Articles 27 and 32

The interpretative mandate under the Maputo Protocol

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Article 27: Interpretation

The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

Article 32: Transitional Provisions

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

1 Introduction

As detailed throughout the preceding chapters, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is a response to the inability of the existing international human rights framework to make women's rights protection a reality.[1] Departing from the premise that the norms existing at the time were inadequate,[2] it provides for greater normative specificity in the form of women-focused rights.[3] However, the Maputo Protocol accepts that even if norms are much more women-specific and elaborate, there is a historical implementation

1 Preamble (para 12): '*despite the ratification* of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, w*omen in Africa still continue to be victims* of discrimination and harmful practices'. Our emphasis. See A Rudman 'Preamble' sec 4.12 in this volume for further discussion.

2 For a juxtaposition between the Maputo Protocol and pre-existing treaties relevant to women's rights, see F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11 16-29.

3 For an insightful discussion, see F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72-84.

gap that would still need to be bridged.[4] This implementation gap arises in large part due to the limited access by women and women's rights organisations to domestic remedies and regional human rights bodies. Although this chapter focuses on access to regional bodies, the role of these bodies is premised on the understanding that national courts would be the first port of call.[5]

The issue of monitoring and interpretation of the Maputo Protocol is, therefore, crucial. Articles 27 and 32 of the Maputo Protocol deal with the 'interpretation' of the Protocol arising from its 'application' and 'implementation'. The Maputo Protocol does not establish a new or separate monitoring body responsible to oversee its implementation. As a protocol complementary to the African Charter, as discussed in chapter 1 of this commentary, it adds to the substantive protection that the Charter gives, while leaving its monitoring to the supervisory mechanisms under the Charter framework, the African Commission on Human and Peoples' Rights (African Commission) and African Court on Human and Peoples' Rights (African Court).[6] In this way, the Maputo Protocol differs from the African Charter on the Rights and Welfare of the Child (African Children's Charter). Adopted in 1990, the African Children's Charter is a self-standing and separate treaty, with no institutional link to the African Charter or Commission. Under the African Children's Charter, a separate child-specific monitoring body, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), was created.

While the possibility of adopting a separate treaty with a self-standing women-specific treaty monitoring body was raised and considered during the drafting process of the Maputo Protocol, preferences for a protocol complementary to and relying on the existing monitoring framework of the African Charter prevailed. The reasons for this preference include the human resources and financial cost required for a separate treaty body,[7] the difficulties experienced by the African Children's Committee in becoming fully operational,[8] and fear of fragmentation of the regional human rights system. While there may be compelling arguments in favour of creating a separate 'African Women's Rights Committee',[9] for example along the lines of the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), it seems to be a case of the horse having bolted. It may be challenging to argue for establishing a new organ to take over parts of the mandate of an existing African Union (AU) body in the context of the African Union's ongoing reform process driven by imperatives such as cost saving and rationalisation.[10] It may also be considered too burdensome to go through a formal and time-consuming process of either amending the Maputo Protocol or adopting an amending protocol thereto.[11] It should further be kept in mind that the UN human rights system, of which the CEDAW Committee is part, consists of nine core human rights treaties, each with its own

4 See eg Banda (n 3) 73 and F Viljoen *International human rights law in Africa* (2012) 257.

5 For domestic court decisions in which the Maputo Protocol has been applied, see S Omondi et al *Breathing life into the Maputo Protocol: jurisprudence on the rights of women and girls in Africa* (2018).

6 See A Rudman 'Introduction' sec 3 in this volume.

7 A Budoo 'Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union' (2018) 18 *African Human Rights Law Journal* 58 71.

8 Viljoen (n 4) 397-398.

9 See Budoo (n 7) 69-73, arguing for reinforcing existing mechanisms and creating new mechanisms such as a working group; and A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 321, contending that such as body would serve 'as a *receiver* of litigation and as a *driver* of implementation (emphasis in original).

10 Embarked upon in 2017, launched by Assembly/AU/Dec.635(XXVIII) 28th ordinary session of the Assembly of the Union, 30 and 31 January 2017, Addis Ababa; Annex to Assembly Decision on the Outcome of the Retreat of the Assembly of the African Union on Institutional Reform of the African Union. Report on 'The Imperative to Strengthen our Union: Proposed Recommendations for the Institutional Reform of the African Union'.

11 See Maputo Protocol art 30 'amendment and revision'. For further discussion see B Traoré 'Articles 28-31' sec 4 in this volume.

self-standing treaty monitoring body. In the African regional human rights system, the existence of a group-specific body is the exception rather than the rule.

This chapter discusses articles 27 and 32 together, as these two provisions are interlinked. Read together, articles 27 and 32 give rise to the following important question: which institution(s) can be 'seized' with complaints against state parties alleging that provisions of the Maputo Protocol have been violated? Article 27, read together with article 32, is ambiguous.[12] This ambiguity arises because, on a narrow literalist reading, the Protocol (a) designates the African Court as the body responsible for dealing with ('interpret') cases arising from its 'application' and 'implementation'; and (b) ascribes to the Commission the same role, but *only until* the establishment of the Court. The formulation of this provision has led some to suggest that, once it has been established, *only* the African Court can interpret the Maputo Protocol, that is, to the exclusion of the African Commission. Other commentators simply indicate that the Court is the body tasked with 'interpreting' the Charter, while omitting any reference to the Commission, thus leaving readers (and potential litigants) with the impression that the Court is the only body to be seized with cases alleging violations of the Protocol.[13]

This chapter seeks to provide clarity on this issue, by highlighting the complementary roles of the Commission and Court in interpreting the Maputo Protocol. The chapter is organised into 7 sections. After this introduction, the chapter sets out the most suitable interpretive approach to human rights treaties, including the Maputo Protocol. In the section 3, it explores the drafting history, before, in the section 4, providing a general understanding of the terms 'interpretation', 'application', 'implementation' and 'monitor'. Section 5 focuses on article 32, while the main and section 6 discusses article 27. This section not only deals with the shared interpretive mandate over the Maputo Protocol of the African Court and African Commission, but also traces the interpretive role of the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court). The conclusion underlines the importance of removing obstacles that impede women's access to the African regional human rights system.

2 Interpretative approach to human rights treaties, including Maputo Protocol

A reading of articles 27 and 32 raises a question to which the answer is not immediately discernible through a literal interpretation, this section explains the interpretive approach that has been used to arrive at the positions in this chapter. This brief foray also provides insights into how the Maputo Protocol as a whole should be interpreted.

International law in general and international human rights law, in particular, provide clear guidance on treaty interpretation. From an international law perspective, the Vienna Convention on the Law of Treaties (VCLT) provides guidance on the rules of treaty interpretation. The general rule is that a treaty should 'be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*'.[14] An interpretation guided by purpose essentially amounts to a purposive or teleological approach to interpretation. Such

12 Viljoen (n 2) 39, expressing that 'the Maputo Protocol is not a model of clarity on this issue'.

13 See eg Banda (n 3) 84, indicating that '[w]hen set up, the African Court will be responsible for the interpretation of the Protocol'; and O Ojigho 'Human rights protection in Africa: special focus on rights of women' *African Union Commission, '2016: African year of Human Rights with a focus on the Rights of Women' (AU ECHO, 2016) The Newsletter of the African Commission* (2016), stating that '[t]he Maputo Protocol in a special way provides in Article 27, that the African Court will be charged with interpretation of the application and implementation of the protocol'.

14 Art 31 of the VCLT. Our emphasis.

an approach allows the consideration of the objectives of the treaty, intrinsic and extrinsic factors, such as socio-political and economic circumstances, and other contextual factors.[15]

The purposive or teleological approach also allows reliance on human rights principles (whether or not expressed in the treaty), and this pathway has been used by various international human rights bodies to expand and read-in protection and obligations that do not appear in the text.[16] The African Commission has for example interpreted the African Charter to read-in the rights to shelter and to food, as implicitly protected by expressly guaranteed rights,[17] whereas the Charter's text does not expressly provide for these rights.

A purposive or teleological approach is well suited to the interpretation of human rights treaties for two main reasons. First, since human rights treaties are considered as 'living instruments', it follows that their interpretation must take into account the current context and people's actual lived realities.[18] Second, a purposive or teleological approach facilitates the adoption of an interpretation that most favours human rights promotion and protection, and, therefore, the 'human being'.[19]

The African Court averred that it adopts a purposive approach to ensure that 'all its decisions are based on the overriding objective of promoting access in order to ensure protection of human rights'.[20] For instance, in answering one of the questions put forward by the African Children's Committee, in recognising that this body is an AU organ, the Court relied on various factors including the mandate of the Committee and other extrinsic factors such as the actual practice, status and relationship of the Committee with other AU organs.[21]

Overall, since enjoyment of human rights is largely determined by the understanding of such rights, a purposive or teleological approach allows for interpretations that are in line with or most favourable to the objectives of the treaty. In the case of the Maputo Protocol, its main objective is discernible from its Preamble, which indicates the determination of state parties to 'ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights'.[22] Accordingly, all interpretations of the Protocol must necessarily pursue this objective.

15 See generally: A Barak *Purposive interpretation in law* (2005), A Amin 'A teleological approach to interpreting socio-economic rights in the African Charter: appropriateness and methodology' (2021) 21 *African Human Rights Law Journal* 204; S Dothan 'The three traditional approaches to treaty interpretation: a current application to the European Court of Human Rights' (2019) 42 *Fordham International Law Journal* 765, CM Fong 'Purposive approach and extrinsic material in statutory interpretation: developments in Australia and Malaysia' (2018) *Journal of the Malaysian Judiciary* 1.

16 S Dothan 'In defence of expansive interpretation in the European Court of Human Rights' (2014) 3 *Cambridge Journal of International & Comparative Law* 508.

17 See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (*SERAC*) (2001) AHRLR 60 (ACHPR 2001) paras 49, 50-54, 57 & 66.

18 Traced back to the view of the European Court of Human Rights that '[t]he Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions', *Tyrer v The United Kingdom* ECHR (15 March 1978) Ser A 26 para 31.

19 See eg the view of the Inter-American Court of Human Rights that, 'when interpreting the Convention it is always necessary to choose the alternative that is most favourable to protection of the rights enshrined in said treaty, based on the principle of the rule most favourable to the human being' *Mapiripán Massacre v Colombia* IACHR (15 September 2005) Ser C 122 para 106; and the African Court: 'The Court accepts that the purposive theory or presumption is one of the tools, if not the most important, of interpreting or construing a legal instrument in order to determine whether a statute applies to a particular circumstance … The Court is also aware that there has been a global movement towards the use of the purposive approach', *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights,* Request 2/2013, African Court on Human and Peoples' Rights (Request 2/2013) para 92.

20 Request 2/2013 (n 19) para 96.

21 However, in answering the second question presented by the Committee, the Court did not utilise the purposive approach owing to its view about the clarity of the impugned provision.

22 Maputo Protocol, Preamble para 14.

A purposive or teleological approach to interpretation facilitates this goal where reliance on a literal interpretation is inappropriate.

3 Drafting history

The Final Draft[23] of the Maputo Protocol, following the Nouakchott[24] and Kigali[25] Drafts, formed the basis for the further development of the Maputo Protocol.[26] As discussed below, it received input from the Meeting of Experts in 2001, commentary by the Office of the Legal Counsel in 2002 and the NGO Forum in 2003. In the Final Draft, article 23 sets out the verbatim provision that was later renumbered as article 27.

The interrelatedness of articles 27 and 32 appears from the drafting process of the Protocol. At the first meeting of government experts, in 2001,[27] the draft provision that the African Court 'shall be seized with matters of interpretation arising from the application or implementation of this Protocol' gave rise to the question how this would be possible since the Court had by then not yet been established. By that time, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol), which was adopted on 10 June 1998, had indeed not yet entered into force. The following response to this query was recorded: '[m]embers were informed that, pending the establishment of the African Court, the African Commission on Human and Peoples' Rights was mandated to interpret the Protocol'.[28] The reformulated version accordingly read: '[t]he African *Commission* on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol *until such time as the Court is established* whereby both will be seized with matters of interpretation'.[29] The raising of this concern therefore caused the introduction of the wording that would become article 32.

However, at the second experts' meeting, and in the final version, the two aspects – the entity responsible for interpretation and the non-establishment of the Court – were severed and provided for in two separate articles. The result is articles 27 and 32 of the Maputo Protocol.

Throughout the drafting process, it was uncontentious that 'monitoring' of the Maputo Protocol fell to the African Commission.[30] According to firmly established practice, states under article 62 of the African Charter submit reports to the Commission on their implementation of the Charter. Early on in the drafting process, it was accepted that state parties would similarly have to submit periodic reports to the Commission with respect to their implementation of the Maputo Protocol.[31]

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

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

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

26 The Nouakchott (n 24) and Kigali Drafts (n 25) did not contain any provisions on interpretation.

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

28 Report of the Meeting of Experts (n 27) para 154.

29 Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001 (Revised Final Draft).

30 See art 26 of the final version of the Maputo Protocol where monitoring of the Protocol is explicitly indicated to mirror art 62 of the African Charter i.e. by the African Commission.

31 Resulting in Maputo Protocol art 26(1).

While the amendment arising from the 2001 experts' meeting, cited above, makes it explicit that both the Commission and Court would have the competence to adjudicate individual cases, this clarification did not feature in subsequent and in the final version. However, at no stage of the drafting was it suggested that it be made explicit that the Court be granted the *main or exclusive* mandate to 'interpret' the Maputo Protocol.

The *travaux préparatoires* reveal that it was the Court's and not the Commission's mandate that was questioned during the Maputo Protocol's drafting. The Commission's interpretive mandate was assumed to be self-evident. During the second government experts' meeting, a deletion of the provision spelling out the role of the 'African Court' in interpreting the Protocol was proposed.[32] In the summary of the proceedings of the Meeting of Experts, it is indicated that 'the AU Legal Counsel expressed the view that [it should be deleted since] the Protocol would be an integral part of the African Charter on Human and Peoples' Rights and that in any event, the matter was dealt with under article 45(3) of the African Charter and Article 3 of the Protocol on the Establishment of the African Court on Human and Peoples' Rights'.[33] Article 45(3) of the African Charter provides that the 'functions of the Commission shall be [to] cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights'. Article 3 of the Court Protocol delineates the Court's material jurisdiction. The implication of the Legal Counsel's intervention is clear: Both the Commission and the Court are – even in the absence of any provision in the Protocol – mandated to 'interpret' and 'apply' (and thus adjudicate) complaints or cases emanating from the Maputo Protocol. Regrettably, the Legal Counsel's advice to remove explicit reference to the Court's role was not heeded, and the provision remained intact.[34]

The *travaux préparatoires* provide further insights illustrating that the Commission's supervision of the Maputo Protocol is inherent and assumed. In the Nouakchott Draft, the drafters proposed that the 'Commission can also, through the Secretary-General of the Organisation of African Unity (OAU), propose amendments to the present protocol'. [35] The Kigali Draft of the Maputo Protocol provided that the Commission has to give its opinion on any treaty amendment, and that it may, through the Secretary-General of the OAU, propose amendments to this Protocol. [36] This text clearly shows that as early as 1997, the African Commission was intended as the primary treaty monitoring body and custodian of the Maputo Protocol. This position was confirmed in the Revised Final Draft.[37] In international law, amendment of treaties is primarily vested in state parties 'except in so far as the treaty may otherwise provide'.[38] Aside from the state parties, alternative initiation of amendment would ostensibly fall to a supervisory treaty monitoring body such as was the case in the draft text.

32 Summary of the proceedings of the second Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the rights of Women in Africa, Expt/Prot.Women/Rpt(II), Addis Ababa, Ethiopia, March 2003 (Summary of the proceedings of the Meeting of Experts).

33 Summary of the proceedings of the Meeting of Experts (n 32).

34 The meeting report notes: 'However, the meeting felt, that given the importance of the issue of interpretation in any legal instrument, the Article should be maintained.'

35 Nouakchott Draft (n 24) art 22.

36 Kigali Draft (n 25) art 23.

37 Revised Final Draft (n 29) 25. See also Maputo Protocol art 30(3): 'The Assembly, upon advice from the African Commission, shall examine these proposals [for amendment and revision]'.

38 Art 39 of the VCLT.

4 Concepts and definitions

The terms 'interpretation', 'application' and 'implementation' are used in both articles 27 and 32. It is furthermore useful in this context to also refer to the term 'monitor', used in article 26.[39]

4.1 'Implementation' and 'monitoring'

This analysis of terms starts by discussing 'implementation' and 'monitoring', as these terms capture the all-encompassing responsibility of state parties to human rights treaties, on the one hand, and of human rights treaty bodies, on the other. In AU human rights treaties, 'implementation' refers to the 'legislative and other measures' taken by state parties to give effect to the treaty provisions.[40] 'Implementation' therefore denotes the process undertaken at the domestic level to ensure that state parties live up to their overarching obligation to ensure the full realisation of treaty rights. The concept 'monitoring' is often used in connection to implementation to describe the role of the relevant AU body in reviewing or supervising the state's obligation to implement.[41] Under the African Children's Charter, for example, the mandate of the African Children's Committee is to 'monitor the implementation and ensure protection' of the Charter rights.[42] Under the Maputo Protocol, the African Commission is implicitly tasked with monitoring the implementation by state parties through the consideration of state reports.[43]

4.2 'Interpretation'

Ascribed its ordinary meaning, 'interpretation' denotes a broad process of providing, giving, describing, explaining, making out or bringing out the meaning of something.[44] Treaty interpretation, therefore, is the process of *giving meaning to* or *making out the meaning of* a treaty provision, rather than 'finding' or 'discovering' a predetermined meaning or pre-existing intention of the drafters.[45]

In its narrower sense, 'interpretation' may relate to specific processes of ascribing meaning to treaties outside the ambit of contentious proceedings.[46] A pertinent example is the competence of regional human rights courts to issue advisory opinions.[47] Advisory opinions are aimed at shedding

39 See R Murray 'Article 26' in this volume.

40 See eg Maputo Protocol art 26; African Charter on the Rights and Welfare of the Child (African Children's Charter) art 42(b); Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) art 14(1).

41 Kampala Convention (n 40) art 14(1).

42 African Children's Charter (n 40) art 42(b).

43 Maputo Protocol art 26 is titled 'Implementation and monitoring', but the provision only deals with 'implementation' and not with the 'monitoring' of state reports. However, the reference to art 62 of the Charter, and the established practice of the Commission, by necessary implication means that the task of considering state reports falls to the Commission. See R Murray 'Article 26' in this volume for further discussion.

44 See *Cambridge Dictionary, Concise Oxford, Collins English Dictionary* and *Merriam-Webster*.

45 R Gardiner *Treaty interpretation* (2015) 26-27.

46 The competence of a court to 'interpret' its own judgments is of a very particular nature. The African Court, for example, has a competence that does not relate to the meaning of the Charter or any other treaty, but to the content and implications of its own remedial orders art 28(4) of the Court Protocol; see eg *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (interpretation) (2017) 2 AfCLR 141.

47 See eg art 4(1) of the Court Protocol; L Chenwi 'The advisory proceedings of the African Court on Human and Peoples' Rights' (2020) 38 *Nordic Journal of Human Rights* at 61; as well as JM Pasqualucci 'Advisory practice of the Inter-American Court of Human Rights: contributing to the evolution of international human rights law' (2002) 38 *Stanford Journal of International Law* 241; and J Gerards 'Advisory opinions, preliminary rulings and the new Protocol 16 to the European Convention of Human Rights: a comparative and critical appraisal' (2014) 21 *Maastricht Journal of European and Comparative Law* 630.

light on particular treaty provisions in the absence of a specific dispute between opposing parties. Article 45(3) of the African Charter gives the African Commission the mandate to 'interpret' the Charter – but 'at the request' of a state party, an AU institution or an 'African organization recognised' by the AU.[48] While the African Charter uses the word 'interpretation' in this sub-article, its restricted usage prevents it from shining a more general interpretive light on the word. This provision seems to have been invoked only once, but without an indication of a formal request from an eligible entity. This reliance occurred in 2007 when the Commission adopted its 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples'.[49] However, the Commission has been performing an interpretive function outside the ambit of contentious complaints by adopting thematic resolutions,[50] Principles and Guidelines,[51] Guidelines, and General Comments.[52] In this context, it generally indicated article 45(1)(b) of the Charter (the mandate to 'formulate and lay down principles and rules') as the Charter basis for doing so, rather than article 45(3).

The Maputo Protocol does not use 'interpretation' in this narrow sense. In both articles 27 and 32, the word 'interpretation' is used in conjunction with 'application' and 'implementation'.[53] What is at stake in these articles is therefore not the 'interpretation' of the Protocol in the abstract, but the interpretation *arising from* the 'application' and 'implementation' of the Protocol. Under the Protocol, the term 'interpretation' should therefore be ascribed a much more expansive meaning, aligned with the ordinary sense of the word, namely, all processes through which the meaning of the text is brought to light. While advisory opinions and other forms of standard-setting, aimed at expanding on treaty norms outside a contentious dispute, form part of 'interpretation', so do decisions resulting from the exercise of the relevant body's protective mandate.

48 The African Court, in Appl 1/2013 *Advisory Opinion on the Request for Advisory Opinion by the Socio Economic Rights and Accountability Project (SERAP)* (Advisory Opinion), held that this form of recognition requires an African NGO to have been granted observer accreditation to the AU, pursuant to the Criteria for Granting Observer Status and for a System of Accreditation within the African Union. See further P Maguchu 'When to push the envelope? Corruption, human rights and the request for an advisory opinion by the SERAP to the African Court' (2020) *African Human Rights Yearbook* 436.

49 Adopted by the Commission at its 41st ordinary session, May 2007, Ghana, see para 8, where reliance is placed on art 45(3), in addition to art 45(1)(a) para 7: the mandate to 'collect documentation, carry out studies and research on African problems in the field of Human and Peoples' Right and, if need be, *submit opinions* or make recommendations to the governments, our emphasis.

50 These resolutions do not invoke art 45(3) of the Charter as basis; rather, in some resolutions art 45(1)(b) of the Charter, which mandates the Commission to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation', is invoked. See eg ACHPR/Res.3(V)89: Resolution on the Integration of the Provisions of the African Charter on Human and Peoples' Rights into National Laws of States, adopted at the Commission's 5th ordinary session, Benghazi, Libya, 3-14 April 1989; and ACHPR/Res. 366 (EXT.OS/XX1) 2017: Resolution on the Need to Develop ACHPR Principles on the Declassification and Decriminalization of Petty Offences in Africa, adopted at the Commission's 21st extraordinary session, 23 February-4 March 2017, Banjul, The Gambia.

51 See eg Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter, adopted on 24 October 2011.

52 See eg African Commission General Comment 1 on art 14(1)(d) & (e) of the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 52nd ordinary session of the African Commission held in Yamoussoukro, Ivory Coast 9-22 October 2012, para 1, where reliance is placed on art 45(1)(b).

53 See also art 36(2) of the Statute of the International Court of Justice, which provides for acceptance by states of the Court's jurisdiction in respect of 'interpretation' of a question of international law, and the existence of any fact which, if established, would constitute a breach of an international obligation.

4.3 'Application'

To 'apply' is, in the ordinary sense of the word, to 'make use of as relevant or suitable'.[54] Application is often used in the context of the 'scope of application' of a treaty, for example, to territory outside the borders of the state party (referred to as extraterritorial 'application').[55]

In the context of human rights treaties, the 'application' of a treaty is 'the process of determining the consequences' which, according to the treaty norm, 'should follow in a given situation'.[56] Logically, the processes of 'interpretation' and 'application' are separate, with 'interpretation' preceding 'application'.[57] However, the distinction between the two concepts is not watertight, and often 'application' involves at least a measure of 'interpretation', as meaning emerges from the application of a treaty provision to a concrete set of circumstances. From this perspective, interpretation is not distinct from application, but an integral step towards and part of application.[58]

In the two provisions under discussion, the terms 'application' and 'implementation' are used in combination. While article 27 joins them with an 'or', article 32 uses 'and'. Not much hinges on this difference, as the 'matter of interpretation' may in both instances arise from either 'application' or 'implementation', or from a combination of the two. Article 32 does not require a conjunctive reading, namely, that the interpretation should arise from *both* application *and* implementation but accords with a reading that interpretation may arise from any of the two (application and implementation), or from them both.

In many instances, the terms 'interpretation' and 'application' are used together in a conjoined way, without drawing a difference in the meaning of the two constituent terms.[59] In *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and 13 Others*,[60] the African Commission held that it is not competent to find violations of other international treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the South African Development Community (SADC) Treaty. In its reasoning, the Commission distinguished between the use of such treaties as interpretive guides (which is required under article 60 of the Charter), and their 'application and implementation' as the normative basis for a finding of violation and a possible remedial recommendation. The phrase 'application and implementation' is thus associated with the Commission's competence to find violations as part of its adjudicative mandate. This use of the phrase 'application and implementation' corresponds to its use in articles 27 and 32.

4.4 'Transitional provisions'

Article 32 is headed 'Transitional provisions'. Given that it contains only one provision, the single form ('provision') would have been more appropriate.

54 *Collins English Dictionary* (n 44).

55 See eg the titles of the following: F Coomans & MT Kamminga (eds) *Extraterritorial application of human rights treaties* (2004); M Milanovic *Extraterritorial application of human rights treaties: law, principles, and policy* (2011).

56 A Gourgourinis 'The distinction between interpretation and application of norms in international adjudication' (2011) 2 *Journal of International Dispute Settlement* 31.

57 Gardiner (n 45) 30.

58 MK Yasseen 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités' (1976-III) 151 *Hague Recueils/Collected Courses of the Hague Academy of International Law* 10.

59 The UN Convention on the Elimination of all forms of Racial Discrimination art 22; CEDAW art 29(1); and UN Convention on the Rights of All Migrant Workers and Members of their Families art 92, for example provide that any unresolved dispute about the 'interpretation or application' of the treaty may be referred to the International Court of Justice.

60 Communication 409/12, African Commission on Human and Peoples' Rights, 35th Annual Activity Report (2013) paras 24.

In its ordinary meaning, a 'transition' is a period in which things change from one state to another.[61] Transitional arrangements appear in domestic and international law. National legislation, constitutions and international treaties often contain 'transitional provisions' to regulate the application of newly enacted or amending laws to circumstances preceding the commencement of these new laws. Such 'transitional provisions' (sometimes referred to as 'transitional arrangements')[62] aim to provide for legal certainty and continuity, and to avoid injustice or unfairness. Examples of transitional provisions in 'new' constitutions are the continuity of existing laws;[63] and vesting jurisdiction in institutions pending the establishment of new institutions.[64] An example of a 'transitional arrangement' under international treaty law is the period of delay of four years in applying some of the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights afforded to 'developing' countries.[65]

The establishment of the African Union itself was characterised by a transitional period between the entry into force of the AU Constitutive Act and the launch of the AU.[66] The Constitutive Act makes it clear that the OAU General Secretariat 'shall be the interim Secretariat of the Union' pending the establishment of the AU Commission.[67] The AU Constitutive Act also regulates the consequences of the non-establishment of certain organs. While providing for the Court of Justice of the Union as the organ to be 'seized with matters of interpretation arising from the application or implementation of this Act', the Constitutive Act also stipulates that '[p]ending its establishment, such matters shall be submitted to the Assembly of the Union, which shall decide by a two-thirds majority'.[68] Transitional provisions, for example dealing with the replacement of one set of judges with another, also regulate the eventuality of the African Court being replaced by the African Court of Justice and Human Rights.[69]

5 Article 32 has been overtaken by events and is no longer of relevance

As its heading ('Transitional provisions') underlines, article 32 is a transitional provision.

The relevance of article 32 to the interpretation of Maputo Protocol was made conditional on the *non-establishment* of the African Court: *Until the African Court is established*, the African Commission is to be seized to interpret matters related to the application and implementation of the Maputo Protocol. The implication seems to be that now that the Court has been established, the Commission no longer needs to or should play any role in the interpretation of the Maputo Protocol. However, this understanding is misplaced.

61 *Collins English Dictionary* (n 44).

62 AU Constitutive Act art 33.

63 Item 2(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996: 'All law that was in force when the new Constitution took effect, continues in force, subject to (a) any amendment or repeal; and (b) consistency with the new Constitution'.

64 1990 Namibian Constitution art 138(3): 'Pending the enactment of the legislation contemplated by Article 79, the Supreme Court shall have the same jurisdiction to hear and determine appeals from Courts in Namibia as was previously vested in the Appellate Division of the Supreme Court of South Africa'.

65 TRIPS Agreement art 65(2), under the heading 'transitional arrangements'.

66 AU Constitutive Act art 33(1): 'This Act shall replace the Charter of the Organization of African Unity. However, the Charter shall remain operative for a transitional period of one year or such further period as may be determined by the Assembly, following the entry into force of the Act, for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto.'

67 AU Constitutive Act art 33(4).

68 AU Constitutive Act art 26, under the heading 'Interpretation', and not part of the 'Transitional arrangements'.

69 Protocol on the Statute of the African Court of Justice and Human Rights, Chapter II, 'Transitional provisions' arts 4-7, initial continuity in office of Judges of the African Court and Registry; finalisation of pending cases under the 1998 Court Protocol; and the continued validity of the 1998 Protocol for a period of time.

The transitional provision was intended to provide clarity in so far as the Maputo Protocol refers to an institution, the African Court, that was by the time of its adoption not yet 'established'.[70] From the drafters' perspective, it was uncertain when the Court would in fact become operational.[71] Article 32 rests on the assumption that the Court would be 'established' some time *after the entry into force* of the Maputo Protocol. The 'transitional' period foreseen by article 32 is therefore the interval between the entry into force of the Maputo Protocol and the 'establishment' of the Court. The AU Assembly adopted the Maputo Protocol on 1 July 2003, and it entered into force on 25 November 2005. The Court Protocol was adopted on 10 June 1998. However, it entered into force on 25 January 2004, *after the adoption* of Protocol, but almost two years *before the entry into force* of the Maputo Protocol.

Against this background, the question arises what the 'establishment' of the Court refers to. Going by the ordinary (dictionary) meaning of the word 'establish', it can mean to 'bring into existence',[72] or to 'start or create something'.[73] This definition allows the possibility of 'establish' as referring to (i) the adoption of the Court Protocol; (ii) the entry into force of the Court Protocol; or (iii) the actual operationalisation of the Court.

The first possibility can be easily discounted. 'Establishment' does not refer to the *adoption of the Court Protocol*, because the AU Assembly adopted the Court Protocol some five years prior to adopting the Maputo Protocol.

If the 'establishment' of the Court would be equated with the *entry into force* of its founding treaty (the Court Protocol), the 'transitional provision' would by 25 November 2005 have become inapplicable, leaving article 32 without any effect. In this scenario, the 'transitional provision' would have served no purpose subsequent to the entry into force of the Protocol, since the Court had indeed been 'established' (in the sense of its establishing Protocol entering into force) by the time when the Maputo Protocol took effect. From this point of view, having been overtaken by events, article 32 never was and no longer is of relevance to the exercise of making sense of the Protocol.

However, the Maputo Protocol did not explicitly link the 'entry into force' of the Court Protocol to the Commission's 'pending' competence but opted for the more open-ended phrase 'establishment of the Court'. While the entry into force of the Court Protocol brought the Court into existence, as a matter of law, the Court, as a matter of fact, became operational only after the election of the first judges on 22 January 2006 and their swearing in on 2 July 2006, and after the Court 'officially started its operations in Addis Ababa, Ethiopia in November 2006'.[74] Whichever of these dates are used as the date of the 'establishment' of the Court, it is clear that the transitional period between the Maputo Protocol's entry into force (25 November 2005) and the 'establishment' of the Court (whether 22 January 2006, 2 July 2006, or November 2006) was between around a month and a year. Using the last of these dates, and applying it to this analysis, the Commission served a transitional role between 25 November 2005 and November 2006. What is undeniable, is that the African Commission has since November 2006 not served this role, and definitely no longer acts as a 'transitional monitoring body'. During this period, no complaints or cases alleging violations of the Maputo Protocol were submitted

70 Viljoen (n 4) 313.

71 By 1 July 2003, 11 states had become party to the Court Protocol, see https://au.int/sites/default/files/treaties/36393-s1-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS_0.pdf (accessed 18 May 2023) Ratification by 15 states was required for the entry into force of the Court Protocol (Court Protocol art 34(3)).

72 *Oxford Dictionary* (n 44).

73 As above.

74 Available at African Court on Human and Peoples' Rights 'Welcome to the African Court' https://www.african-court.org/wpafc/welcome-to-the-african-court/ (accessed 23 June 2023).

to either the Commission or the Court. Understandably, therefore, article 32 was never invoked, and has subsequently been overtaken by events.

Article 32 should consequently not serve to restrict the protective reach or substantive effects of the Maputo Protocol. As a provision that has fallen into disuse, it is arguable that the Protocol should, as a living instrument, now be construed without reference to article 32.

6 Article 27: a shared interpretive mandate over the Maputo Protocol by the African Court and African Commission

The African Commission and African Court share the mandate to interpret matters arising from the 'application' and 'implementation' of the Maputo Protocol. The Court has been established to 'complement the protective mandate of the African Commission',[75] and not to *replace* it. While individuals or NGOs in state parties to the Maputo Protocol that have accepted the Court's jurisdiction can access the Court indirectly,[76] or directly,[77] individuals and NGOs in *all state parties to the Protocol* may submit cases to the Commission, therefore, comparatively, the Commission's access is unfettered. However, while the Commission's findings are generally accepted as being recommendatory, the Court's judgments are unequivocally binding in nature.[78] In cases decided on their merits and then referred to the Court by the Commission, the Court's judgments may be viewed as reinforcing (or 'enforcing') the Commission's findings.[79] For individuals and NGOs to access the Court directly for an interpretation of the Maputo Protocol, states need to have satisfied a tripartite requirement: ratification of the Maputo Protocol; ratification of the Court Protocol; and an acceptance of the Court's jurisdiction by having made a declaration under article 34(6) of the Court Protocol. Individuals and NGOs in Maputo Protocol-states not party to the Court Protocol and in states that have accepted the Court's jurisdiction but have not accepted direct access, have no choice but to seize the Commission. Individuals and NGOs (enjoying observer status with the Commission) in those states that have accepted direct access to the Court may directly seize the Court. The Table below shows that while the structure of complementarity between the Commission and Court is fixed, the position in respect of specific states will change over time as their ratification status and acceptance of article 34(6) change.

75 African Court Protocol art 2. The Preamble to the Court Protocol, para 8 '*Firmly convinced* that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights'.

76 By first submitting complaints to the Commission which can then refer a matter to the African Court as guided by its 2020 Rules of Procedure.

77 In respect of states that have made and deposited a declaration under art 34(6) of the Court Protocol.

78 Art 28(2) of the Court Protocol: 'The judgment of the Court decided by majority shall be final and not subject to appeal'. See also Viljoen (n 4) 414.

79 See eg Court Protocol, Preamble, para 8, noting that the 'reinforces the functions of the African Commission'.

Table: Avenues for individuals or NGOs to vindicate their Maputo Protocol (MP) rights (in contentious proceedings)

Item	Treaties ratified; declaration made	Can individual/ NGO invoke MP as guide (art 60)?	Can individual/ NGO allege MP violation?	Can individual/ NGO seize Commission?	Can individual/ NGO directly seize Court?	Number of states in category (as at 1/5/23)
1	Charter	Yes	No	Yes	No	54
2	Charter and Court Protocol	Yes	No	Yes	No	34
3	Charter, Court Protocol and 34(6) declaration	Yes	No	Yes	Yes	8
4	Charter and Maputo Protocol	Yes	Yes	Yes	No	43
5	Charter, Maputo Protocol and Court Protocol	Yes	Yes	Yes	No	30
6	Charter, Maputo Protocol, Court Protocol and 34(6) declaration	Yes	Yes	Yes	Yes	8

6.1 The Court's interpretive mandate over the Maputo Protocol

While the Court's material jurisdiction extends to the Maputo Protocol, given the incomplete acceptance by states of the Court's jurisdiction, it has personal jurisdiction over a very limited number of matters pertaining to the 'application' and 'implementation' of the Maputo Protocol.

By virtue of article 3 of the Court Protocol, the African Court has jurisdiction over cases concerning the 'interpretation and application' of any 'human rights instrument ratified by the state concerned'. Under article 4 of the same Protocol, the African Court may provide advisory opinions on 'any legal matter relating to the Charter or any other relevant human rights instruments'. There is no doubt that, as a human rights treaty adopted by the AU Assembly, the Maputo Protocol falls within the scope of the Court's contentious jurisdiction, as provided for in article 3. As a 'relevant human rights instrument', the Maputo Protocol also undoubtedly falls under the Court's advisory competence.[80] The

80 See also Pan African Lawyers Union on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and other human rights instruments in Africa, Opinion 1/2018 (4 December 2020) (*Vagrancy* Advisory Opinion) paras 27 & 136-140.

Court's interpretive jurisdiction over the Maputo Protocol is thus not dependent on article 27, since the Court Protocol is unequivocal that the Maputo Protocol falls within its jurisdictional ambit. As far as girls are concerned, the Court's jurisdiction covers the provisions of both the Maputo Protocol and the African Children's Charter.[81]

In at least two cases emanating from its contentious jurisdiction, the Court interpreted and applied the Maputo Protocol. In the case of *APDF*,[82] the Court found Mali, a state party to the Maputo Protocol, in violation of numerous provisions of the Protocol.[83] As Mali had made a declaration under article 34(6) of the Court Protocol, the two NGOs (both enjoying observer status with the African Commission) were entitled to submit this case directly to the African Court. In another case before the Court, *Kouma and Diabaté*,[84] the applicants' contention that various Protocol provisions had been violated, was not considered because the Court declared the case inadmissible. However, the Court accepted that it had material jurisdiction over the matter.[85]

The Court also interpreted and applied the Maputo Protocol in the exercise of its advisory jurisdiction. In an advisory opinion concerning the compatibility of vagrancy offences with the applicable international human rights standards, the Court concluded that such laws violate article 24 of the Maputo Protocol (dealing with special protection of women in distress, including poor women), in addition to violating various provisions of the African Charter and the African Children's Charter.[86] However, another request pertaining to the provisions of the Maputo Protocol was not entertained, based on the Court's holding on which entities are entitled to make such requests.[87] The list of entitled entities mirrors the wording of article 45(3) of the Charter, discussed earlier, including 'African organisations recognised by the AU'.[88] The Court held that the requirement that the organisation should be 'recognised by the AU' can only be met if it had been granted observer status by the AU Commission or if it has an Memorandum of Understanding (MOU) with the AU.[89]

81 See eg *Vagrancy* Advisory Opinion (n 80) paras 27, 120, 123, 128; and also L Chenwi 'Women's representation and rights in the African Court' (2022) 18 *The Age of Human Rights Journal* at 354.

82 *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (2018) 2 AfCLR 380. For a further discussion, see BK Kombo 'Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389-413 and YM Ngombo & GM Manzanza 'L'arrêt *Association pour le Progrès et la Défense des Droits des Femmes Maliennes et Institute for Human Rights and Development in Africa c. Mali* en procès' (2020) 4 *Annuaire africain des droits de l'homme* 457-475.

83 Arts 2, 2(2), 6(a), 6(b), 21(1) & 21(2). For discussions of this decision, see eg Kombo (n 82); YM Ngombo & GM Manzanza 'L'arrêt Association pour le Progrès et la Défense des Droits des Femmes Maliennes et Institute for Human Rights and Development in Africa c. Mali en procès' (2020) 4 *Annuaire africain des droits de l'homme* 457-475; and F Capone '*APDH and IHRDA v Mali*: recent developments in the jurisprudence of the African Court on Human and Peoples' Rights' (2020) 24(5) *International Journal of Human Rights* 580-592.

84 *Kouma and Diabaté v Mali* (admissibility) (2018) 2 AfCLR 237 (*Kouma and Diabaté*). For a discussion of this decision, see E Bizimana 'Commentaire de l'arrêt de la Cour africaine des droits de l'homme et des peuples dans l'affaire *Mariam Kouma et Ousmane Diabaté c. Mali*' (2019) 3 *Annuaire africain des droits de l'homme* 355-373.

85 *Kouma and Diabaté* (n 84) para 27, read with para 2.

86 *Vagrancy* Advisory Opinion (n 80) para 140.

87 *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and Others* (Advisory Opinion) (2017) 2 AfCHR 622, requesting for an advisory opinion on the interpretation of art 6(d) of the Maputo Protocol and the States' obligations consequent thereto; and contending that this provision imposes an obligation to enact national legislative measures to guarantee that every marriage is recorded in writing and registered in accordance with national laws in order to be legally recognised.

88 Court Protocol art 4(1).

89 Application 1/2013 *Advisory Opinion on the Request for Advisory Opinion by the Socio Economic Rights and Accountability Project (SERAP)* (Advisory Opinion). See also A Jones 'Form over substance: the African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17 *African Human Rights Law Journal* 320-328.

The apprehension may be expressed that a contentious matter may be brought as an advisory request, thus overcoming the inability of individuals or NGOs to access the Court directly, or circumventing the admissibility requirements that have to be met in respect of contentious cases, including exhaustion of local remedies. This apprehension may be addressed by highlighting that even if the substance covered in an advisory request overlaps with a contentious issue, an advisory opinion does not impose obligations on states and does not resolve issues between parties. In any event, this 'problem' may be more apparent than real, due to the restrictive standing requirements on individuals and NGOs for requesting advisory opinions.

Access to the Court to bring cases alleging violations of the Maputo Protocol is in important ways determined by the Court's personal jurisdiction.

First, the state against which a case is brought must have accepted the Court's jurisdiction by ratifying or acceding to the Court Protocol. As of 1 May 2023, 30 of the 43 state parties to the Maputo Protocol were also party to the Court Protocol. The Court has personal jurisdiction in respect of the Maputo Protocol over these 30 states.[90] Thirteen of the state parties to the Maputo Protocol have not accepted the jurisdiction of the Court.[91] Since the Court lacks personal jurisdiction over these states, individuals, and NGOs in the 13 states have to seize the Commission with complaints alleging violations of the Maputo Protocol. Should the Court be considered the only body that may adjudicate alleged violations of the Maputo Protocol, as long as these states do not become party to the Court Protocol, it would be impossible to hold them accountable for these violations. Such an interpretation would fly in the face of the principles of treaty acceptance, justice and common sense, as it would render state parties to the Maputo Protocol accountable for violations of the Protocol on condition that they have also accepted the Court's jurisdiction. Under these circumstances, the Commission clearly has an important role to complement the gap in the Court's jurisdictional reach.

Second, an individual or NGO (enjoying observer status with the Commission) can approach the Court directly if that state has accepted direct individual access by making a declaration under article 34(6) of the Court Protocol. In the 26 state parties to the Maputo Protocol that have accepted the Court's jurisdiction *without making an article 34(6) declaration*, individuals and NGOs are not entitled to approach the Court directly. The only option open to them to vindicate their Protocol rights is to submit a communication to the African Commission and request that the Commission refers the case to the Court.[92] The Commission's reluctance to refer communications to the Court is evidenced by the fact that it has, in the decade and a half of its co-existence with the Court, only referred three cases to the Court.[93] Meaningful access to the Court's binding remedial orders depends on the Commission's

90 These states are: Algeria, Benin, Burkina Faso, Cameroon, Comoros, Congo, Côte d'Ivoire, DRC, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa, Tanzania, Togo, Tunisia and Uganda.

91 These states are: Angola, Cape Verde, Djibouti, Eswatini, Equatorial-Guinea, Ethiopia, Liberia, Namibia, São Tomé e Príncipe, Seychelles, Sierra Leone, Zambia and Zimbabwe.

92 See 2020 Rules of Procedure of the African Commission, Rules 130(1): '[t]he Commission may, before deciding on the admissibility of a Communication submitted under Articles 48, 49 or 55 of the Charter, decide that the Communication should be referred to the Court, provided that the respondent State has ratified the African Court Protocol'; Rule 130(2): '[t]the Commission shall obtain the complainant's consent to any referral to the Court'. The 2020 Rules are less detailed than the 2010 Rules, which in Rule 118 allowed for 4 specific forms of referral: following non-compliance by the state against which a decision on the merits had been made; following non-compliance by the state in respect of which a request for provisional measures had been made; in a situation of serious or massive violations; and, arguably an all-encompassing ground, 'at any stage of the examination of a communication'.

93 *African Commission on Human and Peoples' Rights (Benghazi) v Libya* App 4/2011 25 March 2011 (Order for Provisional Measures), (2011) 1 AfCLR 17; *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 15 March 2013 (Order for Provisional Measures), (2013) 1 AfCLR 145; *African Commission (Saif al-Islam Gaddafi) v Libya* App 2/2013 3 June 2016 (Judgment on Merits), (2016) 1 AfCLR 153; *African Commission on Human and Peoples' Rights v Kenya (merits)* (2017) 2 AfCLR 9.

willingness to refer cases to the Court – provided, obviously, that relevant cases are submitted to it in the first place. Only eight states had, as at 1 May 2023, declarations in place under the Court Protocol accepting the competence of individuals and NGOs to submit cases directly to the Court (that is, by-passing the Commission).[94] So far, the vast majority of cases decided by the Court have been against these states.[95] As a matter of practical reality, therefore, should the Court be the only port of call for aggrieved individuals (and NGOs) aiming to vindicate their Maputo Protocol rights, such recourse would be restricted to individuals and NGOs in those eight states. While state parties and African intergovernmental organisations may also refer cases directly to the Court,[96] none of these entities has as yet lodged any complaint, and experience strongly suggests that they are not likely to seize the Court with women's rights cases.[97]

At the same time, accepting the Court's jurisdiction is not part of the requirements to be bound to the Maputo Protocol. An interpretation that the Court has sole adjudicating powers over the Protocol would lead to outcomes that are irrational and inimical to the object and purpose of the Maputo Protocol,[98] which is to ensure greater protection to women against a background of concern for the failure of existing treaties to have any impact on their lives.

6.2 The Commission's interpretive mandate over the Maputo Protocol

The Maputo Protocol is embedded in the Charter,[99] as captured in the nature and meaning of the term 'protocol'. The Maputo Protocol is a 'protocol' *to the African Charter.* The Charter provides that 'protocols' may be adopted to 'supplement the provisions of the present Charter'.[100] A 'protocol' may 'supplement' the substantive rights provisions in a treaty,[101] may complement the procedures and mechanisms through which state implementation of these rights is monitored, or do both.[102] Falling primarily in the first category, the Maputo Protocol supplements the Charter's scope of rights protection,[103] while aiming to clarify the role of the monitoring mechanisms. It 'leaves unaffected the

94 They are: Burkina Faso, Gambia, Ghana, Guinea-Bissau, Malawi, Mali, Niger and Tunisia. Four other states: Benin, Côte d'Ivoire, Rwanda and Tanzania have made similar declarations, but subsequently withdrew them (see African Court on Human and Peoples' Rights 'Declarations' https://www.african-court.org/wpafc/declarations/ (accessed 15 March 2023).

95 In fact, with the exception of the three cases submitted by the Commission, mentioned in n 93, all cases have come from individuals and NGOs in these eight states.

96 Court Protocol, arts 5(1)(b), (c) & (d).

97 See Rudman (n 9) 329.

98 See Viljoen (n 4) 313: 'Such an interpretation would fly in the face of the purpose of the Protocol, which is to ensure greater protection to women against a background of concern for the failure.'

99 See also MS Nsibirwa 'A brief analysis of the draft protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40 50, drawing attention to the fact that the Protocol does not exist on its own but must be interpreted 'with due regard to the African Charter'. See also A Rudman 'Introduction' sec 3 in this volume.

100 African Charter art 66.

101 See eg the 2000 (UN) Optional Protocol to the Convention on the sale of children, child prostitution and child pornography and the 2000 (UN) Optional Protocol to the Convention on the involvement of children in armed conflict, both complementing the substance of the CRC; see also the Protocol to the African Charter on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons), the Protocol to the African Charter on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities), and the Protocol to the African Charter on the Rights of Citizens to Social Protection and Social Security (Protocol on Social Security), all complementing the substance of the African Charter.

102 From the point of view of the Court Protocol, the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) introduces both substantive and procedural changes.

103 In many ways, the Maputo Protocol complements art 18(3) of the African Charter. See *Organisation Mondiale contre la Torture et Ligue de la Zone Afrique pour la Défense des Droits des Enfants et Elèves (pour le compte de Céline) c. République démocratique du Congo*, Communication 325/2006, African Commission on Human and Peoples' Rights, 38th Annual Activity Report (2015) (*Céline*) para 85: 'The Commission considers that mentioned provisions of the Protocol have necessarily been

institutional landscape, and merely extends the scope of the African Commission's mandate to cover the specific rights of women'.[104]

The African Commission is the supervisory body that monitors the African Charter.[105] Similarly, monitoring of the Maputo Protocol, including by considering communications, logically also falls to the African Commission.[106] Had the Maputo Protocol been completely silent on the issue of interpretation, the inescapable conclusion would have been – based on the relationship between the Charter and the Maputo Protocol – that the Commission is the monitoring body for considering both state reports and examining communications. In this reading, article 27 (whether read together with article 32 or not), establishes that the Court and the Commission have a complementary competence to interpret matters arising from the application of the Maputo Protocol. Such an interpretation is in line with a purposive interpretation of the Maputo Protocol. A purposive reading of article 62 the African Charter similarly concluded that the Commission should be entrusted with receiving and examining state reports, despite the Charter's silence as to the body entrusted with this function.[107] This interpretation can only be contradicted by clear language to the contrary, explicitly carving out an exclusive adjudicatory space for the Court. The Protocol does, however, not contain any such provision.

An interpretation of the Maputo Protocol that allows complementary roles to the Commission and Court is in line with subsequent Protocols to the African Charter. All three subsequent substantive protocols to the Charter, the Protocol on the Rights of Older Persons, the Protocol on the Rights of Persons with Disabilities, and the Protocol on Social Security, provide for complementary monitoring by the Commission and the Court.[108] This subsequent practice should be used to shed light on any interpretive ambiguity arising from the Maputo Protocol.[109]

adopted to apply and define the content of the right to equality (under art 2) and on the protection of women and children (under art 18(3))' (unofficial translation). At least in its initial provisions, the Maputo Protocol indeed emulates the substance of the African Charter (Compare arts 2-6 of the Charter and arts 2-5 of the Maputo Protocol (dealing with equality, dignity, life, integrity and bodily security). See in this regard the Nouakchott Draft (n 24), which draws a clear parallel between the Charter and Protocol provisions.

104 Viljoen (n 4) 312-313.

105 African Charter art 30.

106 See A Birhanu 'Reflections on Ethiopia's reservations and interpretive declarations to the Maputo Protocol' (2019) 31 *Journal of Ethiopian Law* 3121 145: 'the promotional, protective and interpretive mandates of the African Commission remain effective in respect of the enforcement of the Maputo Protocol'; Viljoen (n 2) 40, '[t]he logic of the complementary relationship between the African Charter and the African Women's Protocol requires that the Protocol be read as enlarging the scope of claims that may be submitted to the Commission in order to improve the situation of women. In the absence of any explicit provision excluding the competence of the Commission to do so, the Protocol should be understood to mandate the Commission to examine communications alleging violations of the rights under the Protocol'; Viljoen (n 4) 313 and M Kamunyu 'The gender responsiveness of the African Commission on Human and Peoples' Rights' PhD thesis, University of Pretoria, 2018. See also Omondi et al (n 5), who observe that the Commission 'plays an oversight role in the promotion and protection of human rights, as well as monitors State compliance with the African Charter (and its Protocols, including the Maputo Protocol)' 9.

107 See Recommendation on Periodic Reports, Annex IX to the African Commission's First Annual Activity Report, Nov 1987-April 1988, 'considering that the Charter does not stipulate to which authority or body the Periodic Report should be directed', 'the Commission is the appropriate organ … capable … of studying … and making pertinent observations' to state parties, African Union 'Activity reports' https://www.achpr.org/activityreports/viewall?id=1 (accessed 23 June 2023).

108 The same logic is on display in the extension of the substantive mandate of the UN Committee on the Rights of the Child (CRC Committee). When the CRC Committee's competence to deal with communications was added in a 2011 Protocol to the 1990 UN Convention on the Rights of the Child (Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted on 19 December 2011), this competence did not only cover the 'mother treaty', the CRC, but also the two Protocols adopted to the CRC on 25 May 2000, the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography; and the Optional Protocol to the Convention on the involvement of children in armed conflict. These two treaties added to the substantive scope of the CRC, and – like the AU treaties discussed above – make the rights provisions part of the mandate of the pre-existing quasi-judicial body, the CRC Committee. It should be noted that by 1 May 2023, none of these Protocols has entered into force.

109 In line with the VCLT art 31(3)(b).

Like the Maputo Protocol, the Protocol on the Rights of Older Persons does not add a new monitoring mechanism. However, the drafters in this instance, departing from the position under the Maputo Protocol, made it clear that the 'African Commission shall have the mandate to interpret the provisions of the Protocol'.[110] The interpretive role of the Court is mentioned, too, but not as the main or exclusive body tasked with the interpretation or the application of the Protocol. The Protocol on the Rights of Older Persons stipulates that the Court may become involved in the interpretation of the Protocol when the Commission refers a case to the Court.[111] It adds that, 'where applicable', the African Court 'shall have the mandate to hear disputes arising from the application or implementation of this Protocol'.[112] The 'applicable' circumstances would be when the state complained against is a state party to both the Protocol on the Rights of Older Persons and the Court Protocol; and, if the matter is brought by an NGO or individual, the state has also made a declaration under article 34(6) of the Court Protocol. The Protocol on the Rights of Persons with Disabilities affirms that the Commission is responsible for interpreting this Protocol.[113] Following the wording of the Protocol on the Rights of Older Persons,[114] it highlights the potential role of the Court in the context of indirect access (referral of cases by the Commission to the Court).[115] It differs in one respect from the Protocol on the Rights of Older Persons, by specifically mentioning the possibility of direct access to the Court, provided that the state concerned has made the declaration under article 34(6) of the Court Protocol.[116] The Protocol on Social Security also confirms, in an unqualified and unconditional formulation, that the African Commission 'shall be seized with matters of interpretation arising from the implementation of this Protocol';[117] and that the Court 'shall be' similarly seized but only in respect of state parties to the Court Protocol.[118]

Even if the specific wording differs, these three Protocols are all unequivocal that both the Commission and the Court may be approached to find or decide on alleged violations of the respective Protocols. They also acknowledge that the Court may also be approached, depending on the respondent state's acceptance of the Court's jurisdiction and the optional direct access provision under the Court Protocol.

The Maputo Protocol strongly implies that the Commission's mandate of examining state reports is extended to cover reporting under the Protocol. States are called upon to submit periodic reports in accordance with article 62 of the African Charter.[119] The competence under article 62 of the Charter is exercised by the Commission. The Commission's practice has been built on the logical inference that the Commission is also responsible for examining reports under article 26 of the Maputo Protocol. Since this aspect of the Commission's overall mandate has been extended to cover the Maputo Protocol provisions, it should follow that the Commission also retains its protective mandate. In this way, one aspect of the Commission's mandate is not severed from the mandate as a whole.

110 Protocol on the Rights of Older Persons art 22(3).

111 Protocol on the Rights of Older Persons art 22(4).

112 Protocol on the Rights of Older Persons art 22(5).

113 Protocol on the Rights of Persons with Disabilities art 32(3) which is a word-for-word replica of art 22(3) of the Protocol on the Rights of Older Persons.

114 Protocol on the Rights of Persons with Disabilities art 32(4).

115 Protocol on the Rights of Persons with Disabilities art 32(5), in relation to states that have made a declaration under art 34(6) of the Court Protocol.

116 Protocol on the Rights of Persons with Disabilities art 32(5), in relation to states that have made a declaration under art 34(6) of the Court Protocol.

117 Protocol on Social Security art 29(1).

118 Protocol on Social Security art 29(2).

119 Maputo Protocol art 26(1).

Against this background, the practice of the Commission is further explored. By 1 May 2023, the African Commission had not found any violation of the Maputo Protocol, as such. However, it had referred to the Protocol in at least three of the communications submitted to it.

In two of these decisions, the Court used the Maputo Protocol as an *interpretive guide* in respect of states that were not party to the Protocol (Egypt and Ethiopia). In these instances, article 60 of the African Charter provides the basis of reliance on the Maputo Protocol. Reliance on a treaty under article 60 is not dependent on ratification of or accession to that treaty by the state complained against.[120] In these instances, the Commission clearly lacked the competence to find a violation of the Protocol. The role of the Court did not enter the picture, as none of these states had ratified the Court Protocol either.

In *Interights*,[121] the Commission placed reliance on the definition of 'discrimination' in the Protocol.[122] The Commission was not 'seized' with an allegation that the Protocol had been infringed, since Egypt had neither signed nor ratified the Protocol then (and it still has not, by 1 May 2023).[123] In its remedial recommendations, the Commission in fact 'urged' Egypt to ratify the Maputo Protocol.[124]

In *Equality Now*,[125] the complainants argued that Ethiopia violated its obligations under articles 4, 5 and 6 of the Protocol.[126] However, Ethiopia had by that time only signed and not yet ratified the Protocol.[127] Signature of a treaty entails a weaker form of obligation under international law than ratification.[128] Signing does not establish a state's consent to be bound to a treaty, while ratification does.[129] While ratification imposes binding obligations on a state party, signature of a treaty only obliges a signatory state to 'refrain from acts' that would 'defeat the object and purpose' of that treaty.[130] Even if the Commission did not explicitly state the reason for doing so, it did not in its decision on the merits deal with the complainants' contentions that the Commission should find violations of the Maputo Protocol, as such. Presumably the reason is Ethiopia's status as a non-state party to the Protocol. In arriving at its decision of finding violations of the African Charter, the Commission did, however, rely on the definition of 'discrimination' in the Maputo Protocol.[131]

In a third finding, *Céline,* the Commission placed its most extensive reliance thus far on the Maputo Protocol. This communication concerns the failure of law enforcement agents to investigate, prosecute and punish those responsible for the multiple rapes of a 17-year-old girl. The Commission found that

120 African Charter art 60 '[t]he Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various … instruments *adopted by* the United Nations and African countries', our emphasis.

121 *Egyptian Initiative for Personal Rights and Interights v Egypt* Communication 323/06 African Commission on Human and Peoples' Rights, Combined thirty-second and thirty-third Annual Activity Report (2013).

122 *Interights* (n 121) paras 87, 121.

123 African Union 'List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf (accessed 23 June 2023).

124 *Interights* (n 121) para 275(vi).

125 *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples' Rights 57th Annual Activity Report (2016).

126 As above para 94.

127 Ethiopia signed the Protocol on 1 June 2004; it deposited its instrument of ratification on 17 September 2019.

128 See eg WM Cole 'Human rights as myth and ceremony? Reevaluating the effectiveness of human rights treaties, 1981-2007' (2012) 117(4) *American Journal of Sociology* 1137.

129 Art 1(b) of the VCLT.

130 Art 18(a) of the VCLT; see further B Traoré 'Articles 28-31' sec 2 in this volume.

131 *Equality Now* (n 125) para 144, with reference to art 1(f) of the Maputo Protocol.

this inaction violated numerous Charter provisions, including article 18(3), which obliges state parties to 'ensure the elimination of every discrimination against women and also ensure the protection of the rights of women' as provided for in international treaties.[132] In interpreting these provisions, the Commission referred ('cross-referred') to the Maputo Protocol.[133]

The Democratic Republic of Congo (DRC) became a state party to the African Charter in 1987; and to the Maputo Protocol in 2009.[134] On 8 December 2020, the DRC accepted the Court's jurisdiction by depositing its instrument of ratification to the African Court Protocol.[135] When the girl in *Céline* was raped in February 2006, the DRC was not yet a state party to the Maputo Protocol. And when the complaint was submitted, in May 2006, the DRC was not yet bound to observe the Maputo Protocol. The Commission could *at that time,* consequently, not find a violation of the Maputo Protocol. However, it took the Commission almost a decade to arrive at a decision in this matter. When it decided the communication in November 2015, the DRC had become a state party to the Maputo Protocol. In its finding, the Commission held that the complaint – the failure to investigate and bring to justice the perpetrators of the rape – constituted a continuous violation.[136] On the basis that (a) the DRC had 'ratified' the Maputo Protocol 'in 2008';[137] and (b) the violation persisted beyond the date on which the DRC became a state party to the Maputo Protocol, the Commission considered itself competent to find a violation of the Protocol.[138]

Notwithstanding this logic, the Commission did not on the facts of the specific case find a violation of the Maputo Protocol, as such.[139] Instead, the Commission concluded, with reference to articles 27 and 32 of the Protocol, that it is competent to *interpret* article 18(3) of the Charter by cross-referencing the relevant provisions of the Maputo Protocol.[140] While the Maputo Protocol is used only as an interpretive guide in *Céline*, the Commission's reasoning in that finding leaves the door wide open for a finding of violation by the Commission based on the transgression of a provision of the Maputo Protocol. In fact, the Commission's reasoning suggests that a finding of violation based on the Protocol could equally have been made in that case. This contention is all the more pertinent because particular provisions of the Maputo Protocol – articles 4(b) and (e),[141] obliging state parties to prevent and eradicate all forms of sexual violence and punish the perpetrators of such violence – capture the essence of the case with much greater specificity and accuracy than the open-ended and general language of article 18(3) of the Charter.[142] The fact that the complainant did not rely on the Maputo Protocol may be one of the reasons why the Commission did not make explicit reference to the Maputo Protocol in the operative paragraph of its findings.[143]

132 *Céline* (n 103) para 87.

133 *Céline* (n 103) para 83, '*en lecture croisée*'.

134 The DRC became a state party on the date of deposit of its instrument of ratification on 9 February 2009, in line with Maputo Protocol art 29(2). The date of deposit should be distinguished from the date of ratification through domestic processes, which in this case is 9 June 2008; see African Union 'Treaties' www.au.int/en/treaties (accessed 23 June 2023).

135 Under art 34(6) of the Court Protocol.

136 *Céline* (n 103) para 83.

137 As above.

138 As above.

139 There is no reference to or reliance on the Maputo Protocol in the operative paragraph of the finding, *Céline* (n 103) para 87.

140 *Céline* (n 103) para 83: '[l]a Commission est par conséquent compétente pour interpréter les dispositions de l'article 18(3) de la Charte en lecture croisée avec celles du Protocole de Maputo quant à leur application et mise en œuvre','*[t]he Commission is consequently competent to interpret the provisions of article 18(3) of the Charter read in cross-reference with those of the Maputo Protocol with respect to their application and implementation*' (unofficial translation).

141 *Céline* (n 103) para 84, the Commission cites these provisions in a longer list of relevant articles.

142 See further R Nekura 'Article 4' in this volume.

143 *Céline* (n 103) paras 8 & 87.

Ultimately, the Commission framed its decision as a violation of the Charter - as guided by and interpreted through the prism of the Maputo Protocol, under the explicit authority of article 60 of the Charter - and not as a violation of the Maputo Protocol.[144] Although it has not yet found a violation of the Maputo Protocol and passed up the opportunity in *Céline* to subject articles 27 and 32 to a rigorous analysis, the Commission came very close to definitively confirming the Commission's competence to be 'seized', and to examine and decide communications alleging violations of the Protocol.

6.3 The ECOWAS Court's interpretive mandate over the Maputo Protocol

The African Court is not the only judicial body with jurisdiction over the Maputo Protocol. Although the Maputo Protocol makes no mention of the ECOWAS Court, this sub-regional judicial tribunal has proven to provide fertile ground for the growth of the Protocol on African soil – albeit with a limited geographic scope. The 15 states comprising ECOWAS all fall under the jurisdiction of the ECOWAS Court of Justice. With the exception of Niger, all of the ECOWAS member states have ratified the Maputo Protocol. Of the 15, nine have accepted the African Court's jurisdiction,[145] and of these nine states, six by 1 June had direct access declarations in place.[146]

Despite the silence of the Maputo Protocol about its potential role, the ECOWAS Court has in numerous cases held that ECOWAS member states have violated Maputo Protocol provisions. Although ECOWAS was established in 1975 mainly to advance economic integration and prosperity among its members, its mandate was gradually extended to include human rights-related matters.[147] Following the adoption of the 1991 Protocol establishing the ECOWAS Community Court of Justice,[148] the revised 1993 ECOWAS Treaty, and the 2005 Supplementary Protocol, the current situation is that the ECOWAS Court has jurisdiction over both the African Charter and the Maputo Protocol. The competence of the ECOWAS Court to find violations of the African Charter is based on a cumulative reading of article 4(g) of the ECOWAS Treaty (as revised in 1993), and articles 9(4) and 10(d) of the 1991 Protocol (as amended in 2005). Article 4(g) introduces the 'recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' as one of the fundamental principles of the organisation. Article 9(4) endows the Court with jurisdiction to 'determine cases of violation of human rights that occur in member states'. Article 10(d) states that access to the Court is open to '[i]ndividuals on application for relief for violation of their human rights'. On this combined basis, the Court has on numerous occasions, found violations of the African Charter in cases brought by individuals.[149] In fact, the majority of the Court's decisions contain findings that the African Charter had been violated.[150] These decisions by the ECOWAS Court

144 *Céline* (n 103) para 85: the Commission finds a violation of art 18(3) of the Charter read through the interpretive lense ('*en lecture interprétée*') of the Maputo Protocol.

145 The ECOWAS members *not* party to the Court Protocol are: Cape Verde, Equatorial Guinea, Guinea, Liberia, São Tomé e Príncipe, and Sierra Leone.

146 Burkina Faso, Ghana, The Gambia, Guinea-Bissau, Mali, and Niger have made the declaration; Côte d'Ivoire and Benin had made it previously but have subsequently withdrawn their declarations; and Nigeria never made the declaration.

147 See eg ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* at 310-11.

148 Supplementary Protocol Amending the Preamble and arts 1, 2, 9 & 30 of Protocol (A/P.1/7/91) Relating to the Community Court of Justice (19 January 2005) A/SP1/01/05.

149 See eg *Ugoke v Nigeria and Others* Judgment ECW/CCJ/JUD/03/05 (7 October 2005) where the Court clarified that the African Charter can – in the absence of any ECOWAS human rights catalogue – be invoked as the basis of human rights violations; *Karaou v Niger* Judgment ECW/CCJ/JJD/06/08 (27 October 2008), and *Mannah v The Gambia* Judgment ECWCCJ/JJD/03/08 (5 June 2008).

150 See ECOWAS Court 'Decisions' http://www.courtecowas.org/decisions-3/ (accessed 23 June 2023).

include findings of violations of the Charter against states that do not fall under the jurisdiction of the African Court.[151]

While the ECOWAS Treaty identifies the African Charter as a normative pillar, none of the ECOWAS legal instruments explicitly refer to the Maputo Protocol. However, the 1991 Protocol provides an expansive list of instruments over which the Court has the competence to adjudicate, including disputes relating to the 'interpretation and application of the Treaty, Conventions and Protocols of the Community'.[152] Without being very deliberate about the legal basis for doing so, the Court has on numerous occasions found violations of the Maputo Protocol – together with violations of the African Charter and other human rights treaties.[153] The ECOWAS Court appears to be a more attractive forum for individuals to seize in pursuit of obtaining judicial recourse than the African Commission and the African Court. For one thing, the ECOWAS Court does not require prior exhaustion of domestic remedies.[154] For another, the ECOWAS Court allows direct access to individuals in all state parties to its legal regime. Even though it allows easier access to individuals – including women – than the African Court, the ECOWAS Court has not been free of criticism about the content of its judgments related to women's rights issues.[155]

7 Conclusion

Adopting a purposive approach, the Maputo Protocol in articles 27 and 32 accords complementary roles to the African Court and Commission in interpreting matters arising from the implementation and application of the Protocol. The Maputo Protocol is a living instrument and is therefore to be interpreted and used contextually for the purpose for which it was developed, which is to advance women's rights protection in Africa. As a transitional provision governing a transitional period that has come to an end, article 32 is no longer relevant to the interpretation or application of the Maputo Protocol.

The interpretive role of the Court and Commission is closely linked to the level of state acceptance of the Maputo Protocol, the Court Protocol and of direct individual access to the Court. A significant number of states have not accepted the Court's jurisdiction, making any approach to obtain a binding judgment an impossibility. As the number of state parties to the Court Protocol and direct-access declarations increase, the role of the Court becomes more prominent. For as long as the Commission is the only monitoring body accessible to individuals, at least in some countries, its role remains

151 See eg *Counsellor Muhammad Kabine Ja'neh v the Republic of Liberia & Another*, Judgment ECW/CCJ/JUD/28/20 (10 November 2020); *Alex Nain Saab Moran v Republic of Cape Verde*, Judgment ECW/CCJ/JUD/07/2021 (15 March 2021).

152 Art 9(1) of the 1991 Protocol, as amended.

153 See eg *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017) (*Dorothy Njemanze)*; *Aminata Diantou Diane v Mali* Judgment No ECW/CCJ/JUD/14/18 (21 May 2018).

154 HS Adjolohoun 'The ECOWAS Court as a human rights promoter? Assessing five years' impact of the Koraou slavery judgment' (2013) 31 *Netherlands Quarterly of Human Rights* 342.

155 See eg C O'Connell 'Reconceptualising the first African Women's Protocol case to work for all women' (2019) 19 *African Human Rights Law Journal* at 532, '[b]y avoiding the complex arguments around the criminalisation of sex work and also neglecting to incorporate an analysis of the Women's Protocol in its judgment, the ECOWAS Court, perhaps inadvertently, perpetuated stereotypes that stigmatise and harm sex workers'; and 527, arguing that the Court provided 'no thorough analysis of the respective rights provisions as they applied' in *Dorothy Njemanze*. See also ME Addadzi-Koom 'Of the women's rights jurisprudence of the ECOWAS Court: the role of the Maputo Protocol and the due diligence standard' (2020) 28 *Feminist Legal Studies* 155; and A Rudman 'A feminist reading of the emerging jurisprudence of the African and ECOWAS Courts Evaluating their responsiveness to victims of sexual and gender-based violence' (2020) 31 *Stellenbosch Law Review* at 424.

pertinent.[156] However, so far, few women's rights cases have reached the Commission, and when they did, the Commission stopped short of finding violations of the Maputo Protocol.

Ultimately, the Maputo Protocol is about improving the reality of women's lives. The impact of the Maputo Protocol depends on meaningful access to its monitoring bodies. A lack of access can hamper the Protocol's impact, as it has done in respect of the African Charter and CEDAW. Even though it has been and is possible for women-specific cases to be brought to the African Commission and the CEDAW Committee,[157] there has been a dearth of such cases actually being submitted.

Recourse to remedies under the provisions of the Maputo Protocol depends on effective access to justice at the domestic level and to supranational adjudicatory mechanisms with jurisdiction over the Maputo Protocol. A plethora of factors impede access to justice, especially for women and women's rights organisations, at the domestic level.[158] Even if a complainant succeeds in overcoming the hurdle of exhausting domestic remedies, various factors at the regional level further inhibit access.[159] The reluctance of NGOs and individuals to submit women-specific communications can in part be laid at the door of the Commission for not 'engaging with, detailing and personifying women's human rights claims'.[160] Although the Commission came very close to making a finding based on the Maputo Protocol in *Céline*, the decade-long delay in finalising this case reinforces the impression that the Commission does not prioritise women's rights cases. By adopting a restrictive interpretation to the question as to who may submit requests for advisory opinions, the Court placed a further constraint on access to justice. The comparatively greater caseload of the ECOWAS Court underscores the importance of unimpeded access.

156 The present structural barriers to access have prompted Rudman (n 9) to describe the role of the African Commission, in this context, as 'the main body for handling women's complaints' (at 341).

157 Of the 52 African state parties to CEDAW, only 26 have accepted the right of individual petition. Of these states, 8 have *not* accepted the Court's jurisdiction: Angola, Botswana, Cabo Verde, Central African Republic, Equatorial Guinea, Namibia, Seychelles and South Sudan, indicating a possible preference for interpretation by UN (rather than African) bodies, and for judicial rather than quasi-judicial bodies.

158 These factors include laws that discriminate against women, biased in law enforcement and in the legal profession, and poverty and pressing life circumstances, which are general impediments to justice that are exacerbated in respect of women.

159 See eg Rudman (n 9) 321; and Chenwi (n 81) 354-355.

160 Rudman (n 9) 332.