

THE IMPACT OF THE MAPUTO PROTOCOL IN THE DEMOCRATIC REPUBLIC OF CONGO



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1 Introduction

A study on masculinity in the Democratic Republic of Congo (DRC) conducted by the United Nations Entity for Gender Equality and the Empowerment of Women and the Swedish Embassy in the DRC indicated that ‘in the collective imagination of the people interviewed, men are imbued with the characteristics that are associated with a hegemonic view of masculinity’.¹ Both women and ‘men in “subordinate” or

less powerful positions’ are often affected by this negative masculinity.² Women are generally considered inferior to men,³ and the division of labour in the political, administrative, and educational fields is often based on entrenched gender roles, including those that make women good financial managers and individuals who should teach relatively uncomplicated subjects.⁴ Many factors may explain the discriminatory attitudes some members of the Congolese society can have *vis-à-vis* women including women’s historical marginalisation in education and politics as well as by religious and customary practices. At the independence in 1960, the country had one female graduate. This largely stemmed from the reluctance of many families to allow their girls to be exposed to western religious education that may prompt them to rebel against their traditional

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1 Mireia Cano Vinas ‘Gender audit of the Peace, Security and Cooperation Framework for the Democratic Republic of Congo and the Region’ (October 2015) 23 https://www.international-alert.org/sites/default/files/Gender_AuditDRC_EN_2015.pdf (accessed 11 June 2021).

2 Vinas (n 1) 23.

3 JR Oppong & T Woodruff *Democratic Republic of Congo* (2007) 48-50.

4 R Kamidi ‘Du statut de la femme en République démocratique du Congo : rapport d’une réflexion prospective pour un changement pérenne’ (Juin 2015) 11 https://www.eda.admin.ch/dam/countries/count-ries-content/the-democratic-republic-of-congo/fr/Rapport%20SF%20RDC_0409.pdf (accessed 11 June 2021).

marriage and other customary roles.⁵ This was compounded by the ‘missionary ideology’ – schools were owned by Belgian missionaries – which ‘emphasized the differences between the sexes and male superiority’.⁶ As Coquery-Vidrovitch puts it, ‘[t]he girls educated by nuns, were supposed to develop the qualities of docility and sweetness and to practice housekeeping. The goal here was to make them good mothers, prepared to remain in the home and instil Christian values in their children’.⁷

The post-independence conception of women by political leaders and the musical portrayal of women were not anything to desire. Although President Mobutu Seseke who ruled DRC for 32 years recognised the relevance of equal treatment between men and women, he is said to have claimed that ‘it remains to be understood, with all due consideration, that there will always be a boss in every household’.⁸ According to him:⁹

Until proof to the contrary, the boss in our land is the one who wears the pants. Our female citizens should also understand this, accept it with a smile, and with revolutionary submissiveness.

Mobutu was simply exposing a belief shared within the large spectrum of the Congolese society including in the musical sector. Luambo Makiadi, the best Congolese musician of the time, was known for his misogynistic tendencies and objectification of women through

songs and musical commentaries.¹⁰ In the political sphere, Catherine Nzunzi wa Mbombo suggests that women generally serve as instruments for mass mobilisation and stepping stones to achieve the goals of male politicians. They are hardly considered as equal political partners.¹¹ The appointment of female candidates or political leaders tends to camouflage the exploitation of women for statistical or propaganda purposes.¹²

Before the formal occupation of what is today the DRC by the Belgians, women promoted the black consciousness through messianic movement. Some produced visions and prophecies that called for the restoration of the political order distorted by invaders.¹³ The contribution of Dona Beatrice, a prophetess famously known as Kimpa Vita, stood out among many others. She launched a theology of liberation of blacks against Portuguese colonialists in the Kingdom of Kongo in the early 1700s. Kimpa Vita preached a theology centred on ‘Kongo cultural symbolism’ and emphasised on the African roots of Christ and Christianity and incited her fellow blacks to ‘find their roots by rejecting European clothing and values’.¹⁴ Kimpa Vita was burned at the age of 24 under the instigation of Portuguese who saw in her theology, a counter-European hegemony and anti-Catholic Christianity narrative antithetical to colonial business. However, the activism and stamina of Kimpa Vita, a

5 C Coquery-Vidrovitch *African women: a modern history* (1994) 43; GA Matsanza *Résilience ou sursis de l’Etat: l’identité nationale au secours de la RD Congo* (2018) 143.

6 Coquery-Vidrovitch (n 5) 144 113.

7 Coquery-Vidrovitch (n 5) 144. See also C Nzuzi wa Mbombo ‘Le role de la femme politique en République Démocratique du Congo’ in Konrad Adenauer Stiftung (ed) *Femme et engagement politique en République Démocratique du Congo* 68.

8 Coquery-Vidrovitch (n 5) 185-186.

9 As above.

10 L Kengo wa Dondo *La passion de l’Etat: mémoires* (2019) 102-103.

11 Nzuzi wa Mbombo (n 7) 68. PM Mantuba-Ngoma *Les élections dans l’histoire politique de la République démocratique du Congo (1957-2011)* (2013) 41.

12 C Odimba et al *La participation des femmes dans les processus de paix et la prise de décision politique en République démocratique du Congo* (2012) 41.

13 Coquery-Vidrovitch (n 5) 43.

14 As above.

female African messiah, had inspired the creation of numerous nationalist movements within and outside the Kingdom of Kongo.¹⁵

Kimpa Vita's legacy seems to be withering away as women's rights and women's image have broadly worsened off, particularly in the eastern DRC following the protracted armed conflicts in the late 1990s. Most of these conflicts are characterised by acts of sexual violence against women and the weaponization of female bodies for military advantages.¹⁶ The response of the state was initially not robust, especially in the early 2000s. Political leaders were busy trying to end conflicts and reunite the country before they could bring back to the table the issue of accountability for women's rights violations.¹⁷ Numerous public trials against military (officials) and civilian who engaged in sexual violence conducts were held by military and civilian tribunals.¹⁸ Nevertheless, durable solutions to effectively dignify

women, including reparation,¹⁹ mass awareness-raising about women rights, and behavioural/attitudinal change are slow. The adoption of a number of legal instruments, such as the Sexual Violence Acts, the application of the Rome Statute by military tribunals²⁰ and the commitment of the state to align other legislation with international agreements DRC has ratified are part of these efforts to further women's rights.

The explicit recognition and protection of women's rights, first in the 2003 Interim Constitution and then in the 2006 Final Constitution of the DRC, is an important step towards strengthening the legal protection of women's rights at the highest normative level. The 2006 DRC Constitution (the Constitution) emphasises the need to eliminate discrimination against women, protect and promote their rights, ensure their 'equitable' representation at the national, provincial and local levels and to eliminate violence against women and sexual violence in particular. The Constitution directly responds and attempts to prevent the re-occurrence of the historical violence women have been subjected to.²¹ Constitutional provisions act as means to incrementally reform legislation that do not promote equality between men and women and to contribute to the change of attitudes

- 15 E. Descamps 'Kimpa Vita, l'étoile révolutionnaire du Kongo' 7 March 2018 *Jeune Africa* <https://www.jeuneafrique.com/444727/societe/kimpa-vita-lespoir-kongo/> (accessed 15 March 2021).
- 16 See generally United Nations Human Rights Office of the High Commissioner 'Rapport du projet mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre 1993 et juin 2003 sur le territoire de la République démocratique du Congo' (August 2010) paras 529-532 https://www.ohchr.org/documents/countries/cd/drc_mapping_report_final_fr.pdf (accessed 17 March 2021).
- 17 PT Shirambere 'Transitional justice and peacebuilding in the Democratic Republic of the Congo' (2015) 2(2) *Southern African Peace and Security Studies* 49; SP Tunamsifu 'Transitional justice processes in Africa: the case of the Democratic Republic of the Congo' (2018) 4 <https://www.csvr.org.za/project-reports/DRC-Case-Philippe-Tunamsifu.pdf> (accessed 17 March 2021).
- 18 See generally Avocats Sans Frontières *Recueil de jurisprudence congolaise en matière de crimes internationaux: édition critique* (2013) 32 https://asf.be/wp-content/uploads/2013/12/ASF_RDC_JurisprudenceCrimesInternat_201312.pdf (accessed 17 March 2021).

- 19 Discussion with Nzuzi Mambakasa Benny, Deputy Coordinator, National Human Rights Commission, Kwango Province, December 2020, Kinshasa.
- 20 Avocats Sans Frontières (n 18). On the Rome Statute in DRC, see generally, PM Magadju 'Législation congolaise de mise en oeuvre du Statut de Rome: un pas en avant, un pas en arrière' in HJ van der Merwe & G Kemp (eds) *International criminal justice in Africa, 2016* (2016) 165-199; B Kahombo 'The principle of complementarity in practice: A survey of Congolese legislation implementing the Rome Statute of the International Criminal Court' in HJ van der Merwe & G Kemp (eds) *International criminal justice in Africa, 2016* (2016) 204-239.
- 21 2006 DRC Constitution, arts 14 & 15.

towards women in the broader society. The effective participation of women's rights organisations to and their advocacy for women's rights during the 2002 peace and reconciliation process influenced the recognition of women's specific rights in the 2006 Constitution.²² Despite this normative progress, gender equality constitutional norms seem to be floating meaninglessly above the Congolese society for lack of effective implementation as discussed further.²³

This chapter examines the impact of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in the DRC. In what follows, we review the background to and the status of the ratification of the Maputo Protocol, the question of its domestication and incorporation into the legal system, legislative reforms and governmental policy. We also analyse reasons behind the lack of court decisions invoking the Maputo Protocol, the DRC relationship with regional human rights mechanisms, the role of civil society organisations in improving the quality of the implementation of the Protocol, the place of the Maputo Protocol in the legal education as well as the possible role of the National Human Rights Commission. The chapter concludes by arguing that the implementation of the Maputo Protocol is characterized by a certain amount of progress in the legislative area that, however, lacks practical implications. The starting point for understanding this is the tension that the ratification of the Maputo Protocol has

faced in the DRC, as demonstrated below.

2 Background to and status of the ratification of the Maputo Protocol

The DRC signed the Maputo Protocol in December 2003, ratified it in July 2008 and deposited the instrument of ratification in February 2009.²⁴ The ratification was preceded by the parliamentary approval of the Protocol in 2006 and the authorisation to ratify it as contemplated under article 214(1) of the Constitution.²⁵ The government ratified the Protocol two years later, in June 2008.²⁶ The Maputo Protocol was published in the Official Gazette in March 2018.²⁷

The power to negotiate and ratify treaties and international agreements rests with the President of the Republic.²⁸ However, parliament must

22 C Odimba, P-R Namegabe & Julienne Baseke Nzabandora *La participation des femmes dans le processus de paix et la prise de décision politique en République démocratique du Congo* (July 2012) 29

23 See the discussion in section 4 below.

24 Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 22 September 2018).

25 Act 06/015 of 12 June 2006 authorizing DRC to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in *J.O.R.D.C.* (5 June 2018) 5-6.

26 Ratification Table of the Maputo Protocol <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 11 July 2018).

27 Safe2choose 'RDC: Le protocole de Maputo enfin publié au journal officiel' 18 June 2018 <https://safe2choose.org/fr/blog/drc-maputo-protocol-legalization-abortion#:~:text=Le%20protocole%20de%20Maputo%20repr%C3%A9sente,aux%20services%20de%20sant%C3%A9%20reproductive> (last accessed 7 July 2018). For the consequence of the gazetting on the application of the Protocol in the national legal system, see AS Sidibe 'Communication introductive générale' in *Les Cahiers de l'AOA-HJF Les actes du colloque international sur l'application du droit international dans l'ordre juridique interne des Etats Africains francophones* (2003) 54-55.

28 The Constitution of the Democratic Republic of the Congo (n 21) art 213.

approve certain types of treaties such as treaties related to international organisations, those which modify domestic legal provisions and treaties on the status of individuals, before the government can effectively ratify them.²⁹ The procedure is meant to ensure that the international instrument obtains domestic legitimacy through the body on which the Constitution confers the power to make laws and oversee governmental activities.³⁰ The President of the Republic, the Prime Minister, the President of the National Assembly or Senate, one tenth of National Assembly and Senate members may approach the Constitutional Court to review the compatibility of an international treaty, such as the Maputo Protocol, with the Constitution before its approval and ratification.³¹ This review is both procedural; (the Court may review whether individuals involved in the ratification are invested with such powers) and substantive; the Court must examine whether substantive provisions of the treaty are compatible with or contradictory to the Constitution including the Bill of Rights. It is only when the compatibility is confirmed that the treaty can be ratified, otherwise, the constitutional provision in question must be amended to align with the international treaty.³²

29 The Constitution of the Democratic Republic of the Congo (n 21) art 214.

30 The Constitution of the Democratic Republic of the Congo (n 21) art 100.

31 The Constitution of the Democratic Republic of the Congo (n 21) art 216.

32 The Constitution of the Democratic Republic of the Congo (n 21) art 216. This was the case the Treaty on the Organisation for the Harmonisation of Business Law in Africa (OHADA). *Decision R.Const. 112/TSR of 5 February 2010, Requête tendant à obtenir un avis consultatif sur la contrariété éventuelle à la Constitution de certaines dispositions du Traité du 17 Octobre 1993 relatif à l'harmonisation du droit des affaires en Afrique (Ohada)* available at <http://www.la-constitution-en-afrique.org/article-ohada-la-constitution-sacrifiee-47288675.html> (accessed 13 May 2018).

On the ground, the process for ratifying the Maputo Protocol faced resistance, particularly because some religious and political groups believed the Protocol could be used to allow abortion on demand.³³ Those who supported the ratification of the Protocol, mainly activists and organisations protecting women's rights, regarded it as a modern legal instrument that effectively responds to the plight of women in post-conflict situations. Most of its ground-breaking provisions³⁴ on sexual and reproductive rights may reduce the dehumanising effects of sexual violence that were pervasive at the time of ratification. The pertinent provision in point is, for example, article 14(2)(c) which can facilitate women victims of 'sexual assault, rape, incest' perpetrated by national and foreign armed groups and forces to protect their reproductive rights by deciding whether to keep the pregnancy. However, the Catholic Church through its non-for-profit organisations pioneered the resistance on account that faith and culture prevent the suppression of innocent life.³⁵ As a consequence, academics, law students and the large population interested in the Protocol generally place emphasis on the right to safe abortion, regarded as

33 'La R. D. Congo en voie de ratifier le Protocole de Maputo' *Kakaluigi* (25 June 2007) <http://kakaluigi.unblog.fr/2007/06/25/la-r-d-congo-en-voie-de-ratifier-le-protocole-de-maputo/> (accessed 8 February 2020).

34 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 and Lee Journal of Civil Rights and Social Justice* 16.

35 L. Guignard 'Résistances catholiques au protocole de Maputo. Mobilisations et controverses autour de la libéralisation de l'avortement en Afrique' (2017) *Genre, sexualité & société*; 'Kananga? les parents s'insurgent contre le protocole de Maputo' *Radio Okapi* (1 August 2007) <https://www.radiookapi.net/sans-categorie/2007/08/01/kananga-les-parents-s%25e2%2580%2599in-surgent-contre-le-protocole-de-maputo> (accessed 8 February 2020).

pervasive, and put aside some groundbreaking provisions that empower women in the community, for instance in the political sphere.³⁶ The activism against the ratification of the Protocol created a distorted view of what the Maputo Protocol seeks to achieve. This negatively impacted the process for domesticating or incorporating the Protocol in the domestic legal order.

3 Domestication and incorporation

As in any monist country,³⁷ international law in DRC is an integral part to municipal law. However, certain procedural requirements must be met for treaties to be applicable in the domestic system. If taken rigidly, these formalities may hamper the prospects for the Maputo Protocol to make substantive contribution to the DRC legal system. The treaty must 'duly' be ratified and gazetted.³⁸ The last condition which generally does not apply to human rights treaties is the reciprocal application by other member states.³⁹ According to Professor Mampuya, the DRC Constitution allows international treaties to be applicable even if they do not

provide for a subjective right of an immediate effect.⁴⁰ If this view is taken seriously by academics, legal professionals and judges, the Maputo Protocol can be invoked before domestic courts and directly applied by judges.⁴¹ This is hardly the case.

Controversy around the meaning of direct application of international (human rights) law,⁴² and particularly the positivistic/formalistic approach to articles 153 and 215 of the Constitution prompt some scholars to suggest that only self-executing provisions can be directly applicable.⁴³ According to Dugard, one might recognise a self-executing provision when:⁴⁴

the language of the treaty so indicates and existing municipal law, either common law or statute, is adequate in the sense that it fails to place any obstacle in the way of treaty application.

The dominant scholarly position holds that because article 14 of the Maputo Protocol clashes with articles 166 and 167 of the 1940 Congolese Penal Code and other specific legislation, it is neither a self-executing provision nor can it be applied directly by courts and tribunals without any amendment to the Penal Code. This is compounded by attitudes of most Congolese civil judges towards international (human rights) law norms. As Advocate Bampile wa Bampile Fabien suggested, 'Congolese judges hardly resort to international human rights law norms when deciding

36 S Vyas-Doorgapersad & TM Lukamba 'The status and political participation of women in the Democratic Republic of Congo (1960-2010): A critical historical reflection' (2011) 62 *New Contree* 94.

37 M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: An introduction' in Magnus Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 5; B Kahombo 'Présentation du Traité de droit international public du professeur Auguste Mampuya: Regards croisés sur le régionalisme africain' (2016) 19 *Recht in Afrika – Law in Africa – Droit en Afrique* 213-217.

38 The Constitution of the Democratic Republic of the Congo (n 21) arts 153 & 215.

39 The Constitution of the Democratic Republic of the Congo (n 21) art 215.

40 A Mapuya Kanunk'a-Tshiabo *Traité de droit international public* (2016) 488-489.

41 See the discussion in section 6 below.

42 JK Mpiana 'La position du droit international dans l'ordre juridique congolais et l'application de ses normes' (2012), PhD dissertation, University of Sapienza (Roma) 163 (on file with authors).

43 B Kahombo (n 37) 213.

44 J Dugard *International law: A South African perspective* (2016) 57.

over relevant cases.⁴⁵ As it will be argued later, in the unique case where the DRC Constitutional Court had the opportunity to apply the Maputo Protocol, the Court failed to do so.

Substantively, the 2006 DRC Constitution and the Maputo Protocol validly complement each other in protecting women's rights. They offer a robust legal framework for enhancing a culture of women's rights protection that has never existed before in DRC. As the supreme law of the land, the Constitution provides for principles, rules and values based on which subsidiary legislation and the Maputo Protocol can ameliorate the plight of women. The breadth and scope of rights covered under the Maputo Protocol are extensive as compared to the Constitution. This is perhaps understandable since the Protocol is a specific treaty on women's rights. The Constitution provides for equality in rights and dignity and equal protection before the law.⁴⁶ It prohibits discrimination against any Congolese,⁴⁷ particularly women,⁴⁸ and enjoins the state to promote and protect women's rights. Under article 14, the state has, in addition, the following obligations. First, to adopt in different areas including civil, political, economic, social, and cultural spheres, appropriate measures to ensure total blossoming of women and their full participation in the nation's development. Second, to adopt all the measures to combat violence against women both in public and private spheres. Third, to ensure women's equitable representation in

national, provincial, and local institutions. Fourth, to implement gender-parity in all its institutions. The Constitution provides for the adoption of a subsidiary legislation to determine modalities of application of these rights. The Gender Parity Act was adopted nine years after the entry into force of the Constitution. Article 15 strengthens the protection of women's rights by enjoining the state to eliminate sexual violence. Under the Constitution:⁴⁹

any sexual violence committed against any person with the intention to destabilize or to displace a family and to make a whole people disappear is established as a crime against humanity punishable by law.

More than any other previous constitution, the 2006 DRC Constitution devotes two provisions on women specific issues in what seems to be a direct response to violence that women have been historically subjected to. This progressive constitutional framework has prompted some scholars, Muzaliwa among others,⁵⁰ to suggest that the Protocol will make no difference as the rights it provides are already enshrined in the Constitution. This argument is not entirely valid for the specific nature of the Protocol's guarantees are more far fetching than the Constitution. Further, it is hazardous to start pitting legal instruments or their norms against each other since they seek to achieve similar goals. We believe that the extent to which the Constitution and the Protocol both contribute to furthering women's rights and how they do complement each other should be the focus of academic scholarship and debates. Viewed from this angle, the Maputo

45 Interview with Advocate Bampile wa Bampile Fabien, December 2020, Kinshasa.

46 The Constitution of the Democratic Republic of the Congo (n 21) arts 11 & 12.

47 The Constitution of the Democratic Republic of the Congo (n 21) art 13.

48 The Constitution of the Democratic Republic of the Congo (n 21) art 14(1).

49 The Constitution of the Democratic Republic of the Congo (n 21) art 15.

50 KP Muzaliwa 'Publication of the Maputo Protocol in the official gazette: Does it make any difference in Congolese criminal law?' (2020) (on file with the author).

Protocol provides many other rights from which law-makers can learn to improve women's rights. Soft law instruments such as general comments clarifying the normative content of the provisions of the Protocol, concluding observations issued by the African Commission on Human and Peoples' Rights (African Commission) and the jurisprudence of the African Commission and the African Court on Human and Peoples' Rights (African Court),⁵¹ if any, can also be used to clarify the meaning and content of articles 14 and 15 of the DRC Constitution as far as effective protection of women's rights is concerned.

4 Legislative reform

Since the ratification of the Maputo Protocol, the DRC has enacted or amended some legislation that enhance the protection of women's rights. Others maintain the *status quo*. Whilst the link is always not clear whether these revisions are the result of the ratification, what is evident is that new legislation attempts to correct retrogressive practices provided for in some of the previous laws.

4.1 Elimination of discrimination against women

The Gender Parity Act was passed in 2015 to set down different principles determining modalities of application of the parity between women and men recognised under article 14 of the Constitution. The Act recognises the persistent inequality between men and

women. It also explicitly mentions the Maputo Protocol as containing obligations by DRC to adopt legislative and administrative measures to enhance women's rights. It does not explicitly indicate whether its adoption is prompted by the ratification of the Protocol. Nonetheless, as indicated, the adoption of the Act seeks to implement article 14(6) of the Constitution. The Act fosters women's rights in the political, administrative, social, economic and cultural spheres. It prohibits discrimination in the education sector,⁵² professional environment especially towards pregnant women,⁵³ as well as in the judiciary, military and police institutions.⁵⁴ The Act is silent in relation to women's political participation. It does not obligate state organs to ensure that equality between men and women is enforced. It creates governmental institutions tasked with following up the level of its implementation. These institutions encompass the Inter-Ministerial Committee and the National Council of Gender and Parity.⁵⁵ The Inter-Ministerial Committee is composed of ministries of gender, women and family, labour, youth, planning, social affairs, health, education and justice whilst the National Council of Gender and Parity is made of representatives of relevant institutions, ministries and CSOs that promote women's rights.⁵⁶

The Family Code has been amended in 2016 to primarily comply with the Constitution and other international human rights instruments. Its amendment aims to strengthen non-discrimination provisions. In its preamble, the Family Code indicates that the purpose

51 Article 32 of the Protocol provides the following: 'Pending the establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application and implementation of this Protocol.'

52 Articles 10 & 11 of the 2015 Gender Parity Act.

53 Gender Parity Act (n 52) arts 21 & 22.

54 Gender Parity Act (n 52) art 27.

55 Gender Parity Act (n 52) arts 28 & 31.

56 Gender Parity Act (n 52) art 29 & 30.

of the amendment is to align the 1987 Family Code with the country international obligations as enshrined in the International Covenant on Civil and Political Rights, International Covenant on Social, Economic and Cultural Rights, the African Charter on Human and Peoples' Rights (African Charter), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and from the Convention on the Rights of the Child (CRC). Whilst the absence of specific mention of the African Charter on the Rights and Welfare of the Child is understandable,⁵⁷ it is unclear why parliament failed to mention the Maputo Protocol.

Substantively, the Family Code innovates in various respects. Equality between men and women is restored in contractual matters and the prosecution for adultery. Child parenting responsibility and the management of the household are done by spouses on equal footage. The previous code required of women to have their husband's permission before they could enter into contracts.⁵⁸ Spouses are given equal power over their children.⁵⁹ As to the administration of assets, spouses are free to decide who between them will administer assets.⁶⁰ Some of the requirements imposed by the Protocol existed since 1987, long before the entry into force of the Maputo Protocol. These include free consent to marriage⁶¹ with sanctions over parents who coerce a person to get married.⁶² The right of a married woman to use her own name and that of her husband if she wants,⁶³

the preference of monogamy⁶⁴ with sanctions for all forms of polygamy;⁶⁵ intervention of the judge in divorce matters on an equal basis for all the spouses, among others.

4.2 Elimination of harmful cultural practices

The Constitution states that traditions inconsistent with public order cannot be part of the legislation.⁶⁶ The Gender Parity Act outlaws stereotype of any nature in schools.⁶⁷ This law affirms that the government must combat all harmful practices in property rights issues.⁶⁸ The Family Code also forbids harmful cultural practices such as rituals women are forced to undergo following the death of their spouse.⁶⁹ The widow has the right to inherit the property of her deceased husband⁷⁰ and to become the guardian and custodian of her children.⁷¹ The minimum age for marriage is 18 years since 2009, with the adoption of the Child Rights Act.⁷² This has been reaffirmed by the Family Code⁷³ recently revised. The Child Rights Act is also explicit on the prohibition of female genital mutilation. This practice is a crime punishable under this law.⁷⁴

57 It was ratified on 8 December 2020 whilst the Family Code was revised in 2016.

58 2016 Revised Family Code, art 448.

59 Revised Family Code (n 58) art 445.

60 Revised Family Code (n 58) art 490.

61 Revised Family Code (n 58) arts 351 & 334.

62 Revised Family Code (n 58) art 336.

63 Revised Family Code (n 58) art 62.

64 Revised Family Code (n 58) art 330.

65 Revised Family Code (n 58) arts 409 to 412.

66 The Constitution of the Democratic Republic of the Congo (n 21) art 153(4).

67 The 2015 Gender Parity Act art 11.

68 Gender Parity Act (n 67) art 9.

69 The 2016 Revised Family Code arts 541 to 545.

70 Revised Family Code (n 69) art 758.

71 Revised Family Code (n 69) arts 322 & 198.

72 The 2009 Child Rights Act art 48.

73 Revised Family Code (n 69) art 352.

74 The 2009 Child Rights Act art 153.

Further, Sexual Violence Act prohibits and sanction several harmful practices. The DRC Initial Report to the African Commission on the Maputo Protocol notes the following:⁷⁵

... sexual mutilation, exploitation of minors for purposes of debauchery, pimping, forced prostitution, harassment and sexual slavery, forced marriage, slavery, zoophilia, the deliberate transmission of sexually transmitted infections, child trafficking and exploitation for sexual purposes, pregnancy and forced sterilization, prostitution and pornography involving children.

In reality, harmful practices are pervasive in some customary rituals, for example sexual mutilations of girls by the *Ngwaka* tribe, in the north and rapists mutilating the genital parts of their victims.⁷⁶ Some scholars argued that the society does not generally combat traditional practices that dehumanise women and girls.⁷⁷

4.3 Sexual and reproductive rights

The Gender Parity Act introduced some provisions on sexual and reproductive rights. These include the right of women

to choose in agreement with her husband the suitable contraceptive method and the best way of family planning.⁷⁸ The Act also adds that the government is responsible for securing accessible, affordable and even free services for the benefit of pregnant women.⁷⁹

The Act Protecting Persons with and Affected by HIV/AIDS (HIV/AIDS Act) provides for free care to HIV positive individuals.⁸⁰ In addition, the Act has been modified to include the obligation to provide 'information' to the other spouse when the partner has been tested HIV positive. In its previous form, the law obliged the spouse who is found positive to HIV to inform *immediately* their partner. After several discussions during workshops and guided by the first general comment of the African Commission, parliament amended this provision in 2018 to include a reasonable time that the HIV positive spouse must observe before they can inform the other spouse. This is a direct influence of General Comment 1 on article 14(1)(d) and (e) of the Maputo Protocol.

One of the most debated issues about the Maputo Protocol relates to abortion. It is a crime to commit abortion according to the Penal Code which has not yet been modified up to now.⁸¹ It is, however, worth mentioning that the Medical Deontology Rules authorises, since 1970, medical practitioners to carry on abortion in order to save the life of the woman.⁸² The Medical Deontology Rules, the Public Health Principles Act and the Penal Code forbid

75 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 160.

76 Democratic Republic of Congo (n 75) para 159.

77 For a full account for the difficulties facing survivors of sexual violence, see SP Tunamsifu 'The right to justice: A challenge of survivors of conflict-related sexual violence in the Eastern Democratic Republic of the Congo' (2015) 15 *African Human Rights Law Journal* 475-481; S Kitharidis 'Rape as a weapon of war: Combating sexual violence and impunity in the Democratic Republic of the Congo, and the way forward' (2015) 15 *African Human Rights Law Journal* 451-464.

78 The 2015 Gender Parity Act art 13.

79 Gender Parity Act (n 78) 14.

80 Act 8/11 of 14 July 2008 Protecting Persons with and Affected by HIV/AIDS art 11.

81 1940 Penal Code arts 165 & 166.

82 Ordinance 70-158 of 30 April 1970 determining Medical Deontology Rules.

voluntary interruption of pregnancy.⁸³ Exceptionally, the Public Health Principles Act permits ‘therapeutic abortion and eugenic abortion’ to save the life of a woman and where a foetus cannot survive.⁸⁴ The Public Health Principles Act does not include sexual assault, rape or incest as grounds for abortion paradoxically despite the fact that it was adopted nine years after DRC had ratified the Maputo Protocol.

4.4 Education and political participation

The Framework Act 14/004 of 11 February 2014 on National Education System provides for equal access to education. Article 33 explicitly provides that ‘the fight against discrimination and inequality in education aims to provide access to education for vulnerable and disadvantaged groups in the national education system [including] girls and women’.⁸⁵ The DRC report to the African Commission notes the following progress achieved in ensuring the right to education:⁸⁶

the public authorities have taken measures to ensure gender equality in education, the major ones focus on: (i) elimination of obstacles impeding access to school by girls and boys (ii) strengthening the presence and maintenance of girls and women in higher education (sciences, mathematics and technology), (iii) reduction of the gap between men and women in basic functional literacy, and (iv) elimination of obstacles preventing the enrolment of adolescent pregnant girls.

In the political sphere, the Constitution and the Gender Parity Act provide for the equitable representation of women in local, provincial and national institutions.⁸⁷ Political parties are called to take into account the principle of parity between men and women when presenting their candidates at national and local elections.⁸⁸ The Act further indicates that political parties that do not observe this rule will not receive any funding from the government.⁸⁹ Since the government in practice does not fund political parties activities and campaigns, it is hard to measure whether this provision will have any practical impact whatsoever. Importantly, the General Electoral Law as last amended in 2017 attempts to ensure that political parties present female candidates to elections. It provides under article 13 that lists of political parties to elections must have both female and male candidates. Ironically, article 13(2) of the General Electoral Law indicates that the absence of one of the two genders does not render the list invalid. Those who support article 13(2) argue that female commitment to political affairs in DRC is volatile. To obligate political parties to have female candidates can prevent the participation of other political parties as it is difficult to find female candidates. The law must not be rigidly prescriptive about the number of women to be included on the list. In an almost formalistic ruling following a petition challenging the constitutionality of the Act, the male-dominated Constitutional Court⁹⁰ observed in 2018 that article 13 of the electoral law was not inconsistent with article 14 of the Constitution on

83 The Public Health Principles Act 18-035 of 13 December 2018 art 85.

84 The Public Health Principles Act (n 83) art 86.

85 Framework-Act 14/004 of 11 February 2014 on National Education System art 33.

86 Democratic Republic of Congo (n 75) para 139.

87 Gender Parity Act (n 52) art 4(2).

88 Gender Parity Act (n 52) art 5.

89 Gender Parity Act (n 52) art 33.

90 At the time the Constitutional Court issued the decision, it was composed of nine male judges. Since 2020, one female judge has joined the bench.

women political empowerment. According to the Constitutional Court,⁹¹

... gender equality cannot be conceived of either in arithmetic terms or as a mathematical equation, with regard to equal opportunities between men and women, and secondly that commitment to political parties are free so that the number of women and men actually engaged in the life of political parties is likely to vary from one political party to another and could not be foreseen in advance to render inadmissible lists which would not provide a determined number of seats for women.

This ruling along with the regressive amendment to the electoral law and the inability of political parties to empower women candidates are simply the emerging part of the iceberg of the widespread male chauvinism in the Congolese society and the unpreparedness of male politicians to have their female colleagues as equal partners. As Makunya argued elsewhere, 'in past elections, some female candidates were removed from party lists and replaced by male candidates'.⁹² There is also an increasing political activism by female leaders. This sorry tale tells us more about the societal commitment to ensuring effective

participation of women in the political process and the manner in which laws continue to be used to maintain the *status quo ante* instead of being progressively construed in a way that encourage women participation and hone their rising political activism with effective legal tools. Article 14 of the Constitution and article 9 of the Maputo Protocol already provide sufficient normative framework that can be utilised to counter regressive behaviours and religious and cultural practices.⁹³ Unless these provisions are taken seriously by both the judiciary, in particular the apex court in constitutional matters and political institutions, the Constitution and the Maputo Protocol will not be worth the paper they are written on.

Available data on women's political participation suggests that the state has not done much to boost the participation of women in the political sphere. During the presidential elections, in 2006, there were four female candidates, none in 2011⁹⁴ and one female candidate in 2018. Women made only 8.4 per cent (42 women) of 500 elected members of the National Assembly in 2006, while 4.6 per cent were elected the same year in the 108 seats Senate. At the provincial level, 43 women were elected as members of the 11 provincial assemblies in a total of 632 seats in 2006. Women's representation in the National Assembly did not improve much in 2018 as compared to the Senate. Currently, the National Assem-

91 Decision *R.Const.* 624/630/631 30 March 2018. The original French reads: '*La Cour considère que l'incise de l'article 13 visé au moyen trouve son explication non point dans une volonté de compromettre le principe de la promotion de la femme proclamé par le constituant, mais uniquement, d'une part dans le fait que l'égalité genre ne peut se concevoir ni en des termes arithmétiques, ni en une équation mathématique, s'agissant d'une égalité de chances entre l'homme et la femme, et d'autre part par le fait que l'engagement dans les partis politiques est libre, en sorte que le nombre de femmes et d'hommes effectivement engagés dans la vie des partis politiques est susceptible de variation d'un parti politique à un autre et ne peut être maîtrisé en amont pour justifier l'irrecevabilité de toutes listes qui n'auraient pas prévu un nombre déterminé de sièges aux femmes*'.

92 TM Makunya 'Beyond legal measures: A review of the DRC's initial report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2023) 67(1) *Journal of African Law* 10.

93 Discussion with Djafari Ramazani, Monitoring Department, National Human Rights Commission, December 2020, Kinshasa.

94 Alternative report to the Committee Against Discrimination 'Rapport sur les violences contre les femmes au Nord et Sud-Kivu, en République Démocratique du Congo' 5, available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/COD/INT_CEDAW_NGO_COD_13432_F.pdf

bly has a total of 50 women members of parliament (10 per cent) whilst the Senate quadrupled women's representation from five to 20 senators (20 per cent).⁹⁵ The government (cabinet) has been unequally constituted since the dawn of democracy in 2006 although 17 per cent of women (12 female ministers out of 67) were appointed in 2019. Twenty two out of 26 provincial governors are male.⁹⁶

Some have suggested that women willing to embark on a political journey 'must be serious about their political engagement, demonstrate technical know-how and be competent'.⁹⁷ However, Léonie Kandolo, women's rights activist, responds that 'there are many competent and expert women in the country'.⁹⁸ The key to women political success, observes Inès Kayakumba, includes the following:⁹⁹

women must [...] have an intellectual background and wisdom, because the political world is very cruel. Moreover, they must show stability to have homeostasis in politics. Also, they must apply strategies that will allow them to resist in this world.

Rachel Wamulu, female journalist, makes observations along these lines:¹⁰⁰

Congolese women must work hard, trying to show what they are capable of. Those who have embraced a career should not demand parity in the media. Rather, they must show that politics is not the preserve of men.

Horxis Boongo, female student at the University of Kinshasa, believes that:¹⁰¹

[t]o emerge in politics, Congolese women must first banish their femininity and not behave like the Congolese women of the 1960s. Clearly, they must not consider themselves as naturally weak. Above all, they must not underestimate themselves or believe that there are activities reserved only for men, such as politics.

Some of these testimonies seem to illustrate a deep belief that women need to prove themselves before they can be entrusted with public office role; that women are 'naturally' weak and that there is the necessity to be more demanding towards women. Men hardly go through the same scrutiny whilst incompetent, corrupt and uneducated male politicians are not difficult to find in the Congolese political sphere.¹⁰² These comments often ignore that historical marginalisation, cultural stereotypes, discrimination fuelled by religious practices, the objectification women have been subjected to, may down the line develop an unconscious belief by both men and women about female inferiority.¹⁰³

95 D Mangali 'Elections : la participation des femmes au Sénat passe de 5 à 20%' (2019) 42 *Journal du Citoyen* 2.

96 G Tshijuka 'Elections des gouverneurs : les femmes de moins en moins dans la course!' *Digital Congo* 19 February 2019 <https://www.digitalcongo.net/article/5c6c21a16f6d3c00044d732b/> (accessed 17 March 2021).

97 J Mpitu 'Que pensez-vous de l'émergence de la femme en politique en RDC?' (2019) 42 *Journal du Citoyen* at 3.

98 Radio France Internationale 'RDC: des femmes réclament un futur gouvernement plus paritaire' 27 May 2019 <https://www.rfi.fr/fr/afrique/20190527-rdc-femmes-reclament-parite-futur-gouvernement-ong> (accessed 15 March 2021).

99 Mpitu (n 97).

100 Mpitu (n 97).

101 Mpitu (n 97).

102 Observatoire de la parité de la République démocratique du Congo 'Elections gouverneurs' *Débout congolais* <https://deboutcongolais.org/elections-gouverneurs-7-gouverneure-0/> (accessed 17 March 2021).

103 As above.

5 Governmental policy reform and formulation

5.1 The 2019 governmental programme

The Prime Minister presented to the National Assembly a programme which focuses on 15 pillars in 2019. Amongst all these pillars, two are of interest to the implementation of provisions of the Maputo Protocol: pillars 13 (fighting poverty and social marginalisation) and 14 (women's autonomy and promotion of the youth).

With the 13th pillar, a presidential programme¹⁰⁴ has been put in place to reduce, in a short time, disparities in sustainable human development in rural areas of the country.¹⁰⁵ This programme is motivated by the lack of tangible success from the former three strategic plans on poverty reduction.¹⁰⁶ Poverty affects 63,9 per cent of the population. Three women out of four (75,6 per cent) are poor whereas one man out of two (51,5 per cent) is poor.¹⁰⁷ This programme will help women to access microfinance,¹⁰⁸ access education in a proportion of 40 per cent;¹⁰⁹ actively be involved in agriculture¹¹⁰ and to benefit from the creation of work.¹¹¹ Although a focus is manifestly put on women, the presidential programme does not mention the ratification of the Maputo Protocol as a motivation to establishing this policy. However, the policy shows

104 Présidence de la République 'Programme présidentiel accéléré de lutte contre la pauvreté et les inégalités (PPA LCPI), Document de programme' (2019) 19, para 26 www.presidentcerdc.cd (accessed 31 January 2021).

105 Présidence de la République (n 104) para 40.

106 Présidence de la République (n 104) para 38.

107 Présidence de la République (n 104) para 18.

108 Présidence de la République (n 104) para 55.

109 Présidence de la République (n 104) para 62.

110 Présidence de la République (n 104) para 68.

111 Présidence de la République (n 104) para 97.

that it seeks to comply with the requirements set forth in CEDAW ratified in 1986.

Pillar 14 seeks to improve women autonomy. The government intended to enable women to participate in the political and economic decisions making; to invest in educating young girls; and establish an environment where women will be autonomous (especially rural women) as a means to achieve inclusion and sustainable growth. The government managed to implement its free access to primary education for both boys and girls. Members of the National Assembly accused the government of having failed to improve social conditions of people including women. In a nutshell, the programmes established by the government were short-lived and did not have significant impact.

5.2 Action and strategic plans

Many action and strategic plans have been adopted by previous governments in different sectors. Only a few relate to the implementation of substantive provisions of the Maputo Protocol.

5.2.1 Gender strategic and action plans

Two documents are worth mentioning. The first is the National Action Plan II on the United Nations Security Council Resolution 1325 (2019-2022) published in September 2018.¹¹² This document aims to promote 'a secured environment which guarantees an equitable implica-

112 Ministère du Genre, de la Famille et de l'Enfant, 'Plan d'Action National de la mise en œuvre de la Résolution 1325 du Conseil de Sécurité des Nations Unies, sur les femmes, la paix et la sécurité IIème génération 2018 - 2022' (September 2018). Discussion with Christian Mupika, civil servant, *Maison de la Femme*, Goma (26 January 2021).

tion of women, men and the youth to peace building efforts in DRC'.¹¹³ The ongoing National Action Plan is based on an evaluation of the previous plan adopted in 2010. The plan notes that armed conflicts still exist; sexual violence against women continue to be perpetrated whilst the state meets with some difficulty to punish the perpetrators.

To improve women's rights, the policy establishes four priority areas of actions: 1) Participation (by increasing the number of women in the sphere of decision-making); 2) Prevention (of all forms of women's and girls' rights violations); 3) Protection (of women's, girls' and other vulnerable groups' rights in a context of armed conflict or not); and 4) the Implementation of programs geared towards uplifting women and girls.¹¹⁴ Government institutions are established to follow-up with the implementation of the National Action Plan II. They encompass key ministries, a representative of the President of the Republic, representatives of United Nations agencies, national and international non-governmental organisations. The National Action Plan II mentions the Maputo Protocol among regional human rights instruments ratified by the DRC.

5.2.2 *The Revised National Strategy against Gender Based Violence*

This document was developed by several actors to improve the previous Strategic Plan adopted in 2009 which had demonstrated some weaknesses.¹¹⁵ The 2009 Strategic Plan focused on sexual violence in the context of armed

conflict, especially in the eastern DRC. The current strategic plan encompasses all types of gender-based violence in all the 26 provinces of the country.¹¹⁶ It has seven components, 29 results to achieve (strategic axes) and 128 activities to put in place in the coming five years.¹¹⁷

The strategic plan shows that despite all the progress made through the legislative reform, there still are problems on the ground. For instance, as regard to forced marriages, the proportion of women between 20 to 24 years old who enter into marriage before the age of 15 years and 18 years is respectively of 8 per cent and 29 per cent,¹¹⁸ many of them are from rural areas.

The Strategic Plan II has put in place a well-coordinated structure to do follow-up on activities unlike the 2009 strategic plan.¹¹⁹ Among other challenges to overcome, the strategic plan notes the inclusion of gender based approach in development programs and proposals; effective application of existing laws (fighting impunity, inefficacy of the judicial system, facilitate access of victims by removing financial barriers to enable victims filing a case in courts and tribunals, provide for well-trained lawyers, enhance the system of compensation or reparations).¹²⁰

113 As above.

114 Ministère du Genre, de la Famille et de l'Enfant (n 112) 19-23.

115 Ministère du Genre, de la Famille et de l'Enfant 'Stratégie nationale de lutte contre les violences basées sur le genre révisée (Revised SNVBG)' (December 2019) 15 (on file with authors).

116 Ministère du Genre, de la Famille et de l'Enfant (n 115), 11.

117 As above.

118 Ministère du Genre, de la Famille et de l'Enfant (n 115), 19.

119 Ministère du Genre, de la Famille et de l'Enfant (n 115), 22-23.

120 Ministère du Genre, de la Famille et de l'Enfant (n 115), 23-27.

6 The lack of court decisions invoking the Maputo Protocol

Broadly speaking, Congolese civil courts and tribunals do not rely on international law.¹²¹ Even when some lawyers attempt to draw judges attention to international human rights instruments, they generally remain less inclined to rely on them.¹²² A study on the application of international law in domestic litigation confirmed the reluctance of most African civil law judges to rely on international human rights law norms.¹²³ This can be attributed to the formalistic approach through which judges view international law norms and the ignorance of the existence and the content of certain human rights instruments by lawyers and judges. Most judges have not realised that at any time of global history, the internationalisation of most branches of the law including constitutional, administrative and criminal law requires of them to be flexible and to resort to norms that can help them clarify the meaning and nature of rights they are dealing with. Advocate Defi-Augustin Fataki wa Luhindi, Senior Counsel at the Court of Cassation, Professor Pacifique Magadju, and Bienvenue Malyabwana, Judge President at the *Tribunal de Grande Instance* of Bukavu, noted the difficulty by judges to rely on international instruments whether counsels have raised them or not. However, Bienvenue Malyabwana noted that one prosecutor had issued an order to approve the abortion by a victim of

rape. This is clearly an implicit and positive influence of the Maputo Protocol although it is not a judicial decision *per se*. We also identify one decision where the tribunal mentioned the African Charter in passing.¹²⁴ A petition challenging the constitutionality of the Public Health Principles Act, particularly in relation to its abortion related provisions, is pending before the Constitutional Court. This will be a good litmus test to appreciate the extent to which the Constitutional Court may rely on or give effect to the Maputo Protocol provisions.

7 Relationship with African human rights mechanisms

7.1 State reporting¹²⁵

Although, the DRC is lagging behind with its reporting obligations – the country has not submitted three reports (2015 to 2021)¹²⁶ – it is nonetheless among the few countries that have submitted their initial report pursuant to article 26(1) of the Maputo Protocol and 62 of the African Charter. Its initial and combined report which covers the period between 2005 and 2015 was considered at the African Commission's 61st ordinary session organised from 1 to 15 November 2017 in The Gambia. However, at the time of writing the African Commission has issued concluding observations, but they have not been made public yet,

121 A number of decisions from military courts and tribunals have relied on the Rome Statute. See *Avocats Sans Frontières* (n 18).

122 TGI/Bukavu, 30 décembre 2006, RP 11133/CD, *Ministère public et partie civile Madame Cibalonza M'Rwambika c. Madame Sikuzani M'balole* REJUSCO (February 2010). Discussion with Senior Counsel Defi-Augustin Fataki wa Luhindi, senior advocate at the Court of Cassation.

123 Killander & Adjolohoun (n 37) 6.

124 For example, CSJ (Section Administrative) 2 November 1990 *Affaire Panzu Mavinga Pelot; Kandi Makwala v Banque du Zaïre* Arrêt RA 236 *Bulletin des Arrêts de la Cour Suprême de Justice, Années 1990 à 1999*, Kinshasa, Editions du Service de Documentation et d'Etudes du Ministère de la Justice (2003) 40-44.

125 This section draws extensively from T Makunya (n 92).

126 Democratic Republic of Congo <https://www.achpr.org/states/statereport?id=114>.

over four years after the consideration of the report.¹²⁷

The report follows the formal requirements enshrined in the 2009 Guidelines on the elaboration of reports: in part B, the report presents the process of its preparation – which included state institutions, United Nations relevant agencies and non-governmental organisations specialised in the protection and the promotion of women's rights, the background information and the implementation of the provisions. The development of the report benefited from international support.¹²⁸ Its successful drafting may be the result of a number of promotional visits undertaken to DRC,¹²⁹ and technical supports,¹³⁰ by the African Commission, in particular the mission conducted in 2016.¹³¹

There are a number of issues that can be flagged out. First, the report is unclear as to the type of CSOs that were involved in its drafting and whether organisations based in provinces and

active in rural areas were also represented. It also does not indicate the type of subject these organisations are specialised in to ensure for example that organisations specialised in the protection of indigenous women, women with disability, internally displaced women, among others, were represented. Second, while the development of the report attempted to be inclusive, some members of civil society organisations and independent institutions involved in its development claimed they were not involved in its validation. In a sense, the drafting and the validation of the report were not as inclusive as they appeared. The trend among state representatives in the drafting committee to remove information that may jeopardise the 'image' of the country may have prompted the Inter-Ministerial Technical Committee for the Preparation and Monitoring of Initial and Periodic Human Rights Reports to adopt and submit the report without seeking the validation by CSOs.¹³²

7.2 Communications

Since the ratification of the Maputo Protocol, no national or international organisation has approached the African Commission against DRC on grounds that it violated the Protocol. Even if such road was to be taken, the DRC does not generally participate in proceedings when communications are filed against it before the African Commission. There is no clear evidence that the DRC has complied with recommendations issued by the African Commission in cases against it. In *Interights, ASADHO and Madam O. Disu v Democratic Republic of Congo*, the African

127 43rd Activity Report of the African Commission on Human and Peoples' Rights, para 18 http://www.achpr.org/files/activity-reports/43/43rd_activity_report_eng.pdf (accessed 26 September 2018). These concluding observations have not been adopted at the time of the writing of this chapter. It has been suggested that the DRC delegation had not responded, in time, to written questions posed by the African Commission.

128 Democratic Republic of Congo (n 75) paras 33-34.

129 The Commission undertook missions in 2011 and 2016 and the issue of reporting was discussed including the technical support the country needed for such a process.

130 The technical support by the then Commissioner in charge of monitoring the promotion and protection of human rights in the DRC and Special Rapporteur on Human Rights Defenders in Africa, Reine Alapini Gansou, was acknowledged in the report.

131 'Press release on the promotion mission of the African Commission on Human and Peoples' Rights to the Democratic Republic of Congo (6-12 August 2016)' 14 August 2016 <http://www.achpr.org/press/2016/08/d310/> (accessed 26 September 2018).

132 Discussion with one of the legal experts, National Human Rights Commission, December 2020 (Kinshasa).

Commission *urgently* requested in November 2013 the DRC to re-open and review a case on the conviction of over 130 individuals for the assassination of former President Laurent-Désiré Kabila 'in strict compliance with human rights [fair trial related] standards at least for persons still in detention'.¹³³ The DRC neither participated in proceedings, nor did it comply with the recommendations. The pattern of the absence of state submissions, effective engagement with the African Commission and compliance with its recommendations may be observed in other cases including *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo* (2017),¹³⁴ *Marcel Wetsh'Okonda Koso and others v DRC* (2008); *Mr Kizila Watumbulwa v Democratic Republic of Congo* (2012),¹³⁵ *Dino Noca v Democratic Republic of Congo* (2012),¹³⁶ *Maître Mamboleo M. Itundamilamba v Democratic Republic of Congo* (2013 in relation to admissibility)¹³⁷ and *Albert Bialufa Ngandu v Democratic Republic of Congo* (2016). This situation may discourage individuals and organisations seeking remedies before regional human rights from doing so.

The DRC deposited the instruments of the ratification of the Protocol to the African Charter on the Establishment of an African Court on Human and

Peoples' Rights but had not made the Declaration under article 34(6) to allow NGOs and individuals to lodge petitions against it. Whilst civil society organisations and potential victims of women's rights violations may indirectly access the Court via the African Commission, the reluctance by the latter to refer cases before the Court does not provide much hope that this alternative route can be utilised.¹³⁸

7.3 Special mechanism and promotional visits of the African Commission

As stated above, the development of the DRC initial report benefited from and was boosted by the African Commission's promotional visit. This visit was conducted in 2016 by the DRC country rapporteur and Special Rapporteur on Human Rights Defenders in Africa. She supported 'the training of multi-sectoral experts engaged with the task of data collection and drafting of the State Report'.¹³⁹ During the African Commission 2016 promotion mission, the delegation noted the¹⁴⁰

commitment of the authorities to ensure that the country meets its obligation to submit periodic reports on the status of implementation of the Charter and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, under Article 62 of the Charter and Article 26 of the Protocol.

133 *Interights, ASADHO and Maître O. Disu v République Démocratique du Congo* Communication 274/03 et 282/03, para 89(b).

134 *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo* 393/10 (2017).

135 *Mr Kizila Watumbulwa v Democratic Republic of the Congo* 285/04.

136 *Dino Noca v Democratic Republic of the Congo* 286/04 (2012).

137 I Derek et al 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: revisiting the Endorois and the Mamboleo decisions' (2018) 2 *Annuaire africain des droits de l'homme* 418.

138 See generally F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67(1) *International & Comparative Law Quarterly* 75-80.

139 *Democratic Republic of Congo* (n 75) para 83.

140 Press release on the Promotion Mission of the African Commission on Human and Peoples' Rights to the Democratic Republic of Congo (6-12 August 2016) 12 August 2016 <https://www.achpr.org/pressrelease/detail?id=125> (accessed 16 March 2021).

The Commission further called on the state to submit its overdue report. It can be suggested that these missions contributed to exerted indirect pressure on the state which led to the submission of the report in 2017.

8 The role of civil society organisations in improving the implementation of the Protocol

Several non-governmental organisations raise awareness about rights provided under the Maputo Protocol. They complement the role of government institutions in educating people on women's rights. Even though the Protocol provides for many rights, sensitisations and discussions are centred around article 14 of the Protocol which is the subject of controversies. CSOs have established a coalition named '*Coalition grossesse non désirée*' (CGND) to coordinate their actions aimed at implementing the Maputo Protocol such as awareness raising, advocacy and field activities. These organisations militated for the adoption of legislation which strengthens the protection of women's rights including the Gender Parity Act, the revised Family Code as well as the HIV/AIDS Act.

Despite some resistance by members of parliament, the CGND conducted a robust campaign which led to the ratification of the Maputo Protocol and its subsequent publication in the national gazette.¹⁴¹ On the ground, NGOs distributed copies of the Protocol to judges and other judicial officers. Significantly, the President of the Superior Council of the Magistracy (CSM) and enjoined judges to rely directly, when necessary, on article 14 of the

Maputo Protocol.¹⁴² This decision was met with some resistance from judges who believed that the CSM was not empowered to give directives on the law applicable to legal matters since such a power is vested with the legislature. This highlights the relevance of a parliamentary Act incorporating the Maputo Protocol into the domestic legal order.

CSOs generally rely on the expertise of legal professionals during awareness campaign with community leaders. The recommendation to revise the HIV/AIDS Act to ensure confidentiality of one's own HIV status *vis-à-vis* the spouse emerged from these forums. This recommendation was inspired by General Comment 1 of the African Commission. In a nutshell, the close collaboration between NGOs and human rights experts ensures that the former is significantly aware about the nature and extent of women's rights protection as provided under the Maputo Protocol and clarified by the African Commission's general comments.

A few organisations directly provide healthcare services to women. Since 2009, Care International launched a programme named 'Uzazi bora' (Better parenting) and Supporting Access to Family Planning Post Abortion Care (SAFPAC). Between 2019 and 2020, over 531 women received post abortion care and 80 per cent of them were willing to use contraceptive methods that were suggested to them. These actions are aimed at saving lives since, as Care International explains, non-safe abor-

Supporting Access to Family Planning Post Abortion Care Project at Care International (February 2021), Goma.

142 Circulaire 04/SPCSM/CFLS/EER/2018 du 06 Avril 2018 relative à la mise en exécution des dispositions de l'article 14 du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux droits de la femme en Afrique.

141 Discussion with Dr Bergson Kakule, programme Manager & Quality Advisor

tion remains one of the main causes of maternal deaths. Currently, NGOs and the government are developing medical norms which will facilitate care givers to provide safe and medicalised abortion.

9 The Maputo Protocol in legal education¹⁴³

The curriculum of law schools includes courses on some aspects of human rights. In the final (fifth) year, law students are taught a human rights devoted course. The 45 hours, three credits course does not have a standardised content thereby providing some room to the lecturer to design the content of their course. This comes with some disadvantages. Lecturers interested in and familiar with domestic public law related matters (constitutional and administrative law) tend to teach only the Bill of Rights. They leave aside regional and global protection of human rights. Others attempt to combine the two aspects with the relative consequence that a lecturer familiar with the international human rights system will not devote significant time to the Bill of Rights. An approach that combines the two levels is generally the best but requires the existence of well-trained lecturers in both domestic and international protection of human rights. At the University of Goma (eastern DRC), since 2012, the teaching of human rights includes an overview of international human rights law. The lecturer examines specific women's rights especially

when dealing with rights of vulnerable groups. They introduce the meaning and content of general comments during discussions related to the sources of international human rights law. Decisions by the African Court and the African Commission are equally discussed with students. This approach is not the same everywhere. Certain lecturers, especially those educated in European universities or African universities with less exposure to the African human rights system, pay more attention to the protection of human rights at the United Nations and the European Court of Human Rights levels during their teachings. Consequently, students, who later become advocates, judges and prosecutors graduate with an insignificant, if any, knowledge of the regional and sub-regional human rights protection mechanisms.¹⁴⁴ This may be one of the root causes of the lack of reliance on the Maputo Protocol in domestic litigation.

It is worth mentioning that since 2016, some aspects of women's rights are dealt with in various courses. The course on 'Gender and development' was introduced in the legal education curriculum for first year students. Another course that was introduced in the curriculum is 'Child Protection'.¹⁴⁵ This course is taught in the third year of law and is compulsory for 60 hours (4 credits). The lecturer has an opportunity to discuss issues such as forced marriage, female genital mutilation,

143 At the time of writing, the DRC had yet to introduce reforms in legal education. With the advent of the *Licence-Master-Doctorat* education system, undergraduate students now have the opportunity to study human rights in various courses up to 207 hours. At the Master's level, specialised human rights courses have been instituted including a specialised master in human rights. The system started to operate in 2022.

144 KK Bindu & T Makunya 'Bringing the African human rights system into classrooms: Some lessons drawn from a lecture delivered at the Université Libre des Pays des Grands Lacs (DR Congo)' *AfricLaw* (4 February 2019) <https://africlaw.com/2019/02/04/bringing-the-african-human-rights-system-into-classrooms-some-lessons-drawn-from-a-lecture-delivered-at-the-universite-libre-des-pays-des-grands-lacs-dr-congo/> (accessed 17 March 2021).

145 Note circulaire 032/MINESU/CABMIN/TMF/12/10/2016 du 12 octobre 2016.

cultural practices that endanger children's rights. However, these legal issues may be taught from an international human rights or municipal law perspective. The lecturer seems to have much room to decide their own perspective. Touching upon the Maputo Protocol will thus depend on whether lecturers rely on international law and understand regional and global dynamics surrounding the protection of children and gender related rights.

10 The role of the National Human Rights Commission

The National Human Rights Commission (CNDH) has a robust human rights mandate¹⁴⁶ that can be used to enhance the implementation of the Maputo Protocol and ensure compliance with concluding observations, if any, delivered by the African Commission.¹⁴⁷ The fact that it enjoys affiliate status with the Commission is an opportunity to raise women's rights issues in the African Commission sessions and learn from the way other national human rights institutions contribute to improving the quality of the implementation of the Protocol. The then CNDH President, Advocate Mwamba Mushikonke admits that although the CNDH generally participates in the African Commission sessions, it has not filed a petition. In a training session organised by the Network of African Human Rights Institutions in Kinshasa (December 2020) participants invoked reasons such as the lack of familiarity with regional human rights mechanisms and proce-

dures before them as some of the reasons why the CNDH has not meaningfully engaged with the African Commission, including on matters related to the Maputo Protocol. Nonetheless, the CNDH participated in the preparation of the 2017 DRC state report submitted to the African Commission. Alidor Kazadi Alika, a member of the CNDH, notes the following:¹⁴⁸

the government must harmonise legislation to be consistent with the Maputo Protocol. The CNDH should engage with human rights organisations to increase sensitization, organise sessions to increase the knowledge of men and women about their rights and conduct advocacy to ensure the teaching of human rights at the secondary school level.

This wish is echoed by Mundumbu Chantal, then Deputy Rapporteur of the CNDH. She notes that 'there is a need for intensified awareness raising campaign. We must ensure that fund is raised for the reparation of rape cases'.¹⁴⁹

11 Conclusion

The road to implementation of the Maputo Protocol in the DRC is characterised by some progress made in the adoption of legislation – chief among them is the Constitution – that fairly and in theory protect specific aspects of women's rights but hardly have practical impact. Theoretical improvements in the legal framework for the protection of women's rights which also includes the ratification and the gazetting of the Maputo Protocol cannot be expected on

146 Article 6 of Act 13/011 of 21 March 2013 on the CNDH.

147 On the CNDH, see generally B Kahombo 'The Democratic Republic of the Congo's National Commission on Human Rights' in CM Fombad (ed) *Compendium of documents on National Human Rights Institutions in eastern and southern Africa* (2019) 101-265.

148 Interview with Alidor Kazadi Alika, member of the DRC CNDH, Kinshasa, December 2020 (notes on file with authors).

149 Notes taken during a December 2020 training session of members of the DRC CNDH, Kinshasa (on file with authors).

its own to improve practical realities in which women live. This is partly because women discrimination is deeply rooted in religious, cultural and political practices which hardly perceive women as equal partners and perpetuate a common belief that women must prove themselves before they can be entrusted with public affairs. What has been progress in theory must thus be honed with robust awareness campaigns geared towards changing the behaviours, attitudes and perceptions of religious leaders, politicians and the community in general towards women. This is of utmost importance since institutions established to monitor the implementation of relevant domestic and international legal instruments protecting women are composed of men and women who may still hold regressive attitudes and perceptions towards women and fail to ensure appropriate transformation. There are many instances of indirect influence of the Maputo Protocol on existing legal framework and institutional practices such as the permission granted by the prosecutor in one case so that the victim of rape could abort and the amendment of the HIV/AIDS Act to conform to the African Commission's General Comment 1. This chapter has demonstrated the low level of engagement with regional human rights bodies, in particular the African Commission. This implies that a serious advocacy campaign is needed to change mindsets at all levels of public and private spheres.