

Article 24

Special protection of women in distress

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- The States Parties undertake to:
- (a) ensure the protection of poor women and women heads of families including women from marginalised population groups and provide an environment suitable to their condition and their special physical, economic and social needs;
 - (b) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

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1 Introduction

Article 24 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is entitled: 'Special protection of women in distress'. There is very little academic writing on the importance, significance, or implementation of article 24. Therefore, this chapter aims to shed some light on the meaning of article 24 and explore how the article might be used more effectively to advance women's rights within states that have ratified the Protocol. To date, scholars and activists have not fully explored the potential of article 24, which functions as a 'catch-all' provision protecting women from marginalised groups or other women who require special consideration of 'physical, economic, and social needs'.

Beginning in the 1980s, researchers increasingly found that poverty around the world was becoming 'feminized.'¹ By the time the African Union (AU) adopted the Maputo Protocol in 2003, it was widely recognised that, worldwide, women were more likely to live in poverty than men.² This held constant

1 VM Moghadam 'The feminization of poverty in international perspective' (1998) 5 *Brown Journal of World Affairs* 225; RE Figura 'An end to poverty through microlending: an examination of the need for credit by poor, rural women and the success of microlending programs' (2002) 8 *New England Journal of International & Comparative Law* 157.

2 Figura (n 1) 157.

regardless of how poverty was measured. In low- and middle-income countries, women were more income-poor than men and lagged in metrics of well-being, such as health, nutrition, and education.³

In sub-Saharan Africa in the early twenty-first century, the incidence of poverty was greater than anywhere except for parts of South Asia.⁴ Africa led the world in both the depth of poverty and vulnerability to poverty.⁵ As elsewhere, women in Africa were more likely to live in poverty and experience poverty differently than men, particularly in rural areas. Lacking marriage, property, and inheritance rights under statutory and customary law, African women were excluded from property ownership (despite doing the vast majority of agricultural labour), evicted from their homes and land upon widowhood, and limited in their ability to undertake or benefit from paid work outside the home.⁶ Gendered division of labour meant that women and girls spent hours on time-intensive tasks, such as collecting food, water, and fuel, completing agricultural labour, and taking care of children and household tasks. As a result of this 'time poverty,' African women and girls struggled to attend school or participate in income-generating activities.⁷ Moreover, poverty had harmful consequences for women's dignity and physical and mental health. African women and girls living in poverty were at higher risk of gender-based violence (GBV) and maternal morbidity and mortality, harms that, in turn, perpetuate poverty.⁸

Two decades after the Maputo Protocol was adopted, African poverty still has a female face. In 2020, for every 100 men between the ages of 25 and 34 living in extreme poverty in sub-Saharan Africa, there were 127 women.⁹ COVID-19 further reversed gains made by African women. During the COVID-19 pandemic, 'women [bore] the brunt of job losses and comprise[d] the majority of frontline health workers, many of whom are under-protected and under-paid.¹⁰ Progress by women's land rights campaigns stalled as advocacy efforts were interrupted, the implementation of property law reforms halted, and movement limitations left women farmers vulnerable to land grabbers.¹¹ Rates of GBV spiked.¹² School closures disrupted the education of millions of girls, placing them at higher risk of

- 3 M Buvinic 'Women in poverty: a new global underclass,' (1998) *Foreign Policy* <https://publications.iadb.org/publications/english/document/Women-in-Poverty-A-New-Global-Underclass.pdf> (accessed 10 May 2023).
- 4 HM McPerson 'Poverty among women in Sub-Saharan Africa: A review of selected issues' (2010) 11 *Journal of International Women's Studies* 51.
- 5 McPerson (n 4) 51.
- 6 S Fredman 'Women and poverty – a human rights approach' (2016) 24 *African Journal of International & Comparative Law* 496-97; McPerson (n 4) 53.
- 7 McPerson (n 4) 54.
- 8 McPerson (n 4) 55-57.
- 9 United Nations Secretary General 'Despite gains, poverty 'still has a woman's face' Secretary-General tells high-level meeting on gender equality' *Women's Empowerment in Africa* (8 February 2020) <https://www.un.org/press/en/2020/sgsm19962.doc.htm> (accessed 10 May 2023).
- 10 W Byanyima 'Overcoming COVID-19 will require tackling inequality' (7 April 2021) *World Economic Forum* <https://www.weforum.org/agenda/2021/04/overcoming-covid-19-will-require-tackling-inequality/> (accessed 16 May 2023).
- 11 'How COVID-19 is affecting land rights in africa' (21 April 2020) International Land Coalition <https://africa.landcoalition.org/en/newsroom/how-covid-19-affecting-land-rights-africa/> (accessed 16 May 2023); 'Implications of COVID-19 to women's livelihood and tenure rights' oxfam & international land coalition https://oi-files-cng-prod.s3.amazonaws.com/panafrica.oxfam.org/s3fs-public/file_attachments/COVID-19,%20women%20and%20land%20rights.pdf (accessed 10 May 2023).
- 12 R Warah 'The invisible pandemic: COVID-19's toll on african women and girls' (1 July 2021) <https://www.one.org/africa/blog/invisible-pandemic-gender-based-violence/> (accessed 10 May 2023); CM Roy et al 'Impact of COVID-19 on gender-based violence prevention and response services in Kenya, Uganda, Nigeria, and South Africa: a cross-sectional survey' (January 2022) 2 *Frontiers in Global Women's Health* 1 <https://www.frontiersin.org/articles/10.3389/fgwh.2021.780771/full> (accessed 10 May 2023).

female genital mutilation (FGM), child marriage, teenage pregnancy, food insecurity, and poverty. Experts project that many of these school-age girls will not re-enrol.¹³

As of 2022, United Nations (UN) Women estimated that 62.8 per cent of the world's extremely poor women and girls live in sub-Saharan Africa and another 5.1 per cent live in Northern Africa and Western Asia.¹⁴ In absolute numbers, this translates to hundreds of millions of people. Moreover, between 2021 and 2030, the number of women and girls living in extreme poverty in sub-Saharan Africa is expected to increase from 249 million to 283 million.¹⁵ In early 2022, experts predicted that 41.2 per cent of women and girls in sub-Saharan Africa would live below national poverty lines that year. A similar percentage is estimated to live on less than USD \$1.90 (ZAR34.25) per day, with 68.3 per cent and 86.7 per cent of sub-Saharan African women and girls living on less than USD \$3.20 (ZAR57.68) and \$5.50 (ZAR99.14), respectively.

Many of these individuals live in households headed by women. Research on the feminisation of poverty also revealed that in the later part of the 20th century, the percentage of households headed by women rose worldwide, and that female-headed households (FHHs) are more likely to be poor.¹⁶ In Africa, recent studies have found that 23-26 per cent of all African households are headed by women, accounting for 18-21 per cent of the continent's population.¹⁷ These FHHs are more likely to be single adult households. They are frequently headed by widows (38 per cent), divorced women (17 per cent), and women who have never married (14 per cent), although approximately 31 per cent are married (often with non-resident husbands).¹⁸ Some debate exists around the economic well-being of FHHs compared to male-headed households (MHHs) due to the heterogeneity of FHH size and composition, as well as the head's marital status.¹⁹ However, controlling for the economies of scale experienced by larger MHHs, recent studies have found that sub-Saharan African households led by widowed, divorced, and never-married women tend to be poorer than households led by men.²⁰

In addition to experiencing poverty differently than men, African women also experience detention differently. In particular, incarcerated women who are pregnant or nursing have unique health concerns and are faced with serious challenges accessing healthcare and childcare while in prison.²¹ Access to antenatal and postnatal healthcare is often limited or non-existent.²² Despite having particular nutritional needs, pregnant and nursing women often receive the same food as other inmates, which

13 Byanyima (n 10); R Warah 'Africa's lost girls' (7 March 2022) *International Politics and Society* <https://www.ips-journal.eu/topics/democracy-and-society/africas-lost-girls-5773/> (accessed 10 May 2023); Human Rights Watch 'Impact of Covid-19 on children's education in Africa' (26 August 2020) <https://www.hrw.org/news/2020/08/26/impact-covid-19-childrens-education-africa#> (accessed 11 May 2023).

14 UN Women 'Poverty deepens for women and girls, according to latest projections' (1 February 2022) <https://data.unwomen.org/features/poverty-deepens-women-and-girls-according-latest-projections> (accessed 10 May 2023).

15 UN Women 'Covid-19 is driving women and girls deeper into poverty' (17 October 2020) <https://data.unwomen.org/features/covid-19-driving-women-and-girls-deeper-poverty> (accessed 10 May 2023).

16 Buvinic (n 3); Moghadam (n 1); Figura (n 2) 162; Ede'o et al 'Feminisation of multidimensional urban poverty in sub-Saharan Africa: evidence from selected countries' (2020) 32 *African Development Review* 632.

17 C Brown & D van de Walle 'Headship and poverty in Africa' (2022) 35 *World Bank Economic Review* 1038 <https://doi.org/10.1093/wber/lhaa024>; Moghadam (n 1) 229; A Milazzo & D van de Walle 'Women left behind? Poverty and headship in Africa' (2017) 54 *Demography* 1119 <https://read.dukeupress.edu/demography/article/54/3/1119/167708/Women-Left-Behind-Poverty-and-Headship-in-Africa> (Africa-wide, 26% of all households are currently headed by women, comprising 21% of Africa's population) (accessed 10 May 2023).

18 Brown & Van de Walle (n 17) 1126.

19 Brown & Van de Walle (n 17) 1039-1040.

20 Brown & Van de Walle (n 17) 1041, 1054.

21 Allen & Overy LLP, *Women in Prison Africa Regional Initiative* (2019).

22 Allen & Overy (n 21) 21-22.

is frequently insufficient in quantity and nutritional value.²³ In some facilities, women must give birth inside the facility unattended, with transfer to a hospital provided only in cases of complications. In other facilities, women are taken to outside facilities to give birth, but may be restrained during labour and returned to prison within days.²⁴

Physical safety is also a concern for pregnant or nursing prisoners. The Special Rapporteur on Prisons and Conditions of Detention has expressed concern about the lack of specific facilities for women and children separate from those for male detainees. The Rapporteur specifically noted that '[p]risons are not a safe place for pregnant women, babies and young children and it is not advisable to separate babies and young children from their mothers'.²⁵

As mentioned above, this chapter elucidates the meaning of article 24. Because article 24 has rarely been interpreted by entities such as the African Commission, this chapter discusses the meaning of the obligations under article 24 and identifies missed opportunities to offer guidance on the meaning of and context for the article. This chapter is organised into seven sections. Following this introduction, the second section addresses the drafting history of article 24. The third section describes the concepts and definitions that are helpful in interpreting the meaning of article 24. Section 4 explores linkages between article 24 and other provisions in the Maputo Protocol and in other human rights treaties. Section 5 analyses the nature and scope of a state party's obligations under article 24. The sixth section discusses state practice in the implementation of article 24, while referring to relevant Concluding Observations of the African Commission on Human and Peoples' Rights (African Commission or the commission). The concluding section assesses the progress made in realising the rights protected under article 24 and makes modest recommendations.

2 Drafting history

The drafting history of specific legal provisions often clarifies the meaning of the legal provisions in question. In the case of article 24, however, there is little information available. The legislative history of the Maputo Protocol indicates that article 24 was added in 2003 after much of the treaty had already been drafted. The earliest legislative history we have for the Maputo Protocol is from 1997 (Nouakchott Draft).²⁶ At this time, the draft Protocol did not include language concerning 'special protection of women in distress'. These early conversations about the substantive content of the Maputo Protocol, however, included provisions prohibiting the death penalty for pregnant women. Article 5 of the Nouakchott Draft (1997) states that states parties to the Protocol shall 'never sentence pregnant women to death'. This provision foreshadows the final text of article 24, which ensures 'the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity'.

In November 1999, language was added to the draft to provide special protection for elderly women and women living with disabilities.²⁷ Despite these additions in the Kigali Draft,²⁸ there was no mention

23 Allen & Overy (n 21) 21-22.

24 M Ackerman *Women in pre-trial detention in Africa* (2014) 29 https://acjr.org.za/resource-centre/WomenInPreTrial.Detention_V2.pdf (accessed 10 May 2023); Allen & Overy (n 21) 21.

25 *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa* (2012) 12, 14.

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

27 The first suggestions for inclusion of special protection for elderly women and women with disabilities is in the November 1999 Agreements, where attendees at the Kigali conference agreed that these provisions should be included in the Protocol. See Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda.

28 As above.

of the provisions now found in article 24. When the provisions relating to special protection for elderly women and women with disabilities were added in 2001, they were combined in a single proposed article that also included the following underlined language, which is now found in article 24:²⁹

State Parties shall undertake to: (a) provide protection to elderly women, *poor women and women head of families* and take specific measures commensurate with their physical economic and social needs.

Drafters later split this proposed article into two articles dealing separately with elderly women and women with disabilities. The language concerning ‘poor women and women head of families’ was cut from the provision regarding elderly women in January 2003 when drafters marked up the November 2001 draft language. The current article 24 language was drafted and proposed during the second meeting of experts held in March 2003, and the final article 24 language was accepted at the March 2003 ministerial meeting.

3 Concepts and definitions

Article 24 is perhaps the most under-utilised substantive provision in the Maputo Protocol. Article 24 has two provisions: The first section, section (a), includes broad language designed to protect poor women, women heads of households, women from marginalised groups, and other women needing special ‘physical, economic, and social’ care. The second provision, section (b), includes more specific language concerning the dignity rights of women in detention, including ‘the right of pregnant or nursing women or women in detention.’

Article 24 requires states to undertake to ‘ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs ...’. This language largely focuses on sub-groups of women who are particularly marginalised for reasons such as poverty, ethnicity, disability, and other aspects of identity that might require special protection.

Three concepts are central to the meaning and importance of article 24: distress, vulnerability, and dignity. ‘Distress’ appears in the heading of the article, which is titled ‘special protection for women in distress.’ Article 24 endorses the notion that, although all women may be subjected to discrimination or subordination, particular women need extra protection because of some vulnerability beyond gender that might cause distress. Poor women, for example, are explicitly mentioned in the article and are subject to the distress that arises from a lack of food, shelter, clean water, and health care.

Although not explicitly mentioned in article 24, vulnerability is at the heart of the protections provided by article 24. The article identifies sub-groups of women such as poor women, women heads of families, women from marginalised population groups, and pregnant or nursing women who are detained by the state, as particularly vulnerable and in need of special protection by the state. Article 24 categorises these groups of women on the basis of vulnerability.

Finally, article 24 uses the word ‘dignity’ only once, but the concept of dignity undergirds the entire article. Sub-section (b) requires states parties to ensure that incarcerated pregnant or nursing women are treated with dignity. Sub-section (a) also suggests that dignity is the underlying concern with respect to the treatment of vulnerable women and requires states to ‘provide an environment suitable to their condition and their special physical, economic, and social needs’. This suggests that the state must prioritise dignity in its interactions with and attempts to protect vulnerable groups of women.

²⁹ Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts). My emphasis.

The focus on marginalised groups of women implicitly invites intersectional analysis. Intersectionality theory ‘posits that aspects of identity, such as race and gender, are mutually constitutive and intersect to create unique experiences of discrimination and subordination’.³⁰ Intersectionality theory grew out of critical race feminism and, in particular, the scholarly work of Kimberlé Crenshaw, and it is important to locate its origins in Black feminist thought. In recent years, intersectionality has gained traction in international human rights discourse, including in UN human rights treaty bodies and in regional human rights bodies. Although most reporting states have not explored article 24 through an intersectional lens, the language of the provision invites states to consider special protections for marginalised groups of women. The focus on marginalised groups of women is in itself intersectional analysis. The language of article 24 recognises that women are differently positioned with respect to other aspects of identity, such as wealth, ethnicity, and physical, economic, and social needs.

None of the periodic reports of states parties to the Maputo Protocol or the African Commission’s Concluding Observations explicitly invoke intersectionality, however. Because intersectional analysis is still a relatively new concept in human rights discourse, this is unsurprising. Article 24 offers an opportunity to encourage states to analyse how different groups of women may experience human rights violations differently based on their membership in other marginalised groups.

In one case in South Africa, the Constitutional Court used an intersectional lens when it decided that the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) was unconstitutional because it did not include domestic workers in the definition of ‘employee’.³¹ The applicants argued that because domestic workers are primarily Black women, the exclusion of domestic workers constitutes discrimination on the basis of both race and gender. The applicants also requested that the court use an intersectional framework for its analysis, which it did noting that ‘[t] here is nothing foreign or alien about the concept of intersectional discrimination in our constitutional jurisprudence’.³² Interestingly, the Court recognised South Africa’s obligations under article 13 of the Maputo Protocol but it did not mention article 24. Article 24’s focus on marginalised groups of women, poor women, and women heads of families would seem to make it highly relevant to the Court’s intersectional analysis of domestic workers. Article 24 remains largely unexplored as a tool for intersectional analysis among courts, reporting states, and the African Commission.

The language of article 24 suggests that drafters hoped to provide added protection to particularly vulnerable groups of women. Article 24 combines a focus on ‘distress’ and ‘marginalization’ with a requirement that states parties treat all women, particularly those who are vulnerable, with dignity. The article specifically mentions poor women, women heads of families, women from marginalised population groups, women with special physical, economic, and social needs, and detained pregnant or nursing women. As such, the article targets women who may need special state protection based on their socio-economic or other status.

4 Linkages to other treaty provisions

Article 24’s broad language of distress and vulnerability follows more specific provisions in the Maputo Protocol that expressly address the rights of older women and women with disabilities. Because the preceding articles address the specific rights of older women and women with disabilities, article 24 acts as a ‘catch-all’ for other groups of marginalised or vulnerable women. When states do report on article 24, the focus is often on conditions of confinement for detained pregnant or breastfeeding women, or women detainees generally. Because article 24(b) specifically references detained women, states tend to zero in on this more specific language of article 24.

30 J Bond *Global intersectionality & contemporary human rights* (2021) 2.

31 *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC).

32 *Mahlangu* (n 31).

It should be noted, however, that article 24, as mentioned above, is preceded by specific provisions on older women and women with disabilities. Drafters added article 24 *after* article 22 on elderly women and article 23 on women with disabilities. The drafters did not intend for article 24 to be subsumed by the two preceding articles. In fact, by intentionally adding article 24 toward the end of the drafting process, the drafters clearly intended to expand coverage beyond the rights of elderly women and women with disabilities. Article 24's expansive focus on marginalised groups of women and women in distress does just that. It creates a catch-all provision that focuses on the rights of women with 'special physical, economic and social needs'. When activists, state representatives or members of the African Commission interpret article 24 as limited to the rights of detained women or focus exclusively on the rights of older women (article 22) or women with disabilities (article 23), they miss an important opportunity to bring attention to the rights of other marginalised groups of women.

Articles 15 and 16 of the Maputo Protocol, which address the right to food security and the rights to adequate housing, respectively, overlap slightly with article 24. Article 24's broader focus on women who need special protection from the state explicitly includes poor women. Because living in poverty often means living without adequate food and housing, any effort by the state to address those basic human needs would also provide the type of protection envisioned in article 24. Similarly, article 19 of the Maputo Protocol provides protection for the right to sustainable development, which overlaps to some extent with article 24's focus on poor women and other groups of vulnerable women. As a result, any poverty alleviation efforts undertaken by states to fulfil article 19 may also help satisfy state obligations under article 24.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons) includes a provision that addresses the needs of older women. Article 9 of the Protocol on the Rights of Older Persons requires states parties to protect older women from GBV, land rights and property abuses, and inheritance discrimination.³³ Similarly, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities) also provides special protection for women with disabilities.³⁴ Article 27 of that Protocol offers wide-ranging protection for women and girls with disabilities. Although neither the Protocol on the Rights of Older Persons nor the Protocol on the Rights of Persons with Disabilities has entered into force, together they suggest that there is a trend toward greater protection for specific groups of women who may be particularly susceptible to 'distress' based on age, disability, or other factors.

The African Charter on the Rights and Welfare of the Child provides additional interpretive guidance on the special protection that should be afforded girl children and the children of detained mothers. Article 21 of the Charter offers special protection against 'customs and practices discriminatory to the child – on the grounds of sex or other status.' This provision is intended to offer protection to children who are 'in distress' or 'particularly vulnerable' by virtue of gender discriminatory practices. In article 30, the Charter also protects children of imprisoned mothers, which is closely related to the substantive content included in article 24 of the Maputo Protocol.

5 Nature and scope of state obligations

States that agree to be bound by human rights obligations agree to respect, protect, and fulfil those human rights. A state's obligation to respect human rights requires that the state not act in a way that interferes with the enjoyment of that right. The obligation to protect rights, like those in article 24, requires states to take action to guarantee the enjoyment of the rights. Finally, the obligation to fulfil a particular human right requires that the state take affirmative steps to ensure and promote the

³³ Protocol on the Rights of Older Persons, art 9.

³⁴ Protocol on the Rights of Persons with Disabilities, art 27.

enjoyment of the right. In the context of article 24's broad language, states assume a duty to provide expansive protection of the rights of vulnerable or marginalised groups of women.

According to the language of article 24, states must address socio-economic disparities that predominantly affect women, particularly women who are also marginalised based on some additional factor such as ethnicity, disability, pregnancy, or incarceration. Article 24, therefore, requires that states invest financial resources in protecting vulnerable groups of women. For example, a state attempting to comply with article 24(a) might create and promote income-generation programs or vocational training that will offer employment opportunities for economically marginalised women. Because the scope of article 24 is quite broad, states have considerable flexibility in demonstrating compliance with the terms of the provision.

In the case of pregnant or nursing women, states may attempt to comply with article 24(b) by creating non-carceral alternatives to detention, deferred sentencing programmes for pregnant or nursing women, or programmes that provide dignified residential options for detained women to live with their children. Each of these initiatives would constitute progress toward the fulfilment of article 24(b), but each requires a state's financial and programmatic commitment. Article 24 incentivises states to create and invest in programs like this that address the needs of the most vulnerable groups of women.

Because there have been few official interpretations of the language in article 24, this chapter also explores how states themselves have interpreted their obligations under article 24. The next section explores the invocation and implementation of article 24 in domestic jurisprudence, regional jurisprudence, state reporting under the Maputo Protocol, the Concluding Observations offered by the African Commission in response to states' reports, and other interpretive guidance for article 24. The analysis reveals that article 24 is rarely invoked by reporting states or by the African Commission itself. As such, it represents a missed opportunity for advocacy on behalf of vulnerable groups of women in the region.

6 Implementation

6.1 Domestic jurisprudence

Typically, state efforts to implement a particular human rights provision offer guidance concerning how governments interpret their obligation under the provision. For their part, national governments in the AU often look to the Commission for interpretive guidance on specific provisions of human rights treaties. In the case of article 24, however, there have been relatively few state efforts to specifically implement article 24 and few authoritative interpretations of article 24 from the Commission. This section begins by exploring article 24's relevance to states' domestic jurisprudence in the contexts of incarcerated women, GBV, and domestic workers. The focus then shifts to regional jurisprudence and the reports that states must submit to the Commission in compliance with their reporting obligations under the Protocol. Finally, the section explores the extent to which article 24 surfaces in the Commission's Concluding Observations in response to state reports.

Although it happens infrequently, courts in states that have ratified the Protocol may cite to relevant provisions of the Protocol in domestic jurisprudence. Article 24, in particular, rarely – if ever – surfaces in national court deliberations and decisions. Kenyan judges and plaintiffs, for example, frequently cite to provisions of the Protocol, typically in support of cases alleging constitutional violations. Those cases cite to the Protocol's many provisions but do not include any citations to article 24. The cases involve: FGM, forced eviction, safe abortion, division of property in divorce, equality before the law,

women's leadership positions, sexual and GBV, children's inheritance, widow eviction, and the right to participate in political and decision-making processes.³⁵

States have interpreted their obligations under article 24 in a variety of ways. Article 24 has rarely, if ever, been discussed by domestic courts even when the courts are considering issues that are highly relevant to article 24's terms. A number of national courts have considered issues related to 'women in distress' generally or to issues specifically mentioned in article 24, such as the treatment of pregnant or breastfeeding women who are held in detention facilities. Some of these decisions reference other provisions in the Protocol but fail to mention article 24. The national court decisions can be divided into three broad categories, each of which includes cases that could have mentioned article 24, but did not.

6.1.1 Detention and birth, pregnancy, and breastfeeding

In *MAO v Attorney General*, the Kenyan High Court ruled that health care facilities could not detain women after giving birth on account of failure to pay the medical expenses related to childbirth.³⁶ The court found that the right to dignity under the Maputo Protocol's article 3 and other instruments prohibits detention under these circumstances. Although article 24 requires states parties to 'ensure the right of pregnant or nursing women or women in detention by providing them with an environment suitable to their condition and the right to be treated with dignity,' the court did not mention this provision in its decision regarding the dignity of women in childbirth. In another Kenyan case involving a hospital's alleged violation of the right to dignity before, during, and after childbirth, the court determined that the hospital had violated the plaintiff's right to dignity, among other rights, but did not cite article 24.³⁷

Other courts also declined to invoke article 24 in cases in which the subject matter concerned women in detention. In Malawi, for example, a court awarded damages to pregnant schoolgirls who had been falsely imprisoned in violation of their constitutional right to dignity. Although the court recognised the additional harm that incarceration causes to pregnant people, it did not mention article 24 or the Protocol more generally.³⁸ Two other cases in Malawi address the incarceration of pregnant and breastfeeding women and cite to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules). Neither court, however, mentioned article 24 of the Protocol despite its relevance in both cases.³⁹

35 See, eg, *MAO & Another v Attorney General & 4 others* [2015] eKLR; *JOO (also known as JM) v Attorney General & 6 others* [2018] eKLR; *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others*; *Kenya National Commission on Human Rights & 3 others* (Amicus Curiae) [2020] eKLR.

36 *MAO v Attorney General* (2015) eKLR; see also, Center for Reproductive Rights 'Kenyan High Court: Maternity hospital illegally imprisoned women, violated human rights' <https://reproductiverights.org/kenyan-high-court-maternity-hospital-illegally-imprisoned-women-violated-human-rights/> (accessed 12 May 2023).

37 *JOO* (n 35).

38 *ON v Attorney General*.

39 In *R v Victor* (Criminal Review 2 of 2020) [2020] MWHC 4 (27 March 2020), a pregnant woman who was convicted of theft and sentenced to six months of hard labour successfully appealed her sentence. The court cited the Bangkok Rules but did not mention art 24 of the Protocol. In the second case, *EL v Republic* (Criminal Case 36 of 2016) [2016] MWHC 656 (19 January 2016), a mother was convicted and sentenced to nine months for breastfeeding while being HIV-positive. The High Court set aside her conviction and ordered her immediate release, citing to the Bangkok Rules regarding the treatment of women in detention.

6.1.2 Gender-based violence

The South African case of *Tshabala v S* involved female rape victims who the court recognised as members of a neighbourhood ‘inhabited by the marginalised and vulnerable members of our society’.⁴⁰ This mention of the victims as marginalised and vulnerable could have triggered the special protection offered by the Protocol’s article 24. However, the Constitutional Court only mentioned the Protocol in a survey of relevant international instruments, without explicitly mentioning article 24. Although the *Tshabalala* Court and other courts have not typically relied on article 24 in situations involving GBV, the article offers some protection from the distress associated with GBV.

Another example involves a case from Uganda in which the court determined that article 6 of the Protocol was violated along with other national and international laws when a young rape victim was forced into an arranged marriage by her family and without her consent.⁴¹ GBV victims often need precisely the kind of ‘special protection’ that article 24 offers. As mentioned, however, article 24 is rarely invoked by activists or jurists in connection with the vulnerability and special needs of victims of GBV.

6.1.3 Domestic workers

In another South African case, *Mahlangu v Minister of Labour (Mahlangu)*, the Constitutional Court recognised that domestic workers are often single parents and the financial heads of their families. The complaint challenged the failure of COIDA to cover domestic workers. Although article 24 provides explicit protection for ‘poor women and women heads of families,’ the court does not mention article 24 in its decision. The *Mahlangu* decision is highly significant for its embrace of intersectionality, which refers to the recognition that discrimination operates across multiple axes of, for example, race, gender and poverty simultaneously. With regard to intersectionality, the court noted:

Multiple axes of discrimination are relevant to the case of domestic workers. Domestic workers experience racism, sexism, gender inequality and class stratification ... The application of an intersectional approach helps us to understand the structural and dynamic consequences of the interaction between these forms of multiple discrimination.⁴²

In many ways, article 24’s focus on marginalised groups of women invites intersectional analysis, as was pointed out in section 3 above. The article addresses subcategories of women who need special protection based on ‘physical, economic, and social needs’ as well as other ‘marginalised population groups.’

6.2 Regional jurisprudence

As of early 2022, there have been no regional decisions that specifically cite article 24 of the Protocol, even though at least two cases address subject matter that falls within the purview of article 24. The ECOWAS Community Court of Justice addressed the unlawful detention of female plaintiffs, finding a violation of multiple articles of the Protocol, but without mentioning article 24.⁴³ Similarly, in late 2019, the ECOWAS Court of Justice found that Sierra Leone’s prohibition on pregnant schoolgirls

40 *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC) para 5.

41 *Uganda v Nakoupuet* (Criminal Case 109 of 2016) [2019] UGCOMM 13 (13 February 2019).

42 *Mahlangu v Minister of Labour* (n 31).

43 *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017) 10. See also, ‘ECOWAS Court makes first pronouncement on Maputo Protocol: rules in favour of plaintiffs in case of Dorothy Njemanze’ <https://www.ihrda.org/2017/10/ecowas-court-makes-first-pronouncement-on-maputo-protocol-rules-in-favour-of-plaintiffs-in-case-of-dorothy-njemanze-3-ors-v-federal-republic-of-nigeria/> (accessed 12 May 2023).

attending school was discriminatory and violated articles 2 and 12 of the Protocol. Although pregnant schoolgirls fall within article 24's general categories of 'women in distress' or the more specific obligation to treat pregnant women with dignity, the Court of Justice did not apply article 24 in this case, perhaps because the litigating lawyers did not rely on article 24 in their arguments.⁴⁴

6.3 States' reports under the Maputo Protocol

States that have ratified the African Charter and the Maputo Protocol are required to periodically report to the African Commission on their progress in implementing the terms of the Protocol. Many reporting states group articles 20 to 24 together and report on those articles jointly. Because many countries address articles 20 to 24 together, they combine a discussion of widows' rights (article 20), the right to inheritance (article 21), special protection of elderly women (article 22), special protection of women with disabilities (article 23), and special protection of women in distress (article 24). Despite the specific requirements of each of the five articles, in many cases, reporting countries address only elderly women and women with disabilities, who are covered by the Protocol's articles 22 and 23 respectively. Malawi's Periodic Report (2015 to 2019), for example, includes a discussion of articles 20 to 23, focusing on widows and women with disabilities, but fails to address article 24.⁴⁵ In contrast, some countries specifically address article 24 in their periodic reports. The reports, however, rarely elaborate on the reporting country's interpretation of 'women in distress.' Examples from states' reports are grouped along substantive lines below.

6.3.1 Elderly women and women with disabilities

Many reporting countries group articles 20 to 24 together and report on these articles collectively. Those reports often focus on elderly women and women with disabilities. Burkina Faso, for example, in its 2011 – 2015 initial report, mentions that '[a]s a result of their status as highly vulnerable people, some women enjoy social protection from government and its partners ... [t]hey include: women living with a disability; widows; older women; [and] women in distress'.⁴⁶ The report then includes several paragraphs addressing people with disabilities and several paragraphs addressing 'older persons'. It does not address the particular challenges of women with disabilities or elderly women. The report also fails to elaborate on its passing reference to women in distress. In another example, Zimbabwe's Combined Periodic Report for 2007-2019 includes a section entitled 'articles 20 to 24: Rights of Specially Protected Women's Groups'.⁴⁷ This sub-section, however, only addresses the rights of elderly women and women with disabilities. It does not mention women in distress or any other groups of marginalised women.

6.3.2 Widowhood

A small number of reports that group articles 20 to 24 together focus on the rights of widows. Cameroon's Combined Periodic Report for 2015-2019, for example, includes a section for these articles

44 *Women Against Violence & Exploitation in Society (WAVES) & Child Welfare Society Sierra Leone (CWS-SL) (On behalf of pregnant adolescent schoolgirls in Sierra Leone) v Sierra Leone* Judgment No ECW/CCJ/JUD/37/19 (12 December 2019) See also, Equality Now 'Nine ways the Maputo Protocol has protected and promoted the rights of women and girls across Africa' https://www.equalitynow.org/news_and_insights/9_ways_maputo_protocol/ (accessed 12 May 2023).

45 Republic of Malawi Periodic Report on the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on the Rights of Women in Africa, May 2015-March 2019.

46 Burkina Faso 3rd and 4th Periodic Report within the Framework of the Implementation of art 62 of the African Charter on Human and Peoples' Rights 2011-2015 para 354.

47 Republic of Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Report under the African Charter on Human and Peoples' Rights and 1st, 2nd, 3rd and 4th Combined Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2007-2019) (2019) 98.

entitled ‘The rights of vulnerable groups benefiting from special protection.’⁴⁸ The report, however, dedicates this section to an extensive discussion of the rights of widows. The report does not discuss other marginalised groups or mention ‘women in distress.’

6.3.3 Detention

Because article 24 offers the specific example of women in detention, many reporting countries include information concerning pregnant, nursing, or other women in detention in their discussion of article 24. Some reports, such as the Eswatini initial report from 2012 to 2018 emphasise government efforts to ensure the breastfeeding women or mothers in detention ‘be afforded an environment which is suitable for bonding and breastfeeding.’⁴⁹

In a review of all state reports filed in compliance with the reporting obligations of the Maputo Protocol, it was common for reporting countries to discuss conditions of detention for pregnant or breastfeeding women. South Africa’s report cross-references the Bangkok Rules in describing its efforts to protect the rights of detained women.⁵⁰ Namibia’s 2015 to 2019 Periodic Report notes that ‘the rights for pregnant and nursing women in detention are protected’ and details government efforts to ensure the rights of detained mothers and pregnant women.⁵¹ This focus is likely the result of the more specific reference to detained women in article 24(b) compared to the more general language concerning vulnerable or marginalised women in article 24(a).

6.3.4 Psychological needs and trauma from gender-based violence

Some countries interpret ‘women in distress’ to include women who face mental health challenges or women who are recovering from trauma, including gender-based violence. The Periodic Report for Eswatini states, ‘The Ministry of Health (Psychiatric Centre) provides counselling and treatment to women who are in stressful situations to prevent them from developing mental illness.’⁵² Similarly, Rwanda’s 2009 – 2016 Periodic Report notes in reference to article 24, ‘women victims of violence of any kind are given special protection including psycho-social, legal and medical assistance from gender desks as well as at Isange One Stop Centres.’⁵³

6.3.5 Minorities and marginalised groups

Kenya’s Periodic Report from 2015-2020 addressed article 24 in a section entitled ‘Rights of Specially Protected Women’s Groups’.⁵⁴ Kenya’s report is one of the few reports that specifically addresses marginalised groups of women. It states:

48 Republic of Cameroon single report comprising the 4th, 5th, and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples’ Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention (2022) p 152.

49 Kingdom of Eswatini formerly known as the ‘Kingdom of Swaziland,’ Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th Periodic Report on the African Charter on Human and Peoples’ Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa, 2001-2019, paras 327, 646.

50 Republic of South Africa Combined 2nd Periodic Report under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2015) 268.

51 Republic of Namibia 7th Periodic Report on the African Charter on Human and Peoples’ Rights and the Second Report under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2020) para 34.1-34.3.

52 Kingdom of Eswatini (n 49) para 646.

53 Republic of Rwanda the 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the Implementation Status of the African Charter on Human and Peoples’ Rights and the Initial Report on the Implementation Status of the Protocol to the African Charter on Human and Peoples’ Rights and the rights of women in Africa (2017) para 127.

54 Republic of Kenya Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and

Article 56 of the Constitution provides that the state should put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life; are provided special opportunities in education and economic fields; are provided special opportunities for access to education; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure. Article 100 advocates for promotion of representation of marginalized groups. The article states that parliament shall enact legislation to promote the representation in parliament of women; Persons with disabilities; youth; ethnic and other minorities; and marginalised communities.⁵⁵

By recognising women from marginalised communities, Kenya's report captures the spirit of article 24, which explicitly refers to 'women from marginalised population groups.' Kenya's report also recognises that article 24's reference to marginalised women invites an intersectional analysis. The report states:

In addressing intersectional discrimination, the government will strengthen measures to support evidence generation on the extent, effects and gender implications of different inequalities, ensure compliance with constitutional and legal provisions against discrimination and develop targeted measures to deal with intersectional inequality.⁵⁶

Kenya's recognition of the intersectional nature of article 24 is significant and may provide a model for other countries to incorporate intersectionality into reporting on article 24 in the future.

6.3.6 Poverty

Article 24 requires that states undertake to 'ensure the protection of poor women ...' Some reporting countries address women's poverty in terms of social protection provided by the government. Angola's report, for example, describes the government's Social Support Programme and notes that the programme has supported numerous female-headed families, 'deprived and dependent women,' women 'affected by accidents and natural disasters, women with disabilities, elderly women, 'vulnerable women with chronic disease,' and other groups of women affected by poverty.⁵⁷ Similarly, Lesotho's 2001 – 2017 Periodic Report describes the government's financial relief for poor people, which 'includes women who are in distress for various reasons.'⁵⁸ Lesotho's Ministry of Social Development provides subsidies for medical and other needs of pregnant and nursing mothers living in poverty.⁵⁹

South Africa's Periodic Report from 2003-2014 also includes an extensive discussion of government programs aimed at combatting women's poverty and the report notes the 'feminized character of poverty.'⁶⁰ In connection with its discussion of article 24 and women's poverty, South Africa's report also describes its 'sanitary dignity campaign' for indigent women and girls. The government acknowledges that indigent women and girls face many challenges managing menstruation without proper supplies, including a large number of missed school days among school-aged girls.⁶¹ Article 24's

Peoples' Rights and the initial report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2020) paras 305-316.

55 Republic of Kenya (n 54) para 306.

56 Republic of Kenya (n 54) para 311.

57 Republic of Angola 6th and 7th Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Protocol on the Rights of Women in Africa 2011-2016 (2017) para 121.

58 The Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2018).

59 The Kingdom of Lesotho (n 58) para 535.

60 Republic of South Africa Combined 2nd Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa 2003-2014 (2015) para 533.

61 Republic of South Africa (n 60) paras 543-546.

language is broad enough to encompass issues such as South Africa's sanitary dignity campaign and, indeed, focuses on human dignity at its core.

6.4 The African Commission's Concluding Observations

In response to the periodic reports of states parties, the African Commission issues Concluding Observations that typically include:

- (1) the positive aspects of the state's compliance with norms in the African Charter and the Maputo Protocol;
- (2) the ongoing challenges or areas of concern in the state's efforts to comply; and
- (3) recommendations as to how the state should approach future compliance and reporting.

In its Concluding Observations, the African Commission rarely mentions article 24, although it does discuss some of the substantive rights embodied in article 24's expansive language. For example, in the Commission's Concluding Observations to Angola, it recommends that the state 'increase[s] the number of health centres in order to reduce the high maternal and child mortality rate, with emphasis on providing free, adequate and available services to rural women and women from indigenous communities.'⁶² The Commission's reference to rural women and women from indigenous communities suggests that it is urging the government of Angola to carefully consider special protection for rural women or 'women from marginalized population groups' as article 24 requires.

In a number of Concluding Observations, the African Commission specifically mentions the conditions of confinement for detained women. For example, in its Concluding Observations to Benin, the Commission expresses concern 'about the welfare of women and children who are particularly vulnerable and live in precarious conditions in prisons.'⁶³ Similarly, in its Concluding Observations to Kenya, the commission commends the state on its efforts to provide child care for the children of female inmates and its efforts to facilitate visits for children to the prisons.⁶⁴

In the case of Liberia, the Commission's Concluding Observations include a general recognition that some women are more vulnerable than others due to poverty, rurality, and other factors. The Commission notes, '[w]omen in rural areas are disproportionately affected by lack of access to adequate health services, education, economic opportunities, social benefits and access to justice'.⁶⁵ The Commission implicitly recognised that rurality and poverty can create the kind of distress and vulnerability that is at the heart of article 24.

6.5 Other interpretive guidance

The African Commission has adopted general comments designed to guide states parties in implementing the Maputo Protocol. To date, the African Commission has released six General Comments, the first three of which address provisions of the Maputo Protocol. None of these General Comments, however, addresses article 24.

62 African Commission Concluding Observations on the Cumulative Periodic Reports (2nd, 3rd, 4th and 5th) of the Republic of Angola adopted at its 12th extra-ordinary session 30 July to 4 August 2012, Recommendation XVI.

63 African Commission Concluding Observations and Recommendations on the 2nd Periodic Report of the Republic of Benin, 13-27 May 2009 para 31.

64 African Commission Concluding Observations and Recommendations on the 8th and 11th Periodic Report of the Republic of Kenya para 15(vi).

65 African Commission Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights para 19.

The African Commission's Special Rapporteur on Women in Africa has addressed the content of article 24 but only in general terms. In the May – November 2021 Inter-Session Activity Report, the Rapporteur recommends that states parties '[e]nsure that national gender mainstreaming efforts are comprehensive and inclusive of all categories of women especially those in rural communities, elderly women, *women in distress*, and women with disabilities.'⁶⁶ The Special Rapporteur does not elaborate on the meaning of 'women in distress' although this appears to be a reference to the content of article 24.

7 Conclusion

The language of article 24 is broad, encompassing a wide range of rights that extend to women 'in distress.' The provision has been under-utilised in advocacy and scholarship related to women's rights under the Maputo Protocol. Despite the fact that it is rarely invoked, article 24 has great potential to facilitate intersectional analysis that will highlight how different groups of women experience marginalisation based on gender and other aspects of identity that make them particularly vulnerable, including poverty.

As a result of the grouping of articles in states' reports, articles 20 (widows' rights), 21 (inheritance), 22 (elderly women), and 23 (women with disabilities) often receive more extensive treatment than article 24 in states' reports. Similarly, the African Commission's Concluding Observations often devote little discussion to article 24. It is rarely mentioned in national or regional jurisprudence. As such, the treatment of article 24 to date represents a missed opportunity to address the intersectional rights violations of women from marginalised groups.

Civil society organisations (CSOs) have an opportunity to advocate for more comprehensive implementation of article 24. CSOs should consider how article 24 might be used in human rights litigation to support claims of rights violations. In appropriate cases, CSOs might use article 24 in briefs on behalf of a complainant or *amici curiae* briefs to argue for the kind of 'special protection for women in distress' encompassed in article 24's broad language. In addition, CSOs and the Commission should raise awareness of the expansive meaning of article 24. Public education designed to bring attention to the potential of article 24 to protect vulnerable groups of women is greatly needed.

66 Special Rapporteur on Rights of Women in Africa 'May-November 2021 Inter-Session activity report of Honourable Commissioner Maria Teresa Manuela' p 8.