Articles 28-31

Final clauses

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Article 28: Signature, Ratification and Accession

1. This Protocol shall be open for signature, ratification and accession by the States Parties, in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission of the AU.

Article 29: Entry into Force

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.
2. For each State Party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession.
3. The Chairperson of the Commission of the AU shall notify all Member States of the coming into force of this Protocol.

Article 30: Amendment and Revision

1. Any State Party may submit proposals for the amendment or revision of this Protocol.
2. Proposals for amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the AU who shall transmit the same to the States Parties within thirty (30) days of receipt thereof.
3. The Assembly, upon advice of the African Commission, shall examine these proposals within a period of one (1) year following notification of States Parties, in accordance with the provisions of paragraph 2 of this article.
4. Amendments or revisions shall be adopted by the Assembly by a simple majority.
5. The amendment shall come into force for each State Party, which has accepted it thirty (30) days after the Chairperson of the Commission of the AU has received notice of the acceptance.

Article 31: Status of the Present Protocol

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.

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1 Introduction

Alongside their core substantive rules, most international treaties provide for specific articles concerned with practical modalities under which they take effect and function efficiently. These provisions are generally listed under the generic term 'final clauses' or 'miscellaneous provisions'. They include articles on the signature, ratification, entry into force, modification or amendment of the treaty. They also provide for specific rules on implementation and monitoring, interpretation, reservations, settlement of disputes, the legal status of annexes or protocols, withdrawal and termination, designation of the depositary and other such practical matters. Put simply, the final clauses of a given international treaty prescribe the procedural modalities governing the functioning of that treaty.[1]

The African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is no exception to this general practice. The fact that this treaty is a Protocol to the African Charter on Human and Peoples' Rights (African Charter) does not change its conventional nature. Under the Vienna Convention on the Law of Treaties (VCLT), a treaty is an international agreement between states, whatever its designation. Hence, neither its designation as 'Protocol' nor its supplementary nature to the African Charter take away its treaty nature.[2] As such, the Maputo Protocol is governed by customary international rules applicable to treaties as codified by the VCLT.

Unlike its substantive articles that provide for specific women's rights with correlated obligations, the last seven articles of the Maputo Protocol deal with different practicalities regarding the functioning of the treaty. This chapter focuses on four of them: article 28 (related to signature, ratification and accession); article 29 (on entry into force); article 30 (on amendment and revision) and article 31 (on the status of the Protocol). The following sections discuss and comment on them in turn.

2 Article 28: Signature, ratification and accession

2.1 Overview

This provision contains two paragraphs. The first paragraph is a generic clause situated in most international treaties. The second paragraph deals with the depository of the Maputo Protocol. The drafting history of the provision reveals that although with some differences in formulation, all the successive drafts of what would become the Maputo Protocol contained a provision on signature, ratification, and the designation of the depository.[3] Paragraph 1 of this provision conflates signature, ratification, and accession. However, these legal processes are different under international law and subjected to distinct legal regimes.[4] Signature expresses the first level of commitment (agreement in principle) of a state to be bound by an international treaty. Only ratification and accession – to name

1 United Nations Publications, Final clauses of multilateral treaties (2003).

2 Art 2(1)(a) of the VCLT.

3 The successive drafts are the following: the Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft); Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft); Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft), reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63; the Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001 (Revised Final Draft); and the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II) Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

4 A signature might, in some cases, pertain to the expression of consent to be bound definitively by a treaty, see VCLT, arts 11 and 12.

only the two terms used in the Protocol – are legally capable of establishing the state's consent to be bound by a treaty. Deposit and registration of treaties follow a different logic.

2.2 Signature of the Maputo Protocol

It is common practice for multilateral treaties to state that they are open for signature. The Maputo Protocol was adopted by the 2nd ordinary session of the AU Assembly of Heads of State (AU Assembly) on 11 July 2003 in Maputo, Mozambique.[5] Under article 28 of the Protocol, the text adopted by the AU Assembly was opened to signature by 'States Parties'. The term 'Signature' can be defined as the name or mark of a person written in their handwriting on a document.[6] In international treaty-making, a signature serves two main functions: First, it symbolically marks the end of the negotiation process and signals intent to ratify the treaty. Second, a signature serves to authenticate the text of the treaty and shows that the signatory state agrees with the text.[7] Regarding the signature of the Maputo Protocol, three critical questions may arise from the first paragraph of article 28: Which entity can sign the Protocol? Which modalities govern the signature of the Protocol? What are the effects of the signature?

2.2.1 Eligibility to sign the Maputo Protocol

Concerning the first question, two different aspects come to the fore. First, article 28 provides that the Maputo Protocol is opened for signature by 'States Parties'. 'States Parties' in this context cannot refer to state parties to the Protocol, as to be considered a 'State Party', a state must first sign and accept the Protocol. It would therefore amount to a logical contradiction to call upon a state already party to the Protocol to sign it. The only reasonable interpretation that can be made of this formulation is that the drafters intended that any signatory state to the Maputo Protocol must be a member or a party to an already existing entity or instrument. The question that follows, therefore, is which entity or instrument should a state be already party to in order to be eligible to sign the Protocol? The answer to this question can be deduced from the fact that the Maputo Protocol is a protocol to the African Charter.[8] The term 'States Parties' may therefore refer to the state parties to the African Charter. The legislative history of the provision supports this interpretation. The Nouakchott Draft provided that the treaty is open for signature by 'States Parties to the African Charter on Human and Peoples' Rights'.[9] This reference disappeared in the subsequent versions of the drafts. The reason for the removal of the reference to the African Charter is unclear.[10]

However, this is not the only possible reading of the term 'States Parties'. 'States Parties' in article 28 may also refer to state parties to the Constitutive Act of the African Union (AU). Indeed, the Protocol was negotiated, first under the auspices of Organisation of African Unity (OAU), and later the AU. It was then formally adopted as a decision of the AU Assembly. In this decision, the AU Assembly appeals to 'all Member States' to sign and ratify the Protocol.[11] This suggests that the Protocol is open to signature by all AU member states, not only to those who are party to the African Charter. This

5 Decision on the Draft Protocol to the African Charter on Human and Peoples' Rights Relating to the Rights of Women Assembly/AU/Dec.19(II).

6 C van Assche 'Article 12' in O Corten & P Klein (eds) *The Vienna Convention on the Law of Treaties* (2011) 217.

7 Nevertheless, the authentication of a treaty can be achieved by other means. These means can be provided in specific terms by state parties in the text or the proposed treaty or agreed upon during the negotiations. Other means of authentication include signature ad referendum or initialling by representatives of states. See art 10 of the VCLT.

8 See A Rudman 'Introduction' sec 3 in this volume for further discussion.

9 Art 21 of the Nouakchott Draft (n 3).

10 It was removed from the Kigali Draft (n 3) and never reappeared in subsequent versions.

11 See Rudman (n 8).

conclusion is reinforced by the requirement, under article 29 of the Protocol, that the AU Chairperson notifies 'all Member States' of the coming into force of the Protocol.

Moreover, AU practice regarding subsequent treaties seems to confirm this interpretation. For instance, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (Protocol on the Rights of Older Persons) defines 'states parties' as 'Member States of the African Union that have ratified or acceded to this Protocol and deposited the instruments of ratification or accession with the Chairperson of the African Union Commission'.[12] Article 25 of the Protocol on the Rights of Older Persons states that '[t]his Protocol shall be open to Member States of the Union for signature, ratification or accession'. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security (Protocol on Social Security) have similar formulations when defining 'states parties' and the signature regime.[13]

This is not a purely theoretical issue with no practical implications. Some practical issues may arise regarding some states' eligibility to sign the Maputo Protocol. For instance, could a state not a party to the African Charter still sign, ratify and become a party to the Maputo Protocol? Could Morocco, for example, sign the Protocol since its reintegration into the AU in 2017, making it a member state of the AU, although Morocco is not a state party to the Charter? The South Sudanese precedent could offer an answer. South Sudan signed the Maputo Protocol before it deposited its instrument of ratification of the African Charter.[14] This suggests that being an AU member state is enough to make a state eligible to sign the Maputo Protocol. However, this approach could create legal inconsistencies. Designed as a supplement to the Charter,[15] the Maputo Protocol, would, in this way, strangely apply to a state that is not a party to the main instrument. Thus, article 28 could arguably have been drafted in a clearer manner.

Another aspect of article 28 worth mentioning is that the Maputo Protocol is open to signature by 'States'. Only African states recognised by the AU can be a party to the Protocol. For that reason, for instance, despite the controversies around its statehood, the Saharawi Arab Democratic Republic signed the Maputo Protocol in 2006 and deposited its instruments of ratification with the AU Commission in April 2022.[16] Territorial entities that claim statehood in Africa but are not recognised as such by the AU cannot validly sign the Maputo Protocol. The same holds for African international organisations. Based on its wording, article 28 bars such international subjects from becoming parties to the Protocol. This means that the AU itself is ineligible to sign or accede to the Protocol.[17]

12 Art 1 of the Protocol on the Rights of Older Persons.

13 Art 37 of the Protocol on the Rights of Persons with Disabilities and art 32 of the Protocol on Social Security.

14 South Sudan signed the Maputo Protocol on 24 January 2013 but only deposited its instrument of ratification of the African Charter on 19 May 2016.

15 See the Preamble to the Protocol referring several times to the Charter and affirming its complementary character.

16 African Union 'Press Releases: Saharawi Arab Democratic Republic becomes the 43rd African Union Member State to ratify the Protocol on Women's Rights' https://au.int/en/pressreleases/20220504/saharawi-arab-democratic-republic-becomes-43rd-african-union-member-state#:~:text=In%202021%2C%20the%20AU%20Commission,continental%20treaties%20on%20women's%20rights (accessed 12 May 2023).

17 In this regard, in the case of the European Union, for instance, there is an evolving discussion on its accession to the European Convention on Human Rights, see eg S Douglas-Scott 'The European Union and human rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 64; and C Eckes 'EU accession to the ECHR: between autonomy and adaptation' (2013) 76 *The Modern Law Review* 254.

2.2.2 Modalities of signature

The competent authority to affix a state's signature on a treaty is the recognised representative of the state. In practice, the signature follows at the end of negotiations. In some cases – especially when the representative at the negotiations lacks the full powers to sign on behalf of the state – such a signature will need confirmation by the relevant organ of the state. This is called 'signature ad referendum'.[18] The following observations can be made in relation to the Maputo Protocol. First, the draft protocol was prepared and discussed over a relatively long period. The meetings of experts were instrumental in the drafting process and the progressive shaping of consensus on the content of the text. These meetings, especially from 2001, were attended by state representatives and marked critical phases of the negotiation process.

However, the ministerial meeting that took place in Addis Ababa on 27-28 March 2003 was undoubtedly the most important political step towards finalising the Maputo Protocol. The previous meetings brought together experts from states and other entities. It is doubtful whether these experts were in a position to negotiate on their states' behalf, let alone conclude the treaty. This does not mean that experts cannot be bestowed, by their states, with full powers to negotiate and sign an international treaty.[19] In the present case, however, these experts were seemingly only in charge of the technical mission of preparing the draft to submit it to political negotiations and adoption. Hence, the most important discussions regarding the final text happened during the Addis Ababa ministerial meeting. For instance, some states 'entered' their 'reservations' to the draft Protocol during that meeting.[20] Moreover, the final text adopted by the ministers was endorsed, without amendments, by the AU Assembly in Maputo in July 2003.

Although international law does not impose specific procedures, timelines, or steps, in the negotiation and adoption process of an international treaty, the adoption of the Maputo Protocol differs somehow from the manner in which many international treaties are adopted. Contrary to the common practice, the adoption of the Maputo Protocol was, arguably, exceedingly formalised. The draft text was first opened for signature after being formally 'adopted' by the ministries in charge during the Addis Ababa meeting and later by the AU Assembly.[21] In that regard, despite its 'solemn' character, the Addis Ababa ministerial meeting did not mark the formal adoption of the Protocol as it needed another solemn adoption by the AU Assembly. Only the Assembly's decision officially marked the adoption of the text of the Maputo Protocol.

Nonetheless, the adoption of the Maputo Protocol by the AU Assembly is different to the concept of 'signature' under article 28. In this context, 'adoption' refers to the 'formal act by which the form and content of a proposed treaty text are established'.[22] When an international organisation adopts a treaty, like the Maputo Protocol, the act of adoption is carried out by the competent body of such an organisation. The competence to adopt the treaty is predetermined by the Constitutive Act of the said Organisation and under the rules and procedures defined thereof. A decision related to adopting a treaty

18 See art 12(2)(b) of the VCLT.

19 See art 7 of the VCLT.

20 Summary of the proceedings of the Ministerial Meeting on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Women in Africa, MIN/PROT.WOMEN/RTS/Rpt, Addis Ababa, Ethiopia, March 2003 (Summary of the proceedings of the Ministerial Meeting), p 4, para 13. These countries include South Africa (reservations on arts 4 & 6 *inter alia*); Tunisia, Sudan, Kenya, Namibia, Zambia (on art 6); Egypt (on art 7); Rwanda and Senegal (on art 14). See Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft). However, technically it is impossible to enter reservations to a draft treaty.

21 As a matter of comparison, the Rome Statute of the International Criminal Court (Rome Statute) was open for signature after the adoption of the Statue by the Rome Conference.

22 See art 9 of the VCLT.

within an international organisation contains and expresses the consent of the states participating in the treaty-making process within the organisation. Generally, and based on the principle of sovereignty, the adopting body is plenary, which means a body in which all member states are represented.

Within the AU, such competence is bestowed on the AU Assembly as the 'supreme organ of the Union'.[23] The AU Assembly adopts AU treaties through 'Decisions'. The decisions of the AU Assembly are ideally adopted by consensus, as was the case with the Maputo Protocol.[24] Therefore, the formal adoption of the Maputo Protocol 'kicked off' the process of signature by states.

Considering the rather long preparatory process of the draft Protocol, which included at least one ministerial meeting before the endorsement of the Protocol by the Head of States, it is surprising that no signature was registered on the day of the adoption of the Protocol. Indeed, no state signed the Maputo Protocol immediately upon its adoption. Following its adoption, the first two signatures were only recorded in September 2003.[25] This is noteworthy because, under international law, heads of state are vested with full powers to sign a treaty on behalf of their states.[26] They were, therefore, legally entitled to sign the Protocol immediately upon its adoption. By comparison, 31 states signed the Protocol on the establishment of the African Court on Human and Peoples' Rights on the day of its adoption.[27]

A few reasons related to the framing of article 28 may explain the lack of readiness of states to sign the Maputo Protocol as soon as it was adopted. The first reason lies in the absence, in article 28, of any specific timeline for signature, which is in line with other AU treaties. Some multilateral treaties provide such a timeline, specifying a date after which signature is no longer possible.[28] The lack of a timeline might explain the lack of urgency in signing the Protocol although it had already gone through a long-drawn-out drafting process.

Another reason might have been that article 28 expressly contains a rather unnecessary requirement that signature – together with ratification and accession – must conform with the respective constitutional procedures of state parties. The requirement to observe domestic law is implicit in the treaty-making process under international law and does not need to be restated. The practice of the AU on this matter is not uniform. While the African Charter, the African Charter on the Rights and Welfare of the Child (African Children's Charter), the Protocol on the Rights of Older Persons and the Protocol on Social Security, do not contain this detail, the requirement does appear in others such as the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).[29] A third reason might be more practical. The depository is based in Addis Ababa, while the treaty was adopted in Maputo. Some heads of states might have preferred to defer signing to a formal appointment at the depository office in Addis Ababa.

23 See art 9 of the Constitutive Act of the African Union (AU Constitutive Act).

24 According to art 7 of the Constitutive Act, failing consensus, the decisions are taken by a two-third majority and a simple majority regarding procedural matters.

25 Tanzania and Libya signed the Protocol on 5 September 2003, 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 12 May 2023).

26 See art 7(2)(a) of VCLT.

27 See ratification status at https://au.int/sites/default/files/treaties/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS.pdf (accessed 12 May 2023).

28 See art 125(1) of the Rome Statute.

29 See art XVI of the Kampala Convention.

2.2.3 Effect of signature

As pointed out above, in signing a treaty, a state signals its future intent to be legally bound by that treaty. Signature in itself does not have a binding effect. In some exceptional cases, however, a treaty may provide that states can, through signature, express their consent to be bound by the treaty. In such cases, the language of the treaty expressly states that signature will have such legal effect.[30] This is generally not the approach taken in multilateral treaty-making. The Maputo Protocol follows the general practice; thus article 28 does not state what the legal effect of signature is. The reference to ratification and accession leaves no doubt that signature should be followed by an additional modality of expressing states' consent to be bound by a treaty. The signature referred to in article 28 is, therefore, a 'simple signature' as opposed to a 'definitive signature'.[31]

This notwithstanding, a simple signature is not totally devoid of legal effect under the law of treaties. According to article 18 of the VCLT, after signing a treaty and before it enters into force, a state is obliged to refrain from acts which would defeat the object and purpose of that treaty. This is an interim 'pre-conventional' obligation imposed on states to act in good faith and 'refrain from acts calculated to frustrate the objects of the treaty'.[32] This obligation extends from the date of signature until the ratification and entry into force of the treaty. However, if, after signing a treaty, a state subsequently makes it clear that it no longer intends to ratify the treaty, then the state is released from the obligation to refrain from acts that would defeat the object and purpose of the treaty.[33]

As far as the Maputo Protocol is concerned, this 'pre-conventional' obligation is quite significant. As of 1 May 2023, nine countries that have signed the Protocol are yet to ratify it.[34] It can be argued that the pre-conventional obligation referred to under article 18 of the VCLT applies to these states. This argument is further strengthened by the supplementary nature of the Protocol. Several obligations contained in the Maputo Protocol are based on the African Charter.[35] Moreover, even for those states that eventually ratified the Maputo Protocol, many did not proceed to the ratification right after the signature. In that regard, they were also obligated not to defeat the object and purpose of the treaty during the extended period from signature to ratification. No doubt the African Commission takes this position, as it occasionally has called upon signatory states to implement some of the Protocol's obligations. For instance, in 2019, referring to the Maputo Protocol, the African Commission called on the political leaders in South Sudan to meet the relevant obligations concerning women's political participation and the right to peace and protection for women.[36] In sum, even if a state has signed the Maputo Protocol without ratifying it, this does not mean that the state can disregard women's human rights.

2.3 Expression of consent to be bound by the Maputo Protocol

In addition to the signature, a 'state must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty'.[37] This specific juridical act is an 'expression of consent to be bound'. Under article 28 of the Maputo Protocol, there are two ways in which states can express such consent to be bound: ratification and accession.

30 Art 12(1) of the VCLT.

31 Van Assche (n 6) 212.

32 See J Crawford *Brownlie's principle of public international law* (2012) 372.

33 Crawford (n 32) 372.

34 Burundi, Central African Republic, Chad, Eritrea, Madagascar, Niger, Somalia, South Sudan, and Sudan.

35 See A Rudman 'Preamble' secs 3.1, 4.2 & 4.3.

36 See African Commission on Human and Peoples' Rights Resolution ACHPR/Res.428 (LXV) 2019.

37 United Nations *Treaty Handbook* (2012) 8.

The wording of article 28 is confusing. The formulation, 'the treaty is opened to signature, ratification or accession', is vague and unconventional. While it is correct to say that a treaty is open for signature, it is rather unconventional to say that a treaty is 'open to' ratification or accession. The better wording would have been that the treaty is 'subject to ratification or accession'.[38] For instance, the African Children's Charter contains two different sub-paragraphs dealing with two separate legal processes; one states that the treaty is 'open to signature' and the other provides that the Charter is 'subject to ratification'.[39] Moreover, international practice tends to rely on various concepts to designate the different ways in which states express their consent, such as ratification, accession, acceptance, and approval. However, the Maputo Protocol only employs two of these terms: ratification and accession.

2.3.1 Ratification

According to the VCLT, ratification is the international act whereby a state establishes its consent to be bound by a treaty on the international plane.[40] This definition focuses on the international dimension of the act of ratification. Only the international act of ratification holds the legal effect of expressing consent to be bound. However, ratification also holds a critical domestic aspect. Indeed, the rationale behind the ratification process is not only to obtain the treaty's approval by competent domestic bodies but also to carry out all necessary steps to ensure that the domestic legal system is ready to implement the proposed treaty. Ratification is, therefore, as legally as it is practically necessary. The domestic procedures depend on the constitutional arrangements within each state. In most African countries, the parliament is the competent body to undertake the domestic ratification or approval of international treaties.[41]

The Maputo Protocol does not prescribe any specific conditions in the ratification process. For instance, there is no stipulated timeline within which states must ratify the Protocol. Therefore, states are free to submit their instrument of ratification any time after signature. The term ratification is only appropriate for states that have taken part in the treaty negotiations and have subsequently signed it. The term applied to states that join after the adoption of a treaty is 'accession', further discussed below.

Domestic readiness before ratification of the Maputo Protocol is justified by the need to align national legislative frameworks with the provisions of the Maputo Protocol. The treaty itself makes this an essential requirement. Under article 26 of the Protocol, as is further discussed in chapter 28, states parties must as one example, 'undertake to adopt all necessary measures and in particular, shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised'.[42]

The fact that it is an attribute of state sovereignty to ratify, or not to ratify a treaty does not mean that states are absolutely free from constraints or pressure to ratify. For various reasons, international or domestic demands by different actors can play a crucial role in obtaining states' ratifications. The Maputo Protocol is an excellent example in that regard. The Protocol was the concretisation of many years of advocacy by African NGOs. Hence, between its adoption in July 2003 and its entry into force in 2005, an unprecedented lobbying campaign was undertaken by civil society organisations (CSOs),

38 See, for instance, art 125 of the Rome Statute. Paragraph 1 of this article provides that the 'Statute is open to signature' and para 2 provides that the 'Statute is subject to ratification acceptance or approval by signatory state'.

39 See, art 47 of the African Children's Charter.

40 Art 2(1)(b) of the VCLT.

41 However, in constitutional monarchies such as Morocco, or Eswatini, the King plays a critical role in the process of ratification.

42 Art 26(2), see R Murray 'Article 26' in this volume.

especially women's rights organisations.[43] Even within the AU, the Solemn Declaration on Gender Equality in Africa (SDGEA) importantly exerted pressure on states to ratify the Protocol.[44]

The speed with which African states ratified the Maputo Protocol remains unprecedented in the history of AU treaties.[45] Barely two years after its adoption in July 2003, the Protocol had already been ratified by more than 15 countries. According to the ratification status provided by the AU, out of the 49 countries that signed the Maputo Protocol, 43 have ratified it. Nine of the signatory states have yet to ratify the Protocol;[46] and three states, Botswana, Egypt, and Morocco, have neither signed nor ratified the Maputo Protocol. There is concurrent pressure on these states to ratify the Protocol. In addition to repeated calls by CSOs, the African Commission has reiterated this demand. For instance, in its 2019 Concluding Observations on the report submitted by Botswana, the Commission expressed its concern regarding the non-ratification by Botswana of the Maputo Protocol and recommended that the country 'should consider' ratifying it.[47]

2.3.2 Accession

The second avenue that states can use to express their consent to be bound by the Maputo Protocol is 'accession'. Under international law, accession refers to a situation whereby a state which did not sign a treaty (and invariably was not involved in the treaty negotiation) formally accepts that treaty.[48] Hence, technically, the main difference between ratification and accession lies in that the former is always preceded by signature, whereas the latter happens without a signature. Indeed, for various reasons, a multilateral treaty can be negotiated and adopted and eventually signed by certain states without the participation of others. The reason might be that the latter states were not invited or were not interested in the negotiations or even that they did not exist as states at the time of negotiation and adoption of the treaty. Therefore, when a treaty provides for the possibility of 'accession', the only step needed is a deposit of an instrument of accession.

The practice related to accession to the Maputo Protocol presents some legal curiosity. The AU table presents a single column with the relevant dates for the identification of ratifying and acceding states. Thus, this column does not specify which country has ratified and which has acceded to the Protocol. With regard to Malawi, Mauritania and Cape Verde, there is no indication of the dates of their signatures of the Protocol. This suggests that their proper status is that of acceding states, rather than ratifying states.[49] The registration page of the Protocol on the UN treaty collection website confirms this hypothesis.[50] This situation is peculiar because these states were represented during the negotiation of the Protocol and at the adoption of the Protocol by the AU Assembly. From a purely legal point of view, these states should have signed and ratified the Protocol instead. Their failure to

43 The role of some women organizations and coalition of women organizations was key in that regard. L Guignard 'Le rôle des acteurs non-gouvernementaux dans la mobilisation juridique en faveur du Protocole de Maputo' (2017) 1 *Annuaire africain des droits de l'homme* 107-124. R Murray *Human rights in Africa: from the OAU to the African Union* (2004) 134.

44 Solemn Declaration on Gender Equality in Africa, para 9.

45 Guignard (n 43) 114.

46 See the list of these countries above (n 34).

47 Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Botswana on the Implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at its 26th extra-ordinary session, 16-30 July 2019, Banjul, The Gambia, para 59. Botswana has not even signed the Protocol yet.

48 Crawford (n 32) 373.

49 See the status of ratification. See also full details of the treaty registration with the UN Secretary-general confirming that these three States have used the accession option and not the ratification one, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805265c4&clang=_en (accessed 15 May 2023).

50 See where the three countries do appear as acceding states. https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805265c4&clang=_en (accessed 15 May 2023).

sign is even more puzzling, considering that the Protocol does not limit the period within which it is open for signature. In the absence of detailed information, it remains unclear whether these states were intentional in acceding to the Protocol instead of signing and ratifying it. In the event that they deposited instruments of ratification, they would not count as such in the absence of prior signature. Conversely, if the instrument sent to the depository was termed an instrument of 'accession', this would be problematic since, having taken part in treaty negotiations, these states should have followed the signature and ratification route.

The only state to whom the 'accession avenue' was legally open was South Sudan, for the simple reason that the treaty was adopted before South Sudan became a sovereign state.[51] Oddly though, South Sudan is listed as a signatory state. Not having been part of the negotiation and adoption process, a strict understanding of the above-discussed concepts would mean that the signature and ratification avenue was closed to South Sudan.

Despite these legal curiosities, these states' expression of consent to be bound by the Protocol are valid. Unlike domestic law, international law is driven more by substance than formalities. What matters the most is the genuine expression by the state of its consent to be bound.[52] Moreover, whether they ratify or accede to a treaty, state parties remain on the same footing due to the principle of equality of rights between the original parties to a treaty and those whose participation results from accession.[53]

Finally, a question might arise regarding the moment of accession. Whether a state can accede to a treaty before its entry into force has often been disputed.[54] However, it is generally accepted that 'accession' can only happen after the treaty enters into force. The Maputo Protocol has undoubtedly adopted this approach, which transpires from article 29, as is further discussed below.[55] Be it through ratification or accession, article 28 requires that the expression of the state's consent to be bound is translated into a specific action at the international level: the deposit of the instrument of ratification or accession.

2.3.3 Depository

The instrument expressing the state's consent to be bound by a treaty – such as ratification or accession – can only produce its legal effect upon the undertaking of specific procedural steps. The deposit of the instrument with the depository is usually considered one of these critical steps.[56] According to the second paragraph of article 28, the instruments of ratification or accession of the Maputo Protocol 'shall be deposited with the Chairperson of the Commission of the AU'. It is a common practice for multilateral treaties to contain a provision appointing the treaty's depository. The depository assumes a custodian function for the treaty, and its role covers many aspects ranging from administrative tasks to critical decisions conferring rights or obligations upon certain states.[57]

It is also a common practice that AU treaties are deposited with the Chairperson of the Commission.[58] The Maputo Protocol follows this long-standing AU/Organization of African Unity (OAU) tradition. Previous drafts of the Protocol, before the transformation of the OAU into the AU,

51 South Sudan signed the Protocol on 24 January 2013.

52 P Reuter *Introduction au droit des traités* (1995) 54-55.

53 J-F Marchi 'Article 15' in Corten & Klein (n 6) 330.

54 Marchi (n 53) 315.

55 Art 29(2) speaks of accession as an act that follows after the entry into force of a treaty.

56 Art 16 of the VCLT.

57 Art 77 of the VCLT.

58 Before the AU, it was the OAU's Secretary-General.

named the Secretary-General of the OAU as the treaty's depository. The only difference between the texts adopted in 2003 and the earlier drafts is that the Chairperson of the AU Commission replaced the Secretary-General of the OAU. As the Secretariat of the AU is responsible for the day-to-day administrative activities of the Union, it is only logical that the Commission serves as the depository of the AU treaties. The AU Commission acts as a custodian of the Constitutive Act, its protocols, the treaties, legal instruments, decisions adopted by the Union and those inherited from the OAU.

The wording of the Maputo Protocol imposed an absolute obligation – *shall* – on states to deposit their instrument of ratification or accession. The first essential role played by the depository concerns the procedure related to the signature. The Chairperson of the Commission must ensure that the person issuing the signature on behalf of their state is entrusted with full powers to do so. As mentioned above, under the VCLT, only the highest authorities of the state – the troika made of Heads of State, Heads of Government and Ministers of Foreign Affairs – do not need to prove that they have full powers.[59] Signing the treaty would usually require arranging an appointment for signature with the depository. The depository is moreover responsible for the safekeeping of the original copies of the treaty, as signed by each contracting state.

In addition, article 28(2) of the Maputo Protocol stipulates another essential aspect of the function performed by the depository of any multilateral treaty. The reception by the depository of the instruments of ratification or accession indicates the 'critical date' of ratification or accession. It serves to determine the exact moment at which the consent of a state to be bound by a treaty can be established and can take effect in its dealings with other contracting states.[60] This date is also essential in reckoning the Protocol's entry into force, as will become clear in the discussion on article 29 below. It is, therefore, not surprising that the AU makes public all the dates of deposit of ratification or accession instruments. This practice creates transparency and certainty as it brings every ratification to the attention of other contracting states and stakeholders such as NGOs and CSOs.

One last critical aspect of the function of the depository, which does not appear under the Protocol, is its responsibility to register the Protocol with the UN Secretary-General. Under article 80 of the VCLT, international treaties 'shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication'.[61] This article is closely related to article 102 of the Charter of the United Nations. Article 102 provides that every treaty and every international agreement entered into by any member of the United Nations shall be registered with the Secretariat and published by it as soon as possible. The primary purpose of this formality is to ensure transparency and security in international legal relations.[62] Concerning the Maputo Protocol, the AU Commission only complied with this formality on 17 September 2018.[63] The Maputo Protocol is published in the UN treaty collection.[64] Moreover, it is the responsibility of the depository to provide all relevant information relating to the treaty including the updated status of ratification, the original text and dates of all reservations and interpretative declarations. Some of

59 Art 7(2)(a) of the VCLT.

60 F Horchani & Y Ben Hammadi 'Article 16' in Corten & Klein (n 6) 341.

61 Art 80(1) of the VCLT.

62 P Klein 'Article 80' in Klein & Corten (n 6) 1798.

63 The Maputo Protocol is registered with the UN under the registration number: No. 68921. The Secretary-general, therefore, issued a certificate of registration. See https://treaties.un.org/doc/Treaties/2018/09/20180917%2012-46%20PM/Other%20Documents/COR-Reg-26363-Sr-68921.pdf (accessed 15 May 2023).

64 See https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805265c4&clang=_en (accessed 15 May 2023).

this information, such as the text of reservations, are still missing on the UN registration status of the Maputo Protocol as well as on the official website of the AU.[65]

3 Article 29 on entry into force

3.1 Overview

Article 29 deals with the critical issue of entry into force of the Maputo Protocol. This relates to the moment from which an international treaty comes into effect. This issue is usually dealt with by the treaty itself, especially in multilateral treaties. Under the international law of treaties, it is one of several matters where the contractual freedom of states is unlimited. Hence, the VCLT imposes no timeframe for the treaty's entry into force. Under article 24 of the VCLT, a treaty enters into force 'in such manner and upon such date as it may provide or as the negotiating States may agree'.[66] Article 29 of the Maputo Protocol follows, in that regard, a well-established customary international law principle.

Entry into force of an international treaty refers more specifically to the starting date of the 'objective applicability' – or the definitive entry into force – as well as its 'subjective application' to a state party. A treaty comes into force, objectively, the first day on which the treaty is enforceable. This means the day from which the treaty's intended legal effects start to unfold. In other words, this is the precise moment when states parties must effectively comply with their obligations under the treaty. The date of objective enforceability of a treaty corresponds to what was agreed upon by the parties. In most cases, regarding multilateral treaties, the objective entry into force is conditioned upon the deposit of a given number of ratification instruments.

The objective entry into force of a treaty differs from the subjective one ('entry into force for a state'). The latter refers to the specific date on which the treaty starts deploying its legal effects on a particular state that has expressed its consent to be bound by it. The subjective entry into force coincides with the objective entry into force for all states that ratified the treaty before its objective entry into force. This means that these states are part of the first group of states whose ratifications permitted the objective entry into force of the treaty. The treaty determines the modalities under which it becomes applicable to a state ratifying it after its objective entry into force. While the first paragraph of article 29 of the Maputo Protocol concerns the first type of entry into force (objective entry into force), the second one deals with the other (subjective entry into force).

In this regard two essential clarifications are in order. First, some provisions of a treaty not yet into force produce certain legal effects on parties immediately by virtue of their specific nature. These provisions deal with particular rights and obligations, and their application is necessary for the treaty's entry into force. They are concerned with matters that serve a preparatory dimension for the treaty to function once it enters objectively into force. For instance, the sending of instruments of ratification or accession under article 28 before the objective entry into force of the Protocol pertains to an act of application even though the treaty is not yet in force. This also refers to the pre-contractual obligation upon the signatory state not to defeat the object and purpose of the treaty, as discussed above.

65 AU 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 15 May 2023).

66 According to the same art, failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating states.

Second, even though the treaty is not yet into force, the rights and/or obligations that derive from other sources of (international) law are binding on the contracting states. In that sense, all the provisions of the treaty that flow from customary international law, for instance, are binding on contracting states. This is particularly important in human rights treaties, as core rights have a customary character. By the same token, all obligations deriving from pre-existing treaty obligations of the contracting states apply to these states. In the case of the Maputo Protocol, for instance, irrespective of the Protocol's subjective entry into force in relation to a particular state, if that state is a party to other human rights treaties – such as the African Charter – containing the same or similar obligations, these obligations are binding on the concerned state. Since the *Case concerning Military and Paramilitary Activities in and against Nicaragua* the International Court of Justice (ICJ) has highlighted this relative autonomy between obligations deriving from customary international law and those flowing from international treaties.[67]

3.2 Specificities of the entry into force of the Maputo Protocol

Being a topical aspect of treaty-making, the issue of entry into force was discussed in the early drafts of the Maputo Protocol. However, it was only in the Addis Ababa Draft that a separate provision was dedicated to entry into force. Before that, the provision on the entry into force was conflated with the one on signature, ratification and accession.[68] According to the first paragraph of article 29, the Protocol comes into force 30 days after the deposit of 15 instruments of ratification. In light of the above, this corresponds with the 'objective entry into force' of the treaty. The reference to 30 days, which makes the provision clearer, was introduced in the Addis Ababa Draft. The early drafts referred to 'one month' after the deposit of the 15 instruments of ratification.

The AU's practice around the number of ratifications needed for an AU treaty to come into force is not uniform. During the OAU period, a simple majority of member states was often required. For instance, this was the requirement for adopting the African Charter itself.[69] This number was reduced to 15 in the African Children's Charter.[70] This seems to have marked a more recent trend regarding the conditions for entry into force of AU human rights-related treaties. For instance, the Kampala Convention and the Protocol on the Rights of Older Persons take the same approach.[71] The countdown of the 30 days – *dies a quo* – starts from the day after the deposit of the fifteenth instrument of ratification. In other words, from the adoption of the Maputo Protocol on 11 July, 15 ratifications were needed before the counting of the 30 days could start. Comoros was the first state to ratify the Maputo Protocol. Its ratification instrument was deposited on 16 April 2004, about nine months after the adoption of the Protocol by the AU Assembly. Togo deposited the critical fifteenth instrument of ratification on 26 October 2004.[72] The thirtieth day after this deposit falls on 25 November 2005. This is how the Protocol came 'objectively' into force on that day.[73] From this date, the Maputo Protocol could deploy its full legal effect on the first 15 ratifying states.

Article 29(2) concerns what was referred to above as 'subjective entry into force'. According to this provision, for each state party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession. The subjective entry into force for these states occurs, therefore, *immediately after* the deposit of the instruments expressing their consent to be bound. Stipulation of the moment of subjective entry into force differs from one AU

67 *Nicaragua v United States of America*, ICJ, Reports (1986) p 92 para 175.

68 See Nouakchott and Kigali Draft (n 3).

69 Art 63(3) of the African Charter.

70 Art 47(3) of the African Children's Charter.

71 Art XVII of the Kampala Convention and art 26(1) of the Protocol on the Rights of Older Persons.

72 See A Rudman 'Introduction' sec 2.1 in this volume.

73 See https://treaties.un.org/doc/Publication/UNTS/No%20Volume/26363/A-26363-08000002805265c4.pdf (accessed 15 May 2023).

treaty to another. For instance, under the African Charter, the subjective entry into force only starts three months after depositing an instrument of ratification or adherence, provided that the ratification or adherence occurs after the objective entry into force of the Charter.[74]

Article 29(2) of the Maputo Protocol, in essence, speaks to all states that are not part of the first 15 states, referred to in paragraph 1, regardless of whether they are ratifying or acceding states. Unfortunately, this paragraph is poorly drafted, and the wording suggests that it is concerned only with states that have acceded to the Protocol. Although accession, as explained above, applies to state consent after a treaty's entry into force, individual ratifications can also – and do – occur after a treaty's objective entry into force. Therefore, contrary to its wording, article 29(2) applies not only to acceding states but also to 'late' ratifying states. The provision applies to the vast majority of states currently parties to the Maputo Protocol, as their instruments of ratification were submitted after 25 November 2005. It is worth noting that previous drafts of the Protocol were better drafted. The Nouakchott Draft, for instance, indicated that 'the Protocol takes effect in each State party which subsequently *ratifies or adheres* to the present Protocol at the date of deposit of the instrument of *ratification or adhesion*'.[75] Subsequent drafts did not correct the poor drafting of the clause that appeared in the Addis Ababa Draft. More generally, there is a persisting poor drafting issue of provisions relating to the entry into force of AU (human rights) treaties. For instance, article 47 of the African Children Charter is silent on 'subjective entry into force'.[76] Article 26(3) of the Protocol on the Rights of Older Persons is equally problematic as it does not refer to ratification, suggesting, therefore, that 'subjective entry into force' can only flow from accession.[77] The same applies to the Protocol on the Rights of Persons with Disabilities.[78]

Article 29(3) deals with the role of the depository. This function is usually critical as the procedure leading to the entry into force is somewhat complex and needs some administrative supervision. In that regard, it is common practice that multilateral treaties expressly vest their depository with specific tasks. In the absence of these clarifications, some functions are considered inherent to the role of the depository.[79] The role of the depository includes ensuring the correct computation of the number of instruments of ratification, as well as accurate reckoning of the effective date of entry into force.[80] The depository must therefore keep the contracting states updated on the progress regarding ratification and accession. As soon as the last instrument of ratification needed is deposited, the depository must inform the contracting states about the day on which the treaty, objectively, comes into full effect.

4 Article 30: Amendment and revision

4.1 Overview

It is common in treaty-making practice for the treaty to provide for the conditions under which it can be amended. The rationale for amendment lies in the need for improvement of the content of the treaty but also the necessity of adaptation to changing circumstances. The VCLT codifies this rule by providing that an agreement between the parties may amend a treaty.[81] In its ordinary meaning,

74 Art 65 of the African Charter.

75 Art 21 of the African Charter. See also art 22 of the Kigali Draft. My emphasis.

76 Art 47 of the African Charter is silent on 'subjective entry into force'.

77 The provision reads as follows: '[f]or any Member State of the African Union acceding to the present Protocol, the Protocol shall come into force in respect of that State on the date of the deposit of its instrument of accession'.

78 Art 38(3) of the Protocol on the Rights of Persons with Disabilities.

79 Art 80(2) of the VCLT.

80 Art 77 of the VCLT.

81 Art 39 of the VCLT.

amendment refers to the act of changing the content of a treaty by adding, subtracting, or substituting some provisions.

In international practice, the term 'amendment' is used interchangeably with other expressions such as 'revision' or 'modification'. With respect to their legal effects, amendment and revision are similar; however, some multilateral treaties, such as the UN Charter, deal with these two concepts under distinct provisions.[82] The difference suggested by the separation is not in nature but in the degree of change effected on a treaty. Whereas amendment refers to limited reshuffles in treaty provisions, revision concerns more profound substantial changes. The similar legal nature of amendment and revision is reflected in the VCLT, which only refers to the term amendment. It is clear from the preparatory works of the VCLT that the two terms were considered to have the same legal effect. The term 'amendment' was preferred to 'revision' only because the latter, allegedly, has a more political connotation.[83] The story is different when it comes to the term 'modification'. Under article 41 of the VCLT, modification refers to a variation to a treaty's terms initiated by a single state or a limited group of states parties to a multilateral treaty. The resulting modification applies only to the state or states concerned. A modification is an amendment limited *ratione personae*.[84]

Article 30 of the Maputo Protocol uses the two notions. It is unclear whether they are meant to refer to the same legal operation or are intended to achieve different purposes. *Prima facie*, the use of the two terms – especially in the title of this article – suggests that they are envisaged as two different notions. However, a close reading of the provision does not confirm that suggestion. Unlike the UN Charter, for instance, nothing in article 30 shows a difference in the legal regime between amendment and revision. This interpretation is confirmed by article 30(5) of the Maputo Protocol. Whereas all other paragraphs of the provision use the two terms together – 'amendment or revision' – the last paragraph refers only to 'amendment' concerning its entry into force.[85] Interpreting this omission as an intention on the part of the drafters to apply paragraph 5 only to amendments and not to revisions does not hold, for no difference is made between them in the rest of the text. It is only reasonable to consider that the omission confirms the drafters' intent to consider the term amendment in the protocol identical to revision. The drafting history of the provision also supports this conclusion. The early drafts did not mention the term 'revision', which only appeared alongside 'amendment' in the Addis Ababa Draft.[86] Moreover, the AU practice generally suggests that the two concepts are used interchangeably. While the African Charter only refers to 'amendment',[87] other AU treaties use the two terms but not as implying a distinction in their legal regimes.[88] What is important is that article 30 of the Maputo Protocol reflects the two fundamental principles of treaty amendment in international law, namely: the consent of states parties to the amendment – the principle of participation – and the need for a transparent procedure.

4.2 Procedure for the amendment of the Maputo Protocol

Article 30 lays down the amendment procedure. The starting point of that procedure indicates who can initiate an amendment. Under article 30(1), '[a]ny State Party' has the right to initiate an amendment to the Protocol. This excludes states that have signed the Protocol but have not yet ratified it. There is no time limit concerning the ability of a state party to propose amendments. Although this issue has

82 See arts 108 & 109 of the UN Charter.

83 PH Sands 'Article 39' in Corten & Klein (n 6) 968.

84 Art 41 of the VCLT.

85 Art 30(5) of the Maputo Protocol.

86 Art 26 of the Addis Ababa Draft.

87 Art 68 of the African Charter.

88 See art 48 of the African Children's Charter; art XVIII of the Kampala Convention. The equivalence of the two terms seems even more explicit in the Protocol on the Rights of Older Persons (see art 31).

limited relevance as far as the Maputo Protocol is concerned, some multilateral treaties impose such limits. In that regard, the critical question is the possibility of amending a treaty that is not yet in force. Some provisions of a treaty not yet into force may prove obsolete before that treaty's entry into force, justifying an amendment. However, the fact that article 30 refers to a 'State Party' and not a 'signatory State' suggests that the treaty must already be in force before amendment proposals are admissible. This discussion is not only theoretical. AU practice has revealed the possibility of amending a treaty not yet entered into force in the many amendments to the Protocol of the Court of Justice and Human Rights.[89]

Moreover, article 30(1) raises another issue concerning the ability of other entities to propose an amendment to the Protocol. This question is critical as other entities, such as other AU organs, institutions, or even NGOs, may have a legal interest in proposing an amendment to the protocol. However, the wording of article 30 seems to exclude such a right of initiative of 'third parties'. The preparatory works of the Protocol reveal that earlier drafts had envisaged the extension of the right to propose amendments to the African Commission 'through the Secretary-General of the OAU'. This possibility existed in the Nouakchott Draft[90] as well as the Kigali draft.[91] However, this reference seemed to have attracted criticism during the 2001 Meeting of Experts in Addis Ababa. Whereas the rest of the draft provision did not receive any comment, sub-paragraph 5, which related to the ability of the African Commission to propose an amendment, was 'put under brackets for further consideration'.[92] This reference was ultimately removed from the text adopted by the ministerial meeting in March 2003. Unfortunately, the reason for the removal is unclear. One may readily agree that any amendment to the protocol remains the business of state parties.[93] However, in the trend of human rights treaty-making, the Maputo Protocol should not obey purely state-centred considerations. Moreover, the critical contribution played by the African Commission in the drafting process and its role in the regional human rights system should have warranted a different approach to the issue concerning the right to propose amendments. Given the importance of the interactions between the African Commission and CSOs, recognising such a prerogative could have offered an avenue for presenting amendment proposals based on civil society demands.

Article 30(2) deals with other procedural requirements of a proposed amendment. First, the proposal must be made in writing as a formal requirement. The notion of 'writing' may include the possibility of emails or electronic communications.[94] Second, the proposal must be addressed to the Chairperson of the Commission of the AU. This is in line with the functions of the depository, as pointed out above. The depository is responsible for transmitting the proposal to all state parties within thirty days of receipt. Requiring that other parties are familiar with the proposal for amendment is based on the principles of consent and participation. Parties to the treaty have a legal interest in knowing which changes other parties are envisaging; and the principle of participation means that they are free to take part in elaborating the content of the amendment.

89 Protocol of the Court of Justice of the African Union (adopted 1 July 2003, entry into force 11 February 2009), Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014).

90 See art 22 of the Nouakchott Draft (n 3).

91 See art 23 of the Kigali Draft (n 3).

92 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 158 indicating that the part was put under brackets for further consideration).

93 K Ardault & D Dormoy 'Article 40' in Corten & Klein (n 6) 981.

94 This is, to some extent, admitted in the functioning of multilateral treaties where the UN Secretary-General is the depository.

The right to participate meaningfully in the amendment process also entails that state parties receive reasonable notice to enable feedback on the proposals.[95] Article 30 of the Maputo Protocol sets up a 30-day timeline for the amendment procedure. Upon receipt by states parties of the amendment proposals, the AU Assembly must examine the proposals within one year. This provides enough time for state parties to prepare their feedback on the proposals before the meeting of the AU Assembly. Within this period, the African Commission must prepare its comments and send its submissions to the AU Assembly. Based on this feedback, the AU Assembly decides by simple majority whether to adopt or reject the proposal for amendment.[96] This voting modality differs from the usual voting rules at the AU Assembly. In fact, according to article 7 of the AU Constitutive Act, consensus is the standard modality of decision making. Only when consensus fails does the AU Assembly take its decision by a two-thirds majority. Simple majority is only provided for decisions on procedural matters.[97] It is unclear why a simple majority was preferred by the drafters of the Maputo Protocol as far as amendments are concerned.

4.3 Effect of amendment

States are not obligated to accept an amendment to a multilateral treaty unless the treaty provides otherwise. The reason for this rule lies in the international law principle that states cannot be bound without their consent. Therefore, the amendment is treated as a separate agreement and so does not automatically bind a state already party to the treaty.[98] A state must accept the amending agreement before the amendment is considered binding on that state. These essential rules are reflected in article 30(5). The adoption of a proposal for amendment by the AU Assembly is not the end of the story. For such an amendment to be enforceable with respect to a state, it ought to have been accepted by that state. The procedure of acceptance of an amendment is quite similar to the ratification or accession procedure. In the same way that a state is required to send the ratification or accession instruments to the depository, the Protocol requires each state to send a notice of acceptance to the Chairperson of the Commission of the AU.

The amendment comes into force for each accepting state 30 days after receiving the notice of the acceptance by the depository. The initial treaty only binds states parties that do not accept the amendment. Those states that have accepted the amendment are bound by the treaty as amended. In the context of the Maputo Protocol, another issue may arise regarding the effect of an amendment with respect to states that are not yet parties to the Protocol. In this hypothetical case, states wishing to adhere to the treaty would be considered as adhering to the Protocol as amended unless they express a contrary intention at the time of their ratification or accession.[99]

5 Article 31: Status of the Present Protocol

5.1 Overview

Given that the Maputo Protocol does not exist in a vacuum, how does it interact with other legal instruments – be it domestic or international – related to women's rights? Article 31 is concerned with this issue. It falls in the category of what are often termed 'more favourable protection clauses', 'saving

95 See art 40(3) of the VCLT: 'Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended'.

96 Art 30(4).

97 Art 7 of the Constitutive Act.

98 Art 40(4) of the VCLT.

99 Art 40(5) of the VCLT.

clauses', 'no-pretext clauses', 'subsidiarity clauses'[100] or '*clauses de la liberté la plus favorisée*'.[101] Although they exist in other types of international treaties, they are most common in human rights treaties. They are intended to ensure the most favourable protection of human rights. In addition, such clauses are aimed at deterring a state from citing one treaty as justification for undermining better treatment afforded by another.[102] The clause is sometimes considered a general principle that is implicit in the application of human rights instruments. In that regard, it is often associated with the '*pro persona*' and '*pro homine*' principles of interpretation developed, especially in the jurisprudence of the Inter-American Court of Human Rights.[103]

Article 31 of the Maputo Protocol is unique compared to other human rights treaties concluded under the auspices of the AU. Other AU human rights treaties do take context into account and refer to other instruments. Examples include Articles 60 and 61 of the African Charter and article 46 of the African Children's Charter. These provisions refer to the 'sources of inspiration' in interpreting and applying the two conventions. However, article 31 of the Maputo Protocol goes further than that. It is a genuine conflict resolution provision as it imposes an obligation to apply any existing better treatment provided under other instruments pertinent to women's rights, whether international, regional or domestic. Thus, the Protocol's own provisions are to be disregarded if at any time they prove less protective of women than the provisions of such other instrument. In that regard, article XX of the Kampala Convention comes closest to article 31, the main differences being that the 'saving clause' in the Kampala Convention is less explicit, and it refers only to better treatment in other regional or international instruments, not in domestic law.[104] Another 'safeguard clause'– which is also a genuine conflict resolution provision – similar to article 31 is article 24 of the Protocol on the Rights of Older Persons. The difference between the two provisions, however, lies in the type of conflict they aim at resolving. While article 31 of the Maputo Protocol envisages a broad range of potential conflicting obligations – between the Maputo Protocol and any other instruments – article 24(2) of the Protocol on the Rights of Older Persons provides only for the resolution of a conflict between 'two or more provisions' of the same protocol.[105]

The direct source of inspiration for drafting article 31 is undoubtedly article 23 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). According to this article, nothing in CEDAW shall affect any provisions that are more conducive to the achievement of equality between men and women, which may be contained: (a) In the legislation of a state party; or (b) In any other international convention, treaty or agreement in force for that state.[106] Although there is a striking similarity between the two provisions, it also appears that article 23 of CEDAW is more limited in scope. It is only concerned with 'equality between men and women', whereas article 31 of the Maputo Protocol contemplates any provisions that can offer better treatment to women. In

100 See A Rachovitsa 'Treaty clauses and fragmentation of international law: applying the more favourable protection clause in human rights treaties' (2016) 16 *Human Rights Law Review* 77.

101 E Decaux 'Article 60' in L-E. Pettiti et al (eds) *La Convention européenne des droits de l'homme. Commentaire article par article* (1995) 897-903.

102 Rachovitsa (n 100) 80-82.

103 FA Villareal 'El principio pro homine: Interpretación extensiva vs. El consentimiento del Estado' (2005) *3 Revista Colombiana de derecho internacional* 337; L Hennebel & H Tigroudja *Traité de droit international des droits de l'homme* (2016) 646.

104 See especially para 2: '[T]his Convention shall be without prejudice to the human rights of internally displaced persons under the African Charter on Human and Peoples' Rights and other applicable instruments of international human rights law or international humanitarian law. Similarly, it shall in no way be understood, construed or interpreted as restricting, modifying or impeding existing protection under any of the instruments mentioned herein'.

105 The provision reads as follows: 'In the event of a contradiction between two or more provisions of this Protocol, the interpretation which favours the rights of Older Persons and protects their legitimate interest shall prevail'.

106 See art 23 of CEDAW.

that regard, the Maputo Protocol is more progressive as it covers a larger spectrum of more favourable treatment deriving from other international instruments.[107]

The context of the adoption of the Maputo Protocol well explains the insertion of this provision. Although absent in the first two drafts, the provision appeared in the Final Draft. The draft provision that was discussed during the 2001 Meeting of Experts expanded even more on this matter. In addition to the single paragraph that would later become article 31, the said draft contained two other paragraphs referring expressly to women's rights protected under the African Charter and other 'regional and international declarations and conventions'.[108] This formulation is similar to the formulation in article 18(3) of the African Charter, which refers to 'the rights of women and the child as stipulated under international declarations and conventions'.[109] The value of the reference to a Declaration, which in itself lacks a formally binding character, is questionable. The Revised Final Draft adopted during the 2001 expert meeting did not keep these two paragraphs, probably because they were considered redundant.

When the history of domestic and international human rights standards on women's rights is considered, the Maputo Protocol was arguably adopted quite late. It must be recalled that CEDAW was adopted 24 years earlier. This relatively long period of time had already translated into progress in some alignment of domestic legislation with international standards. In addition to this existing normative framework, the Maputo Protocol is intended as a supplementary instrument to other human rights instruments, regional or international.[110] The Protocol's Preamble bears witness to this.[111] The drafters of the Maputo Protocol did not intend to undermine these instruments in any way. Article 31, therefore, aimed to clarify the relationship between these instruments and preserve their full effectiveness where they provide better treatment. It is also evident that the existence in CEDAW of a similar clause played an important role in the inclusion of article 31 in the Maputo Protocol.

Finally, despite their apparent clarity, provisions such as article 31 of the Protocol may raise specific difficulties regarding their implementation. First, the expression 'more favourable protection' remains vague. The conclusion that a particular treatment is the most favourable to women may prove controversial in some cases. For instance, it has been argued that some forms of protective legislation, such as legislation that barred women from certain occupations, although described as more 'favourable' to women, were based on 'stereotypes about women's roles'.[112] Hence, what is 'more favourable' would depend on a contextual assessment. Second, the true function that the so-called 'saving clauses' in human rights treaties serve is often disputed. Some consider them interpretative tools, others categorise them as application tools, and others argue that they are conflict resolution tools.[113] These classifications are arguably not mutually exclusive, as interpretation in international law is also profoundly concerned with avoiding and resolving conflicts.[114] Nonetheless, it is clear that article 31 is a 'priority clause'. It imposes an obligation on any interpreter and applier of the Protocol to interpret and apply its provisions in a manner that accords with the most protective standards

107 On other qualities of the Protocol compared to CEDAW, 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* 21.

108 See art 27 of the Revised Final Draft (n 3).

109 Art 18(3) of the African Charter.

110 Viljoen (n 107) 16.

111 See A Rudman 'Preamble' secs 3.2, 3.3 & 4.5 in this volume.

112 MA Freeman et al 'Article 26' in MA Freeman et al (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* (2012) 533.

113 Rachovitsa (n 100) 83.

114 SB Traoré 'Jus cogens and interpretation in international law' in D Tladi (ed) *Peremptory norms of general international law (Jus Cogens). Disquisitions and disputations* (2021) 135.

recognised in other relevant instruments. However, article 31 goes beyond such interpretive guidance and accords priority to more protective provisions over its own provisions. In that sense, the article certainly provides a conflict resolution tool.

Third, another critical aspect of this article relates to enforceability upon the concerned state of the provisions deemed 'more favourable' to women. For the clause to apply, the more favourable provision must be one that is enforceable on the state concerned. While domestic law provisions would obviously be applicable to the state, international conventions containing more favourable provisions would only be applicable if the state has ratified them. However, the reference in the article 'to treaties or agreements' seems broad enough to encompass customary international law. In that sense, if a 'more favourable' provision stems both from an international treaty and customary international law, despite the lack of ratification of such treaty by a state, it can still be enforceable against that state on account of customary international law.

5.2 More favourable treatment under domestic law

Article 31 of the Protocol states that where a national law offers better protection for women, such domestic provision should prevail. This might appear striking, for, generally, the assumption is that international law standards, especially in human rights, are more protective than national law. However, considering the cultural diversity of states globally, some progressive standards in a field such as women's rights may prove to be more easily attainable at the domestic level than via a multilateral treaty. Whatever the case, international law does not prevent states from adopting domestic legislation that provides a higher standard of protection than what is contained in international law. In that regard, article 31 may appear somehow pointless. As a matter of fact, states should observe their own domestic laws in good faith. In that sense, full compliance with these national laws – when they provide for the highest level of protection – should never be a real issue.

However, things might be more complicated. As an international treaty, the Maputo Protocol aspires to a high position, in the sense that it is expected that states work toward aligning their national laws to the international treaty. The Maputo Protocol, therefore, becomes the point of reference, and more progressive domestic laws, if they exist, are arguably endangered.[115] More importantly, considering the persistence of obstacles to the realisation of certain aspects of women's rights, the existence of more protective standards in national legislation might be ignored in the pretext of applying the protocol.

In most instances, issues of interpretation and application of different human rights standards do not derive from – and result in – a clear-cut conflict of norms which would have called for the use of well-grounded conflict resolution tools.[116] Instead, in practice, different standards may give rise to unexpected interpretation issues, leading to diverging solutions between domestic and international law. In these cases, article 31 would warrant the application of the most favourable interpretation.

This issue is far from theoretical. Some provisions of the Maputo Protocol are considered to offer a lower level of protection to women compared to some domestic legislations. South Africa is a good illustration in that regard. At the adoption of the Maputo Protocol, South Africa repeatedly stated that its domestic laws were more protective in many respects than the Protocol. For that reason, it entered some reservations and interpretive declarations raising these concerns. For instance, South Africa entered the first reservation concerning article 4(2)(j), which provides that states must not carry

115 This situation is suggested in South Africa's Combined second Periodic Report under the African Charter on human and peoples' rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa, Report to the African Commission on Human and Peoples' Rights, August 2015, p 147, paras 32-35.

116 See J Klabbers *Treaty conflict and the European Union* (2009) 34, affirming that the saving clauses are not concerned with conflict of norms at all.

out death sentences on pregnant or nursing women. In its reservation, South Africa states that the article does not find application in South Africa because the country has outlawed the death penalty.[117]

South Africa also entered a reservation to article 6(d), concerning the requirement that a marriage be recorded in writing and registered in accordance with national laws to be legally recognised.[118] In its Combined 2nd Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Maputo Protocol, South Africa explained that the reservation was made to protect women in customary marriages of which many are not registered. It went on to clarify that the application of article 6(d) of the Protocol would exclude many South African women from the protection of the law. Thus, the Recognition of Customary Marriages Act, 1998, provides that the non-registration of a customary marriage does not affect the validity of the marriage.[119] This example shows that national legislation can be more protective than the Maputo Protocol on this prevalent issue of registration of marriages in African countries and many others.[120] However, as discussed above, this argument has not gone unchallenged.[121]

5.3 More favourable treatment under international law

As mentioned above, article 31 also refers to more favourable protective provisions in international law instruments. The reference covers multiple instruments ranging from sub-regional and regional instruments to international instruments. It can also be interpreted broadly to include instruments beyond those that deal directly with women's rights. At the regional level, the African Charter, which the protocol aims to supplement, comes to mind. In addition to the African Charter, the African Children's Charter and the African Youth Charter[122] are also relevant in this enumeration as they deal with girls and adolescent girls.[123] Other specific instruments, such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Kampala Convention, are also worth mentioning. The reference in article 31 to the 'regional and continental' provision is poorly drafted as the intention was undoubtedly to refer to sub-regional and regional or continental instruments. A previous draft of the provision explicitly used the term 'sub-regional'.[124] These types of instruments include legal standards adopted by the regional economic communities, such as the Southern African Development Community Protocol on Gender and Development [125] or the East African Community Gender Policy.[126]

117 South Africa's Report (n 115) p 148 para 37.

118 Some organisations attempted to seek clarity on this provision through a request for advisory opinion before the African Court on Human and Peoples' Rights. The Court found that it was not able to give the advisory opinion. See *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and Others*, Appl 001/2016 Advisory Opinion, 28 September 2017 (2017) 2 AfCLR 622. This issue is also discussed below in sec 5.4.

119 Combined Report of South Africa (2015) (n 115) p 148, para 39.

120 On the issue of registration of customary marriages see C Musembi 'Article 6' in this volume.

121 For instance, some organisations tried to get an advisory opinion on this matter from the African Court on Human and Peoples' Rights in 2016. The applicants stated that 'the issue of non-registration and non-recording of marriages has rendered women vulnerable in that (i) women are unable to provide proof of their marriages, (ii) women are easily divorced, (iii) women are unable to enforce the requirement that a woman's consent must be sought before the man can take a second wife in a polygamous marriage, (iv) women are unable to secure land and property rights and that, (v) it makes it difficult for countries to collect, monitor and analyse vital information about a population'. See *Request for Advisory Opinion by the Centre for Human Rights* (n 118).

122 African Youth Charter (adopted 2 July 2006, entry into force 8 August 2009).

123 See art 3 of the African Children's Charter.

124 See draft art 27(2) of the Revised Final Draft (n 3).

125 Adopted in 2008 and revised in 2016.

126 East African gender policy adopted in Arusha in May 2018 http://fawe.org/girlsadvocacy/wp-content/uploads/2018/12/EAC-Gender-Policy.pdf (accessed 16 May 2023).

At the international level, which is also evident in the discussion throughout the various chapters of this Compilation, CEDAW is the central reference. Beyond these, international human rights treaties, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, are relevant, as are international humanitarian law treaties which accord specific protection to women in armed conflict. International Labour Organization standards on working conditions for women could also become relevant.

In addition to these international treaties, the question might arise whether other types of international law – including customary international laws – are covered by article 31. Arguably, as mentioned above, the broad scope of article 31 implies that rules of customary international law are included. The scope could also extend to non-binding instruments. This would mean that critical regional instruments such as the Solemn Declaration on Gender Equality in Africa would be included; at the universal level, this would include instruments such as the Universal Declaration on Human Rights, and critical resolutions of the UN Security Council, such as Resolution 1325.[127] This is because the term 'agreement' seems to convey a broader meaning than conventions and treaties in the wording of article 31. A different interpretation would render the term meaningless and at odds with the principle of effectiveness in legal interpretation. In that regard, it is worth mentioning that one draft text of the provision referred to 'regional and international declarations'.[128] It is unclear why this provision was dropped from the final draft.

It is one thing to map the regional and international instruments that might fit within the scope of article 31. It is quite another, in any given case, to locate the most favourable provisions in these instruments compared to the Maputo Protocol. The clause contained in article 31 does not deal with the general relationship between the Maputo Protocol and other human rights treaties in the abstract. This relationship is governed by traditional tools of interpretation in international law, such as the principle according to which 'specific rules are given priority over general rules' (*lex specialis derogat legi generali*). Should the matter appear before a domestic court, the first point of reference is likely national legislation, especially the Constitution. Generally, domestic courts and tribunals would only refer to international instruments after having located a given right in their domestic sources. The most 'progressive' interpretation of these international instruments would therefore serve to secure the most favourable protection for women's rights. For instance, in *State v Chirembwe*,[129] a case concerning rape and violence against women, the High Court of Zimbabwe not only relied on the Maputo Protocol but also on some provisions of CEDAW as interpreted by its monitoring body, specifically General Recommendation 19 on violence against women.[130] This approach is particularly beneficial as the implementation of CEDAW has yielded jurisprudence that has clarified the scope of several aspects of women's rights.

5.4 Reservations

Final clauses of international treaties are the natural locus of provisions on reservations. However, the Maputo Protocol contains no such provision. As a matter of fact, neither the African Charter nor the African Children's Charter contain provisions on reservations. The Kampala Convention,

127 United Nations Security Council Resolution 1325 on Women, Peace and Security, S/RES/1325 (2000) Adopted by the Security Council at its 4213th meeting, on 31 October 2000 (UN Security Council Resolution 1325).

128 Art 27(3) of the Revised Final Draft (n 3).

129 [2015] ZWHHC 162 (High Court of Zimbabwe) cited in S Omondi et al *Breathing life into the Maputo Protocol: jurisprudence on the rights of women and girls in Africa* (Nairobi, Kenya: Equality Now, 2018) 84.

130 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, A/47/38 (CEDAW Committee General Recommendation 19).

however, allows for reservations.[131] Nonetheless, the issue of reservations is still relevant in relation to the Maputo Protocol because some African states have entered reservations to the Protocol.[132]

5.4.1 Overview of the regime of reservations to human rights treaties

A reservation means a 'unilateral statement, however, phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.[133] International law does not prohibit the practice of reservations, and many international instruments contain provisions on reservations. Some, like the Rome Statute, exclude the possibility of entering a reservation on any of its provisions. According to the VCLT, when the treaty is silent on reservations, they are still permitted unless they are incompatible with the object and purpose of the treaty.[134] The legal effects of reservations are governed by a rather complex acceptance-objection system provided for under article 20 of the VCLT.[135]

If anything, the VCLT regime is quite flexible, permissive, and built upon a classical premise that conceives international treaties as a set of reciprocal rights and obligations among sovereign states. However, it is generally accepted that human rights treaties derive from a different paradigm. Unlike other treaties, they are not concerned with bilateral relations between sovereign entities but the recognition of specific rights of individuals – and groups in some cases – and the attendant obligation on states to protect, promote and realise them. Therefore, the adequacy of the VCLT regime of reservations as applied to human rights treaties has been questioned. The validity of reservations on human rights treaties cannot depend only on the objection-acceptance approach, which is at the heart of the VCLT regime. Hence, there is a growing consensus that reservations to human rights treaties should be subjected to a stricter test.[136]

In its General Comment 24, the UN Human Right Committee (HRC) considered that the VCLT provisions on the role of state objections concerning reservations is inadequate in addressing the problem of reservations to human rights treaties.[137] A few critical conclusions can be drawn from the position of the HRC. First, as the supervisory body, the HRC considers that it is best placed to assess the validity of reservations to the covenant. Second, according to the HRC, 'the normal consequence of an unacceptable reservation is not that the covenant will not be in effect at all for a reserving party'. Rather, such a 'reservation will generally be severable, in the sense that the covenant will be operative for the reserving party without benefit of the reservation'.[138] Early on, the European Court of Human Rights adopted a similar approach to the issue of reservations. It considers that states making invalid reservations remain bound by their obligations and that these reservations should simply be disregarded.[139] Thirdly, the HRC provides some indication of the elements to be considered in conducting the validity test: a reservation must be specific and transparent and not general; it must 'indicate in precise terms its scope in relation to specific provisions'. The overall effect of a

131 See art XXI.

132 These states are Ethiopia, Kenya, Cameroon, Mauritius, Namibia, Rwanda, South Africa, Uganda, Algeria.

133 Art 2(1)(d) of the VCLT.

134 Art 19(c) of the VCLT.

135 Art 20 of the VCLT.

136 R Baratta 'Should invalid reservations to human rights treaties be disregarded?' (2000) 11 *European Journal of International Law* 413.

137 UN Human Rights Committee (HRC) General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under art 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6 (HRC General Comment 24) para 17.

138 See HRC General Comment 24 (n 137) para 18.

139 *Belilos v Switzerland* ECHR (29 April 1988) SA 132, paras 40-49.

group of reservations – cumulative effect – as well as the effect of each reservation on the integrity of the covenant, is an essential consideration that might play out during the validity test as well.[140] The International Law Commission's 2011 Guide to Practice on reservations considers an invalid reservation null and void and produces no legal effect. Despite the nullity of such a reservation, there is a presumption that the reserving state is still a party to the treaty without the benefit of its reservation unless the state expresses a contrary intention.[141]

The supervisory bodies have not thoroughly dealt with the issue of validity and 'opposability' of reservations to African human rights treaties. As pointed out above, the core African human rights treaties, including the Maputo Protocol, do not contain a provision on reservations.[142] A limited number of states have made reservations to these treaties. Viljoen suggests that this situation may explain the relatively different practice compared with other international treaties. He also explains that considering the comparatively 'lackadaisical attitude of fellow States regarding the African System and weak implementation and follow up by the African Commission, States might consider that these reservations are not required'.[143] In a decision on a communication in 2018 relating to the practice of the Baha'i faith in Egypt, the African Commission faced the issue of reservations.[144] Egypt entered a reservation regarding article 8 of the Charter, which was, according to Egypt, to be implemented in accordance with Islamic law. Following the jurisprudence of the HRC, the African Commission considered that it has the power to assess the validity of this reservation. It eventually decided that the reservation was not incompatible with the object and purpose of the Charter. The position was not strongly elaborated, and it remains to be seen how this issue will be developed over time through the jurisprudence of the Commission, the African Court and other monitoring bodies within the African system.

5.4.2 Reserving states and the nature of reservations to the Maputo Protocol

As it stands, nine states have entered reservations to the Protocol. Most reservations pertain to Articles 6, 7 and 14. The 'most ardent opponents' to the Protocol – those likely to enter reservations – have not yet ratified it.[145] These states are Niger, Egypt, Chad, Somalia, Eritrea, Sudan, South Sudan, the Central African Republic, Madagascar and Burundi.[146] Some reserving countries raised the issue of the compatibility of the Protocol with Islamic principles. Nevertheless, some Muslim-majority countries have ratified the Protocol, sometimes without reservations.[147] A possible explanation for this

140 HRC General Comment 24 (n 137) para 19.

141 Adopted by the International Law Commission at its 63rd session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the International Law Commission, 2011, vol II, Part Two, UN Doc A/66/10, para 75, see Guideline 4.5.3. paras 1-2.

142 This trend is changing because the Kampala Convention and the Protocol on the Rights of Older Persons have provisions on reservations.

143 Viljoen (107) 41.

144 *Hossam Ezzat and Rania Enayet (represented by Egyptian Initiative for Personal Rights and INTERIGHTS) v The Arab Republic of Egyp*t, Communication 355/ 07, AfCHPR, 12th Annual Activity Report (2017) paras 149-167.

145 This observation was made by Viljoen in 2009 and still holds. See Viljoen (n 107) 41-42.

146 See here 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 16 May 2023).

147 Tunisia, Senegal, Mali, and Mauritania, to list a few.

is the historical experience with reservations to human rights treaties at the international level. The CEDAW Committee, for instance, has sustained calls on countries such as Libya,[148] Tunisia[149] and Niger[150] to withdraw their reservations to CEDAW. The first two countries entered no reservations to the Maputo Protocol upon ratification, and Niger is yet to ratify it. Among the first group of ratifying states, Namibia, South Africa, Rwanda, and The Gambia had entered reservations to the Protocol. The Gambia eventually withdrew its reservations after a national campaign to that effect.[151] In addition to its reservations, South Africa, as mentioned above, also made two interpretative declarations.[152] Cameroon, Kenya and Uganda entered reservations when ratifying the Protocol at a later stage. More recently, Ethiopia, Mauritius, and Algeria also entered reservations to the Protocol.

Kenya's reservation concerns two provisions of the Protocol: article 10(3) and article 14(2)(c). The first provides that state parties must take necessary measures to reduce military expenditure in favour of social development and the promotion of women in particular.[153] article 14(2)(c) deals with women's sexual and reproductive rights. Kenya's reservation targets the specific provision on the right to medical abortion, citing its divergent national legislation. Namibia made a time-bound reservation on article 6(d) of the Protocol regarding the recording and registration of customary marriages pending the enactment of new legislation on this matter.

South Africa, as mentioned above, entered a reservation to article 4(2)(j), making it clear that the death penalty has been abolished in South Africa. Regarding article 6(d) South Africa reservation concerns the recording of traditional marriage. With regard to article 6(h) South Africa entered a reservation because, in its opinion, the provision subjugates the equal rights of men and women with respect to the nationality of their children to national legislation and national security interests, on the basis that it may remove inherent rights of citizenship and nationality from children'.[154] One of South Africa's interpretative declarations concerns article 31 of the Protocol. South Africa considers that its Bill of rights should not be regarded as offering less favourable protection of human rights.[155]

Uganda and Rwanda, similarly to Kenya, entered a reservation to article 14(2)(c). According to Uganda, this article must not be interpreted so as to confer an individual right to abortion or mandating a state party to provide access thereto. Uganda stated that it would not be bound by this clause unless permitted by domestic legislation expressly providing for abortion.[156] Rwanda also entered a reservation on article 14(2)(c). It is not clear what the exact formulation of Rwanda's reservation was. However, although the reservation is still listed in the Status List pertaining to the status of ratification of the

148 Concluding observations on the 2nd Periodic Report and the Combined 3d to 5th Periodic Reports of the Libyan Arab Jamahiriya of the Committee on the Elimination of Discrimination against Women (6 February 2009) UN Doc CEDAW/C/LBY/CO/5 (2009) para 13, urging Libya to withdraw its reservations.

149 Concluding Observations on the Combined 5th and 6th Periodic Reports of Tunisia of the Committee on the Elimination of Discrimination against Women (5 November 2010) UN Doc CEDAW/C/TUN/ CO/6 (2010) 13 para urging Tunisia to withdraw its reservations.

150 Concluding observations on the Combined 3rd and 4th Periodic Reports of the Niger of the Committee on the Elimination of Discrimination against Women (24 July 2017) UN Doc CEDAW/C/NER/CO/3-4 (2017) para 8, in line with its previous observations, the CEDAW Committee considers that many reservations made by Niger are impermissible and must be withdrawn.

151 Viljoen (n 107) 43.

152 HRC General Comment 24 (n 137) para 3. In theory, an interpretative declaration differs from a reservation, but in practice, under the guise of an interpretive declaration, a State could enter reservations. When applying the test set out by the HRC to the South African declarations it is clear that they are genuine interpretive declarations.

153 See A Budoo 'Article 10' in this volume.

154 See Status of Ratification of the Maputo Protocol. Unpublished document. On file with the author.

155 Status of Ratification (n 154).

156 As above.

Maputo Protocol provided by the African Union Office of the Legal Counsel (AUOLC)[157] Rwanda reported that it has removed its reservation on the Maputo Protocol related to abortion and that this move is aimed at protecting the lives of unborn children and their mothers.[158]

Upon ratification in 2012, Cameroon entered a reservation contending that the acceptance of the Maputo Protocol should in no way be construed as endorsement, encouragement or promotion of homosexuality, abortion (except therapeutic abortion), genital mutilation, prostitution or any other practice which is not consistent with universal or African ethical and moral values, and which could be wrongly understood as arising from the rights of women to respect as a person or to free development of her personality'.[159]

Contrary to Algeria, whose reservations indicate only the article concerned with no other indication or explanation,[160] the reservations entered by Ethiopia and Mauritius are quite expansive. They relate to many articles of the Protocol. All in all, Ethiopia entered reservations *vis-à-vis* five articles and made interpretative declarations against five provisions. On article 6 Ethiopia has entered reservations against three sub-paragraphs (c), (d) and (f) and made interpretive declarations against 2 sub-paragraphs (b) and (j). In addition to these provisions, Ethiopia has entered reservations against articles 7(a), 10(3), 21(1) and 27. Article 27 of the Maputo Protocol deals with the interpretive powers given to the African Court on Human and Peoples' Rights (African Court).[161] Ethiopia's reservation about this provision may be superfluous since Ethiopia is not a state party to the Protocol to the African Charter on establishing the African Court on Human and Peoples' Rights. However, one may consider that this reservation attests to Ethiopia's consistent reluctance to be bound by the rulings of the Arusha-based human rights court.

Mauritius also entered a considerable number of reservations. Mauritius has declared that it shall not take any legislative measures under article 6(b) and 6(c) of the Protocol where these measures would be incompatible with provisions of the laws in force in Mauritius. In relation to article 9 of the Protocol, Mauritius affirms that it shall use its best endeavours to ensure the equal participation of women in political life in accordance with its Constitution. Mauritius has further indicated that it shall not take any measures under articles 4(2)(k), 10(2)(d) and 11(3) of the Protocol (all provisions relating to the protection of refugees). Moreover, Mauritius declares that it shall use its best endeavours to achieve the aims in article 12(2) of the Protocol, in accordance with its Constitution, and the accession to the Protocol should not be regarded as an acceptance of positive discrimination by the Republic of Mauritius. Finally, Mauritius declared 'that it shall not take any measures under article 14(2)(c) of the protocol in relation to the authorisation of medical abortion in cases of sexual assault, rape and incest whether the matter has not been reported to the police or where the pregnancy as exceeded its fourteenth week'.[162]

157 As above.

158 The 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the implementation status of the African Charter on human and peoples' rights & the initial report on the implementation status of the Protocol to the African Charter on human and Peoples' Rights and the rights of women in Africa (Maputo protocol) (2009-2016) p 30 para 78.

159 Status of Ratification (n 154).

160 Algeria seems to have entered reservations on arts 6, 7 & 14. No further indication is provided. See Status of Ratification (n 154).

161 According to this article 'The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol'. See F Viljoen & M Kamunyu 'Articles 27 and 32' in this volume.

162 See Status of Ratification (n 154).

5.4.3 Validity of reservations

Some of the reservations mentioned above do not appear to pose a flagrant issue of validity. It remains the responsibility of the African Commission and the African Court to assess their validity in light of the object and purpose of the Charter and the Protocol. As pointed out above, some elements must be considered when conducting such an assessment. For instance, any blanket reservation subordinating the application of the protocol to its compatibility with Islamic law without further precision would fail the validity test. The reservations made by The Gambia and eventually withdrawn would have undoubtedly fallen within this category.[163] By the same token, the reservation made by Cameroon is highly questionable. The text of the reservation makes a vague reference to the elusive concept of 'universal and African ethical and moral values'. Moreover, the reservation does not indicate in a precise manner its scope in relation to specific provisions of the Protocol. Considering the criteria developed by the HRC, mentioned above, such a reservation would lack the essential attributes of a valid reservation.

The same holds regarding Ethiopia's, Mauritius', and Algeria's reservations. As explained above, Ethiopia has entered a significant number of reservations and many 'interpretative declarations' that would more likely pertain to proper reservations.[164] All in all, its reservations and 'interpretive declarations' concern about one-third of the substantive articles of the protocol. The number of reservations entered by Mauritius is also striking. This fact alone is enough to raise a concern regarding the validity of these reservations. As pointed out above, one of the criteria the HRC provides to assess the validity of reservations to human rights treaties is the cumulative effect of a group of reservations. Mauritius reservations – put together – would arguably compromise the object and purpose of the Protocol. Moreover, the test of transparency and specificity is also not met since the language of the reservations remains vague and lacks the necessary preciseness required for reservations to human rights treaties. In that regard, Algeria's reservations, which only refer to three provisions without further elaboration, would also fail the validity test.

South Africa has explained that the profound concern justifying its reservations was to ensure that the protocol does not undermine its domestic legislation, which South Africa considers offers more protection of women's rights than the protocol. However, some have argued that South Africa's reservation on article 6(d) on the recording of marriages in writing and their registration strike at the core of the Maputo Protocol, considering impacts such as the inability to verify child marriages.[165] This interpretation of the reservation is only possible if one assumes that the non-recording and non-registration of marriages would lead to the proliferation of marriage of girls under the legal age. However, in its report to the Commission, mentioned above, the South African government has explained that the reservation was made to protect women in existing customary marriages, of which many are not registered in South Africa.[166] Viewed from that perspective and regarding the intention of the reserving state, the reservations do not seem to defeat the treaty's purpose. This interpretation of the meaning and effect of South Africa's reservation is disputed.[167]

163 As suggested by Viljoen (n 107) 43.

164 HRC General Comment 24 (n 137) para 3. The HRC explains that '[i]f a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation'.

165 Viljoen (n 107) 43.

166 Combined Report of South Africa (2015) (n 115) p 148 para 39.

167 See *Request for Advisory Opinion by the Centre for Human Rights* (n 118).

As pointed out above, Namibia was concerned about the same issue. However, it is questionable whether Namibia still considers its reservation operative. In fact, despite being urged by the African Commission to include information regarding its reservation to the Protocol in its periodic reports,[168] the last report of Namibia contains no reference to the reservation.[169] In its Concluding Observations on Namibia's 6th Periodic Report, the Commission did not raise the issue.[170] This might suggest that there is no more concern regarding the reservations by Namibia. It remains to be confirmed if the country has implicitly withdrawn its reservation.

The reservations made by Uganda are specific and concerned with the issue of medical abortion under certain conditions. The Ugandan reservation sounds more like an interpretive declaration. It is also well known that the issue of medical abortion reveals a lack of consensus within and across Africa (and the world). Although one might encourage a more expansive stance on this matter, it would undoubtedly be incorrect to consider any reservation on this matter as invalid. The validity test would depend on the intention behind this reservation and how it affects the Protocol's 'object and purpose'. Unfortunately, in its last Concluding Observations, the Commission did not comment on this reservation.[171]

One last observation regarding the validity of these reservations refers to their publicity. Reservations to international treaties should be made easily accessible to each party and the public. Without this formality, the reservation would not be open to scrutiny. This points once again to the crucial role of the depository, as discussed above. However, the original texts of the reservations made to the Maputo Protocol are not available on the official website of the AU dedicated to OAU/AU treaties, conventions, protocols and charters as is common practice within the UN.[172] In addition, only Kenya's reservation is available on the registration page of the Protocol on the UN website.[173] It is unclear why the texts of all reservations have not been published by the AU and sent to the UN Secretary-General during the registration and publication of the Protocol.

6 Conclusion

As an international treaty, the Maputo Protocol provides the final clauses as discussed in this chapter. The objectives of these clauses are primarily to clarify the procedural and practical aspects of the functioning of the treaty. These types of provisions are critical as they impact the effective functioning of the treaty. The present chapter highlighted some shortcomings regarding their drafting and discussed these in light of the customary international law applicable to multilateral treaties codified by the VCLT.

If anything, the discussion has highlighted the importance of – and the need for – rigorous drafting of treaties. Discussing the Protocol's provisions on issues such as signature, entry into force,

168 Concluding Observations and Recommendations on Sixth Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011-2013) African Commission on Human and Peoples' Rights, adopted at its 58th ordinary session 6-20 April 2016, Banjul, The Gambia, paras 10-11.

169 7th Periodic Report (2015-2019) on the African Charter on Human and Peoples' Rights and the 2nd Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020).

170 Africa Commission Concluding Observations (2016) (n 168).

171 Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010-2012) African Commission on Human and Peoples' Rights, adopted at its 57th ordinary session 4-18 November 2015, Banjul, The Gambia.

172 AU https://au.int/en/treaties (accessed 16 May 2023).

173 UN https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805265c4&clang=_en and see the text of the Kenyan reservation registered with the UN https://treaties.un.org/doc/Publication/UNTS/No%20Volume/26363/A-26363-Kenya-0800000280526689.pdf (accessed 16 May 2023). It must be noted that the UN registration page does not reflect the updated ratification table mentioned in the footnote above.

and amendments and comparing them with other similar provisions in other AU treaties has shown that some difficulties may arise in the course of their application due to poor drafting. In the same vein, the reservations issue must be given more attention. The role of the depository is crucial in this regard. The AUOLC is expected to play a central role in guiding the depository to assume its mission effectively. For instance, the updated status of ratification of the treaty, the exact content and dates of all reservations should be available to the public.

Finally, the issue of reservations entered to the Protocol deserves more attention from the monitoring bodies. As pointed out in this chapter, several reservations made to the Protocol arguably fail the validity test. This is a critical issue as it concerns the scope of application of the protocol and the effectiveness of the protection afforded to women in the reserving states. It is, therefore, essential that the motoring bodies do not miss any opportunity to elaborate on this issue. Although this concerns all the monitoring bodies, the Africa Commission can play a critical role in evaluating periodic state reports. The Commission has, on occasion, indicated in its Concluding Observations to states' reports that it is concerned with reservations made by states. It is critical that the Commission elaborates further on this issue in the future.