidelines* on the Protocol, reiterating that submissions should follow these latter Guidelines.⁷³

4.2 Duplication of reporting obligations under United Nations and African Union human rights mechanisms

Besides their reporting obligations under the Maputo Protocol, states parties to CEDAW are also required to report under CEDAW, to which 52 of the 55 African Union (AU) states are party, compared to the 43 ratifications of the Maputo Protocol. In addition, all AU states should submit annual reports under the Solemn Declaration on Gender Equality in Africa (SDGEA).⁷⁴ An AU initiative, adopted by the AU Assembly in 2004, the SDGEA sets out a number of thematic areas of action, standards which were developed through drawing upon international and regional instruments. Other AU treaties and initiatives, such as the African Charter on Democracy, Elections and Governance⁷⁵ and the African Peer Review Mechanism (APRM), similarly require regular state updates.⁷⁶ Sub-regional initiatives, such as the SADC Protocol on Gender and Development, also oblige states to report every two years.⁷⁷

Voluntary National Reviews on the implementation of the Sustainable Development Goals (SDGs) will encompass measures taken on SDG 5 namely, 'Gender Equality: 'Achieve gender equality and empower all women and girls', addressing the targets and indicators around ending all forms of discrimination, eliminating violence and harmful practices; recognising unpaid and domestic work; ensuring full and effective participation in decision-making; and access to sexual and reproductive health. As has been indicated elsewhere, these map closely on to CEDAW obligations but also those of the Maputo Protocol.⁷⁸ Many African states have submitted such reports.⁷⁹

Despite the significant overlap in their content,⁸⁰ in practice, the separate reporting continues. This inevitably leads to 'reporting fatigue', particularly for those states that are good international citizens in trying to report on time and across each of these instruments. The burden is exacerbated where the capacity and resources available to draft these reports in national ministries, as is the case in many countries, may be limited. Consequently, it is not surprising that any report submitted to the African Commission 'sometimes is perceived as an administrative burden and less of an opportunity for critical engagement'.⁸¹

73 Guidelines on Shadow Reports of the African Commission on Human and Peoples' Rights, adopted by The African Commission on Human and Peoples' Rights, meeting at its 72nd ordinary session held from 19 July to 2 August 2022, part II.e.

74 Art 12 of the SDGEA.

75 Art 49. See also Guidelines III/9, Guidelines for State Parties Reports under African Charter on Democracy, Elections and Governance. Annex 1 to Rules of Procedure, 2016. M Wiebusch & CC Aniekwe 'The African Charter on Democracy, Elections and Governance: past, present and future' (2019) 63 *Journal of African Law* 9-38.

76 African Peer Review Mechanism (APRM) Declaration on Democracy, Political, Economic and Corporate Governance includes reference to gender equality and Objectives, Standards, Criteria and indicators for the APRM includes CEDAW among the standards and among the indicators, whether the state has ratified CEDAW and other instruments, whether there is adequate protection for the rights of women in the constitution and legislation and steps taken to ensure participation of women in national life, paras 2.9.2 & 2.9.3.

77 SADC Gender Protocol, art 35(4).

78 The Danish Institute for Human Rights 'The Human Rights Guide to the Sustainable Development Goals' https://sdg.humanrights.dk/en/targets2?combine_1=xxx&goal=74&target=&instrument=2480&title_1=&field_country_tid=All&field_instrument_group_tid=All&combine= (accessed 23 June 2023).

79 UN-DESA 'Voluntary National Reviews' <https://sustainabledevelopment.un.org/vnrs/#VNRDatabase> (accessed 23 June 2023).

80 N Abdulmelik & T Belay 'Advancing women's political rights in Africa: the promise and potential of ACDEG' (2019) 54 *Africa Spectrum* 156-157.

81 Johnson (n 20).

Yet there is significant potential to reduce the reporting burden on states if these various bodies were willing to consider ways in which a single or fewer reports may address some or all of these obligations. Whilst not implying that a report to one body should necessarily replace those to another, cross referencing and referring to others may assist in the drafting. Reports to CEDAW, for example, at the very least ‘can provide valuable insight into how [a state] views its progress in implementing the Maputo Protocol’, given the similarity between many of the provisions in the two instruments.⁸² The African Governance Architecture, which is the ‘comprehensive and institutional political framework for the promotion of Democracy, Good Governance and Human Rights in Africa’,⁸³ and its African Governance Platform (‘an informal and non-decision-making mechanism’) are certainly intended to provide some coherence, at the AU level. The Platform includes the African Commission, the African Court on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child, as well as the APRM and ‘[a]ny African Union organ or institution that may be established or given the mandate by the Assembly to promote governance, democracy and human rights’.⁸⁴ Yet this does not appear to have been used to streamline the reporting requirements of states under these various instruments. Hence, although some of the reports to the SDGEA include sections on the Maputo Protocol, they are brief,⁸⁵ and in general, the reports remain distinct. Viljoen previously suggested a light-touch harmonisation, namely that states attach to their article 62 African Commission/article 26 Maputo Protocol reports those that they have submitted to other UN and AU mechanisms.⁸⁶ Even this does not appear to have happened.

4.3 Communications

The communications process is not mentioned in the Maputo Protocol as a tool for implementation. Prior to the adoption of the Maputo Protocol, there were very few communications on the rights of women and which referred to article 18(3)⁸⁷ and even subsequently, communications have not been filed to any real extent, in part perhaps due to the controversy surrounding whether it is only the Court which has exclusive jurisdiction on the Maputo Protocol.⁸⁸ The African Commission has been criticised for missing opportunities and an ‘overall lack of zeal to advance women’s rights’ through this procedure.⁸⁹ However, some examples do illustrate the potential. For example, in *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, the state was not a party to the Maputo Protocol, but the African Commission used this and CEDAW to interpret the provisions of the African Charter to define discrimination, ultimately recommending that the state, in implementing its findings, ratify the Protocol.⁹⁰

In judgments adopted by the African Court, African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee) and by the Economic Community of West African States (ECOWAS) Court of Justice (ECOWAS Court), violations of the Maputo Protocol can

82 Dechert (n 11) 11.6.4.

83 African Governance Architecture Rules of Procedure, Rule 1.

84 African Governance Architecture Rules of Procedure, Rule 2.

85 Rwanda *Report on the Implementation of Solemn Declaration on Gender Equality In Rwanda 2019* (2020) p 12.

86 Viljoen (n 1) 37.

87 R Murray *The African Charter on Human and Peoples’ Rights: a commentary* (2019).

88 See F Viljoen & M Kamunyu ‘Articles 27 and 32’ in this volume.

89 S Rajab-Leteipan & M Kamunyu *Litigating before the African Commission on Human and Peoples’ Rights. a practice manual* (Equality Now, 2017) 4. M Prandini Assis ‘Women in the rulings of the African Commission on Human and Peoples’ Rights’ <http://www.publicseminar.org/2015/05/women-in-the-rulings-of-the-african-commission-on-human-and-peoples-rights/> (accessed 23 June 2023). See *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples’ Rights 57th Annual Activity Report (2016).

90 Communication 323/06 African Commission on Human and Peoples’ Rights, Combined 32nd and 33rd Annual Activity Report (2013) para 121.

be found alongside those of other international instruments.⁹¹ Indeed, applicants have used CEDAW and interpretations by its Committee to support their arguments on the content of the rights in the Maputo Protocol.⁹² Attempts to request the African Court to issue an Advisory Opinion on aspects of the Maputo Protocol have so far failed with the Court holding that it did not have jurisdiction.⁹³ As with the African Commission, litigation on women's rights and the Maputo Protocol before the African Court has yet to reach its full potential.⁹⁴

5 Conclusion

Article 26 adds on the one hand, a rather pedestrian approach to implementation and monitoring, through the use of existing mechanisms, specifically, in article 26(1) the existing state reporting process under the African Charter and consequently incorporates all of its challenges; and, on the other, in article 26(2), some potentially innovative methods with respect to gender responsive budgeting. While accountability for measures taken to implement the Maputo Protocol is enhanced where states have submitted their reports in compliance with the *State Reporting Guidelines* and these are examined in public, if states fail to report to the African Commission then the main device by which the Maputo Protocol is to be monitored is lost.

There is a risk that because article 26 links implementation and monitoring, the key element, implementation, is lost. The development of *Guidelines on State Reporting* addresses in part the African Commission's role in monitoring. But the African Commission needs to spend more time elaborating on what states should do to implement the provisions of the Protocol, including through gender responsive budgeting. For the latter, it can draw upon initiatives at SADC and CEDAW, signposting states to the guidelines and including reference to them in its own documents, General Comments and Concluding Observations as they relate to the Protocol.

Initiatives at the AU level,⁹⁵ such as the 'Maputo Protocol Scorecard and Index (MPSI)' provide a tool by which states can undertake 'ongoing audits to promote gender equality'.⁹⁶ The MPSI gives states a framework 'as a performance measuring tool for Member States as well as provide gender

91 See *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (2018) 2 AfCLR 380 (APDF) paras 69 & 78. See B Kombo 'Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389. Before the African Children's Committee, Communication 0012/Com/001/2019 Decision 002/2022 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* April 2022. Before the ECOWAS Court *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/CCJ/JUD/06/08 (27 October 2008); *Azali Abia and Another v Benin* ECW/CCJ/JUD/01/15; *Mary Sunday v Federal Republic of Nigeria* Judgment No ECW/CCJ /JUD/11/18 (17 May 2018); *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017); *Women Against Violence & Exploitation in Society (WAVES) & Child Welfare Society Sierra Leone (CWS-SL) (On behalf of pregnant adolescent schoolgirls in Sierra Leone) v Sierra Leone* Judgment No ECW/CCJ/JUD/37/19 (12 December 2019).

92 APDF (n 91) paras 98-99.

93 *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and Others* (Advisory Opinion) (2017) 2 AfCLR 622.

94 O Fagbemi 'Litigating the rights of women at the ECOWAS Court' in K Kanyali Mwikya et al (eds) *Litigating the Maputo Protocol, a compendium of strategies and approaches for defending the rights of women and girls in Africa*, Equality Now, 2020, chap 5.

95 See also AU Strategy for Gender Equality & Women's Empowerment 2018-2028, para 3.1.1.1: Implement 'All for Maputo Protocol' programme to include time-bound additional dedicated High Level support 116 funding and training for select state, 117 women's rights defense organizations, 118 private sector, media, universities and independent scholars and app platforms'.

96 African Union 'Maputo Protocol scorecard & index: a stepping stone towards achieving women's rights' <https://au.int/en/articles/maputo-protocol-scorecard-index-stepping-stone-towards-achieving-womens-rights> (accessed 23 June 2023).

disaggregated data and information on the status of gender equality for the effective generation of appropriate gender-responsive policies and other initiatives'.⁹⁷

These initiatives need to be disseminated and encouraged. The African Commission should consider additional practical ways in which it can elaborate further on the specifics of how states can implement the various provisions of the Protocol. As Kane notes, '[n]ow we have available one of the most revolutionary women's rights treaties ever drawn up, our struggle must be to set to work to ensure that states that have ratified it begin to apply it'.⁹⁸

97 As above.

98 I Kane 'Harmonising the Protocol with national legal systems' in Musa et al (n 13) 58.

Articles 27 and 32

The interpretative mandate under the Maputo Protocol

Frans Viljoen and Mariam Kamunyu

Article 27: Interpretation

The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

Article 32: Transitional Provisions

Pending the establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application and implementation of this Protocol.

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1 Introduction

As detailed throughout the preceding chapters, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is a response to the inability of the existing international human rights framework to make women's rights protection a reality.¹ Departing from the premise that the norms existing at the time were inadequate,² it provides for greater normative specificity in the form of women-focused rights.³ However, the Maputo Protocol accepts that even if norms are much more women-specific and elaborate, there is a historical implementation

- 1 Preamble (para 12): '*despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices*'. Our emphasis. See A Rudman 'Preamble' sec 4.12 in this volume for further discussion.
- 2 For a juxtaposition between the Maputo Protocol and pre-existing treaties relevant to women's rights, see F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11 16-29.
- 3 For an insightful discussion, see F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72-84.

gap that would still need to be bridged.⁴ This implementation gap arises in large part due to the limited access by women and women's rights organisations to domestic remedies and regional human rights bodies. Although this chapter focuses on access to regional bodies, the role of these bodies is premised on the understanding that national courts would be the first port of call.⁵

The issue of monitoring and interpretation of the Maputo Protocol is, therefore, crucial. Articles 27 and 32 of the Maputo Protocol deal with the 'interpretation' of the Protocol arising from its 'application' and 'implementation'. The Maputo Protocol does not establish a new or separate monitoring body responsible to oversee its implementation. As a protocol complementary to the African Charter, as discussed in chapter 1 of this commentary, it adds to the substantive protection that the Charter gives, while leaving its monitoring to the supervisory mechanisms under the Charter framework, the African Commission on Human and Peoples' Rights (African Commission) and African Court on Human and Peoples' Rights (African Court).⁶ In this way, the Maputo Protocol differs from the African Charter on the Rights and Welfare of the Child (African Children's Charter). Adopted in 1990, the African Children's Charter is a self-standing and separate treaty, with no institutional link to the African Charter or Commission. Under the African Children's Charter, a separate child-specific monitoring body, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), was created.

While the possibility of adopting a separate treaty with a self-standing women-specific treaty monitoring body was raised and considered during the drafting process of the Maputo Protocol, preferences for a protocol complementary to and relying on the existing monitoring framework of the African Charter prevailed. The reasons for this preference include the human resources and financial cost required for a separate treaty body,⁷ the difficulties experienced by the African Children's Committee in becoming fully operational,⁸ and fear of fragmentation of the regional human rights system. While there may be compelling arguments in favour of creating a separate 'African Women's Rights Committee',⁹ for example along the lines of the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), it seems to be a case of the horse having bolted. It may be challenging to argue for establishing a new organ to take over parts of the mandate of an existing African Union (AU) body in the context of the African Union's ongoing reform process driven by imperatives such as cost saving and rationalisation.¹⁰ It may also be considered too burdensome to go through a formal and time-consuming process of either amending the Maputo Protocol or adopting an amending protocol thereto.¹¹ It should further be kept in mind that the UN human rights system, of which the CEDAW Committee is part, consists of nine core human rights treaties, each with its own

4 See eg Banda (n 3) 73 and F Viljoen *International human rights law in Africa* (2012) 257.

5 For domestic court decisions in which the Maputo Protocol has been applied, see S Omondi et al *Breathing life into the Maputo Protocol: jurisprudence on the rights of women and girls in Africa* (2018).

6 See A Rudman 'Introduction' sec 3 in this volume.

7 A Budoo 'Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union' (2018) 18 *African Human Rights Law Journal* 58-71.

8 Viljoen (n 4) 397-398.

9 See Budoo (n 7) 69-73, arguing for reinforcing existing mechanisms and creating new mechanisms such as a working group; and A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 321, contending that such a body would serve 'as a receiver of litigation and as a driver of implementation (emphasis in original).

10 Embarked upon in 2017, launched by Assembly/AU/Dec.635(XXVIII) 28th ordinary session of the Assembly of the Union, 30 and 31 January 2017, Addis Ababa; Annex to Assembly Decision on the Outcome of the Retreat of the Assembly of the African Union on Institutional Reform of the African Union. Report on 'The Imperative to Strengthen our Union: Proposed Recommendations for the Institutional Reform of the African Union'.

11 See Maputo Protocol art 30 'amendment and revision'. For further discussion see B Traoré 'Articles 28-31' sec 4 in this volume.

self-standing treaty monitoring body. In the African regional human rights system, the existence of a group-specific body is the exception rather than the rule.

This chapter discusses articles 27 and 32 together, as these two provisions are interlinked. Read together, articles 27 and 32 give rise to the following important question: which institution(s) can be 'seized' with complaints against state parties alleging that provisions of the Maputo Protocol have been violated? Article 27, read together with article 32, is ambiguous.¹² This ambiguity arises because, on a narrow literalist reading, the Protocol (a) designates the African Court as the body responsible for dealing with ('interpret') cases arising from its 'application' and 'implementation'; and (b) ascribes to the Commission the same role, but *only until* the establishment of the Court. The formulation of this provision has led some to suggest that, once it has been established, *only* the African Court can interpret the Maputo Protocol, that is, to the exclusion of the African Commission. Other commentators simply indicate that the Court is the body tasked with 'interpreting' the Charter, while omitting any reference to the Commission, thus leaving readers (and potential litigants) with the impression that the Court is the only body to be seized with cases alleging violations of the Protocol.¹³

This chapter seeks to provide clarity on this issue, by highlighting the complementary roles of the Commission and Court in interpreting the Maputo Protocol. The chapter is organised into 7 sections. After this introduction, the chapter sets out the most suitable interpretive approach to human rights treaties, including the Maputo Protocol. In the section 3, it explores the drafting history, before, in the section 4, providing a general understanding of the terms 'interpretation', 'application', 'implementation' and 'monitor'. Section 5 focuses on article 32, while the main and section 6 discusses article 27. This section not only deals with the shared interpretive mandate over the Maputo Protocol of the African Court and African Commission, but also traces the interpretive role of the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court). The conclusion underlines the importance of removing obstacles that impede women's access to the African regional human rights system.

2 Interpretative approach to human rights treaties, including Maputo Protocol

A reading of articles 27 and 32 raises a question to which the answer is not immediately discernible through a literal interpretation, this section explains the interpretive approach that has been used to arrive at the positions in this chapter. This brief foray also provides insights into how the Maputo Protocol as a whole should be interpreted.

International law in general and international human rights law, in particular, provide clear guidance on treaty interpretation. From an international law perspective, the Vienna Convention on the Law of Treaties (VCLT) provides guidance on the rules of treaty interpretation. The general rule is that a treaty should 'be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*'.¹⁴ An interpretation guided by purpose essentially amounts to a purposive or teleological approach to interpretation. Such

12 Viljoen (n 2) 39, expressing that 'the Maputo Protocol is not a model of clarity on this issue'.

13 See eg Banda (n 3) 84, indicating that '[w]hen set up, the African Court will be responsible for the interpretation of the Protocol'; and O Ojigho 'Human rights protection in Africa: special focus on rights of women' *African Union Commission, 2016: African year of Human Rights with a focus on the Rights of Women* (AU ECHO, 2016) *The Newsletter of the African Commission* (2016), stating that '[t]he Maputo Protocol in a special way provides in Article 27, that the African Court will be charged with interpretation of the application and implementation of the protocol'.

14 Art 31 of the VCLT. Our emphasis.

an approach allows the consideration of the objectives of the treaty, intrinsic and extrinsic factors, such as socio-political and economic circumstances, and other contextual factors.¹⁵

The purposive or teleological approach also allows reliance on human rights principles (whether or not expressed in the treaty), and this pathway has been used by various international human rights bodies to expand and read-in protection and obligations that do not appear in the text.¹⁶ The African Commission has for example interpreted the African Charter to read-in the rights to shelter and to food, as implicitly protected by expressly guaranteed rights,¹⁷ whereas the Charter's text does not expressly provide for these rights.

A purposive or teleological approach is well suited to the interpretation of human rights treaties for two main reasons. First, since human rights treaties are considered as 'living instruments', it follows that their interpretation must take into account the current context and people's actual lived realities.¹⁸ Second, a purposive or teleological approach facilitates the adoption of an interpretation that most favours human rights promotion and protection, and, therefore, the 'human being'.¹⁹

The African Court averred that it adopts a purposive approach to ensure that 'all its decisions are based on the overriding objective of promoting access in order to ensure protection of human rights'.²⁰ For instance, in answering one of the questions put forward by the African Children's Committee, in recognising that this body is an AU organ, the Court relied on various factors including the mandate of the Committee and other extrinsic factors such as the actual practice, status and relationship of the Committee with other AU organs.²¹

Overall, since enjoyment of human rights is largely determined by the understanding of such rights, a purposive or teleological approach allows for interpretations that are in line with or most favourable to the objectives of the treaty. In the case of the Maputo Protocol, its main objective is discernible from its Preamble, which indicates the determination of state parties to 'ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights'.²² Accordingly, all interpretations of the Protocol must necessarily pursue this objective.

15 See generally: A Barak *Purposive interpretation in law* (2005), A Amin 'A teleological approach to interpreting socio-economic rights in the African Charter: appropriateness and methodology' (2021) 21 *African Human Rights Law Journal* 204; S Dothan 'The three traditional approaches to treaty interpretation: a current application to the European Court of Human Rights' (2019) 42 *Fordham International Law Journal* 765, CM Fong 'Purposive approach and extrinsic material in statutory interpretation: developments in Australia and Malaysia' (2018) *Journal of the Malaysian Judiciary* 1.

16 S Dothan 'In defence of expansive interpretation in the European Court of Human Rights' (2014) 3 *Cambridge Journal of International & Comparative Law* 508.

17 See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria (SERAC)* (2001) AHRLR 60 (ACHPR 2001) paras 49, 50-54, 57 & 66.

18 Traced back to the view of the European Court of Human Rights that '[t]he Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions', *Tyrer v The United Kingdom* ECHR (15 March 1978) Ser A 26 para 31.

19 See eg the view of the Inter-American Court of Human Rights that, 'when interpreting the Convention it is always necessary to choose the alternative that is most favourable to protection of the rights enshrined in said treaty, based on the principle of the rule most favourable to the human being' *Mapiripán Massacre v Colombia* IACHR (15 September 2005) Ser C 122 para 106; and the African Court: 'The Court accepts that the purposive theory or presumption is one of the tools, if not the most important, of interpreting or construing a legal instrument in order to determine whether a statute applies to a particular circumstance ... The Court is also aware that there has been a global movement towards the use of the purposive approach', *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights*, Request 2/2013, African Court on Human and Peoples' Rights (Request 2/2013) para 92.

20 Request 2/2013 (n 19) para 96.

21 However, in answering the second question presented by the Committee, the Court did not utilise the purposive approach owing to its view about the clarity of the impugned provision.

22 Maputo Protocol, Preamble para 14.

A purposive or teleological approach to interpretation facilitates this goal where reliance on a literal interpretation is inappropriate.

3 Drafting history

The Final Draft²³ of the Maputo Protocol, following the Nouakchott²⁴ and Kigali²⁵ Drafts, formed the basis for the further development of the Maputo Protocol.²⁶ As discussed below, it received input from the Meeting of Experts in 2001, commentary by the Office of the Legal Counsel in 2002 and the NGO Forum in 2003. In the Final Draft, article 23 sets out the verbatim provision that was later renumbered as article 27.

The interrelatedness of articles 27 and 32 appears from the drafting process of the Protocol. At the first meeting of government experts, in 2001,²⁷ the draft provision that the African Court 'shall be seized with matters of interpretation arising from the application or implementation of this Protocol' gave rise to the question how this would be possible since the Court had by then not yet been established. By that time, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol), which was adopted on 10 June 1998, had indeed not yet entered into force. The following response to this query was recorded: '[m]embers were informed that, pending the establishment of the African Court, the African Commission on Human and Peoples' Rights was mandated to interpret the Protocol'.²⁸ The reformulated version accordingly read: '[t]he African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol *until such time as the Court is established* whereby both will be seized with matters of interpretation'.²⁹ The raising of this concern therefore caused the introduction of the wording that would become article 32.

However, at the second experts' meeting, and in the final version, the two aspects – the entity responsible for interpretation and the non-establishment of the Court – were severed and provided for in two separate articles. The result is articles 27 and 32 of the Maputo Protocol.

Throughout the drafting process, it was uncontested that 'monitoring' of the Maputo Protocol fell to the African Commission.³⁰ According to firmly established practice, states under article 62 of the African Charter submit reports to the Commission on their implementation of the Charter. Early on in the drafting process, it was accepted that state parties would similarly have to submit periodic reports to the Commission with respect to their implementation of the Maputo Protocol.³¹

23 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

24 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

25 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

26 The Nouakchott (n 24) and Kigali Drafts (n 25) did not contain any provisions on interpretation.

27 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

28 Report of the Meeting of Experts (n 27) para 154.

29 Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001 (Revised Final Draft).

30 See art 26 of the final version of the Maputo Protocol where monitoring of the Protocol is explicitly indicated to mirror art 62 of the African Charter i.e. by the African Commission.

31 Resulting in Maputo Protocol art 26(1).

While the amendment arising from the 2001 experts' meeting, cited above, makes it explicit that both the Commission and Court would have the competence to adjudicate individual cases, this clarification did not feature in subsequent and in the final version. However, at no stage of the drafting was it suggested that it be made explicit that the Court be granted the *main or exclusive* mandate to 'interpret' the Maputo Protocol.

The *travaux préparatoires* reveal that it was the Court's and not the Commission's mandate that was questioned during the Maputo Protocol's drafting. The Commission's interpretive mandate was assumed to be self-evident. During the second government experts' meeting, a deletion of the provision spelling out the role of the 'African Court' in interpreting the Protocol was proposed.³² In the summary of the proceedings of the Meeting of Experts, it is indicated that 'the AU Legal Counsel expressed the view that [it should be deleted since] the Protocol would be an integral part of the African Charter on Human and Peoples' Rights and that in any event, the matter was dealt with under article 45(3) of the African Charter and Article 3 of the Protocol on the Establishment of the African Court on Human and Peoples' Rights'.³³ Article 45(3) of the African Charter provides that the 'functions of the Commission shall be [to] cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights'. Article 3 of the Court Protocol delineates the Court's material jurisdiction. The implication of the Legal Counsel's intervention is clear: Both the Commission and the Court are – even in the absence of any provision in the Protocol – mandated to 'interpret' and 'apply' (and thus adjudicate) complaints or cases emanating from the Maputo Protocol. Regrettably, the Legal Counsel's advice to remove explicit reference to the Court's role was not heeded, and the provision remained intact.³⁴

The *travaux préparatoires* provide further insights illustrating that the Commission's supervision of the Maputo Protocol is inherent and assumed. In the Nouakchott Draft, the drafters proposed that the 'Commission can also, through the Secretary-General of the Organisation of African Unity (OAU), propose amendments to the present protocol'.³⁵ The Kigali Draft of the Maputo Protocol provided that the Commission has to give its opinion on any treaty amendment, and that it may, through the Secretary-General of the OAU, propose amendments to this Protocol.³⁶ This text clearly shows that as early as 1997, the African Commission was intended as the primary treaty monitoring body and custodian of the Maputo Protocol. This position was confirmed in the Revised Final Draft.³⁷ In international law, amendment of treaties is primarily vested in state parties 'except in so far as the treaty may otherwise provide'.³⁸ Aside from the state parties, alternative initiation of amendment would ostensibly fall to a supervisory treaty monitoring body such as was the case in the draft text.

32 Summary of the proceedings of the second Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the rights of Women in Africa, Expt/Prot.Women/Rpt(II), Addis Ababa, Ethiopia, March 2003 (Summary of the proceedings of the Meeting of Experts).

33 Summary of the proceedings of the Meeting of Experts (n 32).

34 The meeting report notes: 'However, the meeting felt, that given the importance of the issue of interpretation in any legal instrument, the Article should be maintained.'

35 Nouakchott Draft (n 24) art 22.

36 Kigali Draft (n 25) art 23.

37 Revised Final Draft (n 29) 25. See also Maputo Protocol art 30(3): 'The Assembly, upon advice from the African Commission, shall examine these proposals [for amendment and revision]'

38 Art 39 of the VCLT.

4 Concepts and definitions

The terms ‘interpretation’, ‘application’ and ‘implementation’ are used in both articles 27 and 32. It is furthermore useful in this context to also refer to the term ‘monitor’, used in article 26.³⁹

4.1 ‘Implementation’ and ‘monitoring’

This analysis of terms starts by discussing ‘implementation’ and ‘monitoring’, as these terms capture the all-encompassing responsibility of state parties to human rights treaties, on the one hand, and of human rights treaty bodies, on the other. In AU human rights treaties, ‘implementation’ refers to the ‘legislative and other measures’ taken by state parties to give effect to the treaty provisions.⁴⁰ ‘Implementation’ therefore denotes the process undertaken at the domestic level to ensure that state parties live up to their overarching obligation to ensure the full realisation of treaty rights. The concept ‘monitoring’ is often used in connection to implementation to describe the role of the relevant AU body in reviewing or supervising the state’s obligation to implement.⁴¹ Under the African Children’s Charter, for example, the mandate of the African Children’s Committee is to ‘monitor the implementation and ensure protection’ of the Charter rights.⁴² Under the Maputo Protocol, the African Commission is implicitly tasked with monitoring the implementation by state parties through the consideration of state reports.⁴³

4.2 ‘Interpretation’

Ascribed its ordinary meaning, ‘interpretation’ denotes a broad process of providing, giving, describing, explaining, making out or bringing out the meaning of something.⁴⁴ Treaty interpretation, therefore, is the process of *giving meaning to* or *making out the meaning of* a treaty provision, rather than ‘finding’ or ‘discovering’ a predetermined meaning or pre-existing intention of the drafters.⁴⁵

In its narrower sense, ‘interpretation’ may relate to specific processes of ascribing meaning to treaties outside the ambit of contentious proceedings.⁴⁶ A pertinent example is the competence of regional human rights courts to issue advisory opinions.⁴⁷ Advisory opinions are aimed at shedding

39 See R Murray ‘Article 26’ in this volume.

40 See eg Maputo Protocol art 26; African Charter on the Rights and Welfare of the Child (African Children’s Charter) art 42(b); Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) art 14(1).

41 Kampala Convention (n 40) art 14(1).

42 African Children’s Charter (n 40) art 42(b).

43 Maputo Protocol art 26 is titled ‘Implementation and monitoring’, but the provision only deals with ‘implementation’ and not with the ‘monitoring’ of state reports. However, the reference to art 62 of the Charter, and the established practice of the Commission, by necessary implication means that the task of considering state reports falls to the Commission. See R Murray ‘Article 26’ in this volume for further discussion.

44 See *Cambridge Dictionary, Concise Oxford, Collins English Dictionary* and *Merriam-Webster*.

45 R Gardiner *Treaty interpretation* (2015) 26-27.

46 The competence of a court to ‘interpret’ its own judgments is of a very particular nature. The African Court, for example, has a competence that does not relate to the meaning of the Charter or any other treaty, but to the content and implications of its own remedial orders art 28(4) of the Court Protocol; see eg *Actions pour la Protection des Droits de l’Homme (APDH) v Côte d’Ivoire* (interpretation) (2017) 2 AfCLR 141.

47 See eg art 4(1) of the Court Protocol; L Chenwi ‘The advisory proceedings of the African Court on Human and Peoples’ Rights’ (2020) 38 *Nordic Journal of Human Rights* at 61; as well as JM Pasqualucci ‘Advisory practice of the Inter-American Court of Human Rights: contributing to the evolution of international human rights law’ (2002) 38 *Stanford Journal of International Law* 241; and J Gerards ‘Advisory opinions, preliminary rulings and the new Protocol 16 to the European Convention of Human Rights: a comparative and critical appraisal’ (2014) 21 *Maastricht Journal of European and Comparative Law* 630.

light on particular treaty provisions in the absence of a specific dispute between opposing parties. Article 45(3) of the African Charter gives the African Commission the mandate to ‘interpret’ the Charter – but ‘at the request’ of a state party, an AU institution or an ‘African organization recognised’ by the AU.⁴⁸ While the African Charter uses the word ‘interpretation’ in this sub-article, its restricted usage prevents it from shining a more general interpretive light on the word. This provision seems to have been invoked only once, but without an indication of a formal request from an eligible entity. This reliance occurred in 2007 when the Commission adopted its ‘Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples’.⁴⁹ However, the Commission has been performing an interpretive function outside the ambit of contentious complaints by adopting thematic resolutions,⁵⁰ Principles and Guidelines,⁵¹ Guidelines, and General Comments.⁵² In this context, it generally indicated article 45(1)(b) of the Charter (the mandate to ‘formulate and lay down principles and rules’) as the Charter basis for doing so, rather than article 45(3).

The Maputo Protocol does not use ‘interpretation’ in this narrow sense. In both articles 27 and 32, the word ‘interpretation’ is used in conjunction with ‘application’ and ‘implementation’.⁵³ What is at stake in these articles is therefore not the ‘interpretation’ of the Protocol in the abstract, but the interpretation *arising from* the ‘application’ and ‘implementation’ of the Protocol. Under the Protocol, the term ‘interpretation’ should therefore be ascribed a much more expansive meaning, aligned with the ordinary sense of the word, namely, all processes through which the meaning of the text is brought to light. While advisory opinions and other forms of standard-setting, aimed at expanding on treaty norms outside a contentious dispute, form part of ‘interpretation’, so do decisions resulting from the exercise of the relevant body’s protective mandate.

48 The African Court, in Appl 1/2013 *Advisory Opinion on the Request for Advisory Opinion by the Socio Economic Rights and Accountability Project (SERAP)* (Advisory Opinion), held that this form of recognition requires an African NGO to have been granted observer accreditation to the AU, pursuant to the Criteria for Granting Observer Status and for a System of Accreditation within the African Union. See further P Maguchu ‘When to push the envelope? Corruption, human rights and the request for an advisory opinion by the SERAP to the African Court’ (2020) *African Human Rights Yearbook* 436.

49 Adopted by the Commission at its 41st ordinary session, May 2007, Ghana, see para 8, where reliance is placed on art 45(3), in addition to art 45(1)(a) para 7: the mandate to ‘collect documentation, carry out studies and research on African problems in the field of Human and Peoples’ Right and, if need be, *submit opinions* or make recommendations to the governments, our emphasis.

50 These resolutions do not invoke art 45(3) of the Charter as basis; rather, in some resolutions art 45(1)(b) of the Charter, which mandates the Commission to ‘formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African governments may base their legislation’, is invoked. See eg ACHPR/Res.3(V)89: Resolution on the Integration of the Provisions of the African Charter on Human and Peoples’ Rights into National Laws of States, adopted at the Commission’s 5th ordinary session, Benghazi, Libya, 3-14 April 1989; and ACHPR/Res. 366 (EXT.OS/XX1) 2017: Resolution on the Need to Develop ACHPR Principles on the Declassification and Decriminalization of Petty Offences in Africa, adopted at the Commission’s 21st extraordinary session, 23 February-4 March 2017, Banjul, The Gambia.

51 See eg Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter, adopted on 24 October 2011.

52 See eg African Commission General Comment 1 on art 14(1)(d) & (e) of the Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted during the 52nd ordinary session of the African Commission held in Yamoussoukro, Ivory Coast 9-22 October 2012, para 1, where reliance is placed on art 45(1)(b).

53 See also art 36(2) of the Statute of the International Court of Justice, which provides for acceptance by states of the Court’s jurisdiction in respect of ‘interpretation’ of a question of international law, and the existence of any fact which, if established, would constitute a breach of an international obligation.

4.3 ‘Application’

To ‘apply’ is, in the ordinary sense of the word, to ‘make use of as relevant or suitable’.⁵⁴ Application is often used in the context of the ‘scope of application’ of a treaty, for example, to territory outside the borders of the state party (referred to as extraterritorial ‘application’).⁵⁵

In the context of human rights treaties, the ‘application’ of a treaty is ‘the process of determining the consequences’ which, according to the treaty norm, ‘should follow in a given situation’.⁵⁶ Logically, the processes of ‘interpretation’ and ‘application’ are separate, with ‘interpretation’ preceding ‘application’.⁵⁷ However, the distinction between the two concepts is not watertight, and often ‘application’ involves at least a measure of ‘interpretation’, as meaning emerges from the application of a treaty provision to a concrete set of circumstances. From this perspective, interpretation is not distinct from application, but an integral step towards and part of application.⁵⁸

In the two provisions under discussion, the terms ‘application’ and ‘implementation’ are used in combination. While article 27 joins them with an ‘or’, article 32 uses ‘and’. Not much hinges on this difference, as the ‘matter of interpretation’ may in both instances arise from either ‘application’ or ‘implementation’, or from a combination of the two. Article 32 does not require a conjunctive reading, namely, that the interpretation should arise from *both* application *and* implementation but accords with a reading that interpretation may arise from any of the two (application and implementation), or from them both.

In many instances, the terms ‘interpretation’ and ‘application’ are used together in a conjoined way, without drawing a difference in the meaning of the two constituent terms.⁵⁹ In *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and 13 Others*,⁶⁰ the African Commission held that it is not competent to find violations of other international treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the South African Development Community (SADC) Treaty. In its reasoning, the Commission distinguished between the use of such treaties as interpretive guides (which is required under article 60 of the Charter), and their ‘application and implementation’ as the normative basis for a finding of violation and a possible remedial recommendation. The phrase ‘application and implementation’ is thus associated with the Commission’s competence to find violations as part of its adjudicative mandate. This use of the phrase ‘application and implementation’ corresponds to its use in articles 27 and 32.

4.4 ‘Transitional provisions’

Article 32 is headed ‘Transitional provisions’. Given that it contains only one provision, the single form (‘provision’) would have been more appropriate.

54 *Collins English Dictionary* (n 44).

55 See eg the titles of the following: F Coomans & MT Kamminga (eds) *Extraterritorial application of human rights treaties* (2004); M Milanovic *Extraterritorial application of human rights treaties: law, principles, and policy* (2011).

56 A Gourgourinis ‘The distinction between interpretation and application of norms in international adjudication’ (2011) 2 *Journal of International Dispute Settlement* 31.

57 Gardiner (n 45) 30.

58 MK Yasseen ‘L’interprétation des traités d’après la Convention de Vienne sur le droit des traités’ (1976-III) 151 *Hague Recueils/Collected Courses of the Hague Academy of International Law* 10.

59 The UN Convention on the Elimination of all forms of Racial Discrimination art 22; CEDAW art 29(1); and UN Convention on the Rights of All Migrant Workers and Members of their Families art 92, for example provide that any unresolved dispute about the ‘interpretation or application’ of the treaty may be referred to the International Court of Justice.

60 Communication 409/12, African Commission on Human and Peoples’ Rights, 35th Annual Activity Report (2013) paras 24.

In its ordinary meaning, a ‘transition’ is a period in which things change from one state to another.⁶¹ Transitional arrangements appear in domestic and international law. National legislation, constitutions and international treaties often contain ‘transitional provisions’ to regulate the application of newly enacted or amending laws to circumstances preceding the commencement of these new laws. Such ‘transitional provisions’ (sometimes referred to as ‘transitional arrangements’)⁶² aim to provide for legal certainty and continuity, and to avoid injustice or unfairness. Examples of transitional provisions in ‘new’ constitutions are the continuity of existing laws;⁶³ and vesting jurisdiction in institutions pending the establishment of new institutions.⁶⁴ An example of a ‘transitional arrangement’ under international treaty law is the period of delay of four years in applying some of the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights afforded to ‘developing’ countries.⁶⁵

The establishment of the African Union itself was characterised by a transitional period between the entry into force of the AU Constitutive Act and the launch of the AU.⁶⁶ The Constitutive Act makes it clear that the OAU General Secretariat ‘shall be the interim Secretariat of the Union’ pending the establishment of the AU Commission.⁶⁷ The AU Constitutive Act also regulates the consequences of the non-establishment of certain organs. While providing for the Court of Justice of the Union as the organ to be ‘seized with matters of interpretation arising from the application or implementation of this Act’, the Constitutive Act also stipulates that ‘[p]ending its establishment, such matters shall be submitted to the Assembly of the Union, which shall decide by a two-thirds majority’.⁶⁸ Transitional provisions, for example dealing with the replacement of one set of judges with another, also regulate the eventuality of the African Court being replaced by the African Court of Justice and Human Rights.⁶⁹

5 Article 32 has been overtaken by events and is no longer of relevance

As its heading (‘Transitional provisions’) underlines, article 32 is a transitional provision.

The relevance of article 32 to the interpretation of Maputo Protocol was made conditional on the *non-establishment* of the African Court: *Until the African Court is established*, the African Commission is to be seized to interpret matters related to the application and implementation of the Maputo Protocol. The implication seems to be that now that the Court has been established, the Commission no longer needs to or should play any role in the interpretation of the Maputo Protocol. However, this understanding is misplaced.

61 *Collins English Dictionary* (n 44).

62 AU Constitutive Act art 33.

63 Item 2(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996: ‘All law that was in force when the new Constitution took effect, continues in force, subject to (a) any amendment or repeal; and (b) consistency with the new Constitution’.

64 1990 Namibian Constitution art 138(3): ‘Pending the enactment of the legislation contemplated by Article 79, the Supreme Court shall have the same jurisdiction to hear and determine appeals from Courts in Namibia as was previously vested in the Appellate Division of the Supreme Court of South Africa’.

65 TRIPS Agreement art 65(2), under the heading ‘transitional arrangements’.

66 AU Constitutive Act art 33(1): ‘This Act shall replace the Charter of the Organization of African Unity. However, the Charter shall remain operative for a transitional period of one year or such further period as may be determined by the Assembly, following the entry into force of the Act, for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto.’

67 AU Constitutive Act art 33(4).

68 AU Constitutive Act art 26, under the heading ‘Interpretation’, and not part of the ‘Transitional arrangements’.

69 Protocol on the Statute of the African Court of Justice and Human Rights, Chapter II, ‘Transitional provisions’ arts 4-7, initial continuity in office of Judges of the African Court and Registry; finalisation of pending cases under the 1998 Court Protocol; and the continued validity of the 1998 Protocol for a period of time.

The transitional provision was intended to provide clarity in so far as the Maputo Protocol refers to an institution, the African Court, that was by the time of its adoption not yet 'established'.⁷⁰ From the drafters' perspective, it was uncertain when the Court would in fact become operational.⁷¹ Article 32 rests on the assumption that the Court would be 'established' some time *after the entry into force* of the Maputo Protocol. The 'transitional' period foreseen by article 32 is therefore the interval between the entry into force of the Maputo Protocol and the 'establishment' of the Court. The AU Assembly adopted the Maputo Protocol on 1 July 2003, and it entered into force on 25 November 2005. The Court Protocol was adopted on 10 June 1998. However, it entered into force on 25 January 2004, *after the adoption* of Protocol, but almost two years *before the entry into force* of the Maputo Protocol.

Against this background, the question arises what the 'establishment' of the Court refers to. Going by the ordinary (dictionary) meaning of the word 'establish', it can mean to 'bring into existence',⁷² or to 'start or create something'.⁷³ This definition allows the possibility of 'establish' as referring to (i) the adoption of the Court Protocol; (ii) the entry into force of the Court Protocol; or (iii) the actual operationalisation of the Court.

The first possibility can be easily discounted. 'Establishment' does not refer to the *adoption of the Court Protocol*, because the AU Assembly adopted the Court Protocol some five years prior to adopting the Maputo Protocol.

If the 'establishment' of the Court would be equated with the *entry into force* of its founding treaty (the Court Protocol), the 'transitional provision' would by 25 November 2005 have become inapplicable, leaving article 32 without any effect. In this scenario, the 'transitional provision' would have served no purpose subsequent to the entry into force of the Protocol, since the Court had indeed been 'established' (in the sense of its establishing Protocol entering into force) by the time when the Maputo Protocol took effect. From this point of view, having been overtaken by events, article 32 never was and no longer is of relevance to the exercise of making sense of the Protocol.

However, the Maputo Protocol did not explicitly link the 'entry into force' of the Court Protocol to the Commission's 'pending' competence but opted for the more open-ended phrase 'establishment of the Court'. While the entry into force of the Court Protocol brought the Court into existence, as a matter of law, the Court, as a matter of fact, became operational only after the election of the first judges on 22 January 2006 and their swearing in on 2 July 2006, and after the Court 'officially started its operations in Addis Ababa, Ethiopia in November 2006'.⁷⁴ Whichever of these dates are used as the date of the 'establishment' of the Court, it is clear that the transitional period between the Maputo Protocol's entry into force (25 November 2005) and the 'establishment' of the Court (whether 22 January 2006, 2 July 2006, or November 2006) was between around a month and a year. Using the last of these dates, and applying it to this analysis, the Commission served a transitional role between 25 November 2005 and November 2006. What is undeniable, is that the African Commission has since November 2006 not served this role, and definitely no longer acts as a 'transitional monitoring body'. During this period, no complaints or cases alleging violations of the Maputo Protocol were submitted

70 Viljoen (n 4) 313.

71 By 1 July 2003, 11 states had become party to the Court Protocol, see https://au.int/sites/default/files/treaties/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS_0.pdf (accessed 18 May 2023) Ratification by 15 states was required for the entry into force of the Court Protocol (Court Protocol art 34(3)).

72 *Oxford Dictionary* (n 44).

73 As above.

74 Available at African Court on Human and Peoples' Rights 'Welcome to the African Court' <https://www.african-court.org/wpafc/welcome-to-the-african-court/> (accessed 23 June 2023).

to either the Commission or the Court. Understandably, therefore, article 32 was never invoked, and has subsequently been overtaken by events.

Article 32 should consequently not serve to restrict the protective reach or substantive effects of the Maputo Protocol. As a provision that has fallen into disuse, it is arguable that the Protocol should, as a living instrument, now be construed without reference to article 32.

6 Article 27: a shared interpretive mandate over the Maputo Protocol by the African Court and African Commission

The African Commission and African Court share the mandate to interpret matters arising from the ‘application’ and ‘implementation’ of the Maputo Protocol. The Court has been established to ‘complement the protective mandate of the African Commission’,⁷⁵ and not to *replace* it. While individuals or NGOs in state parties to the Maputo Protocol that have accepted the Court’s jurisdiction can access the Court indirectly,⁷⁶ or directly,⁷⁷ individuals and NGOs in *all state parties to the Protocol* may submit cases to the Commission, therefore, comparatively, the Commission’s access is unfettered. However, while the Commission’s findings are generally accepted as being recommendatory, the Court’s judgments are unequivocally binding in nature.⁷⁸ In cases decided on their merits and then referred to the Court by the Commission, the Court’s judgments may be viewed as reinforcing (or ‘enforcing’) the Commission’s findings.⁷⁹ For individuals and NGOs to access the Court directly for an interpretation of the Maputo Protocol, states need to have satisfied a tripartite requirement: ratification of the Maputo Protocol; ratification of the Court Protocol; and an acceptance of the Court’s jurisdiction by having made a declaration under article 34(6) of the Court Protocol. Individuals and NGOs in Maputo Protocol-states not party to the Court Protocol and in states that have accepted the Court’s jurisdiction but have not accepted direct access, have no choice but to seize the Commission. Individuals and NGOs (enjoying observer status with the Commission) in those states that have accepted direct access to the Court may directly seize the Court. The Table below shows that while the structure of complementarity between the Commission and Court is fixed, the position in respect of specific states will change over time as their ratification status and acceptance of article 34(6) change.

75 African Court Protocol art 2. The Preamble to the Court Protocol, para 8 ‘*Firmly convinced* that the attainment of the objectives of the African Charter on Human and Peoples’ Rights requires the establishment of an African Court on Human and Peoples’ Rights to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights’.

76 By first submitting complaints to the Commission which can then refer a matter to the African Court as guided by its 2020 Rules of Procedure.

77 In respect of states that have made and deposited a declaration under art 34(6) of the Court Protocol.

78 Art 28(2) of the Court Protocol: ‘The judgment of the Court decided by majority shall be final and not subject to appeal’. See also Viljoen (n 4) 414.

79 See eg Court Protocol, Preamble, para 8, noting that the ‘reinforces the functions of the African Commission’.

Table: Avenues for individuals or NGOs to vindicate their Maputo Protocol (MP) rights (in contentious proceedings)

Item	Treaties ratified; declaration made	Can individual/ NGO invoke MP as guide (art 60)?	Can individual/ NGO allege MP violation?	Can individual/ NGO seize Commission?	Can individual/ NGO directly seize Court?	Number of states in category (as at 1/5/23)
1	Charter	Yes	No	Yes	No	54
2	Charter and Court Protocol	Yes	No	Yes	No	34
3	Charter, Court Protocol and 34(6) declaration	Yes	No	Yes	Yes	8
4	Charter and Maputo Protocol	Yes	Yes	Yes	No	43
5	Charter, Maputo Protocol and Court Protocol	Yes	Yes	Yes	No	30
6	Charter, Maputo Protocol, Court Protocol and 34(6) declaration	Yes	Yes	Yes	Yes	8

6.1 The Court's interpretive mandate over the Maputo Protocol

While the Court's material jurisdiction extends to the Maputo Protocol, given the incomplete acceptance by states of the Court's jurisdiction, it has personal jurisdiction over a very limited number of matters pertaining to the 'application' and 'implementation' of the Maputo Protocol.

By virtue of article 3 of the Court Protocol, the African Court has jurisdiction over cases concerning the 'interpretation and application' of any 'human rights instrument ratified by the state concerned'. Under article 4 of the same Protocol, the African Court may provide advisory opinions on 'any legal matter relating to the Charter or any other relevant human rights instruments'. There is no doubt that, as a human rights treaty adopted by the AU Assembly, the Maputo Protocol falls within the scope of the Court's contentious jurisdiction, as provided for in article 3. As a 'relevant human rights instrument', the Maputo Protocol also undoubtedly falls under the Court's advisory competence.⁸⁰ The

⁸⁰ See also Pan African Lawyers Union on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and other human rights instruments in Africa, Opinion 1/2018 (4 December 2020) (*Vagrancy Advisory Opinion*) paras 27 & 136-140.

Court's interpretive jurisdiction over the Maputo Protocol is thus not dependent on article 27, since the Court Protocol is unequivocal that the Maputo Protocol falls within its jurisdictional ambit. As far as girls are concerned, the Court's jurisdiction covers the provisions of both the Maputo Protocol and the African Children's Charter.⁸¹

In at least two cases emanating from its contentious jurisdiction, the Court interpreted and applied the Maputo Protocol. In the case of *APDF*,⁸² the Court found Mali, a state party to the Maputo Protocol, in violation of numerous provisions of the Protocol.⁸³ As Mali had made a declaration under article 34(6) of the Court Protocol, the two NGOs (both enjoying observer status with the African Commission) were entitled to submit this case directly to the African Court. In another case before the Court, *Kouma and Diabaté*,⁸⁴ the applicants' contention that various Protocol provisions had been violated, was not considered because the Court declared the case inadmissible. However, the Court accepted that it had material jurisdiction over the matter.⁸⁵

The Court also interpreted and applied the Maputo Protocol in the exercise of its advisory jurisdiction. In an advisory opinion concerning the compatibility of vagrancy offences with the applicable international human rights standards, the Court concluded that such laws violate article 24 of the Maputo Protocol (dealing with special protection of women in distress, including poor women), in addition to violating various provisions of the African Charter and the African Children's Charter.⁸⁶ However, another request pertaining to the provisions of the Maputo Protocol was not entertained, based on the Court's holding on which entities are entitled to make such requests.⁸⁷ The list of entitled entities mirrors the wording of article 45(3) of the Charter, discussed earlier, including 'African organisations recognised by the AU'.⁸⁸ The Court held that the requirement that the organisation should be 'recognised by the AU' can only be met if it had been granted observer status by the AU Commission or if it has an Memorandum of Understanding (MOU) with the AU.⁸⁹

81 See eg *Vagrancy Advisory Opinion* (n 80) paras 27, 120, 123, 128; and also L Chenwi 'Women's representation and rights in the African Court' (2022) 18 *The Age of Human Rights Journal* at 354.

82 *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (2018) 2 AfCLR 380. For a further discussion, see BK Kombo 'Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389-413 and YM Ngombo & GM Manzanza 'L'arrêt *Association pour le Progrès et la Défense des Droits des Femmes Maliennes et Institute for Human Rights and Development in Africa c. Mali* en procès' (2020) 4 *Annuaire africain des droits de l'homme* 457-475.

83 Arts 2, 2(2), 6(a), 6(b), 21(1) & 21(2). For discussions of this decision, see eg Kombo (n 82); YM Ngombo & GM Manzanza 'L'arrêt *Association pour le Progrès et la Défense des Droits des Femmes Maliennes et Institute for Human Rights and Development in Africa c. Mali* en procès' (2020) 4 *Annuaire africain des droits de l'homme* 457-475; and F Capone '*APDF and IHRDA v Mali*: recent developments in the jurisprudence of the African Court on Human and Peoples' Rights' (2020) 24(5) *International Journal of Human Rights* 580-592.

84 *Kouma and Diabaté v Mali* (admissibility) (2018) 2 AfCLR 237 (*Kouma and Diabaté*). For a discussion of this decision, see E Bizimana 'Commentaire de l'arrêt de la Cour africaine des droits de l'homme et des peuples dans l'affaire *Mariam Kouma et Ousmane Diabaté c. Mali*' (2019) 3 *Annuaire africain des droits de l'homme* 355-373.

85 *Kouma and Diabaté* (n 84) para 27, read with para 2.

86 *Vagrancy Advisory Opinion* (n 80) para 140.

87 *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and Others* (Advisory Opinion) (2017) 2 AfCHR 622, requesting for an advisory opinion on the interpretation of art 6(d) of the Maputo Protocol and the States' obligations consequent thereto; and contending that this provision imposes an obligation to enact national legislative measures to guarantee that every marriage is recorded in writing and registered in accordance with national laws in order to be legally recognised.

88 Court Protocol art 4(1).

89 *Application 1/2013 Advisory Opinion on the Request for Advisory Opinion by the Socio Economic Rights and Accountability Project (SERAP)* (Advisory Opinion). See also A Jones 'Form over substance: the African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17 *African Human Rights Law Journal* 320-328.

The apprehension may be expressed that a contentious matter may be brought as an advisory request, thus overcoming the inability of individuals or NGOs to access the Court directly, or circumventing the admissibility requirements that have to be met in respect of contentious cases, including exhaustion of local remedies. This apprehension may be addressed by highlighting that even if the substance covered in an advisory request overlaps with a contentious issue, an advisory opinion does not impose obligations on states and does not resolve issues between parties. In any event, this ‘problem’ may be more apparent than real, due to the restrictive standing requirements on individuals and NGOs for requesting advisory opinions.

Access to the Court to bring cases alleging violations of the Maputo Protocol is in important ways determined by the Court’s personal jurisdiction.

First, the state against which a case is brought must have accepted the Court’s jurisdiction by ratifying or acceding to the Court Protocol. As of 1 May 2023, 30 of the 43 state parties to the Maputo Protocol were also party to the Court Protocol. The Court has personal jurisdiction in respect of the Maputo Protocol over these 30 states.⁹⁰ Thirteen of the state parties to the Maputo Protocol have not accepted the jurisdiction of the Court.⁹¹ Since the Court lacks personal jurisdiction over these states, individuals, and NGOs in the 13 states have to seize the Commission with complaints alleging violations of the Maputo Protocol. Should the Court be considered the only body that may adjudicate alleged violations of the Maputo Protocol, as long as these states do not become party to the Court Protocol, it would be impossible to hold them accountable for these violations. Such an interpretation would fly in the face of the principles of treaty acceptance, justice and common sense, as it would render state parties to the Maputo Protocol accountable for violations of the Protocol on condition that they have also accepted the Court’s jurisdiction. Under these circumstances, the Commission clearly has an important role to complement the gap in the Court’s jurisdictional reach.

Second, an individual or NGO (enjoying observer status with the Commission) can approach the Court directly if that state has accepted direct individual access by making a declaration under article 34(6) of the Court Protocol. In the 26 state parties to the Maputo Protocol that have accepted the Court’s jurisdiction *without making an article 34(6) declaration*, individuals and NGOs are not entitled to approach the Court directly. The only option open to them to vindicate their Protocol rights is to submit a communication to the African Commission and request that the Commission refers the case to the Court.⁹² The Commission’s reluctance to refer communications to the Court is evidenced by the fact that it has, in the decade and a half of its co-existence with the Court, only referred three cases to the Court.⁹³ Meaningful access to the Court’s binding remedial orders depends on the Commission’s

90 These states are: Algeria, Benin, Burkina Faso, Cameroon, Comoros, Congo, Côte d’Ivoire, DRC, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa, Tanzania, Togo, Tunisia and Uganda.

91 These states are: Angola, Cape Verde, Djibouti, Eswatini, Equatorial-Guinea, Ethiopia, Liberia, Namibia, São Tomé e Príncipe, Seychelles, Sierra Leone, Zambia and Zimbabwe.

92 See 2020 Rules of Procedure of the African Commission, Rules 130(1): ‘[t]he Commission may, before deciding on the admissibility of a Communication submitted under Articles 48, 49 or 55 of the Charter, decide that the Communication should be referred to the Court, provided that the respondent State has ratified the African Court Protocol’; Rule 130(2): ‘[t]he Commission shall obtain the complainant’s consent to any referral to the Court’. The 2020 Rules are less detailed than the 2010 Rules, which in Rule 118 allowed for 4 specific forms of referral: following non-compliance by the state against which a decision on the merits had been made; following non-compliance by the state in respect of which a request for provisional measures had been made; in a situation of serious or massive violations; and, arguably an all-encompassing ground, ‘at any stage of the examination of a communication’.

93 *African Commission on Human and Peoples’ Rights (Benghazi) v Libya* App 4/2011 25 March 2011 (Order for Provisional Measures), (2011) 1 AfCLR 17; *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 15 March 2013 (Order for Provisional Measures), (2013) 1 AfCLR 145; *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 3 June 2016 (Judgment on Merits), (2016) 1 AfCLR 153; *African Commission on Human and Peoples’ Rights v Kenya (merits)* (2017) 2 AfCLR 9.

willingness to refer cases to the Court – provided, obviously, that relevant cases are submitted to it in the first place. Only eight states had, as at 1 May 2023, declarations in place under the Court Protocol accepting the competence of individuals and NGOs to submit cases directly to the Court (that is, bypassing the Commission).⁹⁴ So far, the vast majority of cases decided by the Court have been against these states.⁹⁵ As a matter of practical reality, therefore, should the Court be the only port of call for aggrieved individuals (and NGOs) aiming to vindicate their Maputo Protocol rights, such recourse would be restricted to individuals and NGOs in those eight states. While state parties and African intergovernmental organisations may also refer cases directly to the Court,⁹⁶ none of these entities has as yet lodged any complaint, and experience strongly suggests that they are not likely to seize the Court with women’s rights cases.⁹⁷

At the same time, accepting the Court’s jurisdiction is not part of the requirements to be bound to the Maputo Protocol. An interpretation that the Court has sole adjudicating powers over the Protocol would lead to outcomes that are irrational and inimical to the object and purpose of the Maputo Protocol,⁹⁸ which is to ensure greater protection to women against a background of concern for the failure of existing treaties to have any impact on their lives.

6.2 The Commission’s interpretive mandate over the Maputo Protocol

The Maputo Protocol is embedded in the Charter,⁹⁹ as captured in the nature and meaning of the term ‘protocol’. The Maputo Protocol is a ‘protocol’ to the *African Charter*. The Charter provides that ‘protocols’ may be adopted to ‘supplement the provisions of the present Charter’.¹⁰⁰ A ‘protocol’ may ‘supplement’ the substantive rights provisions in a treaty,¹⁰¹ may complement the procedures and mechanisms through which state implementation of these rights is monitored, or do both.¹⁰² Falling primarily in the first category, the Maputo Protocol supplements the Charter’s scope of rights protection,¹⁰³ while aiming to clarify the role of the monitoring mechanisms. It ‘leaves unaffected the

94 They are: Burkina Faso, Gambia, Ghana, Guinea-Bissau, Malawi, Mali, Niger and Tunisia. Four other states: Benin, Côte d’Ivoire, Rwanda and Tanzania have made similar declarations, but subsequently withdrew them (see African Court on Human and Peoples’ Rights ‘Declarations’ <https://www.african-court.org/wpafc/declarations/> (accessed 15 March 2023)).

95 In fact, with the exception of the three cases submitted by the Commission, mentioned in n 93, all cases have come from individuals and NGOs in these eight states.

96 Court Protocol, arts 5(1)(b), (c) & (d).

97 See Rudman (n 9) 329.

98 See Viljoen (n 4) 313: ‘Such an interpretation would fly in the face of the purpose of the Protocol, which is to ensure greater protection to women against a background of concern for the failure.’

99 See also MS Nsibirwa ‘A brief analysis of the draft protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women’ (2001) 1 *African Human Rights Law Journal* 40 50, drawing attention to the fact that the Protocol does not exist on its own but must be interpreted ‘with due regard to the African Charter’. See also A Rudman ‘Introduction’ sec 3 in this volume.

100 African Charter art 66.

101 See eg the 2000 (UN) Optional Protocol to the Convention on the sale of children, child prostitution and child pornography and the 2000 (UN) Optional Protocol to the Convention on the involvement of children in armed conflict, both complementing the substance of the CRC; see also the Protocol to the African Charter on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons), the Protocol to the African Charter on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities), and the Protocol to the African Charter on the Rights of Citizens to Social Protection and Social Security (Protocol on Social Security), all complementing the substance of the African Charter.

102 From the point of view of the Court Protocol, the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) introduces both substantive and procedural changes.

103 In many ways, the Maputo Protocol complements art 18(3) of the African Charter. See *Organisation Mondiale contre la Torture et Ligue de la Zone Afrique pour la Défense des Droits des Enfants et Elèves (pour le compte de Céline) c. République démocratique du Congo*, Communication 325/2006, African Commission on Human and Peoples’ Rights, 38th Annual Activity Report (2015) (*Céline*) para 85: ‘The Commission considers that mentioned provisions of the Protocol have necessarily been

institutional landscape, and merely extends the scope of the African Commission's mandate to cover the specific rights of women'.¹⁰⁴

The African Commission is the supervisory body that monitors the African Charter.¹⁰⁵ Similarly, monitoring of the Maputo Protocol, including by considering communications, logically also falls to the African Commission.¹⁰⁶ Had the Maputo Protocol been completely silent on the issue of interpretation, the inescapable conclusion would have been – based on the relationship between the Charter and the Maputo Protocol – that the Commission is the monitoring body for considering both state reports and examining communications. In this reading, article 27 (whether read together with article 32 or not), establishes that the Court and the Commission have a complementary competence to interpret matters arising from the application of the Maputo Protocol. Such an interpretation is in line with a purposive interpretation of the Maputo Protocol. A purposive reading of article 62 the African Charter similarly concluded that the Commission should be entrusted with receiving and examining state reports, despite the Charter's silence as to the body entrusted with this function.¹⁰⁷ This interpretation can only be contradicted by clear language to the contrary, explicitly carving out an exclusive adjudicatory space for the Court. The Protocol does, however, not contain any such provision.

An interpretation of the Maputo Protocol that allows complementary roles to the Commission and Court is in line with subsequent Protocols to the African Charter. All three subsequent substantive protocols to the Charter, the Protocol on the Rights of Older Persons, the Protocol on the Rights of Persons with Disabilities, and the Protocol on Social Security, provide for complementary monitoring by the Commission and the Court.¹⁰⁸ This subsequent practice should be used to shed light on any interpretive ambiguity arising from the Maputo Protocol.¹⁰⁹

adopted to apply and define the content of the right to equality (under art 2) and on the protection of women and children (under art 18(3))' (unofficial translation). At least in its initial provisions, the Maputo Protocol indeed emulates the substance of the African Charter (Compare arts 2-6 of the Charter and arts 2-5 of the Maputo Protocol (dealing with equality, dignity, life, integrity and bodily security). See in this regard the Nouakchott Draft (n 24), which draws a clear parallel between the Charter and Protocol provisions.

104 Viljoen (n 4) 312-313.

105 African Charter art 30.

106 See A Birhanu 'Reflections on Ethiopia's reservations and interpretive declarations to the Maputo Protocol' (2019) 31 *Journal of Ethiopian Law* 3121 145: 'the promotional, protective and interpretive mandates of the African Commission remain effective in respect of the enforcement of the Maputo Protocol'; Viljoen (n 2) 40, '[t]he logic of the complementary relationship between the African Charter and the African Women's Protocol requires that the Protocol be read as enlarging the scope of claims that may be submitted to the Commission in order to improve the situation of women. In the absence of any explicit provision excluding the competence of the Commission to do so, the Protocol should be understood to mandate the Commission to examine communications alleging violations of the rights under the Protocol'; Viljoen (n 4) 313 and M Kamunyu 'The gender responsiveness of the African Commission on Human and Peoples' Rights' PhD thesis, University of Pretoria, 2018. See also Omondi et al (n 5), who observe that the Commission 'plays an oversight role in the promotion and protection of human rights, as well as monitors State compliance with the African Charter (and its Protocols, including the Maputo Protocol)' 9.

107 See Recommendation on Periodic Reports, Annex IX to the African Commission's First Annual Activity Report, Nov 1987-April 1988, 'considering that the Charter does not stipulate to which authority or body the Periodic Report should be directed', 'the Commission is the appropriate organ ... capable ... of studying ... and making pertinent observations' to state parties, African Union 'Activity reports' <https://www.achpr.org/activityreports/viewall?id=1> (accessed 23 June 2023).

108 The same logic is on display in the extension of the substantive mandate of the UN Committee on the Rights of the Child (CRC Committee). When the CRC Committee's competence to deal with communications was added in a 2011 Protocol to the 1990 UN Convention on the Rights of the Child (Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted on 19 December 2011), this competence did not only cover the 'mother treaty', the CRC, but also the two Protocols adopted to the CRC on 25 May 2000, the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography; and the Optional Protocol to the Convention on the involvement of children in armed conflict. These two treaties added to the substantive scope of the CRC, and – like the AU treaties discussed above – make the rights provisions part of the mandate of the pre-existing quasi-judicial body, the CRC Committee. It should be noted that by 1 May 2023, none of these Protocols has entered into force.

109 In line with the VCLT art 31(3)(b).

Like the Maputo Protocol, the Protocol on the Rights of Older Persons does not add a new monitoring mechanism. However, the drafters in this instance, departing from the position under the Maputo Protocol, made it clear that the ‘African Commission shall have the mandate to interpret the provisions of the Protocol’.¹¹⁰ The interpretive role of the Court is mentioned, too, but not as the main or exclusive body tasked with the interpretation or the application of the Protocol. The Protocol on the Rights of Older Persons stipulates that the Court may become involved in the interpretation of the Protocol when the Commission refers a case to the Court.¹¹¹ It adds that, ‘where applicable’, the African Court ‘shall have the mandate to hear disputes arising from the application or implementation of this Protocol’.¹¹² The ‘applicable’ circumstances would be when the state complained against is a state party to both the Protocol on the Rights of Older Persons and the Court Protocol; and, if the matter is brought by an NGO or individual, the state has also made a declaration under article 34(6) of the Court Protocol. The Protocol on the Rights of Persons with Disabilities affirms that the Commission is responsible for interpreting this Protocol.¹¹³ Following the wording of the Protocol on the Rights of Older Persons,¹¹⁴ it highlights the potential role of the Court in the context of indirect access (referral of cases by the Commission to the Court).¹¹⁵ It differs in one respect from the Protocol on the Rights of Older Persons, by specifically mentioning the possibility of direct access to the Court, provided that the state concerned has made the declaration under article 34(6) of the Court Protocol.¹¹⁶ The Protocol on Social Security also confirms, in an unqualified and unconditional formulation, that the African Commission ‘shall be seized with matters of interpretation arising from the implementation of this Protocol’;¹¹⁷ and that the Court ‘shall be’ similarly seized but only in respect of state parties to the Court Protocol.¹¹⁸

Even if the specific wording differs, these three Protocols are all unequivocal that both the Commission and the Court may be approached to find or decide on alleged violations of the respective Protocols. They also acknowledge that the Court may also be approached, depending on the respondent state’s acceptance of the Court’s jurisdiction and the optional direct access provision under the Court Protocol.

The Maputo Protocol strongly implies that the Commission’s mandate of examining state reports is extended to cover reporting under the Protocol. States are called upon to submit periodic reports in accordance with article 62 of the African Charter.¹¹⁹ The competence under article 62 of the Charter is exercised by the Commission. The Commission’s practice has been built on the logical inference that the Commission is also responsible for examining reports under article 26 of the Maputo Protocol. Since this aspect of the Commission’s overall mandate has been extended to cover the Maputo Protocol provisions, it should follow that the Commission also retains its protective mandate. In this way, one aspect of the Commission’s mandate is not severed from the mandate as a whole.

110 Protocol on the Rights of Older Persons art 22(3).

111 Protocol on the Rights of Older Persons art 22(4).

112 Protocol on the Rights of Older Persons art 22(5).

113 Protocol on the Rights of Persons with Disabilities art 32(3) which is a word-for-word replica of art 22(3) of the Protocol on the Rights of Older Persons.

114 Protocol on the Rights of Persons with Disabilities art 32(4).

115 Protocol on the Rights of Persons with Disabilities art 32(5), in relation to states that have made a declaration under art 34(6) of the Court Protocol.

116 Protocol on the Rights of Persons with Disabilities art 32(5), in relation to states that have made a declaration under art 34(6) of the Court Protocol.

117 Protocol on Social Security art 29(1).

118 Protocol on Social Security art 29(2).

119 Maputo Protocol art 26(1).

Against this background, the practice of the Commission is further explored. By 1 May 2023, the African Commission had not found any violation of the Maputo Protocol, as such. However, it had referred to the Protocol in at least three of the communications submitted to it.

In two of these decisions, the Court used the Maputo Protocol as an *interpretive guide* in respect of states that were not party to the Protocol (Egypt and Ethiopia). In these instances, article 60 of the African Charter provides the basis of reliance on the Maputo Protocol. Reliance on a treaty under article 60 is not dependent on ratification of or accession to that treaty by the state complained against.¹²⁰ In these instances, the Commission clearly lacked the competence to find a violation of the Protocol. The role of the Court did not enter the picture, as none of these states had ratified the Court Protocol either.

In *Interights*,¹²¹ the Commission placed reliance on the definition of ‘discrimination’ in the Protocol.¹²² The Commission was not ‘seized’ with an allegation that the Protocol had been infringed, since Egypt had neither signed nor ratified the Protocol then (and it still has not, by 1 May 2023).¹²³ In its remedial recommendations, the Commission in fact ‘urged’ Egypt to ratify the Maputo Protocol.¹²⁴

In *Equality Now*,¹²⁵ the complainants argued that Ethiopia violated its obligations under articles 4, 5 and 6 of the Protocol.¹²⁶ However, Ethiopia had by that time only signed and not yet ratified the Protocol.¹²⁷ Signature of a treaty entails a weaker form of obligation under international law than ratification.¹²⁸ Signing does not establish a state’s consent to be bound to a treaty, while ratification does.¹²⁹ While ratification imposes binding obligations on a state party, signature of a treaty only obliges a signatory state to ‘refrain from acts’ that would ‘defeat the object and purpose’ of that treaty.¹³⁰ Even if the Commission did not explicitly state the reason for doing so, it did not in its decision on the merits deal with the complainants’ contentions that the Commission should find violations of the Maputo Protocol, as such. Presumably the reason is Ethiopia’s status as a non-state party to the Protocol. In arriving at its decision of finding violations of the African Charter, the Commission did, however, rely on the definition of ‘discrimination’ in the Maputo Protocol.¹³¹

In a third finding, *Céline*, the Commission placed its most extensive reliance thus far on the Maputo Protocol. This communication concerns the failure of law enforcement agents to investigate, prosecute and punish those responsible for the multiple rapes of a 17-year-old girl. The Commission found that

120 African Charter art 60 [t]he Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various ... instruments adopted by the United Nations and African countries’, our emphasis.

121 *Egyptian Initiative for Personal Rights and Interights v Egypt* Communication 323/06 African Commission on Human and Peoples’ Rights, Combined thirty-second and thirty-third Annual Activity Report (2013).

122 *Interights* (n 121) paras 87, 121.

123 African Union ‘List of Countries Which Have Signed, Ratified/Accessed to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 23 June 2023).

124 *Interights* (n 121) para 275(vi).

125 *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples’ Rights 57th Annual Activity Report (2016).

126 As above para 94.

127 Ethiopia signed the Protocol on 1 June 2004; it deposited its instrument of ratification on 17 September 2019.

128 See eg WM Cole ‘Human rights as myth and ceremony? Reevaluating the effectiveness of human rights treaties, 1981-2007’ (2012) 117(4) *American Journal of Sociology* 1137.

129 Art 1(b) of the VCLT.

130 Art 18(a) of the VCLT; see further B Traoré ‘Articles 28-31’ sec 2 in this volume.

131 *Equality Now* (n 125) para 144, with reference to art 1(f) of the Maputo Protocol.

this inaction violated numerous Charter provisions, including article 18(3), which obliges state parties to ‘ensure the elimination of every discrimination against women and also ensure the protection of the rights of women’ as provided for in international treaties.¹³² In interpreting these provisions, the Commission referred (‘cross-referred’) to the Maputo Protocol.¹³³

The Democratic Republic of Congo (DRC) became a state party to the African Charter in 1987; and to the Maputo Protocol in 2009.¹³⁴ On 8 December 2020, the DRC accepted the Court’s jurisdiction by depositing its instrument of ratification to the African Court Protocol.¹³⁵ When the girl in *Céline* was raped in February 2006, the DRC was not yet a state party to the Maputo Protocol. And when the complaint was submitted, in May 2006, the DRC was not yet bound to observe the Maputo Protocol. The Commission could *at that time*, consequently, not find a violation of the Maputo Protocol. However, it took the Commission almost a decade to arrive at a decision in this matter. When it decided the communication in November 2015, the DRC had become a state party to the Maputo Protocol. In its finding, the Commission held that the complaint – the failure to investigate and bring to justice the perpetrators of the rape – constituted a continuous violation.¹³⁶ On the basis that (a) the DRC had ‘ratified’ the Maputo Protocol ‘in 2008’;¹³⁷ and (b) the violation persisted beyond the date on which the DRC became a state party to the Maputo Protocol, the Commission considered itself competent to find a violation of the Protocol.¹³⁸

Notwithstanding this logic, the Commission did not on the facts of the specific case find a violation of the Maputo Protocol, as such.¹³⁹ Instead, the Commission concluded, with reference to articles 27 and 32 of the Protocol, that it is competent to *interpret* article 18(3) of the Charter by cross-referencing the relevant provisions of the Maputo Protocol.¹⁴⁰ While the Maputo Protocol is used only as an interpretive guide in *Céline*, the Commission’s reasoning in that finding leaves the door wide open for a finding of violation by the Commission based on the transgression of a provision of the Maputo Protocol. In fact, the Commission’s reasoning suggests that a finding of violation based on the Protocol could equally have been made in that case. This contention is all the more pertinent because particular provisions of the Maputo Protocol – articles 4(b) and (e),¹⁴¹ obliging state parties to prevent and eradicate all forms of sexual violence and punish the perpetrators of such violence – capture the essence of the case with much greater specificity and accuracy than the open-ended and general language of article 18(3) of the Charter.¹⁴² The fact that the complainant did not rely on the Maputo Protocol may be one of the reasons why the Commission did not make explicit reference to the Maputo Protocol in the operative paragraph of its findings.¹⁴³

132 *Céline* (n 103) para 87.

133 *Céline* (n 103) para 83, ‘*en lecture croisée*’.

134 The DRC became a state party on the date of deposit of its instrument of ratification on 9 February 2009, in line with Maputo Protocol art 29(2). The date of deposit should be distinguished from the date of ratification through domestic processes, which in this case is 9 June 2008; see African Union ‘Treaties’ www.au.int/en/treaties (accessed 23 June 2023).

135 Under art 34(6) of the Court Protocol.

136 *Céline* (n 103) para 83.

137 As above.

138 As above.

139 There is no reference to or reliance on the Maputo Protocol in the operative paragraph of the finding, *Céline* (n 103) para 87.

140 *Céline* (n 103) para 83: ‘[I]a Commission est par conséquent compétente pour interpréter les dispositions de l’article 18(3) de la Charte en lecture croisée avec celles du Protocole de Maputo quant à leur application et mise en œuvre’, *[t]he Commission is consequently competent to interpret the provisions of article 18(3) of the Charter read in cross-reference with those of the Maputo Protocol with respect to their application and implementation*’ (unofficial translation).

141 *Céline* (n 103) para 84, the Commission cites these provisions in a longer list of relevant articles.

142 See further R Nekura ‘Article 4’ in this volume.

143 *Céline* (n 103) paras 8 & 87.

Ultimately, the Commission framed its decision as a violation of the Charter - as guided by and interpreted through the prism of the Maputo Protocol, under the explicit authority of article 60 of the Charter - and not as a violation of the Maputo Protocol.¹⁴⁴ Although it has not yet found a violation of the Maputo Protocol and passed up the opportunity in *Céline* to subject articles 27 and 32 to a rigorous analysis, the Commission came very close to definitively confirming the Commission's competence to be 'seized', and to examine and decide communications alleging violations of the Protocol.

6.3 The ECOWAS Court's interpretive mandate over the Maputo Protocol

The African Court is not the only judicial body with jurisdiction over the Maputo Protocol. Although the Maputo Protocol makes no mention of the ECOWAS Court, this sub-regional judicial tribunal has proven to provide fertile ground for the growth of the Protocol on African soil – albeit with a limited geographic scope. The 15 states comprising ECOWAS all fall under the jurisdiction of the ECOWAS Court of Justice. With the exception of Niger, all of the ECOWAS member states have ratified the Maputo Protocol. Of the 15, nine have accepted the African Court's jurisdiction,¹⁴⁵ and of these nine states, six by 1 June had direct access declarations in place.¹⁴⁶

Despite the silence of the Maputo Protocol about its potential role, the ECOWAS Court has in numerous cases held that ECOWAS member states have violated Maputo Protocol provisions. Although ECOWAS was established in 1975 mainly to advance economic integration and prosperity among its members, its mandate was gradually extended to include human rights-related matters.¹⁴⁷ Following the adoption of the 1991 Protocol establishing the ECOWAS Community Court of Justice,¹⁴⁸ the revised 1993 ECOWAS Treaty, and the 2005 Supplementary Protocol, the current situation is that the ECOWAS Court has jurisdiction over both the African Charter and the Maputo Protocol. The competence of the ECOWAS Court to find violations of the African Charter is based on a cumulative reading of article 4(g) of the ECOWAS Treaty (as revised in 1993), and articles 9(4) and 10(d) of the 1991 Protocol (as amended in 2005). Article 4(g) introduces the 'recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' as one of the fundamental principles of the organisation. Article 9(4) endows the Court with jurisdiction to 'determine cases of violation of human rights that occur in member states'. Article 10(d) states that access to the Court is open to '[i]ndividuals on application for relief for violation of their human rights'. On this combined basis, the Court has on numerous occasions, found violations of the African Charter in cases brought by individuals.¹⁴⁹ In fact, the majority of the Court's decisions contain findings that the African Charter had been violated.¹⁵⁰ These decisions by the ECOWAS Court

144 *Céline* (n 103) para 85: the Commission finds a violation of art 18(3) of the Charter read through the interpretive lense ('*en lecture interprétée*') of the Maputo Protocol.

145 The ECOWAS members *not* party to the Court Protocol are: Cape Verde, Equatorial Guinea, Guinea, Liberia, São Tomé e Príncipe, and Sierra Leone.

146 Burkina Faso, Ghana, The Gambia, Guinea-Bissau, Mali, and Niger have made the declaration; Côte d'Ivoire and Benin had made it previously but have subsequently withdrawn their declarations; and Nigeria never made the declaration.

147 See eg ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* at 310-11.

148 Supplementary Protocol Amending the Preamble and arts 1, 2, 9 & 30 of Protocol (A/P.1/7/91) Relating to the Community Court of Justice (19 January 2005) A/SPI/01/05.

149 See eg *Ugoke v Nigeria and Others* Judgment ECW/CCJ/JUD/03/05 (7 October 2005) where the Court clarified that the African Charter can – in the absence of any ECOWAS human rights catalogue – be invoked as the basis of human rights violations; *Karaou v Niger* Judgment ECW/CCJ/JUD/06/08 (27 October 2008), and *Mannah v The Gambia* Judgment ECWCCJ/JUD/03/08 (5 June 2008).

150 See ECOWAS Court 'Decisions' <http://www.courtecowas.org/decisions-3/> (accessed 23 June 2023).

include findings of violations of the Charter against states that do not fall under the jurisdiction of the African Court.¹⁵¹

While the ECOWAS Treaty identifies the African Charter as a normative pillar, none of the ECOWAS legal instruments explicitly refer to the Maputo Protocol. However, the 1991 Protocol provides an expansive list of instruments over which the Court has the competence to adjudicate, including disputes relating to the ‘interpretation and application of the Treaty, Conventions and Protocols of the Community’.¹⁵² Without being very deliberate about the legal basis for doing so, the Court has on numerous occasions found violations of the Maputo Protocol – together with violations of the African Charter and other human rights treaties.¹⁵³ The ECOWAS Court appears to be a more attractive forum for individuals to seize in pursuit of obtaining judicial recourse than the African Commission and the African Court. For one thing, the ECOWAS Court does not require prior exhaustion of domestic remedies.¹⁵⁴ For another, the ECOWAS Court allows direct access to individuals in all state parties to its legal regime. Even though it allows easier access to individuals – including women – than the African Court, the ECOWAS Court has not been free of criticism about the content of its judgments related to women’s rights issues.¹⁵⁵

7 Conclusion

Adopting a purposive approach, the Maputo Protocol in articles 27 and 32 accords complementary roles to the African Court and Commission in interpreting matters arising from the implementation and application of the Protocol. The Maputo Protocol is a living instrument and is therefore to be interpreted and used contextually for the purpose for which it was developed, which is to advance women’s rights protection in Africa. As a transitional provision governing a transitional period that has come to an end, article 32 is no longer relevant to the interpretation or application of the Maputo Protocol.

The interpretive role of the Court and Commission is closely linked to the level of state acceptance of the Maputo Protocol, the Court Protocol and of direct individual access to the Court. A significant number of states have not accepted the Court’s jurisdiction, making any approach to obtain a binding judgment an impossibility. As the number of state parties to the Court Protocol and direct-access declarations increase, the role of the Court becomes more prominent. For as long as the Commission is the only monitoring body accessible to individuals, at least in some countries, its role remains

151 See eg *Counsellor Muhammad Kabine Ja’neh v the Republic of Liberia & Another*, Judgment ECW/CCJ/JUD/28/20 (10 November 2020); *Alex Nain Saab Moran v Republic of Cape Verde*, Judgment ECW/CCJ/JUD/07/2021 (15 March 2021).

152 Art 9(1) of the 1991 Protocol, as amended.

153 See eg *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017) (*Dorothy Njemanze*); *Aminata Diantou Diane v Mali* Judgment No ECW/CCJ/JUD/14/18 (21 May 2018).

154 HS Adjolohoun ‘The ECOWAS Court as a human rights promoter? Assessing five years’ impact of the Koraou slavery judgment’ (2013) 31 *Netherlands Quarterly of Human Rights* 342.

155 See eg C O’Connell ‘Reconceptualising the first African Women’s Protocol case to work for all women’ (2019) 19 *African Human Rights Law Journal* at 532, ‘[b]y avoiding the complex arguments around the criminalisation of sex work and also neglecting to incorporate an analysis of the Women’s Protocol in its judgment, the ECOWAS Court, perhaps inadvertently, perpetuated stereotypes that stigmatise and harm sex workers’; and 527, arguing that the Court provided ‘no thorough analysis of the respective rights provisions as they applied’ in *Dorothy Njemanze*. See also ME Addadzi-Koom ‘Of the women’s rights jurisprudence of the ECOWAS Court: the role of the Maputo Protocol and the due diligence standard’ (2020) 28 *Feminist Legal Studies* 155; and A Rudman ‘A feminist reading of the emerging jurisprudence of the African and ECOWAS Courts Evaluating their responsiveness to victims of sexual and gender-based violence’ (2020) 31 *Stellenbosch Law Review* at 424.

pertinent.¹⁵⁶ However, so far, few women's rights cases have reached the Commission, and when they did, the Commission stopped short of finding violations of the Maputo Protocol.

Ultimately, the Maputo Protocol is about improving the reality of women's lives. The impact of the Maputo Protocol depends on meaningful access to its monitoring bodies. A lack of access can hamper the Protocol's impact, as it has done in respect of the African Charter and CEDAW. Even though it has been and is possible for women-specific cases to be brought to the African Commission and the CEDAW Committee,¹⁵⁷ there has been a dearth of such cases actually being submitted.

Recourse to remedies under the provisions of the Maputo Protocol depends on effective access to justice at the domestic level and to supranational adjudicatory mechanisms with jurisdiction over the Maputo Protocol. A plethora of factors impede access to justice, especially for women and women's rights organisations, at the domestic level.¹⁵⁸ Even if a complainant succeeds in overcoming the hurdle of exhausting domestic remedies, various factors at the regional level further inhibit access.¹⁵⁹ The reluctance of NGOs and individuals to submit women-specific communications can in part be laid at the door of the Commission for not 'engaging with, detailing and personifying women's human rights claims'.¹⁶⁰ Although the Commission came very close to making a finding based on the Maputo Protocol in *Céline*, the decade-long delay in finalising this case reinforces the impression that the Commission does not prioritise women's rights cases. By adopting a restrictive interpretation to the question as to who may submit requests for advisory opinions, the Court placed a further constraint on access to justice. The comparatively greater caseload of the ECOWAS Court underscores the importance of unimpeded access.

156 The present structural barriers to access have prompted Rudman (n 9) to describe the role of the African Commission, in this context, as 'the main body for handling women's complaints' (at 341).

157 Of the 52 African state parties to CEDAW, only 26 have accepted the right of individual petition. Of these states, 8 have *not* accepted the Court's jurisdiction: Angola, Botswana, Cabo Verde, Central African Republic, Equatorial Guinea, Namibia, Seychelles and South Sudan, indicating a possible preference for interpretation by UN (rather than African) bodies, and for judicial rather than quasi-judicial bodies.

158 These factors include laws that discriminate against women, biased in law enforcement and in the legal profession, and poverty and pressing life circumstances, which are general impediments to justice that are exacerbated in respect of women.

159 See eg Rudman (n 9) 321; and Chenwi (n 81) 354-355.

160 Rudman (n 9) 332.

Articles 28-31

Final clauses

Sâ Benjamin Traoré

Article 28: Signature, Ratification and Accession

1. This Protocol shall be open for signature, ratification and accession by the States Parties, in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission of the AU.

Article 29: Entry into Force

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.
2. For each State Party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession.
3. The Chairperson of the Commission of the AU shall notify all Member States of the coming into force of this Protocol.

Article 30: Amendment and Revision

1. Any State Party may submit proposals for the amendment or revision of this Protocol.

2. Proposals for amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the AU who shall transmit the same to the States Parties within thirty (30) days of receipt thereof.

3. The Assembly, upon advice of the African Commission, shall examine these proposals within a period of one (1) year following notification of States Parties, in accordance with the provisions of paragraph 2 of this article.

4. Amendments or revisions shall be adopted by the Assembly by a simple majority.

5. The amendment shall come into force for each State Party, which has accepted it thirty (30) days after the Chairperson of the Commission of the AU has received notice of the acceptance.

Article 31: Status of the Present Protocol

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.

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1 Introduction

Alongside their core substantive rules, most international treaties provide for specific articles concerned with practical modalities under which they take effect and function efficiently. These provisions are generally listed under the generic term ‘final clauses’ or ‘miscellaneous provisions’. They include articles on the signature, ratification, entry into force, modification or amendment of the treaty. They also provide for specific rules on implementation and monitoring, interpretation, reservations, settlement of disputes, the legal status of annexes or protocols, withdrawal and termination, designation of the depositary and other such practical matters. Put simply, the final clauses of a given international treaty prescribe the procedural modalities governing the functioning of that treaty.¹

The African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) is no exception to this general practice. The fact that this treaty is a Protocol to the African Charter on Human and Peoples’ Rights (African Charter) does not change its conventional nature. Under the Vienna Convention on the Law of Treaties (VCLT), a treaty is an international agreement between states, whatever its designation. Hence, neither its designation as ‘Protocol’ nor its supplementary nature to the African Charter take away its treaty nature.² As such, the Maputo Protocol is governed by customary international rules applicable to treaties as codified by the VCLT.

Unlike its substantive articles that provide for specific women’s rights with correlated obligations, the last seven articles of the Maputo Protocol deal with different practicalities regarding the functioning of the treaty. This chapter focuses on four of them: article 28 (related to signature, ratification and accession); article 29 (on entry into force); article 30 (on amendment and revision) and article 31 (on the status of the Protocol). The following sections discuss and comment on them in turn.

2 Article 28: Signature, ratification and accession

2.1 Overview

This provision contains two paragraphs. The first paragraph is a generic clause situated in most international treaties. The second paragraph deals with the depositary of the Maputo Protocol. The drafting history of the provision reveals that although with some differences in formulation, all the successive drafts of what would become the Maputo Protocol contained a provision on signature, ratification, and the designation of the depositary.³ Paragraph 1 of this provision conflates signature, ratification, and accession. However, these legal processes are different under international law and subjected to distinct legal regimes.⁴ Signature expresses the first level of commitment (agreement in principle) of a state to be bound by an international treaty. Only ratification and accession – to name

1 United Nations Publications, *Final clauses of multilateral treaties* (2003).

2 Art 2(1)(a) of the VCLT.

3 The successive drafts are the following: the Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples’ Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft); Draft Protocol to the African Charter on Women’s Rights, 26th ordinary session of the African Commission on Human and Peoples’ Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft); Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft), reprinted in MS Nsibirwa ‘A brief analysis of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women’ (2001) 1 *African Human Rights Law Journal* 53-63; the Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001 (Revised Final Draft); and the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II) Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

4 A signature might, in some cases, pertain to the expression of consent to be bound definitively by a treaty, see VCLT, arts 11 and 12.

only the two terms used in the Protocol – are legally capable of establishing the state's consent to be bound by a treaty. Deposit and registration of treaties follow a different logic.

2.2 Signature of the Maputo Protocol

It is common practice for multilateral treaties to state that they are open for signature. The Maputo Protocol was adopted by the 2nd ordinary session of the AU Assembly of Heads of State (AU Assembly) on 11 July 2003 in Maputo, Mozambique.⁵ Under article 28 of the Protocol, the text adopted by the AU Assembly was opened to signature by 'States Parties'. The term 'Signature' can be defined as the name or mark of a person written in their handwriting on a document.⁶ In international treaty-making, a signature serves two main functions: First, it symbolically marks the end of the negotiation process and signals intent to ratify the treaty. Second, a signature serves to authenticate the text of the treaty and shows that the signatory state agrees with the text.⁷ Regarding the signature of the Maputo Protocol, three critical questions may arise from the first paragraph of article 28: Which entity can sign the Protocol? Which modalities govern the signature of the Protocol? What are the effects of the signature?

2.2.1 Eligibility to sign the Maputo Protocol

Concerning the first question, two different aspects come to the fore. First, article 28 provides that the Maputo Protocol is opened for signature by 'States Parties'. 'States Parties' in this context cannot refer to state parties to the Protocol, as to be considered a 'State Party', a state must first sign and accept the Protocol. It would therefore amount to a logical contradiction to call upon a state already party to the Protocol to sign it. The only reasonable interpretation that can be made of this formulation is that the drafters intended that any signatory state to the Maputo Protocol must be a member or a party to an already existing entity or instrument. The question that follows, therefore, is which entity or instrument should a state be already party to in order to be eligible to sign the Protocol? The answer to this question can be deduced from the fact that the Maputo Protocol is a protocol to the African Charter.⁸ The term 'States Parties' may therefore refer to the state parties to the African Charter. The legislative history of the provision supports this interpretation. The Nouakchott Draft provided that the treaty is open for signature by 'States Parties to the African Charter on Human and Peoples' Rights'.⁹ This reference disappeared in the subsequent versions of the drafts. The reason for the removal of the reference to the African Charter is unclear.¹⁰

However, this is not the only possible reading of the term 'States Parties'. 'States Parties' in article 28 may also refer to state parties to the Constitutive Act of the African Union (AU). Indeed, the Protocol was negotiated, first under the auspices of Organisation of African Unity (OAU), and later the AU. It was then formally adopted as a decision of the AU Assembly. In this decision, the AU Assembly appeals to 'all Member States' to sign and ratify the Protocol.¹¹ This suggests that the Protocol is open to signature by all AU member states, not only to those who are party to the African Charter. This

5 Decision on the Draft Protocol to the African Charter on Human and Peoples' Rights Relating to the Rights of Women Assembly/AU/Dec.19(II).

6 C van Assche 'Article 12' in O Corten & P Klein (eds) *The Vienna Convention on the Law of Treaties* (2011) 217.

7 Nevertheless, the authentication of a treaty can be achieved by other means. These means can be provided in specific terms by state parties in the text or the proposed treaty or agreed upon during the negotiations. Other means of authentication include signature ad referendum or initialling by representatives of states. See art 10 of the VCLT.

8 See A Rudman 'Introduction' sec 3 in this volume for further discussion.

9 Art 21 of the Nouakchott Draft (n 3).

10 It was removed from the Kigali Draft (n 3) and never reappeared in subsequent versions.

11 See Rudman (n 8).

conclusion is reinforced by the requirement, under article 29 of the Protocol, that the AU Chairperson notifies ‘all Member States’ of the coming into force of the Protocol.

Moreover, AU practice regarding subsequent treaties seems to confirm this interpretation. For instance, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons (Protocol on the Rights of Older Persons) defines ‘states parties’ as ‘Member States of the African Union that have ratified or acceded to this Protocol and deposited the instruments of ratification or accession with the Chairperson of the African Union Commission’.¹² Article 25 of the Protocol on the Rights of Older Persons states that ‘[t]his Protocol shall be open to Member States of the Union for signature, ratification or accession’. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Citizens to Social Protection and Social Security (Protocol on Social Security) have similar formulations when defining ‘states parties’ and the signature regime.¹³

This is not a purely theoretical issue with no practical implications. Some practical issues may arise regarding some states’ eligibility to sign the Maputo Protocol. For instance, could a state not a party to the African Charter still sign, ratify and become a party to the Maputo Protocol? Could Morocco, for example, sign the Protocol since its reintegration into the AU in 2017, making it a member state of the AU, although Morocco is not a state party to the Charter? The South Sudanese precedent could offer an answer. South Sudan signed the Maputo Protocol before it deposited its instrument of ratification of the African Charter.¹⁴ This suggests that being an AU member state is enough to make a state eligible to sign the Maputo Protocol. However, this approach could create legal inconsistencies. Designed as a supplement to the Charter,¹⁵ the Maputo Protocol, would, in this way, strangely apply to a state that is not a party to the main instrument. Thus, article 28 could arguably have been drafted in a clearer manner.

Another aspect of article 28 worth mentioning is that the Maputo Protocol is open to signature by ‘States’. Only African states recognised by the AU can be a party to the Protocol. For that reason, for instance, despite the controversies around its statehood, the Saharawi Arab Democratic Republic signed the Maputo Protocol in 2006 and deposited its instruments of ratification with the AU Commission in April 2022.¹⁶ Territorial entities that claim statehood in Africa but are not recognised as such by the AU cannot validly sign the Maputo Protocol. The same holds for African international organisations. Based on its wording, article 28 bars such international subjects from becoming parties to the Protocol. This means that the AU itself is ineligible to sign or accede to the Protocol.¹⁷

12 Art 1 of the Protocol on the Rights of Older Persons.

13 Art 37 of the Protocol on the Rights of Persons with Disabilities and art 32 of the Protocol on Social Security.

14 South Sudan signed the Maputo Protocol on 24 January 2013 but only deposited its instrument of ratification of the African Charter on 19 May 2016.

15 See the Preamble to the Protocol referring several times to the Charter and affirming its complementary character.

16 African Union ‘Press Releases: Saharawi Arab Democratic Republic becomes the 43rd African Union Member State to ratify the Protocol on Women’s Rights’ <https://au.int/en/pressreleases/20220504/saharawi-arab-democratic-republic-becomes-43rd-african-union-member-state#:~:text=In%202021%2C%20the%20AU%20Commission,continental%20treaties%20on%20women’s%20rights> (accessed 12 May 2023).

17 In this regard, in the case of the European Union, for instance, there is an evolving discussion on its accession to the European Convention on Human Rights, see eg S Douglas-Scott ‘The European Union and human rights after the Treaty of Lisbon’ (2011) 11 *Human Rights Law Review* 64; and C Eckes ‘EU accession to the ECHR: between autonomy and adaptation’ (2013) 76 *The Modern Law Review* 254.

2.2.2 Modalities of signature

The competent authority to affix a state's signature on a treaty is the recognised representative of the state. In practice, the signature follows at the end of negotiations. In some cases – especially when the representative at the negotiations lacks the full powers to sign on behalf of the state – such a signature will need confirmation by the relevant organ of the state. This is called 'signature ad referendum'.¹⁸ The following observations can be made in relation to the Maputo Protocol. First, the draft protocol was prepared and discussed over a relatively long period. The meetings of experts were instrumental in the drafting process and the progressive shaping of consensus on the content of the text. These meetings, especially from 2001, were attended by state representatives and marked critical phases of the negotiation process.

However, the ministerial meeting that took place in Addis Ababa on 27-28 March 2003 was undoubtedly the most important political step towards finalising the Maputo Protocol. The previous meetings brought together experts from states and other entities. It is doubtful whether these experts were in a position to negotiate on their states' behalf, let alone conclude the treaty. This does not mean that experts cannot be bestowed, by their states, with full powers to negotiate and sign an international treaty.¹⁹ In the present case, however, these experts were seemingly only in charge of the technical mission of preparing the draft to submit it to political negotiations and adoption. Hence, the most important discussions regarding the final text happened during the Addis Ababa ministerial meeting. For instance, some states 'entered' their 'reservations' to the draft Protocol during that meeting.²⁰ Moreover, the final text adopted by the ministers was endorsed, without amendments, by the AU Assembly in Maputo in July 2003.

Although international law does not impose specific procedures, timelines, or steps, in the negotiation and adoption process of an international treaty, the adoption of the Maputo Protocol differs somehow from the manner in which many international treaties are adopted. Contrary to the common practice, the adoption of the Maputo Protocol was, arguably, exceedingly formalised. The draft text was first opened for signature after being formally 'adopted' by the ministries in charge during the Addis Ababa meeting and later by the AU Assembly.²¹ In that regard, despite its 'solemn' character, the Addis Ababa ministerial meeting did not mark the formal adoption of the Protocol as it needed another solemn adoption by the AU Assembly. Only the Assembly's decision officially marked the adoption of the text of the Maputo Protocol.

Nonetheless, the adoption of the Maputo Protocol by the AU Assembly is different to the concept of 'signature' under article 28. In this context, 'adoption' refers to the 'formal act by which the form and content of a proposed treaty text are established'.²² When an international organisation adopts a treaty, like the Maputo Protocol, the act of adoption is carried out by the competent body of such an organisation. The competence to adopt the treaty is predetermined by the Constitutive Act of the said Organisation and under the rules and procedures defined thereof. A decision related to adopting a treaty

18 See art 12(2)(b) of the VCLT.

19 See art 7 of the VCLT.

20 Summary of the proceedings of the Ministerial Meeting on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Women in Africa, MIN/PROT.WOMEN/RTS/Rpt, Addis Ababa, Ethiopia, March 2003 (Summary of the proceedings of the Ministerial Meeting), p 4, para 13. These countries include South Africa (reservations on arts 4 & 6 *inter alia*); Tunisia, Sudan, Kenya, Namibia, Zambia (on art 6); Egypt (on art 7); Rwanda and Senegal (on art 14). See Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft). However, technically it is impossible to enter reservations to a draft treaty.

21 As a matter of comparison, the Rome Statute of the International Criminal Court (Rome Statute) was open for signature after the adoption of the Statute by the Rome Conference.

22 See art 9 of the VCLT.

within an international organisation contains and expresses the consent of the states participating in the treaty-making process within the organisation. Generally, and based on the principle of sovereignty, the adopting body is plenary, which means a body in which all member states are represented.

Within the AU, such competence is bestowed on the AU Assembly as the ‘supreme organ of the Union’.²³ The AU Assembly adopts AU treaties through ‘Decisions’. The decisions of the AU Assembly are ideally adopted by consensus, as was the case with the Maputo Protocol.²⁴ Therefore, the formal adoption of the Maputo Protocol ‘kicked off’ the process of signature by states.

Considering the rather long preparatory process of the draft Protocol, which included at least one ministerial meeting before the endorsement of the Protocol by the Head of States, it is surprising that no signature was registered on the day of the adoption of the Protocol. Indeed, no state signed the Maputo Protocol immediately upon its adoption. Following its adoption, the first two signatures were only recorded in September 2003.²⁵ This is noteworthy because, under international law, heads of state are vested with full powers to sign a treaty on behalf of their states.²⁶ They were, therefore, legally entitled to sign the Protocol immediately upon its adoption. By comparison, 31 states signed the Protocol on the establishment of the African Court on Human and Peoples’ Rights on the day of its adoption.²⁷

A few reasons related to the framing of article 28 may explain the lack of readiness of states to sign the Maputo Protocol as soon as it was adopted. The first reason lies in the absence, in article 28, of any specific timeline for signature, which is in line with other AU treaties. Some multilateral treaties provide such a timeline, specifying a date after which signature is no longer possible.²⁸ The lack of a timeline might explain the lack of urgency in signing the Protocol although it had already gone through a long-drawn-out drafting process.

Another reason might have been that article 28 expressly contains a rather unnecessary requirement that signature – together with ratification and accession – must conform with the respective constitutional procedures of state parties. The requirement to observe domestic law is implicit in the treaty-making process under international law and does not need to be restated. The practice of the AU on this matter is not uniform. While the African Charter, the African Charter on the Rights and Welfare of the Child (African Children’s Charter), the Protocol on the Rights of Older Persons and the Protocol on Social Security, do not contain this detail, the requirement does appear in others such as the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).²⁹ A third reason might be more practical. The depository is based in Addis Ababa, while the treaty was adopted in Maputo. Some heads of states might have preferred to defer signing to a formal appointment at the depository office in Addis Ababa.

23 See art 9 of the Constitutive Act of the African Union (AU Constitutive Act).

24 According to art 7 of the Constitutive Act, failing consensus, the decisions are taken by a two-third majority and a simple majority regarding procedural matters.

25 Tanzania and Libya signed the Protocol on 5 September 2003, <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 12 May 2023).

26 See art 7(2)(a) of VCLT.

27 See ratification status at https://au.int/sites/default/files/treaties/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS.pdf (accessed 12 May 2023).

28 See art 125(1) of the Rome Statute.

29 See art XVI of the Kampala Convention.

2.2.3 *Effect of signature*

As pointed out above, in signing a treaty, a state signals its future intent to be legally bound by that treaty. Signature in itself does not have a binding effect. In some exceptional cases, however, a treaty may provide that states can, through signature, express their consent to be bound by the treaty. In such cases, the language of the treaty expressly states that signature will have such legal effect.³⁰ This is generally not the approach taken in multilateral treaty-making. The Maputo Protocol follows the general practice; thus article 28 does not state what the legal effect of signature is. The reference to ratification and accession leaves no doubt that signature should be followed by an additional modality of expressing states' consent to be bound by a treaty. The signature referred to in article 28 is, therefore, a 'simple signature' as opposed to a 'definitive signature'.³¹

This notwithstanding, a simple signature is not totally devoid of legal effect under the law of treaties. According to article 18 of the VCLT, after signing a treaty and before it enters into force, a state is obliged to refrain from acts which would defeat the object and purpose of that treaty. This is an interim 'pre-conventional' obligation imposed on states to act in good faith and 'refrain from acts calculated to frustrate the objects of the treaty'.³² This obligation extends from the date of signature until the ratification and entry into force of the treaty. However, if, after signing a treaty, a state subsequently makes it clear that it no longer intends to ratify the treaty, then the state is released from the obligation to refrain from acts that would defeat the object and purpose of the treaty.³³

As far as the Maputo Protocol is concerned, this 'pre-conventional' obligation is quite significant. As of 1 May 2023, nine countries that have signed the Protocol are yet to ratify it.³⁴ It can be argued that the pre-conventional obligation referred to under article 18 of the VCLT applies to these states. This argument is further strengthened by the supplementary nature of the Protocol. Several obligations contained in the Maputo Protocol are based on the African Charter.³⁵ Moreover, even for those states that eventually ratified the Maputo Protocol, many did not proceed to the ratification right after the signature. In that regard, they were also obligated not to defeat the object and purpose of the treaty during the extended period from signature to ratification. No doubt the African Commission takes this position, as it occasionally has called upon signatory states to implement some of the Protocol's obligations. For instance, in 2019, referring to the Maputo Protocol, the African Commission called on the political leaders in South Sudan to meet the relevant obligations concerning women's political participation and the right to peace and protection for women.³⁶ In sum, even if a state has signed the Maputo Protocol without ratifying it, this does not mean that the state can disregard women's human rights.

2.3 **Expression of consent to be bound by the Maputo Protocol**

In addition to the signature, a 'state must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty'.³⁷ This specific juridical act is an 'expression of consent to be bound'. Under article 28 of the Maputo Protocol, there are two ways in which states can express such consent to be bound: ratification and accession.

30 Art 12(1) of the VCLT.

31 Van Assche (n 6) 212.

32 See J Crawford *Brownlie's principle of public international law* (2012) 372.

33 Crawford (n 32) 372.

34 Burundi, Central African Republic, Chad, Eritrea, Madagascar, Niger, Somalia, South Sudan, and Sudan.

35 See A Rudman 'Preamble' secs 3.1, 4.2 & 4.3.

36 See African Commission on Human and Peoples' Rights Resolution ACHPR/Res.428 (LXV) 2019.

37 United Nations *Treaty Handbook* (2012) 8.

The wording of article 28 is confusing. The formulation, ‘the treaty is opened to signature, ratification or accession’, is vague and unconventional. While it is correct to say that a treaty is open for signature, it is rather unconventional to say that a treaty is ‘open to’ ratification or accession. The better wording would have been that the treaty is ‘subject to ratification or accession’.³⁸ For instance, the African Children’s Charter contains two different sub-paragraphs dealing with two separate legal processes; one states that the treaty is ‘open to signature’ and the other provides that the Charter is ‘subject to ratification’.³⁹ Moreover, international practice tends to rely on various concepts to designate the different ways in which states express their consent, such as ratification, accession, acceptance, and approval. However, the Maputo Protocol only employs two of these terms: ratification and accession.

2.3.1 Ratification

According to the VCLT, ratification is the international act whereby a state establishes its consent to be bound by a treaty on the international plane.⁴⁰ This definition focuses on the international dimension of the act of ratification. Only the international act of ratification holds the legal effect of expressing consent to be bound. However, ratification also holds a critical domestic aspect. Indeed, the rationale behind the ratification process is not only to obtain the treaty’s approval by competent domestic bodies but also to carry out all necessary steps to ensure that the domestic legal system is ready to implement the proposed treaty. Ratification is, therefore, as legally as it is practically necessary. The domestic procedures depend on the constitutional arrangements within each state. In most African countries, the parliament is the competent body to undertake the domestic ratification or approval of international treaties.⁴¹

The Maputo Protocol does not prescribe any specific conditions in the ratification process. For instance, there is no stipulated timeline within which states must ratify the Protocol. Therefore, states are free to submit their instrument of ratification any time after signature. The term ratification is only appropriate for states that have taken part in the treaty negotiations and have subsequently signed it. The term applied to states that join after the adoption of a treaty is ‘accession’, further discussed below.

Domestic readiness before ratification of the Maputo Protocol is justified by the need to align national legislative frameworks with the provisions of the Maputo Protocol. The treaty itself makes this an essential requirement. Under article 26 of the Protocol, as is further discussed in chapter 28, states parties must as one example, ‘undertake to adopt all necessary measures and in particular, shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised’.⁴²

The fact that it is an attribute of state sovereignty to ratify, or not to ratify a treaty does not mean that states are absolutely free from constraints or pressure to ratify. For various reasons, international or domestic demands by different actors can play a crucial role in obtaining states’ ratifications. The Maputo Protocol is an excellent example in that regard. The Protocol was the concretisation of many years of advocacy by African NGOs. Hence, between its adoption in July 2003 and its entry into force in 2005, an unprecedented lobbying campaign was undertaken by civil society organisations (CSOs),

38 See, for instance, art 125 of the Rome Statute. Paragraph 1 of this article provides that the ‘Statute is open to signature’ and para 2 provides that the ‘Statute is subject to ratification acceptance or approval by signatory state’.

39 See, art 47 of the African Children’s Charter.

40 Art 2(1)(b) of the VCLT.

41 However, in constitutional monarchies such as Morocco, or Eswatini, the King plays a critical role in the process of ratification.

42 Art 26(2), see R Murray ‘Article 26’ in this volume.

especially women's rights organisations.⁴³ Even within the AU, the Solemn Declaration on Gender Equality in Africa (SDGEA) importantly exerted pressure on states to ratify the Protocol.⁴⁴

The speed with which African states ratified the Maputo Protocol remains unprecedented in the history of AU treaties.⁴⁵ Barely two years after its adoption in July 2003, the Protocol had already been ratified by more than 15 countries. According to the ratification status provided by the AU, out of the 49 countries that signed the Maputo Protocol, 43 have ratified it. Nine of the signatory states have yet to ratify the Protocol;⁴⁶ and three states, Botswana, Egypt, and Morocco, have neither signed nor ratified the Maputo Protocol. There is concurrent pressure on these states to ratify the Protocol. In addition to repeated calls by CSOs, the African Commission has reiterated this demand. For instance, in its 2019 Concluding Observations on the report submitted by Botswana, the Commission expressed its concern regarding the non-ratification by Botswana of the Maputo Protocol and recommended that the country 'should consider' ratifying it.⁴⁷

2.3.2 *Accession*

The second avenue that states can use to express their consent to be bound by the Maputo Protocol is 'accession'. Under international law, accession refers to a situation whereby a state which did not sign a treaty (and invariably was not involved in the treaty negotiation) formally accepts that treaty.⁴⁸ Hence, technically, the main difference between ratification and accession lies in that the former is always preceded by signature, whereas the latter happens without a signature. Indeed, for various reasons, a multilateral treaty can be negotiated and adopted and eventually signed by certain states without the participation of others. The reason might be that the latter states were not invited or were not interested in the negotiations or even that they did not exist as states at the time of negotiation and adoption of the treaty. Therefore, when a treaty provides for the possibility of 'accession', the only step needed is a deposit of an instrument of accession.

The practice related to accession to the Maputo Protocol presents some legal curiosity. The AU table presents a single column with the relevant dates for the identification of ratifying and acceding states. Thus, this column does not specify which country has ratified and which has acceded to the Protocol. With regard to Malawi, Mauritania and Cape Verde, there is no indication of the dates of their signatures of the Protocol. This suggests that their proper status is that of acceding states, rather than ratifying states.⁴⁹ The registration page of the Protocol on the UN treaty collection website confirms this hypothesis.⁵⁰ This situation is peculiar because these states were represented during the negotiation of the Protocol and at the adoption of the Protocol by the AU Assembly. From a purely legal point of view, these states should have signed and ratified the Protocol instead. Their failure to

43 The role of some women organizations and coalition of women organizations was key in that regard. L Guignard 'Le rôle des acteurs non-gouvernementaux dans la mobilisation juridique en faveur du Protocole de Maputo' (2017) 1 *Annuaire africain des droits de l'homme* 107-124. R Murray *Human rights in Africa: from the OAU to the African Union* (2004) 134.

44 Solemn Declaration on Gender Equality in Africa, para 9.

45 Guignard (n 43) 114.

46 See the list of these countries above (n 34).

47 Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Botswana on the Implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at its 26th extra-ordinary session, 16-30 July 2019, Banjul, The Gambia, para 59. Botswana has not even signed the Protocol yet.

48 Crawford (n 32) 373.

49 See the status of ratification. See also full details of the treaty registration with the UN Secretary-general confirming that these three States have used the accession option and not the ratification one, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805265c4&clang=_en (accessed 15 May 2023).

50 See where the three countries do appear as acceding states. https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805265c4&clang=_en (accessed 15 May 2023).

sign is even more puzzling, considering that the Protocol does not limit the period within which it is open for signature. In the absence of detailed information, it remains unclear whether these states were intentional in acceding to the Protocol instead of signing and ratifying it. In the event that they deposited instruments of ratification, they would not count as such in the absence of prior signature. Conversely, if the instrument sent to the depository was termed an instrument of 'accession', this would be problematic since, having taken part in treaty negotiations, these states should have followed the signature and ratification route.

The only state to whom the 'accession avenue' was legally open was South Sudan, for the simple reason that the treaty was adopted before South Sudan became a sovereign state.⁵¹ Oddly though, South Sudan is listed as a signatory state. Not having been part of the negotiation and adoption process, a strict understanding of the above-discussed concepts would mean that the signature and ratification avenue was closed to South Sudan.

Despite these legal curiosities, these states' expression of consent to be bound by the Protocol are valid. Unlike domestic law, international law is driven more by substance than formalities. What matters the most is the genuine expression by the state of its consent to be bound.⁵² Moreover, whether they ratify or accede to a treaty, state parties remain on the same footing due to the principle of equality of rights between the original parties to a treaty and those whose participation results from accession.⁵³

Finally, a question might arise regarding the moment of accession. Whether a state can accede to a treaty before its entry into force has often been disputed.⁵⁴ However, it is generally accepted that 'accession' can only happen after the treaty enters into force. The Maputo Protocol has undoubtedly adopted this approach, which transpires from article 29, as is further discussed below.⁵⁵ Be it through ratification or accession, article 28 requires that the expression of the state's consent to be bound is translated into a specific action at the international level: the deposit of the instrument of ratification or accession.

2.3.3 *Depository*

The instrument expressing the state's consent to be bound by a treaty – such as ratification or accession – can only produce its legal effect upon the undertaking of specific procedural steps. The deposit of the instrument with the depository is usually considered one of these critical steps.⁵⁶ According to the second paragraph of article 28, the instruments of ratification or accession of the Maputo Protocol 'shall be deposited with the Chairperson of the Commission of the AU'. It is a common practice for multilateral treaties to contain a provision appointing the treaty's depository. The depository assumes a custodian function for the treaty, and its role covers many aspects ranging from administrative tasks to critical decisions conferring rights or obligations upon certain states.⁵⁷

It is also a common practice that AU treaties are deposited with the Chairperson of the Commission.⁵⁸ The Maputo Protocol follows this long-standing AU/Organization of African Unity (OAU) tradition. Previous drafts of the Protocol, before the transformation of the OAU into the AU,

51 South Sudan signed the Protocol on 24 January 2013.

52 P Reuter *Introduction au droit des traités* (1995) 54-55.

53 J-F Marchi 'Article 15' in Corten & Klein (n 6) 330.

54 Marchi (n 53) 315.

55 Art 29(2) speaks of accession as an act that follows after the entry into force of a treaty.

56 Art 16 of the VCLT.

57 Art 77 of the VCLT.

58 Before the AU, it was the OAU's Secretary-General.

named the Secretary-General of the OAU as the treaty's depository. The only difference between the texts adopted in 2003 and the earlier drafts is that the Chairperson of the AU Commission replaced the Secretary-General of the OAU. As the Secretariat of the AU is responsible for the day-to-day administrative activities of the Union, it is only logical that the Commission serves as the depository of the AU treaties. The AU Commission acts as a custodian of the Constitutive Act, its protocols, the treaties, legal instruments, decisions adopted by the Union and those inherited from the OAU.

The wording of the Maputo Protocol imposed an absolute obligation – *shall* – on states to deposit their instrument of ratification or accession. The first essential role played by the depository concerns the procedure related to the signature. The Chairperson of the Commission must ensure that the person issuing the signature on behalf of their state is entrusted with full powers to do so. As mentioned above, under the VCLT, only the highest authorities of the state – the troika made of Heads of State, Heads of Government and Ministers of Foreign Affairs – do not need to prove that they have full powers.⁵⁹ Signing the treaty would usually require arranging an appointment for signature with the depository. The depository is moreover responsible for the safekeeping of the original copies of the treaty, as signed by each contracting state.

In addition, article 28(2) of the Maputo Protocol stipulates another essential aspect of the function performed by the depository of any multilateral treaty. The reception by the depository of the instruments of ratification or accession indicates the 'critical date' of ratification or accession. It serves to determine the exact moment at which the consent of a state to be bound by a treaty can be established and can take effect in its dealings with other contracting states.⁶⁰ This date is also essential in reckoning the Protocol's entry into force, as will become clear in the discussion on article 29 below. It is, therefore, not surprising that the AU makes public all the dates of deposit of ratification or accession instruments. This practice creates transparency and certainty as it brings every ratification to the attention of other contracting states and stakeholders such as NGOs and CSOs.

One last critical aspect of the function of the depository, which does not appear under the Protocol, is its responsibility to register the Protocol with the UN Secretary-General. Under article 80 of the VCLT, international treaties 'shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication'.⁶¹ This article is closely related to article 102 of the Charter of the United Nations. Article 102 provides that every treaty and every international agreement entered into by any member of the United Nations shall be registered with the Secretariat and published by it as soon as possible. The primary purpose of this formality is to ensure transparency and security in international legal relations.⁶² Concerning the Maputo Protocol, the AU Commission only complied with this formality on 17 September 2018.⁶³ The Maputo Protocol is published in the UN treaty collection.⁶⁴ Moreover, it is the responsibility of the depository to provide all relevant information relating to the treaty including the updated status of ratification, the original text and dates of all reservations and interpretative declarations. Some of

59 Art 7(2)(a) of the VCLT.

60 F Horchani & Y Ben Hammadi 'Article 16' in Corten & Klein (n 6) 341.

61 Art 80(1) of the VCLT.

62 P Klein 'Article 80' in Klein & Corten (n 6) 1798.

63 The Maputo Protocol is registered with the UN under the registration number: No. 68921. The Secretary-general, therefore, issued a certificate of registration. See <https://treaties.un.org/doc/Treaties/2018/09/20180917%2012-46%20PM/Other%20Documents/COR-Reg-26363-Sr-68921.pdf> (accessed 15 May 2023).

64 See https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805265c4&clang=_en (accessed 15 May 2023).

this information, such as the text of reservations, are still missing on the UN registration status of the Maputo Protocol as well as on the official website of the AU.⁶⁵

3 Article 29 on entry into force

3.1 Overview

Article 29 deals with the critical issue of entry into force of the Maputo Protocol. This relates to the moment from which an international treaty comes into effect. This issue is usually dealt with by the treaty itself, especially in multilateral treaties. Under the international law of treaties, it is one of several matters where the contractual freedom of states is unlimited. Hence, the VCLT imposes no timeframe for the treaty's entry into force. Under article 24 of the VCLT, a treaty enters into force 'in such manner and upon such date as it may provide or as the negotiating States may agree'.⁶⁶ Article 29 of the Maputo Protocol follows, in that regard, a well-established customary international law principle.

Entry into force of an international treaty refers more specifically to the starting date of the 'objective applicability' – or the definitive entry into force – as well as its 'subjective application' to a state party. A treaty comes into force, objectively, the first day on which the treaty is enforceable. This means the day from which the treaty's intended legal effects start to unfold. In other words, this is the precise moment when states parties must effectively comply with their obligations under the treaty. The date of objective enforceability of a treaty corresponds to what was agreed upon by the parties. In most cases, regarding multilateral treaties, the objective entry into force is conditioned upon the deposit of a given number of ratification instruments.

The objective entry into force of a treaty differs from the subjective one ('entry into force for a state'). The latter refers to the specific date on which the treaty starts deploying its legal effects on a particular state that has expressed its consent to be bound by it. The subjective entry into force coincides with the objective entry into force for all states that ratified the treaty before its objective entry into force. This means that these states are part of the first group of states whose ratifications permitted the objective entry into force of the treaty. The treaty determines the modalities under which it becomes applicable to a state ratifying it after its objective entry into force. While the first paragraph of article 29 of the Maputo Protocol concerns the first type of entry into force (objective entry into force), the second one deals with the other (subjective entry into force).

In this regard two essential clarifications are in order. First, some provisions of a treaty not yet into force produce certain legal effects on parties immediately by virtue of their specific nature. These provisions deal with particular rights and obligations, and their application is necessary for the treaty's entry into force. They are concerned with matters that serve a preparatory dimension for the treaty to function once it enters objectively into force. For instance, the sending of instruments of ratification or accession under article 28 before the objective entry into force of the Protocol pertains to an act of application even though the treaty is not yet in force. This also refers to the pre-contractual obligation upon the signatory state not to defeat the object and purpose of the treaty, as discussed above.

65 AU List of Countries Which Have Signed, Ratified/Accessed to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 15 May 2023).

66 According to the same art, failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating states.

Second, even though the treaty is not yet into force, the rights and/or obligations that derive from other sources of (international) law are binding on the contracting states. In that sense, all the provisions of the treaty that flow from customary international law, for instance, are binding on contracting states. This is particularly important in human rights treaties, as core rights have a customary character. By the same token, all obligations deriving from pre-existing treaty obligations of the contracting states apply to these states. In the case of the Maputo Protocol, for instance, irrespective of the Protocol's subjective entry into force in relation to a particular state, if that state is a party to other human rights treaties – such as the African Charter – containing the same or similar obligations, these obligations are binding on the concerned state. Since the *Case concerning Military and Paramilitary Activities in and against Nicaragua* the International Court of Justice (ICJ) has highlighted this relative autonomy between obligations deriving from customary international law and those flowing from international treaties.⁶⁷

3.2 Specificities of the entry into force of the Maputo Protocol

Being a topical aspect of treaty-making, the issue of entry into force was discussed in the early drafts of the Maputo Protocol. However, it was only in the Addis Ababa Draft that a separate provision was dedicated to entry into force. Before that, the provision on the entry into force was conflated with the one on signature, ratification and accession.⁶⁸ According to the first paragraph of article 29, the Protocol comes into force 30 days after the deposit of 15 instruments of ratification. In light of the above, this corresponds with the 'objective entry into force' of the treaty. The reference to 30 days, which makes the provision clearer, was introduced in the Addis Ababa Draft. The early drafts referred to 'one month' after the deposit of the 15 instruments of ratification.

The AU's practice around the number of ratifications needed for an AU treaty to come into force is not uniform. During the OAU period, a simple majority of member states was often required. For instance, this was the requirement for adopting the African Charter itself.⁶⁹ This number was reduced to 15 in the African Children's Charter.⁷⁰ This seems to have marked a more recent trend regarding the conditions for entry into force of AU human rights-related treaties. For instance, the Kampala Convention and the Protocol on the Rights of Older Persons take the same approach.⁷¹ The countdown of the 30 days – *dies a quo* – starts from the day after the deposit of the fifteenth instrument of ratification. In other words, from the adoption of the Maputo Protocol on 11 July, 15 ratifications were needed before the counting of the 30 days could start. Comoros was the first state to ratify the Maputo Protocol. Its ratification instrument was deposited on 16 April 2004, about nine months after the adoption of the Protocol by the AU Assembly. Togo deposited the critical fifteenth instrument of ratification on 26 October 2004.⁷² The thirtieth day after this deposit falls on 25 November 2005. This is how the Protocol came 'objectively' into force on that day.⁷³ From this date, the Maputo Protocol could deploy its full legal effect on the first 15 ratifying states.

Article 29(2) concerns what was referred to above as 'subjective entry into force'. According to this provision, for each state party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession. The subjective entry into force for these states occurs, therefore, *immediately after* the deposit of the instruments expressing their consent to be bound. Stipulation of the moment of subjective entry into force differs from one AU

67 *Nicaragua v United States of America*, ICJ, Reports (1986) p 92 para 175.

68 See Nouakchott and Kigali Draft (n 3).

69 Art 63(3) of the African Charter.

70 Art 47(3) of the African Children's Charter.

71 Art XVII of the Kampala Convention and art 26(1) of the Protocol on the Rights of Older Persons.

72 See A Rudman 'Introduction' sec 2.1 in this volume.

73 See <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/26363/A-26363-08000002805265c4.pdf> (accessed 15 May 2023).

treaty to another. For instance, under the African Charter, the subjective entry into force only starts three months after depositing an instrument of ratification or adherence, provided that the ratification or adherence occurs after the objective entry into force of the Charter.⁷⁴

Article 29(2) of the Maputo Protocol, in essence, speaks to all states that are not part of the first 15 states, referred to in paragraph 1, regardless of whether they are ratifying or acceding states. Unfortunately, this paragraph is poorly drafted, and the wording suggests that it is concerned only with states that have acceded to the Protocol. Although accession, as explained above, applies to state consent after a treaty's entry into force, individual ratifications can also – and do – occur after a treaty's objective entry into force. Therefore, contrary to its wording, article 29(2) applies not only to acceding states but also to 'late' ratifying states. The provision applies to the vast majority of states currently parties to the Maputo Protocol, as their instruments of ratification were submitted after 25 November 2005. It is worth noting that previous drafts of the Protocol were better drafted. The Nouakchott Draft, for instance, indicated that 'the Protocol takes effect in each State party which subsequently *ratifies or adheres* to the present Protocol at the date of deposit of the instrument of *ratification or adhesion*'.⁷⁵ Subsequent drafts did not correct the poor drafting of the clause that appeared in the Addis Ababa Draft. More generally, there is a persisting poor drafting issue of provisions relating to the entry into force of AU (human rights) treaties. For instance, article 47 of the African Children Charter is silent on 'subjective entry into force'.⁷⁶ Article 26(3) of the Protocol on the Rights of Older Persons is equally problematic as it does not refer to ratification, suggesting, therefore, that 'subjective entry into force' can only flow from accession.⁷⁷ The same applies to the Protocol on the Rights of Persons with Disabilities.⁷⁸

Article 29(3) deals with the role of the depositary. This function is usually critical as the procedure leading to the entry into force is somewhat complex and needs some administrative supervision. In that regard, it is common practice that multilateral treaties expressly vest their depositary with specific tasks. In the absence of these clarifications, some functions are considered inherent to the role of the depositary.⁷⁹ The role of the depositary includes ensuring the correct computation of the number of instruments of ratification, as well as accurate reckoning of the effective date of entry into force.⁸⁰ The depositary must therefore keep the contracting states updated on the progress regarding ratification and accession. As soon as the last instrument of ratification needed is deposited, the depositary must inform the contracting states about the day on which the treaty, objectively, comes into full effect.

4 Article 30: Amendment and revision

4.1 Overview

It is common in treaty-making practice for the treaty to provide for the conditions under which it can be amended. The rationale for amendment lies in the need for improvement of the content of the treaty but also the necessity of adaptation to changing circumstances. The VCLT codifies this rule by providing that an agreement between the parties may amend a treaty.⁸¹ In its ordinary meaning,

⁷⁴ Art 65 of the African Charter.

⁷⁵ Art 21 of the African Charter. See also art 22 of the Kigali Draft. My emphasis.

⁷⁶ Art 47 of the African Charter is silent on 'subjective entry into force'.

⁷⁷ The provision reads as follows: '[f]or any Member State of the African Union acceding to the present Protocol, the Protocol shall come into force in respect of that State on the date of the deposit of its instrument of accession'.

⁷⁸ Art 38(3) of the Protocol on the Rights of Persons with Disabilities.

⁷⁹ Art 80(2) of the VCLT.

⁸⁰ Art 77 of the VCLT.

⁸¹ Art 39 of the VCLT.

amendment refers to the act of changing the content of a treaty by adding, subtracting, or substituting some provisions.

In international practice, the term ‘amendment’ is used interchangeably with other expressions such as ‘revision’ or ‘modification’. With respect to their legal effects, amendment and revision are similar; however, some multilateral treaties, such as the UN Charter, deal with these two concepts under distinct provisions.⁸² The difference suggested by the separation is not in nature but in the degree of change effected on a treaty. Whereas amendment refers to limited reshuffles in treaty provisions, revision concerns more profound substantial changes. The similar legal nature of amendment and revision is reflected in the VCLT, which only refers to the term amendment. It is clear from the preparatory works of the VCLT that the two terms were considered to have the same legal effect. The term ‘amendment’ was preferred to ‘revision’ only because the latter, allegedly, has a more political connotation.⁸³ The story is different when it comes to the term ‘modification’. Under article 41 of the VCLT, modification refers to a variation to a treaty’s terms initiated by a single state or a limited group of states parties to a multilateral treaty. The resulting modification applies only to the state or states concerned. A modification is an amendment limited *ratione personae*.⁸⁴

Article 30 of the Maputo Protocol uses the two notions. It is unclear whether they are meant to refer to the same legal operation or are intended to achieve different purposes. *Prima facie*, the use of the two terms – especially in the title of this article – suggests that they are envisaged as two different notions. However, a close reading of the provision does not confirm that suggestion. Unlike the UN Charter, for instance, nothing in article 30 shows a difference in the legal regime between amendment and revision. This interpretation is confirmed by article 30(5) of the Maputo Protocol. Whereas all other paragraphs of the provision use the two terms together – ‘amendment or revision’ – the last paragraph refers only to ‘amendment’ concerning its entry into force.⁸⁵ Interpreting this omission as an intention on the part of the drafters to apply paragraph 5 only to amendments and not to revisions does not hold, for no difference is made between them in the rest of the text. It is only reasonable to consider that the omission confirms the drafters’ intent to consider the term amendment in the protocol identical to revision. The drafting history of the provision also supports this conclusion. The early drafts did not mention the term ‘revision’, which only appeared alongside ‘amendment’ in the Addis Ababa Draft.⁸⁶ Moreover, the AU practice generally suggests that the two concepts are used interchangeably. While the African Charter only refers to ‘amendment’,⁸⁷ other AU treaties use the two terms but not as implying a distinction in their legal regimes.⁸⁸ What is important is that article 30 of the Maputo Protocol reflects the two fundamental principles of treaty amendment in international law, namely: the consent of states parties to the amendment – the principle of participation – and the need for a transparent procedure.

4.2 Procedure for the amendment of the Maputo Protocol

Article 30 lays down the amendment procedure. The starting point of that procedure indicates who can initiate an amendment. Under article 30(1), ‘[a]ny State Party’ has the right to initiate an amendment to the Protocol. This excludes states that have signed the Protocol but have not yet ratified it. There is no time limit concerning the ability of a state party to propose amendments. Although this issue has

82 See arts 108 & 109 of the UN Charter.

83 PH Sands ‘Article 39’ in Corten & Klein (n 6) 968.

84 Art 41 of the VCLT.

85 Art 30(5) of the Maputo Protocol.

86 Art 26 of the Addis Ababa Draft.

87 Art 68 of the African Charter.

88 See art 48 of the African Children’s Charter; art XVIII of the Kampala Convention. The equivalence of the two terms seems even more explicit in the Protocol on the Rights of Older Persons (see art 31).

limited relevance as far as the Maputo Protocol is concerned, some multilateral treaties impose such limits. In that regard, the critical question is the possibility of amending a treaty that is not yet in force. Some provisions of a treaty not yet into force may prove obsolete before that treaty's entry into force, justifying an amendment. However, the fact that article 30 refers to a 'State Party' and not a 'signatory State' suggests that the treaty must already be in force before amendment proposals are admissible. This discussion is not only theoretical. AU practice has revealed the possibility of amending a treaty not yet entered into force in the many amendments to the Protocol of the Court of Justice and Human Rights.⁸⁹

Moreover, article 30(1) raises another issue concerning the ability of other entities to propose an amendment to the Protocol. This question is critical as other entities, such as other AU organs, institutions, or even NGOs, may have a legal interest in proposing an amendment to the protocol. However, the wording of article 30 seems to exclude such a right of initiative of 'third parties'. The preparatory works of the Protocol reveal that earlier drafts had envisaged the extension of the right to propose amendments to the African Commission 'through the Secretary-General of the OAU'. This possibility existed in the Nouakchott Draft⁹⁰ as well as the Kigali draft.⁹¹ However, this reference seemed to have attracted criticism during the 2001 Meeting of Experts in Addis Ababa. Whereas the rest of the draft provision did not receive any comment, sub-paragraph 5, which related to the ability of the African Commission to propose an amendment, was 'put under brackets for further consideration'.⁹² This reference was ultimately removed from the text adopted by the ministerial meeting in March 2003. Unfortunately, the reason for the removal is unclear. One may readily agree that any amendment to the protocol remains the business of state parties.⁹³ However, in the trend of human rights treaty-making, the Maputo Protocol should not obey purely state-centred considerations. Moreover, the critical contribution played by the African Commission in the drafting process and its role in the regional human rights system should have warranted a different approach to the issue concerning the right to propose amendments. Given the importance of the interactions between the African Commission and CSOs, recognising such a prerogative could have offered an avenue for presenting amendment proposals based on civil society demands.

Article 30(2) deals with other procedural requirements of a proposed amendment. First, the proposal must be made in writing as a formal requirement. The notion of 'writing' may include the possibility of emails or electronic communications.⁹⁴ Second, the proposal must be addressed to the Chairperson of the Commission of the AU. This is in line with the functions of the depositary, as pointed out above. The depositary is responsible for transmitting the proposal to all state parties within thirty days of receipt. Requiring that other parties are familiar with the proposal for amendment is based on the principles of consent and participation. Parties to the treaty have a legal interest in knowing which changes other parties are envisaging; and the principle of participation means that they are free to take part in elaborating the content of the amendment.

89 Protocol of the Court of Justice of the African Union (adopted 1 July 2003, entry into force 11 February 2009), Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014).

90 See art 22 of the Nouakchott Draft (n 3).

91 See art 23 of the Kigali Draft (n 3).

92 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 158 indicating that the part was put under brackets for further consideration).

93 K Ardault & D Dormoy 'Article 40' in Corten & Klein (n 6) 981.

94 This is, to some extent, admitted in the functioning of multilateral treaties where the UN Secretary-General is the depositary.

The right to participate meaningfully in the amendment process also entails that state parties receive reasonable notice to enable feedback on the proposals.⁹⁵ Article 30 of the Maputo Protocol sets up a 30-day timeline for the amendment procedure. Upon receipt by states parties of the amendment proposals, the AU Assembly must examine the proposals within one year. This provides enough time for state parties to prepare their feedback on the proposals before the meeting of the AU Assembly. Within this period, the African Commission must prepare its comments and send its submissions to the AU Assembly. Based on this feedback, the AU Assembly decides by simple majority whether to adopt or reject the proposal for amendment.⁹⁶ This voting modality differs from the usual voting rules at the AU Assembly. In fact, according to article 7 of the AU Constitutive Act, consensus is the standard modality of decision making. Only when consensus fails does the AU Assembly take its decision by a two-thirds majority. Simple majority is only provided for decisions on procedural matters.⁹⁷ It is unclear why a simple majority was preferred by the drafters of the Maputo Protocol as far as amendments are concerned.

4.3 Effect of amendment

States are not obligated to accept an amendment to a multilateral treaty unless the treaty provides otherwise. The reason for this rule lies in the international law principle that states cannot be bound without their consent. Therefore, the amendment is treated as a separate agreement and so does not automatically bind a state already party to the treaty.⁹⁸ A state must accept the amending agreement before the amendment is considered binding on that state. These essential rules are reflected in article 30(5). The adoption of a proposal for amendment by the AU Assembly is not the end of the story. For such an amendment to be enforceable with respect to a state, it ought to have been accepted by that state. The procedure of acceptance of an amendment is quite similar to the ratification or accession procedure. In the same way that a state is required to send the ratification or accession instruments to the depository, the Protocol requires each state to send a notice of acceptance to the Chairperson of the Commission of the AU.

The amendment comes into force for each accepting state 30 days after receiving the notice of the acceptance by the depository. The initial treaty only binds states parties that do not accept the amendment. Those states that have accepted the amendment are bound by the treaty as amended. In the context of the Maputo Protocol, another issue may arise regarding the effect of an amendment with respect to states that are not yet parties to the Protocol. In this hypothetical case, states wishing to adhere to the treaty would be considered as adhering to the Protocol as amended unless they express a contrary intention at the time of their ratification or accession.⁹⁹

5 Article 31: Status of the Present Protocol

5.1 Overview

Given that the Maputo Protocol does not exist in a vacuum, how does it interact with other legal instruments – be it domestic or international – related to women's rights? Article 31 is concerned with this issue. It falls in the category of what are often termed 'more favourable protection clauses', 'saving

95 See art 40(3) of the VCLT: 'Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended'.

96 Art 30(4).

97 Art 7 of the Constitutive Act.

98 Art 40(4) of the VCLT.

99 Art 40(5) of the VCLT.

clauses', 'no-pretext clauses', 'subsidiarity clauses'¹⁰⁰ or '*clauses de la liberté la plus favorisée*'.¹⁰¹ Although they exist in other types of international treaties, they are most common in human rights treaties. They are intended to ensure the most favourable protection of human rights. In addition, such clauses are aimed at deterring a state from citing one treaty as justification for undermining better treatment afforded by another.¹⁰² The clause is sometimes considered a general principle that is implicit in the application of human rights instruments. In that regard, it is often associated with the '*pro persona*' and '*pro homine*' principles of interpretation developed, especially in the jurisprudence of the Inter-American Court of Human Rights.¹⁰³

Article 31 of the Maputo Protocol is unique compared to other human rights treaties concluded under the auspices of the AU. Other AU human rights treaties do take context into account and refer to other instruments. Examples include Articles 60 and 61 of the African Charter and article 46 of the African Children's Charter. These provisions refer to the 'sources of inspiration' in interpreting and applying the two conventions. However, article 31 of the Maputo Protocol goes further than that. It is a genuine conflict resolution provision as it imposes an obligation to apply any existing better treatment provided under other instruments pertinent to women's rights, whether international, regional or domestic. Thus, the Protocol's own provisions are to be disregarded if at any time they prove less protective of women than the provisions of such other instrument. In that regard, article XX of the Kampala Convention comes closest to article 31, the main differences being that the 'saving clause' in the Kampala Convention is less explicit, and it refers only to better treatment in other regional or international instruments, not in domestic law.¹⁰⁴ Another 'safeguard clause' – which is also a genuine conflict resolution provision – similar to article 31 is article 24 of the Protocol on the Rights of Older Persons. The difference between the two provisions, however, lies in the type of conflict they aim at resolving. While article 31 of the Maputo Protocol envisages a broad range of potential conflicting obligations – between the Maputo Protocol and any other instruments – article 24(2) of the Protocol on the Rights of Older Persons provides only for the resolution of a conflict between 'two or more provisions' of the same protocol.¹⁰⁵

The direct source of inspiration for drafting article 31 is undoubtedly article 23 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). According to this article, nothing in CEDAW shall affect any provisions that are more conducive to the achievement of equality between men and women, which may be contained: (a) In the legislation of a state party; or (b) In any other international convention, treaty or agreement in force for that state.¹⁰⁶ Although there is a striking similarity between the two provisions, it also appears that article 23 of CEDAW is more limited in scope. It is only concerned with 'equality between men and women', whereas article 31 of the Maputo Protocol contemplates any provisions that can offer better treatment to women. In

100 See A Rachovitsa 'Treaty clauses and fragmentation of international law: applying the more favourable protection clause in human rights treaties' (2016) 16 *Human Rights Law Review* 77.

101 E Decaux 'Article 60' in L-E. Pettiti et al (eds) *La Convention européenne des droits de l'homme. Commentaire article par article* (1995) 897-903.

102 Rachovitsa (n 100) 80-82.

103 FA Villareal 'El principio pro homine: Interpretación extensiva vs. El consentimiento del Estado' (2005) 3 *Revista Colombiana de derecho internacional* 337; L Hennebel & H Tigroudja *Traité de droit international des droits de l'homme* (2016) 646.

104 See especially para 2: '[T]his Convention shall be without prejudice to the human rights of internally displaced persons under the African Charter on Human and Peoples' Rights and other applicable instruments of international human rights law or international humanitarian law. Similarly, it shall in no way be understood, construed or interpreted as restricting, modifying or impeding existing protection under any of the instruments mentioned herein'.

105 The provision reads as follows: 'In the event of a contradiction between two or more provisions of this Protocol, the interpretation which favours the rights of Older Persons and protects their legitimate interest shall prevail'.

106 See art 23 of CEDAW.

that regard, the Maputo Protocol is more progressive as it covers a larger spectrum of more favourable treatment deriving from other international instruments.¹⁰⁷

The context of the adoption of the Maputo Protocol well explains the insertion of this provision. Although absent in the first two drafts, the provision appeared in the Final Draft. The draft provision that was discussed during the 2001 Meeting of Experts expanded even more on this matter. In addition to the single paragraph that would later become article 31, the said draft contained two other paragraphs referring expressly to women's rights protected under the African Charter and other 'regional and international declarations and conventions'.¹⁰⁸ This formulation is similar to the formulation in article 18(3) of the African Charter, which refers to 'the rights of women and the child as stipulated under international declarations and conventions'.¹⁰⁹ The value of the reference to a Declaration, which in itself lacks a formally binding character, is questionable. The Revised Final Draft adopted during the 2001 expert meeting did not keep these two paragraphs, probably because they were considered redundant.

When the history of domestic and international human rights standards on women's rights is considered, the Maputo Protocol was arguably adopted quite late. It must be recalled that CEDAW was adopted 24 years earlier. This relatively long period of time had already translated into progress in some alignment of domestic legislation with international standards. In addition to this existing normative framework, the Maputo Protocol is intended as a supplementary instrument to other human rights instruments, regional or international.¹¹⁰ The Protocol's Preamble bears witness to this.¹¹¹ The drafters of the Maputo Protocol did not intend to undermine these instruments in any way. Article 31, therefore, aimed to clarify the relationship between these instruments and preserve their full effectiveness where they provide better treatment. It is also evident that the existence in CEDAW of a similar clause played an important role in the inclusion of article 31 in the Maputo Protocol.

Finally, despite their apparent clarity, provisions such as article 31 of the Protocol may raise specific difficulties regarding their implementation. First, the expression 'more favourable protection' remains vague. The conclusion that a particular treatment is the most favourable to women may prove controversial in some cases. For instance, it has been argued that some forms of protective legislation, such as legislation that barred women from certain occupations, although described as more 'favourable' to women, were based on 'stereotypes about women's roles'.¹¹² Hence, what is 'more favourable' would depend on a contextual assessment. Second, the true function that the so-called 'saving clauses' in human rights treaties serve is often disputed. Some consider them interpretative tools, others categorise them as application tools, and others argue that they are conflict resolution tools.¹¹³ These classifications are arguably not mutually exclusive, as interpretation in international law is also profoundly concerned with avoiding and resolving conflicts.¹¹⁴ Nonetheless, it is clear that article 31 is a 'priority clause'. It imposes an obligation on any interpreter and applier of the Protocol to interpret and apply its provisions in a manner that accords with the most protective standards

107 On other qualities of the Protocol compared to CEDAW, see F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 21.

108 See art 27 of the Revised Final Draft (n 3).

109 Art 18(3) of the African Charter.

110 Viljoen (n 107) 16.

111 See A Rudman 'Preamble' secs 3.2, 3.3 & 4.5 in this volume.

112 MA Freeman et al 'Article 26' in MA Freeman et al (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* (2012) 533.

113 Rachovitsa (n 100) 83.

114 SB Traoré 'Jus cogens and interpretation in international law' in D Tladi (ed) *Peremptory norms of general international law (Jus Cogens). Disquisitions and disputations* (2021) 135.

recognised in other relevant instruments. However, article 31 goes beyond such interpretive guidance and accords priority to more protective provisions over its own provisions. In that sense, the article certainly provides a conflict resolution tool.

Third, another critical aspect of this article relates to enforceability upon the concerned state of the provisions deemed 'more favourable' to women. For the clause to apply, the more favourable provision must be one that is enforceable on the state concerned. While domestic law provisions would obviously be applicable to the state, international conventions containing more favourable provisions would only be applicable if the state has ratified them. However, the reference in the article 'to treaties or agreements' seems broad enough to encompass customary international law. In that sense, if a 'more favourable' provision stems both from an international treaty and customary international law, despite the lack of ratification of such treaty by a state, it can still be enforceable against that state on account of customary international law.

5.2 More favourable treatment under domestic law

Article 31 of the Protocol states that where a national law offers better protection for women, such domestic provision should prevail. This might appear striking, for, generally, the assumption is that international law standards, especially in human rights, are more protective than national law. However, considering the cultural diversity of states globally, some progressive standards in a field such as women's rights may prove to be more easily attainable at the domestic level than via a multilateral treaty. Whatever the case, international law does not prevent states from adopting domestic legislation that provides a higher standard of protection than what is contained in international law. In that regard, article 31 may appear somehow pointless. As a matter of fact, states should observe their own domestic laws in good faith. In that sense, full compliance with these national laws – when they provide for the highest level of protection – should never be a real issue.

However, things might be more complicated. As an international treaty, the Maputo Protocol aspires to a high position, in the sense that it is expected that states work toward aligning their national laws to the international treaty. The Maputo Protocol, therefore, becomes the point of reference, and more progressive domestic laws, if they exist, are arguably endangered.¹¹⁵ More importantly, considering the persistence of obstacles to the realisation of certain aspects of women's rights, the existence of more protective standards in national legislation might be ignored in the pretext of applying the protocol.

In most instances, issues of interpretation and application of different human rights standards do not derive from – and result in – a clear-cut conflict of norms which would have called for the use of well-grounded conflict resolution tools.¹¹⁶ Instead, in practice, different standards may give rise to unexpected interpretation issues, leading to diverging solutions between domestic and international law. In these cases, article 31 would warrant the application of the most favourable interpretation.

This issue is far from theoretical. Some provisions of the Maputo Protocol are considered to offer a lower level of protection to women compared to some domestic legislations. South Africa is a good illustration in that regard. At the adoption of the Maputo Protocol, South Africa repeatedly stated that its domestic laws were more protective in many respects than the Protocol. For that reason, it entered some reservations and interpretive declarations raising these concerns. For instance, South Africa entered the first reservation concerning article 4(2)(j), which provides that states must not carry

115 This situation is suggested in South Africa's Combined second Periodic Report under the African Charter on human and peoples' rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa, Report to the African Commission on Human and Peoples' Rights, August 2015, p 147, paras 32-35.

116 See J Klabbers *Treaty conflict and the European Union* (2009) 34, affirming that the saving clauses are not concerned with conflict of norms at all.

out death sentences on pregnant or nursing women. In its reservation, South Africa states that the article does not find application in South Africa because the country has outlawed the death penalty.¹¹⁷

South Africa also entered a reservation to article 6(d), concerning the requirement that a marriage be recorded in writing and registered in accordance with national laws to be legally recognised.¹¹⁸ In its Combined 2nd Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Maputo Protocol, South Africa explained that the reservation was made to protect women in customary marriages of which many are not registered. It went on to clarify that the application of article 6(d) of the Protocol would exclude many South African women from the protection of the law. Thus, the Recognition of Customary Marriages Act, 1998, provides that the non-registration of a customary marriage does not affect the validity of the marriage.¹¹⁹ This example shows that national legislation can be more protective than the Maputo Protocol on this prevalent issue of registration of marriages in African countries and many others.¹²⁰ However, as discussed above, this argument has not gone unchallenged.¹²¹

5.3 More favourable treatment under international law

As mentioned above, article 31 also refers to more favourable protective provisions in international law instruments. The reference covers multiple instruments ranging from sub-regional and regional instruments to international instruments. It can also be interpreted broadly to include instruments beyond those that deal directly with women's rights. At the regional level, the African Charter, which the protocol aims to supplement, comes to mind. In addition to the African Charter, the African Children's Charter and the African Youth Charter¹²² are also relevant in this enumeration as they deal with girls and adolescent girls.¹²³ Other specific instruments, such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Kampala Convention, are also worth mentioning. The reference in article 31 to the 'regional and continental' provision is poorly drafted as the intention was undoubtedly to refer to sub-regional and regional or continental instruments. A previous draft of the provision explicitly used the term 'sub-regional'.¹²⁴ These types of instruments include legal standards adopted by the regional economic communities, such as the Southern African Development Community Protocol on Gender and Development¹²⁵ or the East African Community Gender Policy.¹²⁶

117 South Africa's Report (n 115) p 148 para 37.

118 Some organisations attempted to seek clarity on this provision through a request for advisory opinion before the African Court on Human and Peoples' Rights. The Court found that it was not able to give the advisory opinion. See *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and Others*, Appl 001/2016 Advisory Opinion, 28 September 2017 (2017) 2 AfCLR 622. This issue is also discussed below in sec 5.4.

119 Combined Report of South Africa (2015) (n 115) p 148, para 39.

120 On the issue of registration of customary marriages see C Musembi 'Article 6' in this volume.

121 For instance, some organisations tried to get an advisory opinion on this matter from the African Court on Human and Peoples' Rights in 2016. The applicants stated that 'the issue of non-registration and non-recording of marriages has rendered women vulnerable in that (i) women are unable to provide proof of their marriages, (ii) women are easily divorced, (iii) women are unable to enforce the requirement that a woman's consent must be sought before the man can take a second wife in a polygamous marriage, (iv) women are unable to secure land and property rights and that, (v) it makes it difficult for countries to collect, monitor and analyse vital information about a population'. See *Request for Advisory Opinion by the Centre for Human Rights* (n 118).

122 African Youth Charter (adopted 2 July 2006, entry into force 8 August 2009).

123 See art 3 of the African Children's Charter.

124 See draft art 27(2) of the Revised Final Draft (n 3).

125 Adopted in 2008 and revised in 2016.

126 East African gender policy adopted in Arusha in May 2018 <http://fawe.org/girlsadvocacy/wp-content/uploads/2018/12/EAC-Gender-Policy.pdf> (accessed 16 May 2023).

At the international level, which is also evident in the discussion throughout the various chapters of this Compilation, CEDAW is the central reference. Beyond these, international human rights treaties, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, are relevant, as are international humanitarian law treaties which accord specific protection to women in armed conflict. International Labour Organization standards on working conditions for women could also become relevant.

In addition to these international treaties, the question might arise whether other types of international law – including customary international laws – are covered by article 31. Arguably, as mentioned above, the broad scope of article 31 implies that rules of customary international law are included. The scope could also extend to non-binding instruments. This would mean that critical regional instruments such as the Solemn Declaration on Gender Equality in Africa would be included; at the universal level, this would include instruments such as the Universal Declaration on Human Rights, and critical resolutions of the UN Security Council, such as Resolution 1325.¹²⁷ This is because the term ‘agreement’ seems to convey a broader meaning than conventions and treaties in the wording of article 31. A different interpretation would render the term meaningless and at odds with the principle of effectiveness in legal interpretation. In that regard, it is worth mentioning that one draft text of the provision referred to ‘regional and international declarations’.¹²⁸ It is unclear why this provision was dropped from the final draft.

It is one thing to map the regional and international instruments that might fit within the scope of article 31. It is quite another, in any given case, to locate the most favourable provisions in these instruments compared to the Maputo Protocol. The clause contained in article 31 does not deal with the general relationship between the Maputo Protocol and other human rights treaties in the abstract. This relationship is governed by traditional tools of interpretation in international law, such as the principle according to which ‘specific rules are given priority over general rules’ (*lex specialis derogat legi generali*). Should the matter appear before a domestic court, the first point of reference is likely national legislation, especially the Constitution. Generally, domestic courts and tribunals would only refer to international instruments after having located a given right in their domestic sources. The most ‘progressive’ interpretation of these international instruments would therefore serve to secure the most favourable protection for women’s rights. For instance, in *State v Chirembwe*,¹²⁹ a case concerning rape and violence against women, the High Court of Zimbabwe not only relied on the Maputo Protocol but also on some provisions of CEDAW as interpreted by its monitoring body, specifically General Recommendation 19 on violence against women.¹³⁰ This approach is particularly beneficial as the implementation of CEDAW has yielded jurisprudence that has clarified the scope of several aspects of women’s rights.

5.4 Reservations

Final clauses of international treaties are the natural locus of provisions on reservations. However, the Maputo Protocol contains no such provision. As a matter of fact, neither the African Charter nor the African Children’s Charter contain provisions on reservations. The Kampala Convention,

127 United Nations Security Council Resolution 1325 on Women, Peace and Security, S/RES/1325 (2000) Adopted by the Security Council at its 4213th meeting, on 31 October 2000 (UN Security Council Resolution 1325).

128 Art 27(3) of the Revised Final Draft (n 3).

129 [2015] ZWHHC 162 (High Court of Zimbabwe) cited in S Omondi et al *Breathing life into the Maputo Protocol: jurisprudence on the rights of women and girls in Africa* (Nairobi, Kenya: Equality Now, 2018) 84.

130 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, A/47/38 (CEDAW Committee General Recommendation 19).

however, allows for reservations.¹³¹ Nonetheless, the issue of reservations is still relevant in relation to the Maputo Protocol because some African states have entered reservations to the Protocol.¹³²

5.4.1 Overview of the regime of reservations to human rights treaties

A reservation means a ‘unilateral statement, however, phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’.¹³³ International law does not prohibit the practice of reservations, and many international instruments contain provisions on reservations. Some, like the Rome Statute, exclude the possibility of entering a reservation on any of its provisions. According to the VCLT, when the treaty is silent on reservations, they are still permitted unless they are incompatible with the object and purpose of the treaty.¹³⁴ The legal effects of reservations are governed by a rather complex acceptance-objection system provided for under article 20 of the VCLT.¹³⁵

If anything, the VCLT regime is quite flexible, permissive, and built upon a classical premise that conceives international treaties as a set of reciprocal rights and obligations among sovereign states. However, it is generally accepted that human rights treaties derive from a different paradigm. Unlike other treaties, they are not concerned with bilateral relations between sovereign entities but the recognition of specific rights of individuals – and groups in some cases – and the attendant obligation on states to protect, promote and realise them. Therefore, the adequacy of the VCLT regime of reservations as applied to human rights treaties has been questioned. The validity of reservations on human rights treaties cannot depend only on the objection-acceptance approach, which is at the heart of the VCLT regime. Hence, there is a growing consensus that reservations to human rights treaties should be subjected to a stricter test.¹³⁶

In its General Comment 24, the UN Human Right Committee (HRC) considered that the VCLT provisions on the role of state objections concerning reservations is inadequate in addressing the problem of reservations to human rights treaties.¹³⁷ A few critical conclusions can be drawn from the position of the HRC. First, as the supervisory body, the HRC considers that it is best placed to assess the validity of reservations to the covenant. Second, according to the HRC, ‘the normal consequence of an unacceptable reservation is not that the covenant will not be in effect at all for a reserving party’. Rather, such a ‘reservation will generally be severable, in the sense that the covenant will be operative for the reserving party without benefit of the reservation’.¹³⁸ Early on, the European Court of Human Rights adopted a similar approach to the issue of reservations. It considers that states making invalid reservations remain bound by their obligations and that these reservations should simply be disregarded.¹³⁹ Thirdly, the HRC provides some indication of the elements to be considered in conducting the validity test: a reservation must be specific and transparent and not general; it must ‘indicate in precise terms its scope in relation to specific provisions’. The overall effect of a

131 See art XXI.

132 These states are Ethiopia, Kenya, Cameroon, Mauritius, Namibia, Rwanda, South Africa, Uganda, Algeria.

133 Art 2(1)(d) of the VCLT.

134 Art 19(c) of the VCLT.

135 Art 20 of the VCLT.

136 R Baratta ‘Should invalid reservations to human rights treaties be disregarded?’ (2000) 11 *European Journal of International Law* 413.

137 UN Human Rights Committee (HRC) General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under art 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6 (HRC General Comment 24) para 17.

138 See HRC General Comment 24 (n 137) para 18.

139 *Belilos v Switzerland* ECHR (29 April 1988) SA 132, paras 40-49.

group of reservations – cumulative effect – as well as the effect of each reservation on the integrity of the covenant, is an essential consideration that might play out during the validity test as well.¹⁴⁰ The International Law Commission's 2011 Guide to Practice on reservations considers an invalid reservation null and void and produces no legal effect. Despite the nullity of such a reservation, there is a presumption that the reserving state is still a party to the treaty without the benefit of its reservation unless the state expresses a contrary intention.¹⁴¹

The supervisory bodies have not thoroughly dealt with the issue of validity and 'opposability' of reservations to African human rights treaties. As pointed out above, the core African human rights treaties, including the Maputo Protocol, do not contain a provision on reservations.¹⁴² A limited number of states have made reservations to these treaties. Viljoen suggests that this situation may explain the relatively different practice compared with other international treaties. He also explains that considering the comparatively 'lackadaisical attitude of fellow States regarding the African System and weak implementation and follow up by the African Commission, States might consider that these reservations are not required'.¹⁴³ In a decision on a communication in 2018 relating to the practice of the Baha'i faith in Egypt, the African Commission faced the issue of reservations.¹⁴⁴ Egypt entered a reservation regarding article 8 of the Charter, which was, according to Egypt, to be implemented in accordance with Islamic law. Following the jurisprudence of the HRC, the African Commission considered that it has the power to assess the validity of this reservation. It eventually decided that the reservation was not incompatible with the object and purpose of the Charter. The position was not strongly elaborated, and it remains to be seen how this issue will be developed over time through the jurisprudence of the Commission, the African Court and other monitoring bodies within the African system.

5.4.2 Reserving states and the nature of reservations to the Maputo Protocol

As it stands, nine states have entered reservations to the Protocol. Most reservations pertain to Articles 6, 7 and 14. The 'most ardent opponents' to the Protocol – those likely to enter reservations – have not yet ratified it.¹⁴⁵ These states are Niger, Egypt, Chad, Somalia, Eritrea, Sudan, South Sudan, the Central African Republic, Madagascar and Burundi.¹⁴⁶ Some reserving countries raised the issue of the compatibility of the Protocol with Islamic principles. Nevertheless, some Muslim-majority countries have ratified the Protocol, sometimes without reservations.¹⁴⁷ A possible explanation for this

140 HRC General Comment 24 (n 137) para 19.

141 Adopted by the International Law Commission at its 63rd session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the International Law Commission, 2011, vol II, Part Two, UN Doc A/66/10, para 75, see Guideline 4.5.3. paras 1-2.

142 This trend is changing because the Kampala Convention and the Protocol on the Rights of Older Persons have provisions on reservations.

143 Viljoen (107) 41.

144 *Hossam Ezzat and Rania Enayet (represented by Egyptian Initiative for Personal Rights and INTERIGHTS) v The Arab Republic of Egypt*, Communication 355/ 07, AfCHPR, 12th Annual Activity Report (2017) paras 149-167.

145 This observation was made by Viljoen in 2009 and still holds. See Viljoen (n 107) 41-42.

146 See here <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 16 May 2023).

147 Tunisia, Senegal, Mali, and Mauritania, to list a few.

is the historical experience with reservations to human rights treaties at the international level. The CEDAW Committee, for instance, has sustained calls on countries such as Libya,¹⁴⁸ Tunisia¹⁴⁹ and Niger¹⁵⁰ to withdraw their reservations to CEDAW. The first two countries entered no reservations to the Maputo Protocol upon ratification, and Niger is yet to ratify it. Among the first group of ratifying states, Namibia, South Africa, Rwanda, and The Gambia had entered reservations to the Protocol. The Gambia eventually withdrew its reservations after a national campaign to that effect.¹⁵¹ In addition to its reservations, South Africa, as mentioned above, also made two interpretative declarations.¹⁵² Cameroon, Kenya and Uganda entered reservations when ratifying the Protocol at a later stage. More recently, Ethiopia, Mauritius, and Algeria also entered reservations to the Protocol.

Kenya's reservation concerns two provisions of the Protocol: article 10(3) and article 14(2)(c). The first provides that state parties must take necessary measures to reduce military expenditure in favour of social development and the promotion of women in particular.¹⁵³ article 14(2)(c) deals with women's sexual and reproductive rights. Kenya's reservation targets the specific provision on the right to medical abortion, citing its divergent national legislation. Namibia made a time-bound reservation on article 6(d) of the Protocol regarding the recording and registration of customary marriages pending the enactment of new legislation on this matter.

South Africa, as mentioned above, entered a reservation to article 4(2)(j), making it clear that the death penalty has been abolished in South Africa. Regarding article 6(d) South Africa reservation concerns the recording of traditional marriage. With regard to article 6(h) South Africa entered a reservation because, in its opinion, the provision subjugates the equal rights of men and women with respect to the nationality of their children to national legislation and national security interests, on the basis that it may remove inherent rights of citizenship and nationality from children'.¹⁵⁴ One of South Africa's interpretative declarations concerns article 31 of the Protocol. South Africa considers that its Bill of rights should not be regarded as offering less favourable protection of human rights.¹⁵⁵

Uganda and Rwanda, similarly to Kenya, entered a reservation to article 14(2)(c). According to Uganda, this article must not be interpreted so as to confer an individual right to abortion or mandating a state party to provide access thereto. Uganda stated that it would not be bound by this clause unless permitted by domestic legislation expressly providing for abortion.¹⁵⁶ Rwanda also entered a reservation on article 14(2)(c). It is not clear what the exact formulation of Rwanda's reservation was. However, although the reservation is still listed in the Status List pertaining to the status of ratification of the

148 Concluding observations on the 2nd Periodic Report and the Combined 3d to 5th Periodic Reports of the Libyan Arab Jamahiriya of the Committee on the Elimination of Discrimination against Women (6 February 2009) UN Doc CEDAW/C/LBY/CO/5 (2009) para 13, urging Libya to withdraw its reservations.

149 Concluding Observations on the Combined 5th and 6th Periodic Reports of Tunisia of the Committee on the Elimination of Discrimination against Women (5 November 2010) UN Doc CEDAW/C/TUN/CO/6 (2010) 13 para urging Tunisia to withdraw its reservations.

150 Concluding observations on the Combined 3rd and 4th Periodic Reports of the Niger of the Committee on the Elimination of Discrimination against Women (24 July 2017) UN Doc CEDAW/C/NER/CO/3-4 (2017) para 8, in line with its previous observations, the CEDAW Committee considers that many reservations made by Niger are impermissible and must be withdrawn.

151 Viljoen (n 107) 43.

152 HRC General Comment 24 (n 137) para 3. In theory, an interpretative declaration differs from a reservation, but in practice, under the guise of an interpretive declaration, a State could enter reservations. When applying the test set out by the HRC to the South African declarations it is clear that they are genuine interpretive declarations.

153 See A Budoo 'Article 10' in this volume.

154 See Status of Ratification of the Maputo Protocol. Unpublished document. On file with the author.

155 Status of Ratification (n 154).

156 As above.

Maputo Protocol provided by the African Union Office of the Legal Counsel (AUOLC)¹⁵⁷ Rwanda reported that it has removed its reservation on the Maputo Protocol related to abortion and that this move is aimed at protecting the lives of unborn children and their mothers.¹⁵⁸

Upon ratification in 2012, Cameroon entered a reservation contending that the acceptance of the Maputo Protocol should in no way be construed as endorsement, encouragement or promotion of homosexuality, abortion (except therapeutic abortion), genital mutilation, prostitution or any other practice which is not consistent with universal or African ethical and moral values, and which could be wrongly understood as arising from the rights of women to respect as a person or to free development of her personality'.¹⁵⁹

Contrary to Algeria, whose reservations indicate only the article concerned with no other indication or explanation,¹⁶⁰ the reservations entered by Ethiopia and Mauritius are quite expansive. They relate to many articles of the Protocol. All in all, Ethiopia entered reservations *vis-à-vis* five articles and made interpretative declarations against five provisions. On article 6 Ethiopia has entered reservations against three sub-paragraphs (c), (d) and (f) and made interpretive declarations against 2 sub-paragraphs (b) and (j). In addition to these provisions, Ethiopia has entered reservations against articles 7(a), 10(3), 21(1) and 27. Article 27 of the Maputo Protocol deals with the interpretive powers given to the African Court on Human and Peoples' Rights (African Court).¹⁶¹ Ethiopia's reservation about this provision may be superfluous since Ethiopia is not a state party to the Protocol to the African Charter on establishing the African Court on Human and Peoples' Rights. However, one may consider that this reservation attests to Ethiopia's consistent reluctance to be bound by the rulings of the Arusha-based human rights court.

Mauritius also entered a considerable number of reservations. Mauritius has declared that it shall not take any legislative measures under article 6(b) and 6(c) of the Protocol where these measures would be incompatible with provisions of the laws in force in Mauritius. In relation to article 9 of the Protocol, Mauritius affirms that it shall use its best endeavours to ensure the equal participation of women in political life in accordance with its Constitution. Mauritius has further indicated that it shall not take any measures under articles 4(2)(k), 10(2)(d) and 11(3) of the Protocol (all provisions relating to the protection of refugees). Moreover, Mauritius declares that it shall use its best endeavours to achieve the aims in article 12(2) of the Protocol, in accordance with its Constitution, and the accession to the Protocol should not be regarded as an acceptance of positive discrimination by the Republic of Mauritius. Finally, Mauritius declared 'that it shall not take any measures under article 14(2)(c) of the protocol in relation to the authorisation of medical abortion in cases of sexual assault, rape and incest whether the matter has not been reported to the police or where the pregnancy as exceeded its fourteenth week'.¹⁶²

157 As above.

158 The 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the implementation status of the African Charter on human and peoples' rights & the initial report on the implementation status of the Protocol to the African Charter on human and Peoples' Rights and the rights of women in Africa (Maputo protocol) (2009-2016) p 30 para 78.

159 Status of Ratification (n 154).

160 Algeria seems to have entered reservations on arts 6, 7 & 14. No further indication is provided. See Status of Ratification (n 154).

161 According to this article 'The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol'. See F Viljoen & M Kamunyu 'Articles 27 and 32' in this volume.

162 See Status of Ratification (n 154).

5.4.3 *Validity of reservations*

Some of the reservations mentioned above do not appear to pose a flagrant issue of validity. It remains the responsibility of the African Commission and the African Court to assess their validity in light of the object and purpose of the Charter and the Protocol. As pointed out above, some elements must be considered when conducting such an assessment. For instance, any blanket reservation subordinating the application of the protocol to its compatibility with Islamic law without further precision would fail the validity test. The reservations made by The Gambia and eventually withdrawn would have undoubtedly fallen within this category.¹⁶³ By the same token, the reservation made by Cameroon is highly questionable. The text of the reservation makes a vague reference to the elusive concept of ‘universal and African ethical and moral values’. Moreover, the reservation does not indicate in a precise manner its scope in relation to specific provisions of the Protocol. Considering the criteria developed by the HRC, mentioned above, such a reservation would lack the essential attributes of a valid reservation.

The same holds regarding Ethiopia’s, Mauritius’, and Algeria’s reservations. As explained above, Ethiopia has entered a significant number of reservations and many ‘interpretative declarations’ that would more likely pertain to proper reservations.¹⁶⁴ All in all, its reservations and ‘interpretive declarations’ concern about one-third of the substantive articles of the protocol. The number of reservations entered by Mauritius is also striking. This fact alone is enough to raise a concern regarding the validity of these reservations. As pointed out above, one of the criteria the HRC provides to assess the validity of reservations to human rights treaties is the cumulative effect of a group of reservations. Mauritius reservations – put together – would arguably compromise the object and purpose of the Protocol. Moreover, the test of transparency and specificity is also not met since the language of the reservations remains vague and lacks the necessary preciseness required for reservations to human rights treaties. In that regard, Algeria’s reservations, which only refer to three provisions without further elaboration, would also fail the validity test.

South Africa has explained that the profound concern justifying its reservations was to ensure that the protocol does not undermine its domestic legislation, which South Africa considers offers more protection of women’s rights than the protocol. However, some have argued that South Africa’s reservation on article 6(d) on the recording of marriages in writing and their registration strike at the core of the Maputo Protocol, considering impacts such as the inability to verify child marriages.¹⁶⁵ This interpretation of the reservation is only possible if one assumes that the non-recording and non-registration of marriages would lead to the proliferation of marriage of girls under the legal age. However, in its report to the Commission, mentioned above, the South African government has explained that the reservation was made to protect women in existing customary marriages, of which many are not registered in South Africa.¹⁶⁶ Viewed from that perspective and regarding the intention of the reserving state, the reservations do not seem to defeat the treaty’s purpose. This interpretation of the meaning and effect of South Africa’s reservation is disputed.¹⁶⁷

163 As suggested by Viljoen (n 107) 43.

164 HRC General Comment 24 (n 137) para 3. The HRC explains that ‘[i]f a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation’.

165 Viljoen (n 107) 43.

166 Combined Report of South Africa (2015) (n 115) p 148 para 39.

167 See *Request for Advisory Opinion by the Centre for Human Rights* (n 118).

As pointed out above, Namibia was concerned about the same issue. However, it is questionable whether Namibia still considers its reservation operative. In fact, despite being urged by the African Commission to include information regarding its reservation to the Protocol in its periodic reports,¹⁶⁸ the last report of Namibia contains no reference to the reservation.¹⁶⁹ In its Concluding Observations on Namibia's 6th Periodic Report, the Commission did not raise the issue.¹⁷⁰ This might suggest that there is no more concern regarding the reservations by Namibia. It remains to be confirmed if the country has implicitly withdrawn its reservation.

The reservations made by Uganda are specific and concerned with the issue of medical abortion under certain conditions. The Ugandan reservation sounds more like an interpretive declaration. It is also well known that the issue of medical abortion reveals a lack of consensus within and across Africa (and the world). Although one might encourage a more expansive stance on this matter, it would undoubtedly be incorrect to consider any reservation on this matter as invalid. The validity test would depend on the intention behind this reservation and how it affects the Protocol's 'object and purpose'. Unfortunately, in its last Concluding Observations, the Commission did not comment on this reservation.¹⁷¹

One last observation regarding the validity of these reservations refers to their publicity. Reservations to international treaties should be made easily accessible to each party and the public. Without this formality, the reservation would not be open to scrutiny. This points once again to the crucial role of the depositary, as discussed above. However, the original texts of the reservations made to the Maputo Protocol are not available on the official website of the AU dedicated to OAU/AU treaties, conventions, protocols and charters as is common practice within the UN.¹⁷² In addition, only Kenya's reservation is available on the registration page of the Protocol on the UN website.¹⁷³ It is unclear why the texts of all reservations have not been published by the AU and sent to the UN Secretary-General during the registration and publication of the Protocol.

6 Conclusion

As an international treaty, the Maputo Protocol provides the final clauses as discussed in this chapter. The objectives of these clauses are primarily to clarify the procedural and practical aspects of the functioning of the treaty. These types of provisions are critical as they impact the effective functioning of the treaty. The present chapter highlighted some shortcomings regarding their drafting and discussed these in light of the customary international law applicable to multilateral treaties codified by the VCLT.

If anything, the discussion has highlighted the importance of – and the need for – rigorous drafting of treaties. Discussing the Protocol's provisions on issues such as signature, entry into force,

168 Concluding Observations and Recommendations on Sixth Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011-2013) African Commission on Human and Peoples' Rights, adopted at its 58th ordinary session 6-20 April 2016, Banjul, The Gambia, paras 10-11.

169 7th Periodic Report (2015-2019) on the African Charter on Human and Peoples' Rights and the 2nd Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020).

170 Africa Commission Concluding Observations (2016) (n 168).

171 Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010-2012) African Commission on Human and Peoples' Rights, adopted at its 57th ordinary session 4-18 November 2015, Banjul, The Gambia.

172 AU <https://au.int/en/treaties> (accessed 16 May 2023).

173 UN https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805265c4&clang=_en and see the text of the Kenyan reservation registered with the UN <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/26363/A-26363-Kenya-0800000280526689.pdf> (accessed 16 May 2023). It must be noted that the UN registration page does not reflect the updated ratification table mentioned in the footnote above.

and amendments and comparing them with other similar provisions in other AU treaties has shown that some difficulties may arise in the course of their application due to poor drafting. In the same vein, the reservations issue must be given more attention. The role of the depository is crucial in this regard. The AUOLC is expected to play a central role in guiding the depository to assume its mission effectively. For instance, the updated status of ratification of the treaty, the exact content and dates of all reservations should be available to the public.

Finally, the issue of reservations entered to the Protocol deserves more attention from the monitoring bodies. As pointed out in this chapter, several reservations made to the Protocol arguably fail the validity test. This is a critical issue as it concerns the scope of application of the protocol and the effectiveness of the protection afforded to women in the reserving states. It is, therefore, essential that the monitoring bodies do not miss any opportunity to elaborate on this issue. Although this concerns all the monitoring bodies, the Africa Commission can play a critical role in evaluating periodic state reports. The Commission has, on occasion, indicated in its Concluding Observations to states' reports that it is concerned with reservations made by states. It is critical that the Commission elaborates further on this issue in the future.

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