

Introduction

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1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the only regional human rights treaty focusing broadly on women's rights, is a landmark instrument.¹ As suggested by Banda, it is a 'strong indicator of the normative acceptance of the idea that human rights are women's rights'.² Alongside the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), it is a ground-breaking treaty in the struggle for women's equal rights. Importantly, the Maputo Protocol promotes substantive equality and aims to transform the lives of African women towards the holistic protection of their human rights. It applies to all forms of discrimination against African women; hence it is not restricted to the specific fields of protection spelt out within it. The Maputo Protocol further speaks to intersecting identities and vulnerabilities, focusing on, for example, widowhood, elderly women, women with disabilities, and women living in poverty.³

Like the African Charter on Human and Peoples' Rights (African Charter) the Maputo Protocol combines civil, political, socio-economic, cultural, and collective rights. It takes its point of departure from the reality that,

1 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), Declaration on the Elimination of Violence Against Women in the ASEAN Region and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) focus exclusively on eliminating violence against women.

2 F Banda 'Blazing a trail: the African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 84.

3 See Maputo Protocol arts 20, 22, 23 & 24.

despite the ratification of the African Charter and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.⁴

The first article of the Maputo Protocol contains a number of powerful definitions guiding the application of the subsequent provisions.⁵ ‘Women’ are defined by their gender and not their biological sex, while discrimination against women is broadly defined in terms of its substantive impact on women’s equal enjoyment of their human rights and fundamental freedoms in all spheres of life.⁶ Linked to this definition is a comprehensive list of state obligations targeting not only the legislative arm of the state but also requiring each state party to prevent discrimination and impose sanctions on non-state actors, including family and community members as well as corporate actors for discriminatory acts.⁷

As detailed throughout this Commentary, in a bid to recognise the complex, oppressive cultural and religious contexts within which many African women live, the Maputo Protocol moreover offers a definition of ‘harmful practices’.⁸ The Maputo Protocol is the first treaty to do so, providing African women with protection against any ‘behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity’. It employs state obligations to address the oppressive patriarchal *status quo* by requiring the state to socialise and re-socialise every individual and every community to uphold the inherent dignity of all women.

This collection is the first comprehensive commentary on the provisions of the Maputo Protocol. The Commentary analyses the Maputo Protocol’s provisions alongside the jurisprudence and interpretive comments that have emerged from its monitoring bodies: the African Commission on Human and Peoples’ Rights (African Commission), the African Court on Human and Peoples’ Rights (African Court), the African Committee on the Rights and Welfare of the Child (African Children’s Committee), the Special Rapporteur on Rights of Women in Africa (Special Rapporteur on Women in Africa); sub-regional courts such as the Economic Community of West African States Community Court of Justice (ECOWAS Court); and domestic courts. The Commentary also draws from the important work done by the member states through their initial and periodic reporting under articles 26(1) of the Maputo Protocol and 62 of the African Charter. Where relevant, reference is also made to the essential work of other international and regional treaty bodies and courts to provide interpretive rigour. Since the jurisprudence of the African Commission and African Court on the Maputo Protocol is still in its early stages, contributing authors were also encouraged to supplement the regional sources with examples from domestic jurisdictions where domestic courts have interpreted and applied the Maputo Protocol. Moreover, this Commentary aims to engage the most important scholarship on the Maputo Protocol to provide the reader with a comprehensive list of source materials.

In terms of its structure, this Commentary contains detailed analyses of the Preamble, as contained in the following chapter, and of each article of the Maputo Protocol. It includes separate chapters on the interpretive mandates linked to the African Commission and the African Court, articles 27 and 32 and the final provisions, found in articles 28-31. The sources relied on in every chapter are primarily the text of the article in question, the preparatory work, general recommendations, state reports, concluding observations and case law through which regional, sub-regional and domestic courts and quasi-legal bodies have interpreted and applied the Maputo Protocol. The general drafting process is

4 Preamble to the Maputo Protocol. For further discussion see A Rudman ‘Preamble’ in this volume.

5 See M Kamunyu ‘Article 1’ in this volume.

6 Maputo Protocol art 1(f).

7 Maputo Protocol arts 2 & 5.

8 See M Kamunyu ‘Article 1’ and S Nabaneh ‘Article 5’ in this volume for further discussion.

described in this chapter. Each chapter then contains a detailed description of the drafting history of the article in question. This dimension was considered important to include in the Commentary as no other comprehensive comment on the preparatory work exists.⁹

While each chapter is self-contained and can be read as a stand-alone piece, this Commentary was also conceived of as an inherent whole. Thus, every attempt was made to harmonise the structure of the chapters, bearing in mind the diversity of contexts that surrounds each article. The Commentary moreover introduces a number of concepts, ideas and issues that are relevant throughout the Maputo Protocol, and where they are addressed in more detail elsewhere in the Commentary it directs the reader to the appropriate chapters through cross references.

As far as limitation goes, this Commentary does not claim to offer a detailed analysis of the status or position of women under regional or international law or developments in the international protection of women's human rights outside the framework of the Protocol. Instead, the aim is to provide a comprehensive guide to the extraordinary legal instrument that the Maputo Protocol has proven to be, so that others may use it and build onto it in the struggle for the respect, promotion, protection, and fulfilment of *all* rights of *every* woman in Africa.

This introduction to the Commentary dwells on the history, adoption, and structure of the Maputo Protocol; alongside some of the principles of general international law which affect the interpretation and implementation of the Maputo Protocol. Therefore, this chapter is divided into six sections. Section 2 presents the history of the Maputo Protocol and the surrounding events and historical context that inspired this ground-breaking treaty. Section 3 provides some insight into the close relationship between the Maputo Protocol and the African Charter. Section 4 gives a brief insight into the status of the Protocol in domestic legal systems, while section 5 sets out the structure of the Protocol. Section 6 provides some brief thoughts on the chapters and discussions to follow.

2 The history of the Maputo Protocol

2.1 Overview

Article 32 of the Vienna Convention on the Law of Treaties (VCLT) establishes that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' to establish its meaning.¹⁰ One of the chief sources in treaty interpretation, the Preamble, is discussed in the next chapter. This section details the preparatory work of the Maputo Protocol, making visible the context within which the Maputo Protocol should be understood.

Drafting any international treaty, where many stakeholders are naturally involved, is a lengthy and complex process. The conception of the Maputo Protocol is no exception. As succinctly concluded by Nsibirwa, '[t]he history of the Draft [Maputo] Protocol is quite a long one'.¹¹ As discussed throughout this chapter, and indeed throughout this Commentary, the Maputo Protocol was not conceived of and drafted in a vacuum. Its adoption must be viewed against a much broader contemporary international,

9 Some aspects of the drafting history are discussed in Banda (n 2), 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; 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*; and R Murray 'A feminist perspective on reform of the African human rights system' (2001) 1 *African Human Rights Law Journal*.

10 Art 32 follows on art 31 which sets out the general, primary, rules of treaty interpretation.

11 Nsibirwa (n 9) 41.

regional, and sub-regional political, legal, and social background.¹² As is evident from the drafting history, many different stakeholders made their mark on the Protocol. Moreover, the institutional framework into which it fits changed while the Protocol was developed. For instance, the position of the Special Rapporteur on Women in Africa was created, and the promotion of gender equality was explicitly declared as a founding principle of the African Union (AU) and given visibility in the Constitutive Act of the African Union (AU Constitutive Act).¹³

The drafting of the Maputo Protocol began, as is further detailed below, in 1995. The Maputo Protocol was adopted eight years later, on 11 July 2003, by the AU Assembly of Heads of State and Government (AU Assembly) in Maputo, Mozambique. Hence, the short title ‘Maputo Protocol’ is used throughout this Commentary.¹⁴ In terms of the AU member states’ interaction with the newly adopted Maputo Protocol, no instruments of ratification were received by the African Union Commission (AU Commission) in the first nine months after the Protocol was adopted. Comoros became the first state to deposit its instrument of ratification on 16 April 2004, followed by Libya,¹⁵ Rwanda,¹⁶ Namibia,¹⁷ and Lesotho¹⁸ in 2004. In July 2004, the AU Assembly adopted the Solemn Declaration on Gender Equality in Africa,¹⁹ where member states committed themselves to sign and ratify the Maputo Protocol by the end of 2004. In 2005, South Africa,²⁰ Senegal,²¹ Mali,²² Djibouti,²³ Nigeria,²⁴ Malawi,²⁵ Cape Verde,²⁶ The Gambia,²⁷ and Benin followed suit.²⁸ Togo deposited its instrument of ratification on 26 October 2005, becoming the fifteenth state to do so.²⁹ Thirty days later, on 25 November 2005, the Protocol entered into force in accordance with its final provisions.³⁰ Thus, a little more than ten years after the drafting began and two years and four months after it was adopted, the Protocol became operative in the first 15 state parties. While it took only a little more than three years for the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) to enter into force, it took more than five years after its adoption for the African Charter to enter into force; and more than nine years from the adoption of the African Charter on the Rights and Welfare of the Child (African Children’s Charter) before it entered into force.

12 Viljoen (n 9) 12.

13 Art 4(l).

14 Other short titles commonly used are ‘Women’s Protocol’ or ‘African Women’s Protocol’.

15 30 June 2004.

16 1 July 2004.

17 26 August 2004.

18 5 November 2004.

19 Assembly/AU/Decl.12 (III) Rev.1 (SDGEA) para 9.

20 14 January 2005.

21 30 January 2005.

22 3 February 2005.

23 4 February 2005.

24 18 February 2005.

25 29 June 2005.

26 22 July 2005.

27 6 September 2005.

28 13 October 2005.

29 According to art 29(1) ‘[t]his Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification’.

30 See B Traoré ‘Articles 28-31’ in this volume, for further discussion. For current status of ratifications see African Union, ‘Reservations and declarations entered by member states on the protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’, March 2022, communication from the African Union Commission. On file with the author.

2.2 International context

In terms of international law, the Maputo Protocol was drafted in a context where an international treaty on women's rights, CEDAW, had already been established, along with its monitoring body, the UN Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee).³¹ The UN General Assembly adopted CEDAW in 1979. Described as an international bill of rights for women,³² it entered into force in September 1981. By the end of 1995, at the initial phase of the drafting process of the Maputo Protocol, 43 members of the then Organisation of African Unity (OAU) had ratified CEDAW.³³ By the time the Maputo Protocol was adopted in 2003, all AU and UN member states except Somalia and Sudan had ratified CEDAW.³⁴ In 2015, four years after gaining independence, South Sudan ratified CEDAW. However, Somalia and Sudan have neither signed nor ratified CEDAW. As these states have also not yet ratified the Maputo Protocol, women in these states have effectively been left outside the reach of the provisions of both CEDAW and the Maputo Protocol.³⁵

In the lead-up to the drafting process of the Maputo Protocol, five influential human rights-related conferences were hosted by the UN: the UN Conference on Environment and Development,³⁶ the Second World Conference on Human Rights,³⁷ the UN Conference on Population and Development,³⁸ the World Summit for Social Development,³⁹ and the Fourth World Conference on Women.⁴⁰ The latter resulted in the Beijing Declaration and Platform for Action (Beijing Platform).⁴¹ The Beijing Platform covers 12 critical areas of concern to women's rights which were all relevant to the development of the Maputo Protocol.⁴²

In addition, on the regional plane, the Fifth African Regional Conference on Women⁴³ was held in Dakar in November 1994 in preparation for the Fourth World Conference on Women. The conference adopted the Dakar Platform for Action (Dakar Platform),⁴⁴ a synthesis of regional perspectives and

31 Established under art 17 of CEDAW. By the time the Maputo Protocol entered into force the Optional Protocol to CEDAW had also entered into force establishing the complaint and inquiry mechanisms under CEDAW.

32 The United Nations and The Advancement of Women, 1945-1995, UN Blue Books Series, Vol. VI (Revised edition 1996) 5.

33 Angola, Benin, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Togo, Tunisia, Uganda, Tanzania, Zambia, and Zimbabwe.

34 Excluding the Sahrawi Arab Democratic Republic.

35 Somalia and Sudan have both signed the Maputo Protocol. See B Traoré 'Articles 28-31' sec 2.2.3 in this volume on the discussion of art 18 of the VCLT on the obligation not to defeat the object and purpose of a treaty prior to its entry into force.

36 Rio de Janeiro, Brazil, 3-14 June 1992, Agenda 21.

37 Vienna, Austria 14-25 June 1993.

38 Cairo, Egypt, 5-13 September 1994.

39 Copenhagen, Denmark 6-12 March 1995.

40 Beijing, China 4-15 September 1995. Preceded by the World Conferences on Women in Mexico City in 1975, Copenhagen in 1980, Nairobi in 1985.

41 United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995. Endorsed by UNGA Resolution 50/203, 22 December 1995.

42 These are (1) women and poverty; (2) education and training of women; (3) women and health; (4) violence against women; (5) women and armed conflict; (6) women and the economy; (7) women in power and decision-making; (8) institutional mechanisms; (9) human rights of women; (10) women and media; (11) women and the environment; and (12) the girl child.

43 Dakar, Senegal, 16-23 November 1994.

44 African Platform for Action: African common position for the advancement of women E/ECA/CM/21/RES/802(XXX) Adopted at the 296th meeting, 3 May 1995 Economic Commission for Africa.

priorities as well as a framework for action for formulating policies and implementing concrete and sustainable programs for advancing African women. The Dakar Platform was developed in consonance with the Nairobi Forward-looking Strategies,⁴⁵ the Abuja Declaration⁴⁶ and the Kampala Action Plan.⁴⁷

The drafting process moreover relied on some influential sub-regional instruments on women's rights, such as the Southern African Development Community (SADC) Declaration on Gender and Development and its addendum on violence against women.⁴⁸

These gatherings, their related outcomes, and already existing instruments on women's rights all brought women's issues to the forefront. This is not to say that states and other stakeholders sufficiently acknowledged women's narratives and struggles, but the voices of women's rights organisations, especially organisations from the African continent, had started to grow stronger.⁴⁹ Common themes of these narratives presented by non-governmental organisations (NGOs) were the failure of the existing legal framework to provide protection of women's rights, the negative impact of cultural and religious practices on women's rights, and women's lack of access to resources for development. Thus, women's issues were on the agenda when the Second World Conference on Human Rights took place in Vienna, Austria in 1993. The conference culminated in the adoption of the 1993 Vienna Declaration and Programme of Action (Vienna Declaration), a plan of action to strengthen the protection of human rights across the globe.

Importantly, the Vienna Declaration recognised that women's human rights are 'an inalienable, integral and indivisible part of universal human rights'.⁵⁰ It also confirmed that women are entitled to full and equal participation in 'political, civil, economic, social and cultural life, at the national, regional and international levels'.⁵¹

As a point of departure for further work on guaranteeing women's rights globally, the Vienna Declaration concluded that 'the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community'.⁵² The Vienna Declaration also recognised, in line with General Recommendation 19 of the CEDAW Committee, issued in 1992, that '[g]ender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated'.⁵³ Later that same year, the UN General Assembly adopted the UN Declaration on the Elimination of Violence Against Women. In addition to concluding the Vienna Declaration, the Vienna Conference also took the novel step to support the creation of a new international mechanism, a Special Rapporteur on Violence against Women, subsequently appointed in 1994.⁵⁴

45 Report of the world conference to review and appraise the achievements of the united nations decade for women: equality, development and peace, Nairobi, Kenya, 15-26 July 1985. United Nations, New York, 1986.

46 Regional Conference on the Integration of Women in Development and on the Implementation of the Arusha Strategies for the Advancement of Women in Africa, Abuja, Federal Capital Territory, Nigeria, 1989.

47 The Regional Conference on Women and Peace which took place in Kampala, Uganda 22-25 November 1993.

48 Banda (n 2) 74.

49 Viljoen (n 9) 12.

50 Vienna Declaration para 18.

51 As above.

52 As above.

53 Vienna Declaration para 18; see also UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, A/47/38 (General Recommendation 19).

54 Commission on Human Right Resolution 1994/45 Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women.

2.3 The early drafting stage 1995-1999

At the beginning of March 1995, the African Commission, working together with Women in Law and Development in Africa (WiLDAF), the International Commission of Jurists, and the African Centre for Democracy and Human Rights Studies (ACDHRS) hosted the seminar on the African Woman and the African Charter on Human and Peoples' Rights, in Lomé, Togo.⁵⁵ This is regarded as the official starting point of the drafting of the Maputo Protocol.⁵⁶ Two main recommendations came out of the discussions at this seminar: the creation of a protocol that would elaborate on women's rights, which would be part and parcel of the African Charter,⁵⁷ and the creation, by the African Commission, of the position of a Special Rapporteur on African Women's Rights.⁵⁸

At its 17th ordinary session, the African Commission endorsed the recommendation of the seminar to prepare a draft protocol on the rights of women.⁵⁹ The African Commission also established a mechanism to consider the position of African women under the existing regional human rights framework.⁶⁰ A working group consisting of Commissioners Dankwa, Duarte-Martins, the first female Commissioner at the Commission, and Ondziel-Gnelenga was set up to initiate the work on a draft protocol.⁶¹ In July 1995, the OAU Assembly officially endorsed the development of a draft protocol on the rights of women.⁶²

The Working Group's first meeting took place in Nouakchott in, Mauritania, in April 1997.⁶³ The International Commission of Jurists, in collaboration with the African Commission, hosted an expert meeting on the preparation of a draft protocol to the African Charter concerning the rights of women. This meeting resulted in the first draft of the Protocol, the Nouakchott Draft.⁶⁴ Once the first draft was prepared, feedback was generated from all over Africa and the diaspora following an email discussion of the draft initiated by the African Women's Development and Communication Network (FEMNET).⁶⁵ At its 22nd ordinary session in November 1997, the African Commission extended the Working Group

55 The seminar took place on 8 and 9 March 1995. Interoffice Memorandum, 17 May 2001, subject: draft additional protocol on the rights of women, Annex: Road Map of activities relating to the draft protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para 3. On file with the author.

56 Banda (n 2) 72.

57 See further discussion on the relationship between the African Charter and the Maputo Protocol under 3 below.

58 F Mohamed 'Mobilizing for women's rights' (2005) sister Namibia 12. On file with the author.

59 17th ordinary session of the African Commission was held in Lomé, Togo 13-22 March 1995. The decisions of the 17th ordinary session are available in the 8th Annual Activity Report of the African Commission 1994-1995. See also Interoffice Memorandum (n 55) para 4.

60 Banda (n 2) 73.

61 10th Annual Activity Report of the African Commission on Human and Peoples' Rights 1996/97 para 20. See also Interoffice Memorandum, 17 May 2001 (n 55) para 4.

62 31st ordinary session Resolution AHG/Res 240 (XXXI). As explained by Commissioner Ondziel-Gnelenga, the elaboration of a draft protocol on the rights of women was one of the recommendations made in the Commission's 8th Annual Activity Report 1994-1995. This report was presented to the OAU Assembly, meeting in its 31st ordinary session in Addis Ababa, Ethiopia, from 26-28 June 1995. The OAU Assembly authorised the publication of the 8th Activity Report as well as the conclusions and recommendations relating to the information contained in this report. The 8th Activity Report of the African Commission refers to the Seminar on the African Woman and the African Charter on Human and Peoples' Rights, Lomé, Togo, 8-9 March 1995 and to the Report on the Seminar on the African Woman and the African Charter on Human and Peoples' Rights (Seminar report). However, the Seminar Report is not part of the activity report and thus it is difficult to trace the specific decision to endorse the development of a protocol on African women's rights. See also Interoffice Memorandum (n 55) para 5.

63 10th Annual Activity Report of the African Commission on Human and Peoples' Rights 1996/97 para 17(c), Annex III: Agenda African Commission on Human and Peoples' Rights 21st ordinary session 15-24 April 1997, Nouakchott, Mauritania, para 7(i) Elaboration of the Draft Additional Protocol on African Women's Rights; Doc.OS/7(XXI) Add.8.

64 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).

65 Mohamed (n 58) 12.

initially composed of the three Commissioners to include the International Commission of Jurists and the ACDHRS.⁶⁶ In view of its vast expertise in the field of women's issues and taking into consideration its observer status with the Commission, WiLDAF also joined the Working Group.⁶⁷

The second meeting of the Working Group took place in Banjul, The Gambia in January 1998.⁶⁸ The Working Group submitted an interim report to the African Commission during its 23rd ordinary session in April 1998.⁶⁹ In June 1998, the OAU Assembly, at its 34th ordinary session, requested the African Commission to finalise the Protocol to the African Charter relating to Women's Rights as early as possible.⁷⁰

To support the work of the Working Group's and to further focus its mandate on women's rights, the African Commission created the position of a Special Rapporteur on Women in Africa in May 1999. The Special Rapporteur on Women in Africa led the Working Group on the further preparation of the draft protocol. Commissioner Ondziel-Gnelenga held this position.⁷¹ The mandate of the Special Rapporteur on Women included preparing a situation analysis on the rights of women in Africa and suggesting appropriate remedies to protect women's rights.⁷²

The third meeting of the Working Group was held in June 1999.⁷³ A wider range of stakeholders were consulted, and their contributions were reflected in the draft protocol.⁷⁴ As an example, the International Labour Organization (ILO) provided substantial commentary on the draft, particularly on the labour-related rights.⁷⁵ The Working Group held a fourth meeting in October 1999.⁷⁶ It submitted its final report to the African Commission at its 26th ordinary session held in Kigali, Rwanda in November 1999. The draft emanating from this session is commonly referred to as the Kigali Draft.⁷⁷ At this meeting, the Commission examined and adopted the Kigali Draft and agreed to send it to the OAU General Secretariat for 'appropriate action'.⁷⁸

2.4 The merger

At the time the Kigali Draft was presented to the OAU a parallel process was unfolding within the then OAU Women's Unit. The OAU Women's Unit, together with the Inter-African Committee on

66 Interoffice Memorandum (n 55) para 6. See also 11th Annual Activity Report of the African Commission on human and peoples' rights 1997-1998.

67 Interoffice Memorandum (n 55) para 6. See also 11th Annual Activity Report of the African Commission (n 66).

68 26-28 January 1998 Banjul, The Gambia. Interoffice Memorandum (n 55) para 7.

69 Held in Banjul, The Gambia, 20-29 April 1998. Interoffice Memorandum (n 55) para 7. See also Report of the first meeting of the Working Group on the Additional Protocol to the African Charter on Women's Rights DOC/OS/34c (XXIII); see Murray R. *The African Commission on Human and Peoples' Rights and international law* (2000) 24.

70 Held in Ouagadougou, Burkina Faso, 8-10 June 1998. AHG/Dec.126(XXXIV). See also Interoffice Memorandum (n 55) para 8.

71 25th ordinary session held in Bujumbura, Burundi, from 26 April to 5 May 1999, the African Commission adopted resolution ACHPR/res.38 (XXV) 99 on the appointment of a Special Rapporteur on Women in Africa. The Resolution appointed the first Special Rapporteur in May 1999 retroactively as from October 1998.

72 Murray (n 69) 24.

73 14-15 June 1999 in Dakar, Senegal. Interoffice Memorandum (n 55) para 9.

74 Interoffice Memorandum (n 55) para 9. This draft is referred to by some authors as the Dakar Draft Protocol see Murray (n 69) 24 footnote 131.

75 Interoffice Memorandum ES/WU/COL/JOI/26.99, 5 August 1999. On file with the author.

76 Kigali, Rwanda 30-31 October 1999.

77 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. See also Nsibirwa (n 9) 41-42.

78 Final Communique of the 26th ordinary session of the African Commission on Human and Peoples' Rights Kigali, Rwanda 1-15 November 1999 para 16.

Harmful Traditional Practices Affecting the Health of Women and Children (IAC), were working on a Draft OAU Convention on Harmful Practises.⁷⁹ Some of the rights set out in the Draft OAU Convention on Harmful Practises overlapped with the protections in the Kigali Draft. In order to avoid duplication, the OAU General Secretariat suggested that the African Commission and the OAU Women's Unit work together on the draft protocol. During this process, the OAU Women's Unit and the Legal Division of the OAU initially made a couple of suggestions to improve the Kigali Draft.⁸⁰ In a letter to the Chairman of the African Commission in March 2000, the Legal Counsel for the OAU (OAU Legal Counsel) suggested that a meeting of governmental experts be convened in anticipation of the 26th OAU Summit to be held in Lomé, Togo, in July 2000 and importantly, that for strategic and substantive reasons, the Draft OAU Convention on Harmful Practises be integrated into the Kigali Draft.⁸¹

The merger of these two treaties was not without friction, especially considering the fact the Draft OAU Convention on Harmful Practises would no longer stand independently from the Kigali Draft.⁸² However, after what was referred to as 'fruitful and persuasive discussions' between the OAU and the IAC, the IAC agreed to the merger.⁸³ The President of the IAC nonetheless had some specific requests for the OAU: to recognise the Addis Ababa Declaration on Violence Against Women in the Preamble to the draft protocol; to place all substantive articles of the Draft OAU Convention on Harmful Practises as a separate chapter of the draft protocol under the title 'Harmful Practices'; and to recognise the input of the IAC through a footnote to this chapter.⁸⁴

During the 26th OAU Summit, there were further consultations between the OAU Legal Counsel, the Chief of the OAU Women's Rights Unit, the Secretary of the African Commission and the Special Rapporteur on Women on the Kigali Draft and the suggested merger.⁸⁵ During these consultations, it was agreed that further consultations should be held, enlarged to include a representative of the IAC. The objective of the consultations was to discuss how to actually integrate the Draft OAU Convention on Harmful Practises into a new draft protocol with a view to producing one integrated text to be submitted to a meeting of experts and ministers for their consideration.⁸⁶

A meeting of the OAU Political Department, the OAU Legal Counsel, the Secretariat of the African Commission, the Special Rapporteur on Women in Africa, and representatives of the IAC took place in Addis Ababa in July 2000. The group completed the integration of the Draft OAU Convention on Harmful Practises into the Kigali Draft and prepared one complete draft document to be submitted to the meeting of government experts for consideration.⁸⁷ In September 2000, the integrated document was finalised and termed the Final Draft.⁸⁸ The Final Draft contained 27 articles compared to the 23

79 Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

80 Nsibirwa (n 9) 42.

81 T Maluwa (Legal Counsel for the OAU) Letter to the Chairman of the African Commission CAB/LEG/72.20/27/Vol.I 7 March 2000.

82 OAU Legal Counsel Inter Office Memorandum to the Secretary of the African Commission subject: OAU Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls, I CAB/LEG/117.141/62/Vol.I 17 May 2000 see also response from Berhane Ras-work President of the IAC REF: IACOAU/197.00 9 May 2000. On file with the author.

83 Berhane Ras-work President of the IAC (n 82).

84 As above.

85 OAU Legal Counsel CAB/LEG.66.6/13/Vol.I. On file with the author.

86 OAU Legal Counsel (n 85).

87 Interoffice Memorandum (n 55) paras 14 & 15.

88 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

articles of the Kigali Draft and 13 articles of the Draft OAU Convention on Harmful Practises. None of the requests from the IAC were incorporated into the Final Draft, where harmful practices are referred to in the Preamble and in articles 1, 2 and 5 instead of in a separate chapter.

2.5 The Final Draft and the road towards consensus

To get the Final Draft ready for adoption by the OAU Assembly, a road map was created and distributed to various stakeholders to chart the way forward. The roadmap set out four milestones: a meeting of experts on the draft protocol to take place in February 2001; a second meeting of experts followed by a meeting of the relevant ministers at the end of May 2001; consideration of the draft by the OAU Council of Ministers and finally, adoption of the draft protocol by the OAU Assembly at its meeting in Lusaka, Zambia in July 2001.⁸⁹

The actual schedule deviated from these timeframes as interest waned after the finalisation of the Final Draft. In the meantime, the process of constituting a new continental organisation, the AU, was well underway. The first Pan-African Women Conference was held in Tripoli, Libya, in April 2001 to discuss the role of women vis-à-vis the AU. The conference aimed to call attention to the need to engender the unification process. From the mission report of the conference, it is clear that engagement with women's organisations was high on the agenda. The main outcome of the conference was the acknowledgement that there was a need for more inclusive outreach exercises as well as consultations on how best to ensure the effective inclusion and participation of women in the unification process, as well as in the institutions and structures of the AU.⁹⁰ This included participation in the process towards the adoption of the Maputo Protocol.

After the Pan-African Women Conference, the African Commission held its 29th ordinary session at the same location. At this meeting, the Special Rapporteur on Women in Africa expressed concern about the lack of progress on the Final Draft.⁹¹ It was decided that the OAU Women, Gender and Development Division (OAU Gender Division) should try to rekindle the momentum on the draft protocol towards adoption. In this regard, it was decided that the OAU Gender Division would act as a focal point regarding activities relating to the Final Draft, working together with the OAU Political Department, other relevant OAU Divisions and other stakeholders towards the finalisation of the protocol.⁹²

2.5.1 *First meeting of government experts*

The first meeting of government experts finally took place 12-16 November 2001.⁹³ The meeting consisted of representatives of 44 OAU member states.⁹⁴ It produced a report, the Report of the

the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63. This version with the reference CAB/LEG/66.6 dated 13 September 2000 was named the 'Final Version' by the OAU Legal Counsel and all further commentary would be based on this document as is evident in the references to this document going forward. See Interoffice Memorandum, 30 October 2000, subject: draft protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa CAB/LEG/66.6/22/Vol.I. On file with the author.

89 Interoffice Memorandum (n 55) para 17. Note that the letter to which the roadmap is attached indicates that the meetings of experts were to take place in September and November 2001 respectively.

90 Interoffice Memorandum, 9 May 2001, file no CAD/WGD26/19.01 AU Office of the Legal Counsel para 11. On file with the author.

91 Interoffice Memorandum, AU Office of the Legal Counsel (n 90) para 14.

92 Interoffice Memorandum, AU Office of the Legal Counsel (n 90) para 16.

93 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).

94 Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, The Congo, Côte d'Ivoire, The Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Ghana, Guinea,

Meeting of Experts,⁹⁵ commenting on all substantive provisions of the Final Draft and suggesting revisions, exclusions, new paragraphs, and provisions.⁹⁶ On 22 November 2001, a revised version of the Final Draft was issued, including the revisions and amendments set out in the Report of the Meeting of Experts.⁹⁷ At the meeting, three articles were flagged as ‘contentious’ on which the meeting could not obtain consensus. These were: articles 6 (Marriages), 22 (Monitoring) and 26 (Amendment and Revision). As is further detailed with regard to the respective articles in the chapters that follow, some issues, such as the status of polygamous marriages and the equal right of property of both spouses, yielded a lot of resistance and objections from some state parties and led to reservations.⁹⁸ Following the first meeting of experts, the OAU Legal Counsel also provided feedback on the Revised Final Draft suggesting both editorial and substantive revisions.⁹⁹

2.5.2 *NGO Forum*

Following a period of little engagement with the drafting process, NGOs across the continent gathered momentum once more in 2002 and applied pressure to move the process forward. More groups joined the process, raising concerns about ‘weak’ provisions contained in the draft protocol. Equality Now came on board, and after consultation with WiLDAF, ACDHRS and FEMNET, decided to convene a consultative meeting bringing together women’s rights organisations from across the continent to review the draft and advocate for its improvement.¹⁰⁰ The meeting was held on 4 and 5 January 2003 in Addis Ababa. The meeting produced a report, Comments by the NGO Forum,¹⁰¹ which highlighted the provisions that were considered to be below international standards in the Revised Final Draft and recommended alternative language to strengthen them.¹⁰² Some NGOs also engaged in a dialogue with the AU Commission, emphasising how embarrassing it would be if the draft protocol was adopted as it was.¹⁰³

In a letter to the Interim Commissioner for Peace, Security and Political Affairs of the AU, dated 13 January 2003, in anticipation of the second meeting of government experts, the Africa Office Director of Equality Now, expressed the collective concerns of the NGO Forum:

While appreciating the fact that the African Union has set higher standards in previous legal instruments such as the African Charter itself and the Charter on the Welfare and the Rights of the Child than other regional or international organizations, we are concerned that the draft Protocol on the Rights of Women in Africa does not clearly and consistently reflect the noble objectives of the organization and its member states ... if

Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, South Africa, The Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. See 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 II.2.

95 Report of the Meeting of Experts (n 94).

96 Report of the Meeting of Experts (n 94).

97 (Revised Final Draft), CAB/LEG/66.6/Rev.1.

98 Banda (n 2) 76 & 77; Viljoen (n 9) 42.

99 Comments by the OAU Legal Counsel (2002): CAB/LEG/66.6/Rev.1.

100 Mohamed (n 58) 12.

101 Draft protocol to the African Charter on Human and peoples’ Rights on the Rights of Women in Africa, as adopted by the Meeting of Government Experts in Addis Ababa 16 November 2001, CAB/LEG/66.6/Rev.1.

102 The following NGOs participated in this meeting: African Centre for Democracy and Human Rights Studies, Akina Mama Wa Afrika, Equality Now, Ethiopian Women Lawyers Association, Femmes Africa Solidarite, FEMNET – African Women’s Development And Communication Network, Malian Women Lawyers Association, Senegalese Women Lawyers Association WiLDAF-Women in Law and Development in Africa, WRAPA – Women’s Rights Advancement and Protection Alternative.

103 Mohamed (n 58) 12.

the draft Protocol is passed as it stands now, the African Union would for the first time set lower standards than those already existing regionally and internationally ... [moreover] the repeated postponements of the meetings do not reflect well on the African Union.¹⁰⁴

2.5.3 *Second meeting of government experts and meeting of ministers*

Following the substantial feedback from the NGO Forum and their push for immediate engagement with the draft protocol, a second meeting of government experts was convened 24-26 March 2003. Forty-two¹⁰⁵ AU member states participated in this meeting alongside a number of observer delegations.¹⁰⁶ The meeting considered the articles that had been highlighted at the 2001 meeting of government experts and identified articles 4(2)(m), 6(d), 8, 9, 10, 11, 12, 13, 17, 19, 20, 21 and 23 as needing further attention. A number of amendments were made, and a revised text referred to as the 'New Draft Protocol' was adopted.¹⁰⁷ This draft was subsequently discussed by the Ministerial Meeting on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the rights of women in Africa, held back-to-back with the meeting of government experts.¹⁰⁸ Ambassador and Interim Commissioner Mahamat Habib Doutoum formally opened the ministerial meeting. In his opening address, he made the following remarks that succinctly describe the struggle for women's emancipation and equality. He observed that,

to a certain degree, values of civilizations, be they religious or cultural, tend to rigidly assign specific roles and tasks to men and women, which often limit the participation of women in political life or even keep them away altogether... [t]he Protocol will change behaviour and cultural attitudes inherited from ancestors, and will constitute a stride in reshaping the thinking about the role and dignity of women in modern African societies... once it [is] adopted, the Protocol [will] become one of the international instruments and [will] play a role in enhancing the human rights of women and hence their contribution to development.¹⁰⁹

The ministerial meeting considered the text, article by article, but only substantive issues were discussed.¹¹⁰ It adopted the various articles through consensus to remove the reservations previously entered by some delegations.¹¹¹ Where consensus was not reached, the text submitted by the meeting of government experts was endorsed, and delegations were then free to enter reservations on the said text.¹¹² At the end of its work, the ministerial meeting adopted the final draft version of the Maputo

104 Equality Now Regional Office, Letter to the Interim Commissioner for Peace, Security and Political Affairs African Union, Ambassador Djinnit Said, date 13 January 2003. On file with the author.

105 Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Congo, Côte d'Ivoire, Democratic Republic of Congo, Chad, Ethiopia, Eritrea, Egypt, Guinea Equatorial, Gabon, Guinea Conakry, Gambia, Ghana, Kenya, Lesotho, Libya, Malawi, Mali, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Saharawi Arab Democratic Republic, South Africa, Senegal, Sudan, Swaziland, Sierra Leone, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe.

106 ECA, UNDP, UNICEF, FAO, UNHCR, ILO, UNEP, AWCPD, CIDA CANADA, GPI, WLEA, FIDA, FAS, ICRC, IAC, NCTPE, OHCHR, UNIFEM, CGE, WILDAF, EQUALITY NOW, AJM, AJS, EWLA, ACDHRS, FEMNET, WRAPA, WILSA, FRANCOPHONIE, and AMWA.

107 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 2nd Meeting of Experts).

108 The same state parties and observer organisations participated in this meeting.

109 Summary of the proceedings of the 2nd Meeting of Experts (n 107) para III Opening Ceremony 5.

110 Summary of the proceedings of the 2nd Meeting of Experts (n 107) para VII Proceedings 11(a). It was decided that editorial corrections should be handed over to the AU Commission, which was requested to ensure the harmonisation in all working languages.

111 Summary of the proceedings of the 2nd Meeting of Experts (n 107) para VII Proceedings 11(b). See also Banda (n 2) 76 & 77; Viljoen (n 9) 42.

112 Summary of the proceedings of the 2nd Meeting of Experts (n 107) para VII Proceedings 11(c).

Protocol, also known as the Addis Ababa Draft,¹¹³ containing the 32 articles that are reflected in the Maputo Protocol. Some delegations registered reservations at this stage.¹¹⁴ As reflected above, the Maputo Protocol was adopted on 11 July 2003 by the AU Assembly in Maputo, Mozambique and officially entered into force on 25 November 2005.¹¹⁵

3 Relationship with the African Charter

3.1 Overview

Throughout this Commentary the authors detail the different international instruments that are relevant to understanding and contextualising the comprehensive issues addressed in the Maputo Protocol. As is evident in these discussions, one instrument, the African Charter, stands out. It is the originating treaty to which the Protocol is attached. Therefore, it has a special relationship with the Maputo Protocol, both as an antagonist, as some have argued, and as a point of departure for African women's rights, as was evident at the Lomé seminar 1995. As mentioned in the drafting history, the creation of the Maputo Protocol would come to elaborate on women's rights, which would form part and parcel of the African Charter.¹¹⁶ It is this complex relationship that this section sets out to elaborate. This discussion is then supplemented by analyses of specific linkages between the Maputo Protocol and the African Charter in relation to the specific articles of the Protocol discussed in the Commentary's subsequent chapters.¹¹⁷

3.2 A 'Protocol'

Article 2(1)(a) of the VCLT defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Consequently, 'whatever its particular designation' signifies that the specific designation employed does not determine whether an instrument is a treaty or not. Irrespective of the designation, an international agreement falling under the VCLT's definition is considered to be a treaty. The term 'treaty' is a generic name, and many different terms are used to indicate the same. The term 'treaty' includes, among others, the terms: convention, agreement, pact, *protocol*, charter, statute and covenant. As long as an instrument falls under the above definition, it refers to an international treaty that is binding under international law.

113 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). The original document adopted in English and in French was translated into Arabic and Portuguese. See Interoffice Memorandum, subject: Maputo Documents: Draft Protocol Relating to the Rights of Women in Africa, POL/DIR/63(1)14.03. On file with the author.

114 The following reservations were registered: South Africa art 4(j); Botswana art 4(j) on the notion of nursing women; Tunisia and Sudan art 6(b); Kenya, Namibia and South Africa art 6(d); South Africa and Zambia art 6(h); Egypt, Libya and Sudan art 7(a); Egypt art 7(d); Libya art 11(3); Sudan art 14(1)(a); Burundi, Senegal and Sudan art 14(1)(b); Sudan art 14(1)(c); Libya, Rwanda and Senegal art 14(2)(c); Egypt and Sudan art 20(b); and Egypt art 21. Annex to Draft Protocol (n 113) Table of reservations to the Draft Protocol to the African Charter on Human and Peoples' Rights Related to the Rights of Women in Africa. Not all of the reservations registered at this stage of the drafting process were duly deposited with the AU Commission. See B Traoré 'Articles 28-31' sec 5.4 in this volume, for further discussions on reservations.

115 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), Assembly of the African Union Second ordinary session 10-12 July 2003 Maputo, Mozambique.

116 Mohamed (n 58) 12.

117 The first protocol to the African Charter, is the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights which was adopted on 10 June 1998 and entered into force on 25 January 2004 i.e. after the Maputo Protocol. Since, the adoption of the Maputo Protocol, the Assembly of Heads of State and Governments of the AU has adopted three other normative protocols to the African Charter, see sec 3.2 for further reference.

The Maputo Protocol was created as a ‘supplementary treaty’ but arguably goes much further than merely supplementing or modifying specific rights in the African Charter. Rather, it creates a large number of additional rights and obligations. The mechanism of enlarging already existing human rights treaties by adding protocols is commonly used in, for example, the European regional human rights system, where the European Convention on Human Rights, the originating treaty, has thus far been supplemented by ten additional protocols adding both substance and procedure albeit on a smaller scale in each of the additional protocols.

The Preamble to the Protocol, as is further discussed in the next chapter, opens up with a reference to article 66 of the African Charter, establishing a mutual relationship between these two treaties. Article 66 stipulates that ‘[s]pecial protocols or agreements may, if necessary, supplement the provisions of the present Charter’. The same provision has been used to create the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Court Protocol), the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons (Protocol on the Rights of Older Persons), 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). The essential feature in the use of ‘protocol’ is to signify the protocol’s relationship with the preceding, originating, treaty, both in substance and in procedure. Arguably, by associating the Maputo Protocol with the African Charter, the Maputo Protocol is firmly placed within the monitoring framework created by the African Charter. The association also brings interpretations of the substantive provisions of the African Charter to bear on the Protocol. Thus, as a point of departure, the Maputo Protocol supplements the African Charter in terms of its interpretation, monitoring and substantive provisions.

To supplement something is to add to it to complete or enhance it.¹¹⁸ In the case of protocols to the African Charter, they enhance either its normative or institutional protection. This approach is particularly evident in the role of the African Commission vis-à-vis the Maputo Protocol, which is further elaborated on in Chapter 29, detailing the African Commission’s interpretive mandate under the Protocol. It is also evident in the drafting history of the protocol where most draft articles in the Nouakchott and Kigali Drafts directly referenced the relevant articles in the African Charter, taking the African Charter as a point of departure. The Maputo Protocol thus builds onto the African Charter; it does not replace or supersede its provisions.¹¹⁹

3.3 The format of protection: a new treaty or the deployment of already existing provisions?

At the outset of the drafting process that unfolded in 1995, the main question asked was not related to the format of the legal instrument, that is, the creation of a ‘convention’ or a ‘protocol’, but rather, whether the protection of African women’s rights could be achieved based on an already existing generic human rights instrument: the African Charter. At the seminar in Lomé, two different standpoints on the format of the protection of women’s rights were essentially represented. The first one argued for an addition to the African Charter in the form of a separate treaty (the nature of the relationship between this new treaty and the African Charter was not elaborated upon). The second standpoint argued that the already existing provisions of the African Charter were adequate to protect women’s rights, on the understanding that under the African Charter, ‘everyone’, not ‘every man’ is a rights-bearer.¹²⁰ The outcome, the Maputo Protocol, speaks, to some extent, to both these ideas. On the one hand, it is a

118 Oxford dictionary of English, online version (2015).

119 For further discussion on the inclusion of more favourable provisions see B Traoré ‘Articles 28-31’ secs 5.2 & 5.3 in this volume.

120 Viljoen (n 9) 18. See the Preamble to the African Charter.

separate treaty from the African Charter, with important additional substantive provisions. On the other hand, it builds onto the provisions of the African Charter and supplements existing substance, employing existing monitoring mechanisms.

Tracing the drafting history back to the Lomé seminar, it is evident that the idea from the very beginning was to ‘fill in gaps’ in the African Charter and create an instrument that would become ‘part and parcel’ of the Charter.¹²¹ This stands in stark contrast to the way the African Children’s Charter was conceived of, formulated as a separate charter with a separate monitoring body, the African Children’s Committee and the way the Kampala Convention, as a separate treaty, not a protocol, appoints the African Commission and its Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants as its main monitoring bodies.¹²²

At the time the Maputo Protocol was drafted, discussions and disagreements about the pros and cons of mainstreaming women’s rights in general human rights instruments on the one hand, or protecting them through specific women’s rights instruments on the other, were in full bloom at the international and regional levels.¹²³ One of the main points of contestation in this regard was the conceptualisation of women’s rights within the African Charter and whether this conceptualisation was conducive to the protection of the rights of African women. This discussion is further highlighted in the following section.

3.4 ‘Women’ in the African Charter

The term ‘women’ is used only once in the African Charter, in article 18(3). This provision collectively addresses the rights of women, children, the elderly, and persons with disabilities. One of the main arguments for creating a separate treaty on women’s rights was the focus on the family in article 18(3) and the lack of protection of women’s rights outside the family context. The reference to women exclusively in relation to the ‘family’ was seen by some as entrenching a view of women as valuable only insofar as their reproductive and caregiving roles are concerned.¹²⁴ Restricting the protection of women’s rights to the context of the family, which article 18(2) of the African Charter refers to as ‘the custodian of morals and traditional values recognized by the community’, arguably conflicts with the very achievement of women’s equality since family is often the very sphere in which gender-based discrimination thrives.¹²⁵ The critique further related to the lack of reference to specific harms suffered by women such as female genital mutilation, forced marriages and inequality in inheritance rights of widows and female heirs.

Those who argued against a specific regional instrument on women’s rights suggested that the issue facing African women was not the lack of legal protection but rather the underutilisation of the existing provisions of the African Charter by women or their representatives.¹²⁶ The idea presented was that the guarantees of equality could be ‘unlocked by campaigning for the adoption of resolutions

121 Mohamed (n 58) 12.

122 Art XX(3).

123 Murray (n 9) 205-206.

124 NW Orago & M Nassali ‘The African human rights system: challenges and potential in addressing violence against women in Africa’ in R Manjoo & J Jones (eds) *The legal protection of women from violence: normative gaps in international law* (2018) 113.

125 K Stefszyn & A Prezanti ‘The impact of the protocol on the rights of women in Africa on violence against women in six selected southern African countries: an advocacy tool’ (2009) 2. See also M Addadzi-Koom, ‘Of the women’s rights jurisprudence of the ECOWAS Court: the role of the Maputo Protocol and the due diligence standard’ (2020) 28 *Feminist Legal Studies* 155, 158; and Viljoen (n 9) 19.

126 Viljoen (n 9) 18.

(‘General Comments’) on rights of relevance to women’.¹²⁷ However, this argument was weakened by the weight of history: although the Commission had taken an increased interest in women’s rights in the early 1990s and had interpreted the African Charter progressively and expansively in a number of decisions on communications (not specifically related to women’s rights), it had not published any general comment by 1995. In addition, between 1986 and 1995, it had not dealt with any complaints about women’s rights.¹²⁸ Moreover, the first time that women’s rights were raised within the protective mandate of the African Commission was in relation to its visit to Mauritania in 1996.¹²⁹

4 The status of the Maputo Protocol in the domestic legal systems of member states

To ensure the enforceability of the provisions in the Maputo Protocol at the domestic level, all member states, upon ratification, undertake to incorporate the Protocol within their domestic legal system or to otherwise give it appropriate legal effect within their domestic legal orders.¹³⁰ In this regard, as with most international instruments, the Maputo Protocol does not prescribe direct incorporation of its provisions as a whole into domestic law, but leaves the operative decision to state parties in consideration of their constitutional systems. Therefore, the status of the Maputo Protocol in each domestic legal system, and hence the ability of domestic courts to directly apply it without incorporating or enabling legislation, depends upon the constitutional framework of each state party. This, in turn, relates to whether the state in question applies a monist or dualist approach to incorporating international law into its domestic system. As a point of departure, it is important to note that although clearly specified within a constitution, domestic courts do not always adhere strictly to the mainly theoretical distinction between a monist and a dualist approach.¹³¹ Case law in which domestic courts have applied the Maputo Protocol are discussed throughout this Commentary to further highlight how states and domestic courts have approached the incorporation of the Protocol into domestic law.

In a monist system, international and regional legal obligations are part and parcel of domestic law, and litigants can invoke international and regional obligations.¹³² African states with a German, French, Belgian or Portuguese colonial history generally adhere to the doctrine of monism. States such as Namibia,¹³³ Senegal,¹³⁴ the Democratic Republic of the Congo¹³⁵ and Mozambique¹³⁶ adhere to a monist system.¹³⁷ As explained by Killander, with regard to monist states, any self-executing

127 Viljoen (n 9) 18.

128 Banda (n 2) 73.

129 Murray (n 9) 209 referring to the Report of the Mission to Mauritania of the African Commission on Human and Peoples’ Rights Nouakchott 19-27 June 1996, available in the 10th Annual Activity Report by the African Commission on Human and Peoples’ Rights Annex IX.

130 See for comparison UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28 (CEDAW Committee General Recommendation 28) para 31.

131 See eg *Ex-Parte Attorney General: In re Corporal Punishment by Organs of State*, 1991 (3) SA 76 (NmSc) which stands in stark contrast to *Government of the Republic of Namibia & Others v Mwilima & Others* [2002] NASC 8 (7 June 2002); and *Mitu-Bell Welfare Society v Kenya Airports Authority*, SC Petition 3 of 2018 paras 123-132.

132 J Dugard *International law: a South African perspective* (2011) 42.

133 Art 144 of the Constitution of Namibia (1990).

134 Art 98 of the Constitution of Senegal (2001)

135 Art 215 of the Constitution of the Democratic Republic of the Congo (2015).

136 Art 18 of the Constitution of Mozambique (2018).

137 See also Constitution of Burkina Faso (1991) art 151; Constitution of Cameroon (1992) art 45; Constitution of Mali (1992) art 116; Constitution of the Republic of Benin (1990) art 147; Constitution of the Central African Republic (2016) art 94. These provisions are all modelled on art 55 of the French Constitution of 1958. In general, they provide that treaties or agreements duly ratified or approved shall, upon their publication, have authority superior to that of domestic legislation, subject, for each government or treaty, to application by the other party.

norm would, in theory, be directly applicable.¹³⁸ In this context, a self-executing norm is a norm that provides enough detail to establish an explicit right and/or obligation.¹³⁹ However, the reality is that even in strictly monist states, domestic legislation often takes precedence.¹⁴⁰ As an example, in Kenya, a monist approach can be detected in section 2(5) of the 2010 Kenyan Constitution, indicating that '[t]he general rules of international law shall form part of the law of Kenya'. However, this is tempered by section 21(3) stipulating that '[t]he State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms'.

In a dualist system, often found in states with a British colonial history, states' international and regional legal obligations are not directly enforceable in domestic courts without enabling legislation.¹⁴¹ States such as Zimbabwe,¹⁴² Nigeria,¹⁴³ South Africa,¹⁴⁴ and Malawi¹⁴⁵ approach the incorporation of treaty law from a dualist perspective. Moreover, the trend of merging international and constitutional law resulting from international legal reception, especially with regard to human rights norms, has aptly been described by Bryde as the 'constitutionalisation of international law and internationalisation of national constitutional laws'.¹⁴⁶ However, although the prohibition of discrimination on the basis of sex is largely constitutionalised, as discussed throughout this Commentary, little of the detailed, substantive, and transformative protection of women's rights that is found in the Maputo Protocol is generally found in the constitutional domain. Therefore, direct reception or domestication through legislation is essential. As set out in SDGEA in 2004, a new era of domesticating and implementing the Protocol by all states parties must be ushered in.¹⁴⁷

The African Commission has repeatedly urged state parties, regardless of their constitutional systems, to domesticate all substantive provisions of the Protocol.¹⁴⁸ In its Concluding Observations on Uganda, the Commission, for example, recommended that Uganda take 'measures to pass a specific law domesticating the Maputo Protocol'.¹⁴⁹ Similarly, the Commission expressed concern that South Africa lacked a law domesticating the Maputo Protocol.¹⁵⁰ In the case of The Gambia, the Commission commended the '[d]omestication of the Maputo Protocol and CEDAW through the enactment of the Women's Act, the Domestic Violence Act and the Sexual Offences Act'.¹⁵¹ Importantly, whether or

138 Killander M 'How international human rights law influences domestic law in Africa' (2013) 17 *Law Democracy and Development* 379.

139 Killander (n 138) 379.

140 Killander (n 138) 379.

141 Dugard (n 132) 42.

142 Sec 34 of the Constitution of Zimbabwe (2013).

143 Sec 12(1) of the Constitution of Nigeria (1999).

144 Sec 231(4) of the Constitution of South Africa (1996).

145 Sec 211(1) of the Constitution of Malawi (1994).

146 BO Bryde 'International democratic constitutionalism' in R St.John Macdonald & D Johnston (eds) *Towards world constitutionalism: issues in the legal ordering of the world community* (2005) 121.

147 Para 9.

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

149 Concluding Observations of the African Commission on Human and Peoples' Rights on the 4th Periodic Report of the Republic of Uganda, African Commission on Human and Peoples' Rights, adopted at its 49th ordinary session 28 April to 12 May 2011, Banjul The Gambia, para 15(vi).

150 Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa, African Commission on Human and Peoples' Rights, adopted at its 20th extraordinary session 9-18 June 2016, Banjul, The Gambia, para 33(iii).

151 Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of The Gambia on the Implementation of the African Charter on Human and Peoples' Rights (1994-2018) and the Initial Report on the

not the Protocol is incorporated into domestic law, member states must ensure the rights within their domestic legal system and provide for their effective enforcement through sanctions and remedies as provided for under each article and reinforced by article 25. Moreover, even if a domestic legal system is dualist, the Maputo Protocol can still impose obligations on states that have ratified it but have not yet domesticated it through enabling legislation.

In some member states, constitutional provisions provide for courts to consider international and regional law, such as the Maputo Protocol, in reaching their decisions. For example, section 11(2)(c) of the Constitution of Malawi states that, in interpreting the provisions of the Constitution, courts shall, 'where applicable, have regard to current norms of public international law'.¹⁵² Correspondingly, in South Africa, section 39(1)(b) of the Constitution provides that, '[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law'.¹⁵³

5 The structure of the Maputo Protocol

The Maputo Protocol consists of a Preamble and 32 articles. Different from the African Charter and CEDAW it is not divided into parts. In terms of the structure of the Maputo Protocol, article 1 deals with the definition of key, reoccurring terms in the Protocol; article 2 refers to the general obligations of state parties; and article 5 refers to harmful practices. These provisions form an overarching interpretive framework for the application of the subject-specific obligations throughout the Protocol. Article 3 has a dual character: it fits within the interpretive framework as it contains a broad principle referring to the dignity inherent in all human beings, but it also sets out specific state obligations, such as the prohibition of the exploitation of women, making it a free-standing right. Arguably, in comparing the structure and order of the articles in the Maputo Protocol with those of CEDAW, the first five articles in the Protocol could be viewed as part of the overarching interpretive framework. This is similar to Part I of CEDAW, whose articles 3 and 4 also function as free-standing rights. In this regard, it can be concluded that the interpretive framework is more detailed in the Maputo Protocol, adding both the principle of dignity and a general prohibition of violence against women to the interpretive scope.

Articles 6, 7, 8, 20, 21, 22 and 23 refer to the legal status of women, including within family relations. As briefly mentioned in the introduction, many of these rights also refer to an intersectional approach to equality, identifying specific intersecting identities such as widowhood or old age. Articles 12–17 and 24 predominantly refer to economic, social, and cultural rights, while articles 18 and 19 traditionally would fall under the umbrella of 'group' rights but are phased as individual rights in the Maputo Protocol. Article 9 is the only civil and political right. Articles 10 and 11, unique to the Maputo Protocol, protect women in times of conflict. Articles 25, 26, 27 and 32 deal with implementation and monitoring. The final clauses, articles 28–31, refer to the miscellaneous provisions of the Protocol, such as ratification and amendment and contains a 'most favourable treatment' clause.

Some issues are alluded to in more than one article of the Protocol. 'Dignity', for example, is referred to in the Preamble, articles 1, 3, 22, 23 and 24, which confirms its status as a substantive right, but also its interpretive value. 'Pregnant / pregnancy' is referred to in articles 4, 14 and 24, while 'refugee' is referred to in articles 4, 10 and 11. The structure of the Protocol, the protection of different, overlapping identities and the apparent repetition of issues all signify the lived realities of women,

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) (2005-2014) para 28(i).

152 Constitution of the Republic of Malawi (1994).

153 Constitution of the Republic of South Africa (1996). In this regard it is essential to acknowledge, as has the South African Constitutional Court that binding treaties must always be applied to uphold international legal obligations; while a much broader set of international instruments can be used as interpretive tools see eg *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

which cannot easily be structured or compartmentalised into neat exclusive categories. Thus, we are left with a text that might not appear so well structured but reflects the subjects it is set to protect: African women in all their diverse expressions.

6 Conclusion

When the Saharawi Arab Democratic Republic deposited its instrument of ratification of the Maputo Protocol on 29 April 2022, it brought the number of states parties to 43.¹⁵⁴ Although not covering the whole continent yet, the Protocol has a large footprint.

Every right in the Protocol is instrumental in achieving the core value of the Maputo Protocol, namely substantive equality, which has the power to transform the lives of all African women.

The subsequent chapters provide an in-depth discussion, article by article, of the concepts, obligations, and implementation of each right to expose the legal and practical status of women's rights on the continent. Read together, these contributions present a complex picture of both accomplishments and setbacks, underlining the dire need for swift action by state parties.

Before the article-by-article exposition, Chapter 2 introduces the interpretive framework of the Preamble to the Maputo Protocol providing the context within which the Protocol should be understood and applied.

154 African Union '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> (accessed 22 June 2023). The twelve AU member states that have not yet ratified the Maputo Protocol are: Botswana, Burundi (signed the Protocol on 3 December 2003), Central Africa Republic (signed the Protocol on 17 June 2008), Chad (signed the Protocol on 6 December 2004), Egypt, Eritrea (signed the Protocol on 25 April 2012), Madagascar (signed the Protocol on 28 February 2004), Morocco, Niger (signed the Protocol on 6 July 2004), Somalia (signed the Protocol on 23 June 2006), South Sudan (signed the Protocol on 24 January 2013) and Sudan (signed the Protocol on 30 June 2008). While 9 of these states have signed the Maputo Protocol, Botswana, Egypt, and Morocco have neither signed nor ratified it. See African Union 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 22 June 2023).