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.

Pretoria University Law Press
PULP
publishing African scholarship that matters
www.pulp.up.ac.za

ISBN 978-1-7764117-8-8

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
PULP

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

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

Pretoria University Law Press
PULP
publishing African scholarship that matters
www.pulp.up.ac.za

2023

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

The first in a series of PULP commentaries on African human rights law, under the series title: ***PULP Commentaries on African human rights law***

Published by:
Pretoria University Law Press (PULP)
The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

For more information on PULP, see www.pulp.up.ac.za

Printed and bound by:
Pinetown Printers, South Africa

To order, contact:
PULP
Faculty of Law
University of Pretoria
South Africa
0002
pulp@up.ac.za
www.pulp.up.ac.za

Cover design:
David Ikpo

ISBN: 978-1-7764117-8-8

Table of contents

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*.

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 Hélène 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,
Director, Centre for Human Rights, University of Pretoria
May 2023

Contributors

Annika Rudman is professor of international law at the Department of Public Law at the Faculty of Law, University of Stellenbosch. She specialises in International Human Rights Law with specific focus on the African human rights system, women's rights, LGBTQ rights, Feminist Legal Theory, African Feminism and Queer Theory. Her research focuses on different procedural aspects of the African Court on Human and Peoples' Rights, the interpretation and application of the Maputo Protocol, the protection of SOGIE rights, alongside a keen interest in the jurisprudence of the African Court and the ECOWAS Community Court of Justice. She has served as a visiting professor and scholar at many different universities and on editorial boards across the globe.

Email: arudman@sun.ac.za

ORCID: https://orcid.org/0000-0002-4665-3547

Mariam Kamunyu is an international human rights lawyer, gender equality consultant and academic with a specialisation on the African human rights system. She holds a Doctor of Laws (University of Pretoria/ UP) and a Master of Laws in Human Rights and Democratisation (UP). Her expertise centres on knowing (research), disseminating (teaching, training), influencing (advocacy) and synergising (relationships, partnerships, coalitions), in order to visibilise, enhance or influence laws & data; programmatic interventions; and actors (state & non-state), towards the gender transformation of norms, practices and institutions. Other research and practice interests comprise the nexus between human rights, democracy and governance and their implications for the realisation of human rights in Africa.

Email: mariam.kamunyu@gmail.com

ORCID: https://orcid.org/0000-0003-1193-3351

Emma Charlene Lubaale is an associate professor at the Faculty of Law of Rhodes University. She holds a doctorate (LLD) and master's degree in Law (LLM) from the University of Pretoria; a bachelor's degree in Law from Makerere University (LLB), a post-graduate diploma in legal practice from Uganda's Law Development Center and a post-graduate diploma in Higher Education from the University of Kwazulu Natal. Her current research interests are in women and children's rights, international criminal law, and accountability for gender-based crimes in domestic courts. She is a rated researcher by the National Research Foundation of South Africa and an editorial board member of the Journal of Crime and Justice. Her book publications include National accountability for international crimes in Africa and Violence against women and criminal justice in Africa.

Email address: emmalubaale@gmail.com

Google scholar account: https://scholar.google.co.za/citations?user=6tIuX8QAAAAJ&hl=en

Charlene Kreuser is an Attorney at the Legal Resources Centre and a Research Associate at the University of Venda. Charlene obtained an LLD from the University of Stellenbosch in 2021. Her dissertation focused on developing the right to education of learners with non-heteronormative sexual orientations, gender identities, and gender expressions under the African regional human rights system.

Email: charlene.kreuser@gmail.com

ORCID: http://orcid.org/0000-0001-9175-1384

Ruth Nekura is a human rights lawyer, feminist activist and socio-legal researcher with 10 years' experience working in gender equality and women's rights with a focus on law reform, advocacy and programming. Her work involves conducting gender analyses of laws and implementation practices. She is passionate about access to justice and invokes both structural and individual level analyses to challenge systemic inequality. She is an advocate of the High Court of Kenya and holds a PhD in Public Law(Human rights) from the University of Cape Town. She currently works as Legal Director at the Initiative for Strategic Litigation in Africa.

Email: ruth.nekura@gmail.com

ORCID: https://orcid.org/0000-0003-0716-0704

Satang Nabaneh is a Research Professor of Law and Director of Programs at the Human Rights Center at the University of Dayton. She is also a Postdoctoral Fellow at the Centre for Human Rights, Faculty of Law at the University of Pretoria, and a Research Fellow at the Centre on Law and Social Transformation, Chr. Michelsen Institute, University of Bergen. Her expertise lies in human rights, women's rights, sexual and reproductive health and rights, democratization, constitution-making, and transitional justice. She has published extensively in academic journals and edited volumes, including as co-editor of *The Gambia in Transition: Towards a New Constitutional Order* (Pretoria University Law Press, 2022) and *Sexual Harassment, Law and Human Rights in Africa* (Palgrave, 2023). Currently, she is working on a monograph, *Revisiting Conscientious Objection in Abortion Care: Framing the Global Debate with Lessons from South Africa*.

Email: satang.nabaneh@gmail.com

ORCID: https://orcid.org/0000-0003-0543-0555

Celestine Nyamu Musembi is a Senior Lecturer at the University of Nairobi Faculty of Law. She holds an LL.B. (Hons) from the University of Nairobi, and an LL.M. and S.J.D. in law and legal anthropology from Harvard Law School. She is an advocate of the High Court of Kenya. Her research addresses the interaction of culture and law, and its effect on the property rights of women in family contexts such as inheritance and marital property disputes. She has written on law and policy with respect to social and economic rights, specifically, housing, water, sanitation, food security, and community rights to land. She served on the Advisory Group for the publication of UN-Women's Progress of the World's Women Report 2018 *[Families in a Changing World]*, and contributed to the 2016 UNESCO World Social Science Report *[Challenging Inequalities: Pathways to a Just World]*. She has contributed a chapter to *Gender and land rights in changing global contexts* (Reena Patel, ed, 2022) and to *Research handbook on the politics of human rights law* (Bård Andreassen, ed, 2023).

Email: celestine.musembi@uonbi.ac.ke

ORCID: https://orcid.org/0000-0002-4268-0388

Theodora Talumba Mkali is a Senior Lecturer in Family Law and Gender Law in the Law Faculty at the Catholic University of Malawi (CUNIMA). She currently also serves as the Coordinator for Research & Publications within the Law Faculty at the CUNIMA. She obtained a PhD in Human Rights Law under the supervision of Prof. Annika Rudman from the Stellenbosch University in 2022.

Email: talu.theo@gmail.com

ORCID: https://orcid.org/0000-0003-3576-2016

Ashwanee Budoo-Scholtz is the programme manager of the Master's in Human Rights and Democratisation in Africa at the Centre for Human Rights, Faculty of Law, University of Pretoria, where she completed her LLD in 2016. Her research, teaching and training areas are the African human rights system, with a focus on women's and girls' rights. She is a member of the Editorial Committee of the African Human Rights Yearbook and Global Campus Human Rights Preparedness.

Email: sheetal6189@gmail.com

OCRID: https://orcid.org/0000-0002-9004-014X

Junior Mumbala Abelungu is a professor of International Humanitarian Law and Human Rights at the School of Criminology of the University of Lubumbashi and of Public International Law at the Protestant University of Lubumbashi and of Administrative Law at the Higher Institute of Commerce of Lubumbashi and at Mapon University (DRC). He was also a visiting professor and holder of the 2021-2022 South Chair in the Master's program specialising in human rights at the Catholic Universities of Louvain, Namur and Saint-Louis - Brussels (Belgium). He holds a doctorate in law from the University of Ghent (Belgium), Master of specialisation in international law from the Université Libre de Bruxelles, Master of specialisation in human rights from the Catholic Universities of Louvain, Namur and Saint-Louis – Brussels and a Master of specialisation in Interdisciplinary Analysis of the European construction from the Catholic Universities of Leuven and Saint-Louis – Brussels.

Email: juniormumbala@gmail.com

ORCID: https://orcid.org/0000-0003-1396-0185

Trésor Muhindo Makunya is a postdoctoral researcher and publications coordinator at the Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa. He is also an Associate Professor of Public Law in the Department of Legal Sciences, Faculty of Legal, Political, Administrative, Management and International Relations Studies, University of Goma, Democratic Republic of Congo (DRC), and a Visiting Professor of International Human Rights Law in Africa in the Master of Human Rights Diplomacy at the Catholic University of Lyon (France). He is a consultant in governance to the World Bank Group. He is an advocate of the Court of Appeal of North-Kivu (DRC) and co-edited *L'État africain et la crise postcoloniale. Repenser 60 ans d'alternance idéologique et institutionnelle sans alternative socioéconomique* (2021). He is co-editor of the African Human Rights Yearbook, convening editor of the African Court Law Report, member of the editorial board of the Congolese Yearbook of Constitutional Justice and editorial assistant of the African Human Rights Law Journal. His areas of research include African comparative constitutionalism, comparative legal systems, international human rights law in Africa, public international law, public finance management law and democratisation.

Email: tresormakunyamuhindo@gmail.com

ORCID: https://orcid.org/0000-0002-5645-1391

Sheila Parvyn Wamahiu, a Director of Nairobi-based Jaslika Consulting and Foundation, has a doctorate in Education and Masters in Anthropology. She is driven by a belief in the indivisibility of humanity and the universal values of social justice, equity, equality, and inclusion. A researcher, educator and mentor, her work focuses on the intersection of education, child protection and gender. She has made significant contributions to policy development, programming and practice in these areas during her career of over 30 years primarily in sub-Saharan Africa. She serves on several national and expert boards and advisory committees, including as chair to the National Advisory Board of the Assessment of Life Skills and Values in East Africa (ALiVE). She is the founding chair of Women Educational Researchers of Kenya (WERK) and a founder of the Consortium on Election Research and Advocacy (CERA).

Email: swamahiu@jaslika.com

ORCID: https://orcid.org/0000-0001-8572-8778

Anneth Amin is a Doctor of Laws, and a Lecturer at the Institute of Judicial Administration (IJA) in Tanzania. She obtained an LL.D from Stellenbosch University in 2017 under the supervision of Prof. Sandra Liebenberg. Her research interests focus on the protection and interpretation of socio-economic rights in the African Regional Human Rights System and the United Nations Human Rights System. She has published several journal articles on the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights with the focus on the teleological approach to interpretation.

Email: annethmnzava11@gmail.com

ORCID: https://orcid.org/0000-0002-4626-5827

Ebenezer Durojaye is a Professor of Law and head of the Socio-Economic Rights Project at the Dullah Omar Institute, University of the Western Cape, South Africa. His areas of research include human rights, socio-economic rights, sexual and reproductive health and rights, gender and consti¬tutionalism. He has written extensively in these areas

Email: ebenezerdurojaye19@gmail.com

ORCID: https://orcid.org/0000-0002-7182-4096

Mercy Bwanaisa is a Master of Science candidate in Agricultural Economics at the Faculty of Natural and Agricultural Sciences, University of Pretoria (UP). She specialises in food security and nutrition policy analysis where her research interests include, but are not limited to, the accessibility of healthy, nutritious and safe diets within food systems. She also holds a Bachelor of Science degree in Agricultural Economics from the University of Malawi.

Email: mercybwanaisa@gmail.com

ORCID: https://orcid.org/0000-0003-0486-0457

Magnus Killander is professor of human rights law at the Centre for Human Rights, Faculty of Law, University of Pretoria and Vice-Chair of the Association of Human Rights Institutes (AHRI). He is the academic coordinator of the masters programme in human rights and democratisation in Africa which forms part of the Global Campus of Human Rights. Magnus has a law degree from Lund University, Sweden, a European masters degree in human rights and democratisation (EMA) and a doctoral degree (LLD) from the University of Pretoria.

Email: magnus.killander@up.ac.za

ORCID: https://orcid.org/0000-0001-8728-5368

Adetokunbo (Ade) Johnson is a Lecturer in the Politics of the Global South at the Politics department of the School of Geography, Politics and Sociology, Newcastle University, United Kingdom (UK). She is a member of the Board of Trustees of Action on Disability and Development (ADD) International, UK. Adetokunbo obtained a Doctor of Philosophy (DPhil) degree and a Masters of Philosophy (MPhil) degree in Multidisciplinary Human Rights from the Faculty of Law, University of Pretoria, South Africa. She also holds a Masters of Arts (MA) degree in Human Rights from the University of Kent, Canterbury, United Kingdom. She holds a Bachelor of Science (BSC) degree in Political Science from Babcock University, Nigeria.

Email: adetokunbojohson@gmail.com

ORCID: https://orcid.org/0000-0003-0418-3417

Ademola Oluborode Jegede is a full Professor of Law, an NRF rated researcher and the Interim Director of the Ismail Mahomed Centre for Human and Peoples' Rights in the School of Law, Faculty of Management, Commerce and Law, University of Venda, Thohoyandou, South Africa. He holds degrees from Obafemi Awolowo University Ile-Ife, University of Ibadan and the Centre for Human Rights, Faculty of Law, University of Pretoria. He has been a research visitor to the Centre for International Environmental Law, USA and Human Rights Institute at Abo Akademi, Finland, and he is a Fellow of Salzburg Global Seminar, Austria. His research area is on the intersection of climate change and biodiversity loss with the human rights of vulnerable groups. His writings on these themes include the co-edited books Climate change justice and human rights: An African perspective (Pretoria University Law Press 2022); Human rights and the environment under African Union Law (Palgrave, 2020); and the book: The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications (Pretoria University Law Press, 2016). He is the Initiator and Convening Editor of the African Journal of Climate Law and Justice

Pfanelo Lorrain Mamphiswana is an LLM Student at University of Venda (UNIVEN). She holds degrees in Social Work and LLB from UNIVEN. She is a Candidate Attorney at Ernest Rammela Attorneys, Polokwane. She has also worked as a Social Worker at Makwarela Social Development and Thohoyandou Magistrate as a Social Work Grade 1 at Pfanani Clinic. She facilitates programs under the organisation called Zwoitwa Community Project in 2022.

Email: plmamphiswana@gmail.com

Ndzumbululo Mulaudzi is an LLM (Human Rights) student at the University of Venda (UNIVEN). She also obtained her LLB degree from UNIVEN. Her master's research focuses on the Right to Sustainable Development of Women in South Africa.

Email: ndzumbu28.mulaudzi@gmail.com

Untalimile Crystal Mokoena is a lecturer in the Department of Public Law, in the School of Law, Faculty of Management, Commerce and Law at the University of Venda (UNIVEN). She is currently finalising her PhD thesis titled, 'The protection of indigent widows' right to social assistance in South Africa' at the University of Pretoria. As an emerging researcher, Crystal has written and co-authored various book chapters and journal articles. Her research interests are in human rights and social security law.

Email: crystal.mokoena@univen.ac.za

ORCID: https:// 0000-0002-7300-5537

Zahara Nampewo is a Senior Lecturer at the School of Law, Makerere University in Kampala, Uganda. She also serves as the Deputy Principal. She obtained her PhD from Emory University in the United States, using a feminist analysis to interrogate the role of the social institutions of marriage and family in constructing women's sexuality and morality. She serves on several boards of organisations advocating for good governance and human rights in Uganda. She is also a Board member of the African Legal Think Tank for Women's Rights (ALTOWR), a regional entity advocating for women's rights across Africa. Prior to joining Makerere University, Dr. Nampewo served as Programme Coordinator of the Access to Justice Programme of the Danish International Development Agency (DANIDA) in Uganda, and as Gender Justice Specialist with UN Women in Liberia.

Zahara was winner of the 2019 5th Women in Law Award for "Female Lawyer Academic", awarded by the Uganda Law Society on 7th March 2019.

Email: zahara.nampewo@mak.ac.ug

ORCID: https://orcid.org/0000-0002-0599-8354

Lilian Chenwi is Professor of Law in the School of Law, University of the Witwatersrand (Wits), South Africa. She obtained her Doctor of Laws from the University of Pretoria, South Africa. Prior to joining Wits, she served as the head of the Socio-Economic Rights Project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights (then Community Law Centre) at the University of the Western Cape, South Africa. She teaches in the areas of international human rights law and public international law. She has published widely on human rights, especially socio-economic rights generally, housing rights, African regional protection of human rights, extraterritorial human rights obligations, death penalty from a human rights perspective, and international law. She is an NRF-rated researcher. She is also an editor of the South African Journal on Human Rights.

Email: lilian.chenwi@wits.ac.za

ORCID: http://orcid.org/0000-0002-9245-8945

Johanna Bond is the Dean of Rutgers Law School. Bond joined Rutgers in 2023 as the first law dean to oversee both of the law school campuses in Newark and Camden. Bond is the former Sydney and Frances Lewis Professor of Law at Washington and Lee University School of Law. Bond, a two-time Fulbright Scholar, has published widely in the area of women's international human rights, including a recent book from Oxford University Press, *Global Intersectionality and Contemporary Human Rights*. She teaches international human rights law, gender and the law, and torts. At Washington and Lee, Bond served as Associate Dean for Academic Affairs for four years, during which she helped to manage the law school as part of a small, three-person senior leadership team. Her leadership led to an increased focus on diversity, equity, and inclusion at the law school.

Matilda Lasseko-Phooko holds an LLB degree (cum laude), an LLM in Human Rights and Democratisation in Africa from the University of Pretoria and an LLM in Jurisprudence from the University of South Africa. She served as a research clerk to Justice Zak Yacoob at the Constitutional Court of South Africa in 2009 before joining the Open Society Justice Initiative and the Southern African Litigation Centre as a Law Fellow on the Right of Access to Information until 2011. She litigated with the international law firm Bowmans (formerly Bowman Gilfillan Inc) between 2012 and 2016 as part of the Litigation and Dispute Resolution team. She was the thematic lead on Violence Against Women at Initiative for Strategic Litigation in Africa (ISLA) between 2017 and 2021 where she worked with lawyers from various jurisdictions to provide technical support for women's rights cases and to build the capacity of feminist litigators on the continent. In this time, she focused on the thematic areas of human trafficking, violence against migrant workers and domestic workers, women in the criminal justice system, intersecting violence against women and gender stereotypes and violence against women. She has published in the areas of Transitional Justice, Access to Information and Gender Equality. She is currently the Unit Manager for the Women's Rights Unit at the Centre for Human Rights, Faculty of Law, University of Pretoria. In this role she conducts various interventions with African Union member states, African human rights system mechanisms and civil society to advance the ratification and implementation of the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women.

Email: matilda.lasseko-phooko@up.ac.za

ORCID: https://orcid.org/0000-0002-6058-4533

Rachel Murray is Professor of International Human Rights Law at the University of Bristol and Director of its Human Rights Implementation Centre. Rachel undertakes regular work on the African human rights system, implementation of human rights law, OPCAT and torture prevention, among other areas. She has written widely in these areas and advises national, regional and international organisations, including the African Commission and Court on Human and Peoples' Rights. She engages with governments, civil society organisations and individuals on human rights law and undertakes consultancies for regional and international organisations, including the UN and OSCE. She has held a number of grants, including a major grant from the UK Economic Social and Research Council on implementation which tracked decisions from the regional and UN treaty bodies to examine the extent to which the States have complied with them (http://www.bristol.ac.uk/law/hrlip/). She was formally the Vice Chair of the Board of the Institute for Human Rights and Development in Africa, is a Fellow of the Human Rights Centre at the University of Essex and Deputy Leader of Doughty Street Chambers' International team. She is also a magistrate sitting in Bristol.

Email: Rachel.Murray@bristol.ac.uk

ORCID: https://orcid.org/0000-0003-4077-9381

Frans Viljoen is professor of law and Director of the Centre for Human Rights, Faculty of Law, University of Pretoria. His area of research is regional human rights protection, with particular attention to the African Union human rights standards, institutions and processes. He is the author of one of the leading texts on the African human rights system, and is the founding editor of the *African Human Rights Law Journal.* He has served as visiting professor on the African human rights system at various universities. He is one of the Vice-Chairpersons of the Global Campus of Human Rights. He is a member of the Advisory Committee of the UN Human Rights Council (2022-2024).

Email: frans.viljoen@up.ac.za

ORCID: https://orcid.org/0000-0003-0551-0109

Sâ Benjamin Traoré is an Assistant Professor of Law (African Institute for Research in Social Sciences, Faculty of Governance, Economics and Social Sciences of the Mohammed VI Polytechnic University, Rabat, Morocco). He holds a PhD from the University of Neuchâtel and an LLM from the Geneva Academy of International Humanitarian Law and Human Rights. His academic works cover various subjects such as African legal systems and the practice of law in Africa, (international) legal theory, the law of international organizations, use of force in international law, human rights, international humanitarian law and Business and human rights. He is the author of several articles and a book on The Interpretation of United Nations Security Council Resolutions (Helbing, Basel, 2020).

Email: sabenjamin.traore@um6p.ma

Introduction

Annika Rudman

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 Committee of Experts), 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 Introduction

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;* 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 Lesotho[18] 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 Women[43] 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 Declaration[46] 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 (ICJ), 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 ICJ, 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 initially composed

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.

of the three Commissioners to include the ICJ 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 the Rights of 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.1 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* Annex A. 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-two[105] 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 Lone, 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 Introduction

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 Committee of Experts 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 Congo[135] and Mozambique[136] 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 Malawi[145] 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 states 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

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 the Preamble

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 Draft[17] and the Kigali Draft[18] 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 C 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 Draft[23] 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 Development[34] in paragraph 4;
- Fifth African Regional Conference on Women[35] 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] CEDAW[55] 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 preamblular paragraphs

The states parties to this Protocol,

4.1 Paragraph 1[63]

> 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 onthe 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 60[73] and 61[74] 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 people's 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 CEDAW[77] 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 gender[79] 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 Declaration[91] 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 89) 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 Development[98] and the Kampala Action Plan on Women and Peace,[99] are also of relevance.

93 Resolutions of the UN Secuirty 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 recognised 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 Aids[104] 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.

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 (UNCRC),[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

1 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 1.

2 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 1.

3 African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/153/Rev.2 (1990) art 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 Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 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 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, art 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.

definitions section yet with 20 terms, many of them substantive in nature.[8] These three latter Protocols 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 Draft[11] 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

8 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, art 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 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

Convention on Harmful Practices defined 'harmful practices' in article 1 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. 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.

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.

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* Annex A.

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

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

25 African Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217, arts 2 & 3.

26 African Charter (n 25) 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 Ouguergouz (eds) *The African Union: legal and institutional framework: a manual on the Pan-African organization* (2012) 458.

expresses concern that despite these commitments, women in Africa were still victims of discrimination 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* Communication 341/2007, African Commission on Human and Peoples' Rights, 19th extraordinary session (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 sec 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 the Rights of Women in Africa (SRRWA). 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 SRRWA, 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 ECCJ jurisprudence in this regard: *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/CCJ/JUD/06/08 (2008); *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (2017); *Mary Sunday v Federal Republic of Nigeria* ECW/CCJ/APP/26/15) [2018] ECOWAS CJ 11 (17 May 2018); *Aminata Diantou Diane v Mali* ECW/CCJ/APP/35/17) [2018] ECOWASCJ 14; (21 May 2018); *Aircraft Woman Beauty Igbobie Uzezi v Federal Republic of Nigeria* ECW/CCJ/APP/ 32 of 2019) [2021] ECOWASCJ 10 (30 April 2021); *Women Against Violence & Exploitation in Society (WAVES) & Child Welfare Society Sierra Leone (CWS-SL) (On behalf of pregnant adolescent school girls in Sierra Leone) v Sierra Leone* ECW/CCJ/APP/22/18 (2018); *Adama Vandi v Sierra Leone* ECW/CCJ/APP/52/21 (2021); and *Ekundayo Idris v Nigeria* EW/CCJ/APP/30/19 (2019).

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 equality[47] and respect for human rights[48] 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 sec 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_auda-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

51 African Charter (n 25) 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 (n 25) 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 (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 2(1)(a).

57 Maputo Protocol art 26(1).

58 Maputo Protocol art 26(2).

to submit periodic reports to demonstrate the measures taken towards fully realising the rights in the Protocol.[59]

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

59 Maputo Protocol art 26(1).

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 Kabeer *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-itentity-in-africa (accessed 15 May 2023); L Mwambene & M Wheal '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.

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 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 Committee of Experts 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]

65 Maputo Protocol art 2(3).

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 Maputo Protocol art 2.

69 As above.

70 As above.

71 As above.

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] 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 Protocol[80] 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

72 Maputo Protocol art 1.

73 Maputo Protocol art 2.

74 As above.

75 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 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.

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 mutilation[84] 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

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

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

also provides protection of women from sexual violence during armed conflict.[95] The definition of VAW 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.

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 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.

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 Draft[12] 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* Annex A.

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 programs.

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 (n 44) 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 (n 46) 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 (n 44) 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 Ikpeze '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 Uganda[85] 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 Bill[90] and the Succession Act[91] – 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 Constitution[106] 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 Act[139] 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.

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 preambles[5] 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)[7] 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.[8] 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.[9] 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.[10] 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.[11] 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 (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); UN Convention on the Rights of the Child Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (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 (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217 (African Charter); Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III) (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 Adopted 11 July 2003, entered into force 25 November 2005, CAB/LEG/66.6.

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

9 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).

10 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).

11 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.[12]

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'.[13]

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'.[14]

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.[15] 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.[16] 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.[17] The NGO Forum proposed that article 3 state as follows:

12 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).

13 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 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* Annex A.

15 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.

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

17 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.[18]

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).[19] 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.[20] 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.[21] 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'.[22]

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.[23] Donnelly describes cultural relativism as a 'normative doctrine that demands respect for cultural differences'.[24] However, the issue that arises is that cultural relativism often has as its goal cultural absolutism.[25] The consequence is that

18 Comments by the NGO Forum (n 17).

19 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).

20 Nouakchott Draft (n 12) art 12; Kigali Draft (n 13) art 13; Final Draft (n 15) art 5.

21 J Donnelly 'The relative universality of human rights' (2007) 29 *Human Rights Quarterly* 282; S Răduleţu 'Regional human rights systems and the principle of universality' (2013) 38 *Revista de Stiinte 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.

22 African Charter (n 6) Preamble. See also, Universal Declaration (n 6) Preamble; ICCPR (n 5) Preamble; ICESCR (n 5) Preamble; CEDAW (n 5) Preamble.

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

24 Donnelly (n 21) 294.

25 EH Howard 'Cultural absolutism and the nostalgia for community' (1993) 15 *Human Rights Quarterly* 315 quoted in Donnelly (n 21) 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'.[26]

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'.[27] 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'.[28] 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.[29] 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,[30] 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'[31] but also the right to a dignified life.[32] 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.[33]

26 Donnelly (n 21) 294.

27 See A Rudman 'Preamble' secs 3.4 & 4.12 in this volume.

28 Maputo Protocol (n 14) art 3(1).

29 McCrudden (n 1) 678.

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

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

32 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.

33 *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.[34] Until the adoption of the Maputo Protocol, the right to the free development of the personality was associated primarily with the aims of education.[35] 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.[36]

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.[37]

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 Committee of Experts) 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.[38] Similar to the Maputo Protocol, harmful practices are given a broad meaning with specific instances mentioned by the African Committee of Experts including FGM, child marriage, and sexual exploitation.[39]

Like the African Children's Charter, the Universal Declaration,[40] the ICESCR,[41] and the CRC[42] 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.[43] Beiter adds hereto that individuals should not only develop a sense of their own dignity but also that of others.[44] Ultimately, the free development of

34 Maputo Protocol (n 14) art 3(2).

35 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.

36 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).

37 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 Committee of Experts General Comment on art 31) para 33.

38 African Committee of Experts General Comment on art 31 (n 37) para 22.

39 African Committee of Experts General Comment on art 31 (n 37) paras 22 & 76.

40 Universal Declaration (n 6) art 26(2).

41 ICESCR (n 5) art 13(1).

42 CRC (n 5) art 29(1)(a).

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

44 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'.[45]

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.[46] 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 humane[47] and establishing that mandatory death penalties[48] and unlawful detention violate the right to human dignity.[49] 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'.[50] As such, addressing individuals in degrading language constitutes an infringement of article 5.[51]

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,[52] child marriage,[53] and the death sentence[54]

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

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

47 *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).

48 *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).

49 *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 47) para 40.

50 *Purohit* (n 47) 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.

51 *Purohit* (n 47) paras 58-59.

52 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.

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

54 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 rape[55] or marital rape[56] as a sexual offence, the failure to criminalise FGM,[57] forced sterilisation of women with HIV/AIDS,[58] and the inadequate prosecution of sexual harassment in educational institutions and employment.[59] 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.[60]

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.[61] In this manner, the African Commission recognises that violence and discrimination based on sexual orientation and gender identity violate the right to human dignity.[62]

In May 2017, the African Commission adopted the Guidelines on Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines).[63] 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.[64] 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.[65] 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.[66]

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

56 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.

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

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

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

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

61 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.

62 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.

63 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).

64 Niamey Guidelines (n 63) 12.

65 Niamey Guidelines (n 63) 35.

66 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.[67]

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.[68] 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.[69] Although the Court's decision is welcome, both Rudman[70] and O'Connell[71] 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*,[72] 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'.[73] 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.[74] 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'.[75]

Finally, in *Aircraftwoman Beauty Igbobie Uzezie v the Federal Public of Nigeria*,[76] 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

67 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).

68 Judgment No ECW/CCJ/JUD/08/17 (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.

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

70 Rudman (n 68).

71 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.

72 Judgment No ECW/CCJ/JUD/11/18 (2018).

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

74 *Mary Sunday* (n 72) para IV. See also *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/CCJ/JUD/06/08 (2008). Unofficial English translation available at https://www.refworld.org/cases,ECOWAS_CCJ,496b41fa2.html (accessed 30 July 2022).

75 Rudman (n 68) 448.

76 Judgement No ECW/CCJ/JUD/11/21 (2021).

may be liable for the conduct of non-state actors due to its responsibility to prevent sexual violence.[77] 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.[78]

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*,[79] 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.[80]

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'.[81] 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.[82] 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.[83]

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.*[84] However, it did not find a violation of the right to human dignity.[85] 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.[86]

77 *Aircraftwoman* (n 76) para 67.

78 *Aircraftwoman* (n 76) paras 39 a& 71. See also *Adama Vandi v State of Sierra Leone* Judgment No ECW/CCJ/JUD/32/2022 paras 117-144.

79 (20431/2014) (2015) ZASCA 152; (2015) 4 All SA 609 (SCA); 2016 (1) SACR 468 (SCA) (2 October 2015).

80 *Naidoo* (n 79) para 27.

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

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

83 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).

84 (merits) (2018) 2 AfCLR 380 (*APDF*).

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

86 *APDF* (n 84) para 135.

In the context of article 21 of the African Children's Charter, it has also become clear that the African Committee of Experts 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'.[87] 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.[88] 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.[89] 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.[90]

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.[91] Instead, the authorities' conduct illustrated acceptance or at least tolerance of the custom.[92] 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.[93] 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.[94] Based on this, the joint general recommendation identified FGM, child marriage, forced marriage, polygamy, and honour crimes as harmful practices.[95] 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.[96]

87 African Committee of Experts 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.

88 *Hadijatou Mani Koraou* (n 74) paras 8-9.

89 *Hadijatou Mani Koraou* (n 74) paras 13-14.

90 *Hadijatou Mani Koraou* (n 74) paras 15-28.

91 *Hadijatou Mani Koraou* (n 74) paras 77 and 83.

92 *Hadijatou Mani Koraou* (n 74) para 85.

93 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.

94 Joint General Recommendation/General Comment on Harmful Practices (n 93) paras 17-18.

95 Joint General Recommendation/General Comment on Harmful Practices (n 93) paras 19-29.

96 Joint General Recommendation/General Comment on Harmful Practices (n 93) 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*,[97] 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.[98] Similarly, in *Mugwadi v Dube*,[99] 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.[100]

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.[101]

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.[102] 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'.[103] 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.[104]

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'.[105] 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.

97 Petition Case No. 5 of 2014 (2018) eKLR (High Court, Kenya).

98 Joint General Recommendation/General Comment on Harmful Practices (n 93) paras 59-64.

99 (HC 6913 of 2011) (2014) ZWHHC 314 (17 June 2014).

100 *Mugwadi v Dube* (n 97) 22.

101 *Purohit* (n 47) para 44.

102 *Purohit* (n 47) para 55.

103 *Purohit* (n 47) para 58.

104 *Purohit* (n 47) 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.

105 *Purohit* (n 47) 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'.[106] 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'.[107] 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.[108] 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.[109] 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.[110] 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.[111]

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'.[112] 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.[113] Viewed in the context of

106 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.

107 General Comment 1 (n 106) para 11.

108 General Comment 1 (n 106) para 10.

109 General Comment 1 (n 106) para 42.

110 African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) and art14(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.

111 General Comment 2 (n 110) para 24.

112 Maputo Protocol (n 14) art 14(2)(c).

113 General Comment 2 (n 110) 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.[114] Equally, many constitutions refer to the right to human dignity in relation to specific rights, including the right to work;[115] conditions of detention;[116] the rights of older persons;[117] the rights of persons with disabilities;[118] and the realisation of economic, social, and cultural rights.[119] 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.[120]

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;[121] criminalise and eradicate non-consensual sexual acts;[122] protect women from and address

114 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.

115 Angola, Mozambique, and Seychelles.

116 Egypt, Democratic Republic of the Congo, Ethiopia, Malawi, and Tanzania.

117 Kenya.

118 Eswatini, Kenya, and Uganda.

119 Burundi.

120 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).

121 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.

122 Lesotho: Periodic Report, 2001-2017 (n 121) 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;[123] protect women from sexual harassment in the workplace;[124] adjust criminal court proceedings to be less traumatising for the victims of sexual violence;[125] eradicate FGM and educate the public on issues related to FGM;[126] address gender-based violence;[127] address stereotypes and cultural practices that undermine women's rights;[128] prohibit child marriage[129] and eliminate the trafficking of women.[130]

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.[131] 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.[132]

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.[133] While welcoming the measures taken in Botswana to address gender-based violence, the African Commission nonetheless drew attention to its prevalence.[134] 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.[135] The African Commission has, furthermore, recommended that Malawi criminalise marital rape. Yet, by 2022, this has not been complied with.[136] This by no means represents an exhaustive list of the

123 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.

124 Lesotho: Periodic Report, 2001-2017 (n 121) paras 324-326; Burkina Faso: Periodic Report, 2011-2013 (n 121) para 326.

125 Lesotho: Periodic Report, 2001-2017 (n 121) paras 330-331.

126 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.

127 Republic of Botswana: 2nd & 3rd Periodic Report, 2011-2015 (2018) 27; Ethiopia: Periodic Report, 2009-2013 (n 126) 102.

128 Botswana: Periodic Report, 2011-2015 (n 127) 28-29; Republic of The Gambia: 2nd Periodic Report, 1994-2018 (2018) 23-26.

129 Ethiopia: Periodic Report, 2009-2013 (n 125) 101-102; Kenya: Combined report of the 12th and 13th Periodic Report (2021) para 266.

130 Kenya: Periodic Report (2021) (n 129) para 244.

131 Lesotho: Periodic Report, 2001-2017 (n 121) para 342.

132 Eswatini: Periodic Report, 2001-2019 (n 122) para 377; Mauritius: 9th to 10th Combined Periodic Report, 2016-2019 (2020) paras 296-299.

133 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.

134 Concluding Observations and Recommendations – Botswana: 2nd and 3rd Periodic Report, 2011-2015 (2019) para 52.

135 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.

136 Concluding Observations and Recommendations – Malawi, 2015-2019 (n 56) 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.

---

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 Ichegbo, 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-called[14]

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* Annex A.

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 regional[33] 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.

global[34] 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 (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 Bublitz 'The nascent right to psychological integrity and mental self-determination' in AV Arnauld, 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 Arnauld, 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*, Communication 341/2007 African Commission on Human and Peoples' Rights. 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 international[63] and regional[64] 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 (n 34) art 3; the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (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 (n 72) art 1.

75 CAT (n 72) 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 the Federal Republic of Nigeria* ECW/CCJ/JUD/11/21 (*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 Antiblack racism 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 bodies[113] 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 (IACrtHR), 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 Africa[121] 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* ECW/CCJ/APP/52/21 (31 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 and 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 the Federal Republic of Nigeria* EW/CCJ/APP/30/19 (*E.I.*).

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 People's 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] Kenya[174] and Tanzania[175] 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 Eswatini[183] 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-gbvf-final-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 Committee[187] 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 centres[195] 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 police[198] 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 6thPeriodic 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, Banjul, 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, LGBTIQA+ 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 Niger* ECW/CCJ/JUD/06/2008; *EI* (n 147); *Adama Vandi v Sierra Leone* (n 128). For analysis see O Ojigho '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 Nigeria* Case ECW/CCJ/APP/26/17, 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 LBTIQ+ 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.

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 countries[2] 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 Declaration[7] 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. (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 CEDAW Committee General Recommendation 14 (9th session, 1990) http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm (accessed 25 May 2022).

11 Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women and No. 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, beading[13] 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 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/117.141/62Nol.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 (Older Person's Protocol), which was adopted in January 2016.[33] The Older Persons Protocol 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 Committee of Experts) 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 Older Persons Protocol art 8(1).

35 Older Persons Protocol 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 Committee of Experts 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_ACERWC-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 Combatting 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 Committee of Experts 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 Committee of Experts 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 Committee of Experts, '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 Committee of Experts 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 Ngwena (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 (9th session, 1990).

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 Committee of Experts 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* Communication 341/2007 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 *Eqality 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 Committee of Experts 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 *Eqality 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 (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 (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 conviction [106]

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 Committee of Experts 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 Committee of Experts 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/gendertracker/ (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.

---

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 Committee of Experts).[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 Progrés 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 Committee of Experts' 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 Committee of Experts' engagement with Algeria and Gabon, in which the African Committee of Experts 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 Committee of Experts, 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 of 1994 on equality in marriage and family relations (GR 21).[36] In GR 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 CEDAW Committee General Recommendation 19.

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, 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, para 25.

42 Joint CEDAW/CRC Declaration, 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 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').

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] There is not enough information to determine whether the choice of 'residence' over 'domicile' in the

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 Peoples' Rights (24 April-14 May 2019) para 11.

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 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

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.

52 Freeman, Chinkin & Rudolf (n 51) 235-236.

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 of unwed fathers. This is important because problems in the enforcement of child support obligations arise mostly against unwed fathers or former husbands.

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).

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 family resources.[61] This combined legacy is the basis for laws granting husbands marital power, which

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, Chinkin & Rudolf (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).

61 Armstrong et al (n 33) 342-344. See also Kombo (n 49) 7-11.

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]

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

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, 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, para 23.

65 CEDAW General Recommendation 29, para 37.

66 See CEDAW Concluding Observations Gabon (n 42) para 44(b).

67 CEDAW General Recommendation 29, paras 32, 34 & 35.

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 progress[74] and the inevitable allocation of budgetary, human and other relevant resources.[75]

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

68 CEDAW General Recommendation 21, 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.

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 2005[82] 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 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.

6 through legislation, policies, and other measures. This review is supplemented by CEDAW and the African Committee of Experts 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.

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 Committee of Experts 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.ihrda.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* case[87] 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. 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 Committee of Experts 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) para18.

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.

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 Committee of Experts), 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 Practices[9] 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* Annex A.

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 paramountcy 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, Chinkin & Rudolf (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 Committee of Experts), 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, Chinkin & Rudolf (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), parsa 40-41.

63 See Z Nampewo '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 to 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 Committee of Experts 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 Committee of Experts 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 Committee of Experts 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 marriage[98] 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 Africa Development Cooperation (SADC) 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.

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* Annex A.

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 S*outh 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) T*he UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* 388.

43 S Goonesekere 'Article 15' in Freeman, Chinkin & Rudolf (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 16[51] 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 and others, 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 1 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) *Journal of African Law* 9.

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 Judgment No ECW/CCJ/JUD/11/18 (2018).

103 Para 1. See also *Aminata Diantou Diane v Mali* Judgment No ECW/CCJ/JUD/14/18 (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 (2008); D*orothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v The Federal Government of Nigeria*, Judgment ECW/CCJ/JUD/08/17 (2017).

104 *Mary Sunday* (n 102) para IV.

105 Judgment No ECW/CCJ/JUD/09/22 (*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 the 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 People's 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 People's 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, Zambia[136] 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 violence[140] and human trafficking[141] 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 Code[146] 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) 8.

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) para 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) 8.

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 campaigns[163] 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 CEDAW[169] and the SADC Protocol on Gender and Development[170]

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.

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 2006[11] and the General Assembly Resolution 66/130 on women and political participation[12] 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 Emphasis added.

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, Chinkin & Rudolf (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, Chinkin & Rudolf (n 1) 202.

50 S Wittkopp 'Article 7' in Freeman, Chinkin & Rudolf (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, Chinkin & Rudolf (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 *Centre for Minority Rights Development and Others v Kenya* (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 A*frican 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, Chinkin & Rudolf (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, Chinkin & Rudolf (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 Platform[70] and General Recommendation 23[71] 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, Chinkin & Rudolf (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 retrogress 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, Chinkin & Rudolf (n 1) 201.

84 S Wittkopp 'Article 7' in Freeman, Chinkin & Rudolf (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. My emphasis.

89 *SERAC* (n 87) para 46.

90 As above.

91 S Wittkopp 'Article 7' in Freeman, Chinkin & Rudolf (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, Chinkin & Rudolf (n 1) 216.

94 S Wittkopp 'Article 7' in Freeman, Chinkin & Rudolf (n 1) 217.

95 S Wittkopp 'Article 7' in Freeman, Chinkin & Rudolf (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 Act[114] 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 Act[118] 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 Code[129] 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 J*ournal 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.

Act[144] (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 Bosha (n 134) 103 & 109.

155 Bosha (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.

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_introductory_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 Ouguergouz *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 Draft[13] 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 the1990s 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 Draft[17] 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] he 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 Child[32] (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 Peace[44] 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-bey.ond-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 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 Protocol[72] 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 management[80] 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 regions[82] 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 budgeting[92] 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 above) 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 the Rights of 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.

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, 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 Draft[13] nor the Kigali Draft[14] 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 Aïkoué 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 Committee of Experts) 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 war[52] 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 1997; 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 Tournepiche (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 invitation[75] 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 operations[76] 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 Committee of Experts 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)2.

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 1 is emphatic that women in childbirth[118] and pregnant women[119] 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 1 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 rules[136] 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 conflict[159] 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 acquittanced 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.

* The authors would like to acknowledge the substantive contributions of Jaslika Youth members, Jasmine Wangari and Esther Nyambura Njoroge to the development of this chapter.

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 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 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).
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 and Exploitation in Society (WAVES) and Child Welfare Society in Sierra Leone (CWS-SL) v the Republic of Sierra Leone*, ECOWAS Court of Justice, ECW/CCJ/JUD/37/19, 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 Committee of Experts) 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 Committee of Experts 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 Committee of Experts 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 Committee of Experts 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(e).

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 Committee of Experts 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 Committee of Experts 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 Committee of Experts 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 Committee of Experts 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 Committee of Experts General Comment 5 (n 72) 45-46.

75 See CEDAW Committee General Recommendation 36 (n 71).

76 African Committee of Experts 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 Committee of Experts 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 Committee of Experts 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's 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 typing[98] 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-cameroons-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 Ministere 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-cameroons-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 Committee of Experts and ECOWAS decisions on punitive pregnancy policies

Both the African Court and the African Committee of Experts have had the opportunity to rule on the matter of the exclusion of pregnant schoolgirls. In 2022 the African Committee of Experts 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 *Women against Violence and Exploitation in Society (WAVES) and Child Welfare Society in Sierra Leone (CWS-SL) v Republic of Sierra Leone*, ECOWAS Court of Justice, Judgment ECW/CCJ/JUD/37/19, 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 Committee of Experts had already dealt substantively with the matter and endorsed the decision of the African Committee of Experts.[125]

The African Committee of Experts 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 CRC[129] 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 judgement 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 *ECOWAS Judgment on Sierra Leone* (n 121) 4.

127 *ECOWAS Judgment on Sierra Leone* (n 121) 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.wantedinafrica.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 policy[145] 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 Africa[152] 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, Sao Tome and Principe, 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).