

Article 26

Implementation and monitoring

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1. States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.
2. States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

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1 Introduction

As the drafting history of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) shows, one of its aims was to 'locate [the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW)] in African reality',¹ developing an instrument that Africa could own, but premised on the understanding that despite the variety of norms and instruments available at the regional and international levels, violations against women continued.² Consequently, it could be argued that the very *raison d'être* of the Maputo Protocol was to ensure the implementation of international standards of the rights of women, rather than the development of those standards per se. As Viljoen wrote in 2009,

the Maputo Protocol should not be primarily viewed as correcting normative deficiencies in international human rights law dealing with human rights, but rather as a response to the lack of implementation of these norms.³

1 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11.

2 See also F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72-84; R Murray 'Women's rights and the Organisation of African Unity and African Union: the Protocol on the Rights of Women in Africa' in D Buss & A Manji (eds) *International law: modern feminist approaches* (2005) 253.

3 Viljoen (n 1) 17.

The aim of this chapter is to provide an analysis of article 26 and how the Maputo Protocol envisages its provisions to be implemented by states and monitored by supranational bodies. Divided into a further 5 sections, section 2 commences with a discussion of the drafting history of this provision. Section 3 considers what implementation means in the context of article 26, how the concept of implementation has been defined and analysis of the particular requirements of article 26(2). Section 4 focuses on the monitoring mechanism set out in the Maputo Protocol, namely the use of article 62 of the African Charter on Human and Peoples' Rights, as well as the potential use of the communications procedure. Section 5 provides conclusions and recommendations.

2 Drafting history

Perhaps reflective of this approach is the fact that earlier drafts of the Maputo Protocol did not include clauses on implementation and monitoring;⁴ these only appeared in 2001.⁵ At that stage, the article included not only the wording found in article 26(1) of the final Protocol but also the right to a remedy, now found in article 25.⁶ The Report of the Meeting of Experts does not explain why this clause on implementation and monitoring was inserted, other than to state that '[t]he meeting could not obtain a consensus on this proposal ... [and] decided to put the proposal under brackets for further consideration'.⁷ The provision, as we now know it, appeared in the final draft without including a reference to a remedy,⁸ the latter moving to a separate article.

3 Implementation

3.1 Defining implementation

Article 26 requires states to 'ensure the implementation at the national level'. There is extensive academic and practitioner literature attempting to define 'implementation' and what this means in terms of state obligations.⁹ This chapter will take implementation to mean the processes by which measures are taken by the various arms of the state, whether the executive, legislature or judiciary, to respond to international obligations.

4 See eg Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft); Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft); Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63; L Kois 'Article 18 of the African Charter on Human and Peoples' Rights: a progressive approach to women's human rights' (1997) 3 *East African Journal of Peace and Human Rights* 94-95.

5 Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001; Nsibirwa (n 4).

6 See M Lasseko-Phooko 'Article 25' in this volume.

7 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 153.

8 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft) art 26.

9 See Volume 12(1) of the *Journal of Human Rights Practice, Righting Wrongs: The Dynamics of Implementing International Human Rights Decision*; M Wadstei 'Implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women' (1988) 6 *Netherlands Quarterly of Human Rights* 5; A Weiss 'Interpreting Islam and women's rights implementing CEDAW in Pakistan' (2003) 18 *International Sociology* 581; C Hillebrecht 'Compliance: actors, context and causal processes' in W Sandholtz & C Whytock (eds) *Research handbook on the politics of international law* (2017) 27; V Ploton 'The implementation of UN treaty body recommendations' (2017) 14 *Sur: International Journal of Human Rights* 219; A von Staden 'Monitoring second-order compliance: the follow-up procedures of the UN human rights treaty bodies' (2018) 9 *Czech Yearbook of International Law* 329.

It is worth noting that how states receive treaties into domestic law will depend on their constitution and whether treaties are incorporated into domestic law upon ratification, require additional legislation, or, as in practice, a more complex procedural and logistical approach is taken. The monist/dualist debate is discussed in Chapter 1.¹⁰

Implementation, according to the African Commission on Human and Peoples' Rights (African Commission), encompasses various strands: the adoption or amendment of legislation or administrative measures and policies and programmes; the creation of institutions; education and awareness-raising activities of rights; the provision of remedies for any rights violated; the availability of a complaints process; and compliance with judgments from various courts and human rights bodies.¹¹ For example, with respect to the right to property during separation, divorce or annulment of marriage, the African Commission notes that information required to implement this obligation includes:

- (a) The domestic legislation providing for women's rights to marital property, including relevant measures of implementation of such legislation.
- (b) The complaints mechanisms available for women in case of separation, divorce or annulment of marriage and the number of complaints received and the outcomes of those complaints;
- (c) The protection available to women in cases of separation divorce or annulment of marriage; and
- (d) The steps taken to implement judgments by national, regional or international courts and human rights mechanisms.¹²

Litigation can also be used as a tool of implementation to bring the Maputo Protocol before domestic courts¹³ and the national judiciary can cite instruments including the Protocol in their rulings,¹⁴ although they rarely do so.¹⁵ Much has also been written on the supporting role of national human rights

10 See A Rudman 'Introduction' in this volume.

11 State Reporting Guidelines under the Protocol to the Charter of Human and Peoples' Rights on the Rights of Women in Africa. Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of Senegal on implementation of the African Charter on Human and Peoples' Rights 2004-2013, African Commission on Human and Peoples' Rights, adopted at its 18th extra-ordinary session 29 July-7 August 2015, Nairobi, Kenya, para 40. See also Dechert LLP 'Implementing the Protocol on the Rights of Women in Africa: Analysing the Compliance of Kenya's Legal Framework' (2014) The Lawyer's Circle, Oxfam <https://policy-practice.oxfam.org/resources/implementing-the-protocol-on-the-rights-of-women-in-africa-analysing-the-compli-333065/> (accessed 9 May 2023).

12 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (art 7(d)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia 19 February-4 March 2020, para 63.

13 S Ndashe 'Strategic litigation: a tool for domesticating the Protocol?' in R Musa et al (eds) *Breathing life into the African Union Protocol on Women's Rights in Africa* (2006) 51.

14 EJ Powell & J Staton 'Domestic judicial institutions and human rights treaty violation' (2009) 53 *International Studies Quarterly* 149; Y Lupu 'Legislative veto players and the effects of international human rights agreements' (2015) 59 *American Journal of Political Science* 578; C Hillebrecht 'The power of human rights tribunals: compliance with the European Court of Human Rights and Domestic Policy Change' (2014) 20 *European Journal of International Relations* 1100; C Hillebrecht *Domestic politics and international human rights tribunals: the problem of compliance* (2014); Dechert (n 11) para 2.6.3.

15 However, see where the Maputo Protocol was cited: the Constitutional Court of South Africa, *Shibi v Sithole and Others* 2005 (1) SA 580 (CC); the Constitutional Court of Uganda, *Uganda Association of Women Lawyers & Others v Attorney General* [2004] UGCC 1; and the High Court of Kenya, *Josephine Oundo Ongwen v Attorney General & Others* [2018] eKLR. See further S Omondi et al *Breathing Life into the Maputo Protocol. Jurisprudence on the rights of women and girls in Africa* (2018) Equality Now Kenya 'Breathing Life into the Maputo Protocol: Page 1 Jurisprudence on the Rights of Women and Girls in Africa' https://d3n8a8pro7vhm.cloudfront.net/equalitynow/pages/817/attachments/original/1543482389/Breathing_Life_into_Maputo_Protocol_Case_Digest-Jurisprudence_on_the_Rights_of_Women_and_Girls_in_Africa.pdf?1543482389 (accessed 23 June 2023).

institutions, other statutory and constitutional bodies and civil society in encouraging, monitoring, and facilitating the implementation of international standards at the domestic and regional levels.¹⁶

While the extent to which the state is considered to take measures to bring its domestic law in line with its international obligations is often explained as being dependent on ‘political will’, this masks the complexity of what needs to happen at the domestic level.¹⁷ First, the inclusion of ground-breaking provisions for which the Maputo Protocol has been praised, particularly around issues of religion and cultural traditions,¹⁸ may in fact render the implementation of the Protocol more challenging.¹⁹ As Johnson notes, ‘the governments of many state parties are not entirely convinced that modern ideas of women’s rights, as encapsulated in the [Maputo] Protocol, should supersede their traditions and local beliefs’.²⁰

Second, the national mechanisms available to coordinate and ensure the implementation of these international obligations, whether they be legislative, executive or judicial action, are not straightforward.²¹ For instance, amending legislation and bringing specific laws in line with the Maputo Protocol is, as Kane notes, a ‘fairly complex legal process that not only requires judicial measures – laws, decrees, etc. – but also statutory, administrative measures’.²² Measures that require the action of the independent arms of the state, the legislature and the judiciary, raise particular challenges.²³

Furthermore, some monitoring and evaluation mechanisms at national level are likely to be required to ensure that ministries act appropriately.²⁴ The African Commission, as has the United Nations (UN), have encouraged states to create institutions at the national level, whether these are government focal points, and national mechanisms for reporting, implementation and follow-up to coordinate activities among state entities in their response to international and regional human rights bodies. Indeed, the

- 16 For example, NANHRI, *The role of NHRIs in Monitoring Implementation of Recommendations of the African Commission on Human and Peoples’ Rights and Judgments of the African Court on Human and Peoples’ Rights* (NANHRI, Kenya, 2016); MS Carboni ‘National Human Rights Institutions’ role implementing decisions of the Inter-American System’, (2019) 12 *Journal of Human Rights Practice*, Special Issue, 2021; CH Heyns & F Viljoen ‘The impact of the United Nations human rights treaties on the domestic level’ (2001) 23 *Human Rights Quarterly* 483-535; L Miara & V Prais ‘The role of civil society in the execution of judgments of the European Court of Human Rights’ (2012) *European Human Rights Law Review* 528-537; Open Society Justice Initiative (OSJI) *From rights to remedies: structures and strategies for implementing human rights decisions* (Open Society Foundations, New York, 2013); Open Society Justice Initiative *From judgment to justice. implementing international and regional human rights decisions* (OSJI, New York, 2010).
- 17 C Hillebrecht ‘The domestic mechanisms of compliance with international human rights law: case studies from the Inter-American human rights system’ (2012) 34 *Human Rights Quarterly* 966.
- 18 Banda (n 2); K Ebeku ‘A new dawn for African women? Prospects of Africa’s protocol on women’s rights’ (2004) 16 *Sri Lanka Journal of International Law* 85.
- 19 K Davis ‘The emperor is still naked: why the Protocol on the Rights of Women in Africa leaves women exposed to more discrimination’ (2009) 42 *Vanderbilt Journal of Transnational Law* 975.
- 20 A Johnson ‘Barriers to fulfilling reporting obligations in Africa under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ (2021) 21 *African Human Rights Law Journal* 176-203.
- 21 R Murray & C de Vos ‘Behind the state: domestic mechanisms and procedures for the implementation of human rights judgments and decisions’ (2019) 12 *Journal of Human Rights Practice* 22-47.
- 22 I Kane ‘Harmonising the Protocol with national legal systems’ in Musa et al (n 13) 53.
- 23 Murray & de Vos (n 21); S Cardenas *Conflict and compliance: state responses to international human rights pressure* (2007); Hillebrecht (n 17).
- 24 JG Stotsky et al *Strategy, policy, and review and research departments sub-Saharan Africa: a survey of gender budgeting efforts*, International Monetary Fund WP/16/152, <https://www.imf.org/external/pubs/ft/wp/2016/wp16152.pdf> (2016), p 38-39 (accessed 9 May 2023).

Committee on the Elimination of Discrimination against Women (CEDAW Committee) has been particularly active in promoting the idea of specialised national bodies on the rights of women.²⁵

3.2 Article 26(2): budget

Article 26(2) introduces an important, yet often not expressly recognised, dimension to implementation, namely the requirement that states ‘provide budgetary and other resources for the full and effective implementation of the rights herein recognised’.²⁶ Determining how states allocate spending in order to implement rights in the Maputo Protocol requires the content of the rights to be elaborated with ‘increasing precision and clarity’.²⁷ Considerable work has been done at the international level to elaborate the budgetary elements of economic, social and cultural rights, for example, particularly in the context of what is a state’s available resources.²⁸ As there are no ‘specific allocational benchmarks’ in a treaty such as the Maputo Protocol, states should indicate how they have in fact considered what resources are available to specific rights.²⁹ This should be coupled with an objective oversight of compliance.³⁰

The African Commission has provided some elaboration on article 26(2) in its interpretation of other provisions of the Maputo Protocol, asserting, for example, that states

should allocate adequate financial resources for the strengthening of public health services so that they can provide comprehensive care in family planning/contraception and safe abortion. This includes making specific budget allocations under the health budget at national and local levels, as well as tracking expenditures on these budget lines. Information on health expenditures should be available to facilitate monitoring, control and accountability.³¹

In addition, it has also recommended that states should ‘fund and empower public health authorities to provide a comprehensive range of services for the prevention and treatment of every person’s sexual and reproductive health’.³²

25 S Lorion *Defining governmental human rights focal points: practice, guidance and concept*, Danish Institute for Human Rights (2021) <https://www.humanrights.dk/files/media/document/Lorion%20Defining%20GHRFPs%20-%20DIHR%202021%20Final.pdf> chapter 1; UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) Convention-specific Reporting Guidelines of the Committee on the Elimination of Discrimination against Women, 8 July 2008, UN Doc CEDAW/SP/2008/INF/1, 2008; D McBride & A Mazur *Gender machineries worldwide. Background paper to the World Development Report 2012* (World Bank, 2011) 31; R Jahan *Strengthening national mechanisms for gender equality and the empowerment of women: a global study analysis* (UN DAW 2010); Beijing Declaration and Platform for Action (Beijing Platform) paras 201 & 203.

26 M Rusimbi ‘Financing the Protocol: considerations for influencing budgets from experiences in Tanzania’ in Musa et al (n 13) 38.

27 M Dutschke et al *Budgeting for economic and social rights: a human rights framework* (2010) 11.

28 International Covenant on Economic, Social and Cultural Rights (ICESCR) art 2(1).

29 P Alston & G Quinn ‘The nature and scope of state parties’ obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 177 & 181; O De Schutter ‘Public budget analysis for the realization of economic, social and cultural rights: conceptual framework and practical implementation’ in KG Young (ed) *The future of economic social and cultural rights* (2019) 527-623.

30 Alston & Quinn (n 29); De Schutter (n 29).

31 African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) and art 14(2)(a) & (c) of the Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted during the 54th ordinary session of the African Commission held in Banjul, The Gambia from 22 October to 5 November 2013, para 62.

32 African Commission General Comment 1 on art 14(d) & (e) of the Protocol to African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted during the 52nd ordinary session of the African Commission held in Yamoussoukro, Ivory Coast 9-22 October 2012.

Such an approach has elements of what is known as ‘gender responsive budgeting’, namely the ‘gender-based assessment of budgets, incorporating a gender perspective at all levels of the budgetary process’.³³ This concept is not new, acknowledged in the Beijing Platform, which required states to ensure ‘a gender perspective in budgetary decisions on policies and programmes, as well as the adequate financing of specific programmes for securing equality between women and men’.³⁴

There are a number of other provisions in the Maputo Protocol related to budget and financing. Article 4(2)(i) requires that states ‘provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women’. In addition, article 10(3) establishes that states ‘take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular’. Article 10(3) further implies a ‘hierarchy’ and prioritisation of spending, an unusual provision for a human rights treaty.³⁵ Budoo argues that article 26(2) includes both these provisions in its reference to ‘all necessary measures’ and thereby ‘imposes a general obligation on states to allocate sufficient budgetary resources to realise the women’s human rights protected by the Maputo Protocol’.³⁶

Guidance on gender responsive budgeting can be drawn from other initiatives under CEDAW and Southern African Development Community (SADC).³⁷ These call on states to redistribute resources among various groups in society, ensuring ‘women’s share of incurred tax is commensurate with their share of earned income’.³⁸ It further calls for ‘[p]ublic expenditure [to prioritize] programmes which facilitate gender equality’; ‘Governments [to] prioritize funding for programmes that increase gender equality’; ‘assessing which macroeconomic policies are most conducive to women’s full development and advancement’; and ensuring that women participate on equal terms with men in budget decision making processes’.³⁹ Yet these are complex determinations. For example,⁴⁰ providing funding for women for courses in low-paid and low-skilled jobs such as sewing, rather than training for well-paid and high-skilled jobs such as computer technology, can have immediate benefits for women, but simultaneously reinforce traditional unequal roles (this is in potential breach of for example articles 3 and 5 of CEDAW.) These complexities mean that it is not possible to use one uniform rule or benchmark to distinguish whether a programme improves women’s equality.

33 Council of Europe, ‘Gender Budgeting: Final Report of the Group of Specialists on Gender Budgeting’ (2005) 10 <https://rm.coe.int/1680596143>, 10 (accessed 23 June 2023); D Elson ‘Integrating gender into government’s budget within a context of economic reform’ in D Budlender et al (eds) *Gender budgets make cents: understanding gender responsive budgets* (2002). T Polzer et al ‘Gender budgeting in public financial management: a literature review and research agenda’ (2021) 89 *International Review of Administrative Sciences* 450-466; M Costa et al ‘Women acting for women’ (2013) 15 *International Feminist Journal of Politics* 333-352.

34 Beijing Platform (n 25) para 345; A Budoo ‘Gender budgeting as a means to implement the Maputo Protocol’s obligations to provide budgetary resources to realise women’s human rights in Africa’ (2016) 9 *African Journal of Legal Studies* at 199-219. A Budoo-Scholtz ‘Resource allocation for the realisation of women’s rights: building on previous gender budgeting initiatives in South Africa’ (2023) 31 *South African Journal on Human Rights* 74; R Downes et al ‘Gender budgeting in OECD countries’ (2016) 3 *OECD Journal on Budgeting*.

35 Viljoen (n 1) 31. G Giacca *Economic, social and cultural rights in armed conflict* (2014) 50; Budoo (n 34).

36 Budoo (n 34).

37 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 17: Measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product, 1991, A/46/38.

38 J Huckerby *Budgeting for women’s rights. Monitoring government budgets for compliance with CEDAW. A summary guide for policy makers* (Gender Equality and Human Rights Advocates, 2008) 4-5, 11-12 & 15 <https://www.unwomen.org/sites/default/files/Headquarters/Media/Publications/UNIFEM/BudgetingForWomensRightsSummaryGuideen.pdf>. For the full report on which this is based, see Elson (n 33).

39 As above.

40 Huckerby (n 38) 7.

As an example, and one dimension of gender budgeting that supports the full and effective implementation of the rights under the Protocol, in respect to the right to work, the African Commission's *Principles and Guidelines on Economic, Social and Cultural Rights* also oblige states to

[t]ake the necessary measures to recognise the economic value of care giving and other household work, for example, subsistence and market gardening, cooking, and caring for children and the elderly. In drawing up their national budgets, States should adopt systems that record the value of women's unpaid contributions to society.⁴¹

A similar reference to gender responsive budgeting can be found in the SADC Protocol on Gender and Development⁴² and the SADC *Guidelines on Gender Responsive Budgeting* (SADC *Guidelines*) provide practical guidance for states. For example, they note that gender budgeting 'is about allocating money for activities that eliminate gender barriers to public services and private sector investments', but 'does NOT mean separate women's budgets' and 'is NOT about whether an equal amount is spent on women and men, but whether the spending is adequate to women's and men's needs'.⁴³ Tools are recommended, such as,

a [gender responsive budgeting] related checklist for use by reporting personnel Ministries responsible for gender or their equivalent ... comprising questions on how national budgets are complying with relevant women's rights instruments that can help those who are documenting state party reports to provide a comprehensive situation of the progress of GRB initiatives within SADC Member States.⁴⁴

In an attempt at streamlining, the SADC *Guidelines* specifically link to CEDAW guidance, and the reporting requirements under both CEDAW and the Maputo Protocol, noting:

Such checklist should be applied when producing state party reports on: the SADC Protocol on Gender and Development, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the CEDAW.⁴⁵

Some countries have been highlighted as taking a progressive approach to gender budgeting. Uganda, for example, included guidelines for various ministries on how to implement goals ensuring gender equality in the budget, in combination with data disaggregated on the basis of sex. Progress was monitored through a 'Certificate on Gender and Equity Compliance'.⁴⁶ Pilot schemes in Rwanda focusing on enrolment in primary, secondary and tertiary education, maternity mortality and spending on health, as well as the aim of the authorities to 'match the format of gender budgeting to its program-budgeting approach' were seen as key.⁴⁷ A Gender Monitoring Office examined compliance.⁴⁸ Moreover, Departments of Women, in some countries, can also drive gender responsive budgeting.⁴⁹

41 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, 24 October 2011, para 59(1).

42 Article 15(2).

43 SADC *Guidelines on Gender Responsive Budgeting*, June 2014, https://www.sadc.int/file/3102/download?token=sFO_lhWI (accessed 23 June 2023).

44 SADC *Guidelines* (n 43) 44.

45 SADC *Guidelines* (n 43).

46 Stotsky et al (n 24) 11 & 16.

47 Stotsky et al (n 24) 24-25.

48 As above.

49 Downes et al (n 34).

In other countries, positive examples of gender budgeting include policies to assist poorer women while the role of parliaments has also been identified in ensuring gender budgeting.⁵⁰ Research shows, however, that the success of such, particularly where resources are scarce, depends on ‘sustained effort on the part of governments’, as well as ‘[i]nstitutionalization in government laws’, and the role of the Ministry of Finance to mandate ‘that sectoral ministries and local governments incorporate gender-oriented goals into their plans’.⁵¹

Although not expressly mentioned in article 26(2), and likely to be subject to some resistance,⁵² there is a strong argument for providing the African Commission and the African Court on Human and Peoples’ Rights with the ability to review the budgetary allocations, particularly around priorities as determined by article 10(3), of states as part of their monitoring role.⁵³ In addition, the African Commission could raise awareness among states and other stakeholders of the helpful guidance already available and use the concluding observations to make directed recommendations to states.⁵⁴

4 Monitoring

Article 26 envisages monitoring to be principally through the state reporting process already functioning under article 62. This requires that states submit reports every two years of the legislative and other measures adopted to implement the African Charter thereby mirroring the wording of this Charter.

There is a certain efficiency in not adding a further institutional or bureaucratic layer to monitoring and instead utilising what is already available. Indeed, the Maputo Protocol can exploit the purposes of the state reporting process articulated by the African Commission, such as public accountability, exchange of information, and constructive dialogue with international experts.⁵⁵ Furthermore, given that ‘women’s human rights issues in most African countries usually are shrouded in silence and secrecy’, the mostly transparent nature of the state reporting process, whereby the reports are made available on the African Commission’s website and the oral examination is held in public, offers important visibility.⁵⁶ Yet, such a close reliance on article 62 also carries with it risks that monitoring the Maputo Protocol would incorporate all the failings of the article 62 process.⁵⁷ Thus, the implementation of article 26 was inevitably going to be thwarted by out-of-date reports; reports that describe little more than the constitutional or legislative provisions without indicating their application in practice or any honesty in the challenges faced in their implementation; a cycle of reporting that focuses more on the oral presentation and which tends to neglect follow-up; and the lack of publicly available concluding observations.

50 Stotsky et al (n 24) 38-39.

51 As above.

52 See eg the reservation by Kenya to art 10(3) which provides: ‘States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular’, implying this international scrutiny over financial issues may not be welcome. The reservation reads: ‘The Government of the Republic of Kenya does not consider as binding upon itself the provisions of art 10(3) and art 14(2)(c) which is inconsistent with the provisions of the Laws of Kenya on health and reproductive rights’, see Justice Lucy Asuagbor, Status of Implementation of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa By Justice Lucy Asuagbor, Commissioner, Special Rapporteur on Women in Africa (African Commission on Human and Peoples’ Rights), 60th Meeting, Commission on the Status of Women (2016) sec III.

53 Viljoen (n 1) 31. A Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system* (2013) 263.

54 SADC Guidelines (n 43) 44-45.

55 Johnson (n 20); MD Evans & R Murray ‘The reporting mechanism of the African Charter on Human and Peoples’ Rights’ in MD Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights the system in practice 1986-2006* (2002) 49-75.

56 Johnson (n 20).

57 Viljoen (n 1) 35; Johnson (n 20); K Quashigah ‘The African Charter on Human and Peoples’ Rights: towards a more effective reporting mechanism’ (2002) 2 *African Human Rights Law Journal* 261. R Sigsworth & L Kumalo *Women, peace and security. Implementing the Maputo Protocol in Africa* ISS Paper 295 (ISS, 2016).

Furthermore, the manner of reporting required by the Maputo Protocol raises a number of challenges, including lack of understanding of what the report should contain, and a lack of knowledge of how to report.⁵⁸ It is this last point that civil society organisations have, through the production of Guidelines, attempted to address.

Although not expressly mentioned by the Protocol, the Special Rapporteur on Women in Africa has played a crucial role in practice in monitoring the implementation of the Protocol by state parties. The Special Rapporteur has been specifically tasked by the African Commission '[t]o follow up on the implementation of the African Charter on Human and Peoples' Rights and its Protocol relative to the Rights of Women in Africa by State Parties, notably by preparing reports on the situation of women rights in Africa and propose recommendations to be adopted by the Commission'.⁵⁹ Through inter-session reports to the African Commission sessions, maintaining contact with government departments responsible for gender issues,⁶⁰ involvement in the drafting of the Guidelines, as noted below, and elaboration of the standards in general comments, the Special Rapporteur adds a further dimension to monitoring.

4.1 Guidelines on state reporting

The lack of understanding as to the content of the reports, with some who had ratified the Maputo Protocol submitting reports without any reference to it.⁶¹

Consequently, the Centre for Human Rights at the University of Pretoria supported the African Commission to draft *Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (State Reporting Guidelines)*⁶² which were adopted by the African Commission in November 2009. They require states to submit their article 62 report and to devote a section of that report (no more than 30 pages) to the Maputo Protocol. This section should include:

- A brief description of state institutions, if any, relevant to the Protocol and information on their budgetary allocation.
- General information on gender budgeting.
- Information on gender mainstreaming, including any policy and capacity-building efforts.
- Information on any gender audit of laws or legal reform efforts undertaken from a gender perspective (attach relevant documents).⁶³

Periodic reports should also include reference to the implementation of recommendations in the concluding observations, as well as their publicity, progress and challenges in their implementation, and future plans. Certain 'measures of implementation' are listed as being required with respect to each provision of the Maputo Protocol, including legislation, institutions and education.⁶⁴ The African

58 Johnson (n 20).

59 ACHPR 'Special Rapporteur on Rights of Women' <https://achpr.au.int/en/mechanisms/special-rapporteur-rights-women> (accessed 9 May 2023).

60 See eg Report on Intersession Activities of the Special Rapporteur on Women in Africa, 39th ordinary session African Commission on Human and Peoples' Rights, 11 to 25 May 2006, Banjul, The Gambia.

61 J Biegon 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: a review of the Pretoria gender expert meeting, 6-7 August 2009' (2009) 9 *African Human Rights Law Journal* 618. L Guignard '*La fabrique de l'égalité par le droit Genèse et usages transnationaux du protocole de Maputo sur les droits des femmes de l'Union africaine*' PhD thesis, l'École normale supérieure Paris-Saclay, 2018.

62 Biegon (n 61); Asuagbor (n 52)

63 State Reporting Guidelines (n 9).

64 See above, sec 1.1 (defining implementation).

Commission has also stated that the sections of the reports should take into account relevant General Comments.⁶⁵

The Special Rapporteur on the Rights of Women has organised a series of awareness-raising sessions for states around the *State Reporting Guidelines*⁶⁶ and also provided an overview of the implementation of the Maputo Protocol by states in her inter-sessional reports.⁶⁷

Indeed, the African Commission has called states to account for not following the *State Reporting Guidelines*, such as where they have not provided specific information. For example, in its Concluding Observations on Namibia's 6th Periodic Report and first report under the Maputo Protocol, the African Commission observed:

Namibia did not fully comply with the Guidelines for State Reporting under the Maputo Protocol, in particular the lack of information on whether individuals and organisations working on gender issues were involved in the preparation of the Report and insufficient background information, especially regarding the application of the Protocol in national courts, reservations entered if any, the state institutions, gender budgeting and gender audit of laws.⁶⁸

Questions are asked about the Maputo Protocol during the oral examination of the report, and the subsequent Concluding Observations may refer to the implementation of the Maputo Protocol.⁶⁹ The success of the *State Reporting Guidelines* is evidenced by the fact that, certainly more recently,⁷⁰ the vast majority of the reports, except for a handful which still discusses the Maputo Protocol under article 18(3),⁷¹ now have a separate section dedicated to the Protocol.⁷² In 2022 the African Commission also adopted *Guidelines on Shadow Reporting* which provide additional information for those wishing to submit alternative reports, noting in particular that shadow reports should take into account any

65 African Commission General Comment 2 (n 31) para 63.

66 Guignard (n 61).

67 Asuagbor (n 52).

68 Concluding Observations on Namibia's 6th Periodic Report and first report under the Maputo Protocol, para 29.

69 Concluding Observations and Recommendations on 6th Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011-2013) African Commission on Human and Peoples' Rights, adopted at its 58th ordinary session 6-20 April 2016, Banjul, The Gambia para 33. Concluding Observations and Recommendations on the Combined Periodic Report of Senegal on implementation of the African Charter on Human and Peoples' Rights (2004-2013), African Commission on Human and Peoples' Rights, adopted at its 18th extra-ordinary session, 29 July-7 August 2015, Nairobi, Kenya, para 40.

70 For earlier reports, see Asuagbor (n 52).

71 Benin, Mauritius, Djibouti: Combined Periodic Report from the 6th to the 10th Periodic Reports on the Implementation of the Provisions of the African Charter on Human and Peoples' Rights, 2009-2018 (2018); 9th to 10th Combined Periodic Report of the Republic of Mauritius on the Implementation of the African Charter on Human and Peoples' Rights (January 2016-August 2019) (2019); Republic of Djibouti, Combined Initial and Periodic Report under the African Charter on Human and Peoples' Rights 1993-2013 (2015). The latest report of Seychelles that is published on the African Commission's website addresses only the Maputo Protocol, although this may be that other documents have not been uploaded, see Country Report 2019 Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, 2021, <https://www.achpr.org/states/statereport?id=137>.

72 Republic of Kenya, Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter On Human and Peoples' Rights on the Rights of Women in Africa, April, 2020; Kingdom of Eswatini, Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa, 2021; and one of the earlier reports to have followed the Guidelines: Republic of Malawi, Report to the African Commission on Human and Peoples' Rights. Implementation of the African Charter on Human and Peoples' Rights 1995-2013 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2005-2013 (2015).

general comments, including those on the Maputo Protocol, as well as the *State Reporting Guidelines* on the Protocol, reiterating that submissions should follow these latter Guidelines.⁷³

4.2 Duplication of reporting obligations under United Nations and African Union human rights mechanisms

Besides their reporting obligations under the Maputo Protocol, states parties to CEDAW are also required to report under CEDAW, to which 52 of the 55 African Union (AU) states are party, compared to the 43 ratifications of the Maputo Protocol. In addition, all AU states should submit annual reports under the Solemn Declaration on Gender Equality in Africa (SDGEA).⁷⁴ An AU initiative, adopted by the AU Assembly in 2004, the SDGEA sets out a number of thematic areas of action, standards which were developed through drawing upon international and regional instruments. Other AU treaties and initiatives, such as the African Charter on Democracy, Elections and Governance⁷⁵ and the African Peer Review Mechanism (APRM), similarly require regular state updates.⁷⁶ Sub-regional initiatives, such as the SADC Protocol on Gender and Development, also oblige states to report every two years.⁷⁷

Voluntary National Reviews on the implementation of the Sustainable Development Goals (SDGs) will encompass measures taken on SDG 5 namely, 'Gender Equality: 'Achieve gender equality and empower all women and girls', addressing the targets and indicators around ending all forms of discrimination, eliminating violence and harmful practices; recognising unpaid and domestic work; ensuring full and effective participation in decision-making; and access to sexual and reproductive health. As has been indicated elsewhere, these map closely on to CEDAW obligations but also those of the Maputo Protocol.⁷⁸ Many African states have submitted such reports.⁷⁹

Despite the significant overlap in their content,⁸⁰ in practice, the separate reporting continues. This inevitably leads to 'reporting fatigue', particularly for those states that are good international citizens in trying to report on time and across each of these instruments. The burden is exacerbated where the capacity and resources available to draft these reports in national ministries, as is the case in many countries, may be limited. Consequently, it is not surprising that any report submitted to the African Commission 'sometimes is perceived as an administrative burden and less of an opportunity for critical engagement'.⁸¹

73 Guidelines on Shadow Reports of the African Commission on Human and Peoples' Rights, adopted by The African Commission on Human and Peoples' Rights, meeting at its 72nd ordinary session held from 19 July to 2 August 2022, part II.e.

74 Art 12 of the SDGEA.

75 Art 49. See also Guidelines III/9, Guidelines for State Parties Reports under African Charter on Democracy, Elections and Governance. Annex 1 to Rules of Procedure, 2016. M Wiebusch & CC Aniekwe 'The African Charter on Democracy, Elections and Governance: past, present and future' (2019) 63 *Journal of African Law* 9-38.

76 African Peer Review Mechanism (APRM) Declaration on Democracy, Political, Economic and Corporate Governance includes reference to gender equality and Objectives, Standards, Criteria and indicators for the APRM includes CEDAW among the standards and among the indicators, whether the state has ratified CEDAW and other instruments, whether there is adequate protection for the rights of women in the constitution and legislation and steps taken to ensure participation of women in national life, paras 2.9.2 & 2.9.3.

77 SADC Gender Protocol, art 35(4).

78 The Danish Institute for Human Rights 'The Human Rights Guide to the Sustainable Development Goals' https://sdg.humanrights.dk/en/targets2?combine_1=xxx&goal=74&target=&instrument=2480&title_1=&field_country_tid=All&field_instrument_group_tid=All&combine= (accessed 23 June 2023).

79 UN-DESA 'Voluntary National Reviews' <https://sustainabledevelopment.un.org/vnrs/#VNRDatabase> (accessed 23 June 2023).

80 N Abdulmelik & T Belay 'Advancing women's political rights in Africa: the promise and potential of ACDEG' (2019) 54 *Africa Spectrum* 156-157.

81 Johnson (n 20).

Yet there is significant potential to reduce the reporting burden on states if these various bodies were willing to consider ways in which a single or fewer reports may address some or all of these obligations. Whilst not implying that a report to one body should necessarily replace those to another, cross referencing and referring to others may assist in the drafting. Reports to CEDAW, for example, at the very least ‘can provide valuable insight into how [a state] views its progress in implementing the Maputo Protocol’, given the similarity between many of the provisions in the two instruments.⁸² The African Governance Architecture, which is the ‘comprehensive and institutional political framework for the promotion of Democracy, Good Governance and Human Rights in Africa’,⁸³ and its African Governance Platform (‘an informal and non-decision-making mechanism’) are certainly intended to provide some coherence, at the AU level. The Platform includes the African Commission, the African Court on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child, as well as the APRM and ‘[a]ny African Union organ or institution that may be established or given the mandate by the Assembly to promote governance, democracy and human rights’.⁸⁴ Yet this does not appear to have been used to streamline the reporting requirements of states under these various instruments. Hence, although some of the reports to the SDGEA include sections on the Maputo Protocol, they are brief,⁸⁵ and in general, the reports remain distinct. Viljoen previously suggested a light-touch harmonisation, namely that states attach to their article 62 African Commission/article 26 Maputo Protocol reports those that they have submitted to other UN and AU mechanisms.⁸⁶ Even this does not appear to have happened.

4.3 Communications

The communications process is not mentioned in the Maputo Protocol as a tool for implementation. Prior to the adoption of the Maputo Protocol, there were very few communications on the rights of women and which referred to article 18(3)⁸⁷ and even subsequently, communications have not been filed to any real extent, in part perhaps due to the controversy surrounding whether it is only the Court which has exclusive jurisdiction on the Maputo Protocol.⁸⁸ The African Commission has been criticised for missing opportunities and an ‘overall lack of zeal to advance women’s rights’ through this procedure.⁸⁹ However, some examples do illustrate the potential. For example, in *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, the state was not a party to the Maputo Protocol, but the African Commission used this and CEDAW to interpret the provisions of the African Charter to define discrimination, ultimately recommending that the state, in implementing its findings, ratify the Protocol.⁹⁰

In judgments adopted by the African Court, African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee) and by the Economic Community of West African States (ECOWAS) Court of Justice (ECOWAS Court), violations of the Maputo Protocol can

82 Dechert (n 11) 11.6.4.

83 African Governance Architecture Rules of Procedure, Rule 1.

84 African Governance Architecture Rules of Procedure, Rule 2.

85 Rwanda *Report on the Implementation of Solemn Declaration on Gender Equality In Rwanda 2019* (2020) p 12.

86 Viljoen (n 1) 37.

87 R Murray *The African Charter on Human and Peoples’ Rights: a commentary* (2019).

88 See F Viljoen & M Kamunyu ‘Articles 27 and 32’ in this volume.

89 S Rajab-Leteipan & M Kamunyu *Litigating before the African Commission on Human and Peoples’ Rights. a practice manual* (Equality Now, 2017) 4. M Prandini Assis ‘Women in the rulings of the African Commission on Human and Peoples’ Rights’ <http://www.publicseminar.org/2015/05/women-in-the-rulings-of-the-african-commission-on-human-and-peoples-rights/> (accessed 23 June 2023). See *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples’ Rights 57th Annual Activity Report (2016).

90 Communication 323/06 African Commission on Human and Peoples’ Rights, Combined 32nd and 33rd Annual Activity Report (2013) para 121.

be found alongside those of other international instruments.⁹¹ Indeed, applicants have used CEDAW and interpretations by its Committee to support their arguments on the content of the rights in the Maputo Protocol.⁹² Attempts to request the African Court to issue an Advisory Opinion on aspects of the Maputo Protocol have so far failed with the Court holding that it did not have jurisdiction.⁹³ As with the African Commission, litigation on women's rights and the Maputo Protocol before the African Court has yet to reach its full potential.⁹⁴

5 Conclusion

Article 26 adds on the one hand, a rather pedestrian approach to implementation and monitoring, through the use of existing mechanisms, specifically, in article 26(1) the existing state reporting process under the African Charter and consequently incorporates all of its challenges; and, on the other, in article 26(2), some potentially innovative methods with respect to gender responsive budgeting. While accountability for measures taken to implement the Maputo Protocol is enhanced where states have submitted their reports in compliance with the *State Reporting Guidelines* and these are examined in public, if states fail to report to the African Commission then the main device by which the Maputo Protocol is to be monitored is lost.

There is a risk that because article 26 links implementation and monitoring, the key element, implementation, is lost. The development of *Guidelines on State Reporting* addresses in part the African Commission's role in monitoring. But the African Commission needs to spend more time elaborating on what states should do to implement the provisions of the Protocol, including through gender responsive budgeting. For the latter, it can draw upon initiatives at SADC and CEDAW, signposting states to the guidelines and including reference to them in its own documents, General Comments and Concluding Observations as they relate to the Protocol.

Initiatives at the AU level,⁹⁵ such as the 'Maputo Protocol Scorecard and Index (MPSI)' provide a tool by which states can undertake 'ongoing audits to promote gender equality'.⁹⁶ The MPSI gives states a framework 'as a performance measuring tool for Member States as well as provide gender

91 See *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (2018) 2 AfCLR 380 (APDF) paras 69 & 78. See B Kombo 'Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389. Before the African Children's Committee, Communication 0012/Com/001/2019 Decision 002/2022 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* April 2022. Before the ECOWAS Court *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/CCJ/JUD/06/08 (27 October 2008); *Azali Abia and Another v Benin* ECW/CCJ/JUD/01/15; *Mary Sunday v Federal Republic of Nigeria* Judgment No ECW/CCJ /JUD/11/18 (17 May 2018); *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017); *Women Against Violence & Exploitation in Society (WAVES) & Child Welfare Society Sierra Leone (CWS-SL) (On behalf of pregnant adolescent schoolgirls in Sierra Leone) v Sierra Leone* Judgment No ECW/CCJ/JUD/37/19 (12 December 2019).

92 APDF (n 91) paras 98-99.

93 *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and Others* (Advisory Opinion) (2017) 2 AfCLR 622.

94 O Fagbemi 'Litigating the rights of women at the ECOWAS Court' in K Kanyali Mwikya et al (eds) *Litigating the Maputo Protocol, a compendium of strategies and approaches for defending the rights of women and girls in Africa*, Equality Now, 2020, chap 5.

95 See also AU Strategy for Gender Equality & Women's Empowerment 2018-2028, para 3.1.1.1: Implement 'All for Maputo Protocol' programme to include time-bound additional dedicated High Level support 116 funding and training for select state, 117 women's rights defense organizations, 118 private sector, media, universities and independent scholars and app platforms'.

96 African Union 'Maputo Protocol scorecard & index: a stepping stone towards achieving women's rights' <https://au.int/en/articles/maputo-protocol-scorecard-index-stepping-stone-towards-achieving-womens-rights> (accessed 23 June 2023).

disaggregated data and information on the status of gender equality for the effective generation of appropriate gender-responsive policies and other initiatives'.⁹⁷

These initiatives need to be disseminated and encouraged. The African Commission should consider additional practical ways in which it can elaborate further on the specifics of how states can implement the various provisions of the Protocol. As Kane notes, '[n]ow we have available one of the most revolutionary women's rights treaties ever drawn up, our struggle must be to set to work to ensure that states that have ratified it begin to apply it'.⁹⁸

97 As above.

98 I Kane 'Harmonising the Protocol with national legal systems' in Musa et al (n 13) 58.