

Preamble

Annika Rudman

1	Introduction.....	20
2	The role of a Preamble.....	22
3	Drafting history.....	23
3.1	References to the African Charter.....	23
3.2	Reference to international, regional and sub-regional instruments.....	24
3.3	Aspects of international relations conducive to realising the purposes of the Protocol.....	25
3.4	The continuation of discrimination against women in Africa.....	27
3.5	Women's contributions and position.....	28
3.6	Harmful practices.....	29
3.7	African values.....	29
3.8	To ensure that the rights of women are protected.....	29
4	Content and concepts of the preambular paragraphs.....	30
4.1	Paragraph 1.....	30
4.2	Paragraph 2.....	31
4.3	Paragraph 3.....	32
4.4	Paragraph 4.....	32
4.5	Paragraph 5.....	33
4.6	Paragraph 6.....	34
4.7	Paragraph 7.....	35
4.8	Paragraph 8.....	36
4.9	Paragraph 9.....	37
4.10	Paragraph 10.....	37
4.11	Paragraph 11.....	38
4.12	Paragraph 12.....	39
4.13	Paragraph 13.....	40
4.14	Paragraph 14.....	40
5	Conclusion.....	41

1 Introduction

In generic terms, a Preamble is a preliminary statement that generally explains the purpose of what is to follow. It is often a place where reference is made to a contemporary context, both legal and historical. In the making of international human rights law, a Preamble often serves more than one objective: to state the reason why a treaty was adopted; to outline a common standard of achievement amongst states; to formulate the substantive values underlying the instrument; to firmly ground it in already existing international instruments; and to, importantly, highlight the (human) wrongs of the past which the treaty aims to address. Thus, the Preamble anchors the treaty provisions in a specific legal context and frame of mind.

The practical purpose of Preambles in international-treaty law is two-fold: to support the interpretation of treaty provisions and to provide insight into the object and purpose of the treaty.¹ Together with the preparatory work of the Maputo Protocol, as analysed throughout this Commentary, a Preamble may assist in establishing the drafters' intentions, which in turn may assist in interpretive exercises. This chapter focuses on the Preamble to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in order to present an important aspect of the interpretive framework of the Protocol.

The Preamble to the Maputo Protocol, consisting of 14 paragraphs, serves all the different purposes outlined above: It links the Protocol's creation with the fact that the African Charter on Human and Peoples' Rights (African Charter) and other international human rights instruments, such as the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), were not enough to eliminate discrimination against African women; it confirms that practices that hinder or endanger the normal growth and affect the physical and psychological development of women must be eliminated; it defines 'African values' from a perspective of equality and dignity; and it makes reference to international, regional and sub-regional hard and soft law on women's rights to contextualise its provisions.

Anchoring a progressive human rights treaty such as the Maputo Protocol to pre-existing treaties could, at first glance, restrict some of its provisions. In all fairness, the view on gender equality has changed over time and continues to develop. From the perspective of the Preamble to CEDAW, Chinkin and Rudolf note that at the time CEDAW was adopted, the concept of gender had not 'yet appeared on the international agenda' and thus, looking back at its Preamble, the language seems somewhat outdated.² However, a Preamble is seldom just a reflection of a contemporary *status quo*. As an example, the Preamble to CEDAW contains progressive and forward-looking references such as the reference to the 'maximum participation of women' and the need for a 'change in the traditional role of men as well as the role of women in society'. In this regard, Chinkin and Rudolf posit that the CEDAW Committee has utilised this progressive language to make CEDAW a 'dynamic instrument'.³ Part of the analysis in this chapter is to trace the same dynamism, if any, in the Preamble to the Maputo Protocol to align it with its many progressive rights.

Moreover, if the Preamble to the Maputo Protocol is compared to the Preambles to the African Charter and CEDAW, because of their historical and normative ties, the absence of some contexts and concepts that are captured in these related instruments have become evident. Both the African Charter and CEDAW refer to the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, and foreign occupation, while no such references are made in the Preamble to the Maputo Protocol. Moreover, the Preamble to the Maputo Protocol lacks reference to 'poverty', which is provided in the Preamble to CEDAW.⁴ The close link between the Maputo Protocol and the African Charter can arguably explain the lack of reference to some of the above mentioned concepts. However, the most striking feature that sets the Preamble to the Maputo Protocol apart from the Preamble to CEDAW is that the latter recognises the disadvantaged position of women, and that perceptions of women and men must change for women's equality to be achieved.

1 M Hulme 'Preambles in treaty law' (2016) 164 *University of Pennsylvania Law Review* 1297.

2 C Chinkin & B Rudolf 'Preamble' in M Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* 37.

3 C Chinkin & B Rudolf 'Preamble' in Freeman, Chinkin & Rudolf (n 2) 37, with reference to UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para 2.

4 It should however be noted that the protection of poor women is ensured in art 24 of the Maputo Protocol.

This is neither featured in the Preamble to the Maputo Protocol nor the Preamble to the African Charter.

This chapter is divided into five sections to address the complex nature and content of the Preamble to the Maputo Protocol. Section 2 presents the generic role of Preambles and further contextualises the position of Preambles in human rights treaties. Section 3 engages with the drafting process of the Preamble to the Maputo Protocol. Section 4 presents the key concepts of each paragraph of the Preamble. The final section presents a few thoughts on the object and purpose of the Maputo Protocol as gleaned from its Preamble.

2 The role of a Preamble

A Preamble can be defined as '[a] clause at the beginning of a ... statute explanatory of the reasons for its enactment and the objects sought to be accomplished'.⁵ A Preamble is not an operational part of a treaty; it does not create binding legal obligations. However, as pointed out by Fitzmaurice, a Preamble 'does have legal force and effect from the *interpretative* standpoint'.⁶ He suggests two primary functions of the Preamble: First, to 'elucidate the meaning of clauses the purpose of which might otherwise be doubtful'; second, to indicate the juridical climate in which the operative clauses of the treaty should be read, 'whether for instance liberally or restrictively, broadly or strictly'.⁷ As further explained by Papadopoulos, 'while the question of the legal value or status of Preambles has not (yet) been resolved, it is generally accepted that Preambles contain ceremonial and politically fuelled ideals that do not give rise to enforceable rights or obligations under international law'.⁸

As is stipulated under article 31(2) of the Vienna Convention of the Law of Treaties (VCLT) in relation to the general rules of interpretation, '[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *Preamble* and annexes: any agreement relating to the treaty and any instrument which was made by one or more parties in connection with the conclusion of the treaty'.⁹ In Chapter 1, reference was made to related agreements, such as the African Charter. However, for the purposes of this discussion, it is essential to note that the VCLT clearly stipulates that the Preamble to a treaty is part of the *text* of the treaty. Thus, the VCLT recognises the inseparable link between the body of a treaty and its Preamble.¹⁰ In this regard, the Preamble should be aligned with the operative part of the text, but only in terms of the context of the treaty.¹¹ As further explained by Hulme, the VCLT creates an opportunity for Preambles to enter into the interpretive process at the text-and-context stage, as described above, but also, and perhaps more importantly, with regard to human rights treaties, at the object-and-purpose stage.¹²

Despite the status of 'text' under the VCLT, Preambles are more frequently used as interpretive resources in the determination of the treaty's object and purpose.¹³ The object-and-purpose test has mainly been provoked by certain vague and all-encompassing reservations to human rights treaties

5 BA Garner *Black's Law Dictionary* (2019).

6 GG Fitzmaurice 'Law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1951) 28 *British Yearbook of International Law* 25.

7 Fitzmaurice (n 6) 25.

8 NA Papadopoulos 'Revisiting the Preamble of the European Social Charter: paper tiger or blessing in disguise?' (2022) 22 *Human Rights Law Review* 1-2.

9 My emphasis.

10 Papadopoulos (n 8) 2.

11 Papadopoulos (n 8) 2.

12 Hulme (n 1) 1297.

13 See eg *Femi Falana v African Union*, Application 001/2011 (jurisdiction) (2012) 1 AfCLR 118 paras 12 & 13.3; and *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (2014) 1 AfCLR 725 paras 77-92.

such as CEDAW.¹⁴ Article 19(c) of the VCLT introduces this test, stipulating that a state may formulate a reservation that is not ‘incompatible with the object and purpose of the treaty’. Although the VCLT does not refer to the Preamble of the treaty *per se*, it is an important source in determining the object and purpose of a treaty. As established by Papadopoulos, ‘the importance of Preambles lies in their role as an important framework in which to interpret the treaty, as well as the obligations it entails, or to infer its “object and purpose”’.¹⁵ In this regard it is important that there are no inconsistencies between the Preamble of the treaty and the treaty text so that the former can be effectively used on the one hand to establish the objective and purpose of the treaty and on the other to fill gaps in the text.

In the context of human rights treaties, it is further relevant to note that contrary to conventional treaties operating on the principle of ‘reciprocity’, human rights treaties, such as the Maputo Protocol, introduce an ‘objective’ system where the interests of the state parties in balancing respective rights and duties often requires an inquiry into their intentions.¹⁶ This makes essential the object-and-purpose enquiry which is centred around the Preamble. In this regard, it is vital to note that the Preamble to the Maputo Protocol makes key statements on equality with reference to both a ‘solemn commitment to eliminate all forms of discrimination and harmful practices against women’ and a *de facto* recognition that ‘women in Africa still continue to be victims of discrimination and harmful practices’. These are strong commitments by state parties to guarantee all the rights within the Protocol and fully realise women’s human rights.

3 Drafting history

3.1 References to the African Charter

As mentioned in the introduction, the Preamble to the Maputo Protocol consists of 14 paragraphs of varying nature. The Nouakchott Draft¹⁷ and the Kigali Draft¹⁸ contained nine paragraphs each; four of these referred directly to provisions in the African Charter: Article 2, in paragraph 1, article 18 in paragraph 2, articles 60 and 61 in paragraph 6 and article 66 in paragraph 9.¹⁹ These references frame the close relationship between the Protocol and the Charter. Due to the fact that the references to articles 2 and 18 are more or less verbatim quotes of the text of these provisions in the African Charter, there were no changes made to these paragraphs from the initial draft to the Addis Ababa Draft.²⁰

With regard to the reference to articles 60 and 61 of the African Charter, the wording changed slightly between the Nouakchott Draft and the Kigali Draft. The Nouakchott Draft referred to the idea that articles 60 and 61 ‘*accept* regional and international instruments *as well as* African practices consistent with international norms on human and peoples’ rights as being important *references* for the application and interpretation of the Charter’ while the Kigali Draft refers to the idea that these articles ‘*recognise* regional and international human rights instruments *and* African practices consistent with international norms on human and peoples’ rights as being important *reference points* for the application

14 See eg Algeria’s reservations to CEDAW.

15 Papadopoulos (n 8) 2.

16 C Chinkin & B Rudolf ‘Preamble’ in Freeman, Chinkin & Rudolf (n 2) 38.

17 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.

18 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.

19 Expert Meeting (n 17).

20 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).

and interpretation of the Charter'.²¹ Arguably the references to 'recognise' and 'reference points' are more accurate in the context of the relevant treaty provisions.

The reference to article 66 of the African Charter appeared as the last provision in the Nouakchott Draft but was moved from the Kigali Draft onwards to serve as the first paragraph. This makes sense considering the fact that the Maputo Protocol was created under this article forming a close relationship between the Protocol and the Charter, as discussed in Chapter 1.²² Moreover, the Final Draft²³ added a specific reference to Resolution 240 of the Assembly of Heads of State and Government (OAU Assembly), endorsing the Commission's work in drafting a protocol on African women's rights.²⁴

The Final Draft presented the references to the African Charter more logically from articles 66, 2, 18, 60 and 61. During the meeting of the NGO Forum, suggestions were made to add a paragraph between the paragraphs referring to articles 18 and 60/61. This paragraph recognised the benefit of elaborating and supplementing all rights in the African Charter as they pertain to women, pursuant to article 66 of the African Charter, in order to secure these rights in reality.²⁵ The arguments provided in support of this provision was that this addition was supported by a similar approach in article 2(a) of CEDAW, which commits states parties to undertake to end discrimination against women through appropriate means that ensure 'practical realization of this principle'. A reference to article 1 of the African Charter was also provided, which similarly requires that state parties recognise the rights in the Charter and 'undertake to adopt legislative or other measures to give effect to them'.²⁶ As 'effective'²⁷ protection of women's rights are reiterated in different forms throughout the Maputo Protocol, this paragraph was ultimately discarded and did not appear in the Addis Ababa Draft. Thus, the structure and content of the Final Draft were kept and feature in paragraphs 1 to 4 in the Preamble to the Maputo Protocol.

3.2 Reference to international, regional and sub-regional instruments

The Nouakchott Draft contained one provision referring to other human rights instruments, notably not referencing CEDAW. This provision, in paragraph 3, referenced the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) and contained a direct reference to the Vienna Declaration and Programme of Action (Vienna Declaration), which frames women's rights as an 'inalienable, integral and indivisible part of universal human rights'. In the Kigali Draft, with the moving of the paragraph relating to article 66 of the African Charter to the beginning of the Preamble, as referred to above, the reference to international instruments became the fourth paragraph. The Kigali Draft added a specific reference to CEDAW and a general reference to 'all other international conventions and covenants relating to the rights of women'. The Final Draft

21 My emphasis.

22 See A Rudman 'Introduction' sec 2.3 in this volume.

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

24 31st ordinary session Resolution AHG/Res 240 (XXXI) (Resolution 240). See further discussion in A Rudman 'Introduction' sec 2.3 in this volume.

25 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003, Preamble.

26 Comments by the NGO Forum (n 25) Preamble.

27 See eg art 2(1)(d) where state parties are obligated to 'take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist'.

provided a full reference to CEDAW and clarified that women's rights as they are protected in these instruments are inalienable, integral and indivisible human rights. Going forward, this paragraph was only revised once where, at the first meeting of experts, a reference to the African Charter on the Rights and Welfare of the Child (African Children's Charter) was inserted.²⁸

The Final Draft also presented a new paragraph, paragraph 8, which referred to 'resolutions, recommendations, decisions and other conventions aimed at eliminating all forms of discrimination and at promoting equality between men and women'. This paragraph was taken almost verbatim from the Draft OAU Convention on Harmful Practices as a direct result of the merger between the Kigali Draft and the Draft Convention on Harmful Practices.²⁹ This paragraph was revised by the first meeting of ministers to delete 'and other' before 'conventions' and to add 'other regional and sub-regional instruments'.³⁰ No further revisions were made; thus, with these final additions, this is how the paragraph appears as paragraph 11 in the Preamble to the Maputo Protocol. The addition of references to a larger pool of international hard-law and soft-law instruments together with reference to regional and sub-regional instruments were essential as it, for example, drew on the Southern African Development Community (SADC) Declaration on gender and development with its addendum, the Grand Bay Declaration on Violence Against Women and Children.

3.3 Aspects of international relations conducive to realising the purposes of the Protocol

Paragraphs 6 to 9 of the Preamble to the Maputo Protocol relate to international relations and commitments that states viewed as key to realising the purpose of the Protocol: to ensure that the rights of women are promoted, realised, and protected. In this regard, the Nouakchott Draft contained references to the:

- UN Conference on Environment and Development;³¹
- Second World Conference on Human Rights;³²
- UN Conference on Population and Development;³³
- World Summit for Social Development³⁴ in paragraph 4;
- Fifth African Regional Conference on Women³⁵ in paragraph 5, adopting the Africa Platform for Action and the Dakar Declaration (Dakar Platform);³⁶ and

28 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 22(a).

29 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).

30 Report of the Meeting of Experts (n 28) para 26.

31 Rio de Janeiro, Brazil, 3-14 June 1992.

32 Vienna, Austria, 14-25 June 1993.

33 Cairo, Egypt, 5-13 September 1994.

34 Copenhagen, Denmark, 6-12 March 1995.

35 Dakar, Senegal, 16-23 November 1994.

36 African Platform for Action and the Dakar Declaration, adopted by the 5th Regional Conference on Women, held at Dakar, 6-23 November 1993, preparations for the 4th world conference on women: action for equality, development and peace, reports from regional conferences and other international conferences, Commission on the Status of Women E/CN.6/1995/5/Add.2 29 December 1994.

- Fourth World Conference on Women,³⁷ which resulted in the Beijing Declaration and Platform for Action (Beijing Platform).³⁸

In terms of the two latter conferences, only the outcomes were listed, that is, the ‘plans of action adopted in Dakar ... and in Beijing’. These two paragraphs remained the same in the Kigali Draft, then listed as paragraphs 5 and 6, respectively.³⁹

The reference to the Dakar and Beijing Platforms in the Nouakchott and Kigali Drafts indicated that states should ‘take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women’. In the Final Draft, these provisions were located in paragraphs 6 and 7, respectively. Paragraph 6 was left unrevised, while paragraph 7 was revised to read, ‘the Plans of Action adopted in Dakar and in Beijing call on all Member States of the United Nations, which have made a *solemn commitment* to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women’.⁴⁰ At the first meeting of ministers, paragraph 6 was adopted without amendments, while paragraph 7 was revised to include the full titles and dates of the documents adopted in Dakar and Beijing.⁴¹ During its engagement with the Preamble, the NGO Forum suggested that the reference to discrimination should be amended to ‘eliminate all forms of discrimination *including* gender-based violence against women, *which has been internationally recognised as a form of sex discrimination*’.⁴² This suggestion was not adopted by the following meetings of experts and ministers, and the draft remained the same through to the Addis Ababa Draft. This is arguably so because a definition of violence against women was incorporated in articles 1 and 4, which protects women against violence in its different forms, provisions that CEDAW lacks. No further revisions were made to these paragraphs. Thus, the paragraph that references the four world conferences appears as paragraph 6, while the paragraph that references the Platforms adopted in Dakar and Beijing appears as paragraph 9 in the Preamble to the Maputo Protocol. This is so because two new paragraphs were added in between these paragraphs.

Paragraphs 7 and 8 refer, in turn, to three important international and regional developments that took place in 2000 and 2001. Paragraph 7, as it appears for the first time in the Addis Ababa Draft, refers to United Nations Security Council Resolution 1325,⁴³ which was adopted on 30 October 2000.

Paragraph 8, which also appears for the first time in the Addis Ababa Draft, refers to the principle of promoting gender equality with reference to the Constitutive Act of the African Union (AU Constitutive Act) concluded in July 2000 and the New Partnership for Africa’s Development (NEPAD)

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

38 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.

39 At the time the Kigali draft was adopted by the African Commission in November 1999, the OUA Assembly had officially endorsed the Addis Ababa Declaration on the Dakar African Platform for Action on Women OAU Assembly of Heads of State and Government 31st ordinary session Resolution AHG/Dec.2 (XXXI).

40 Final Draft (n 23) Preamble para 7. My emphasis.

41 Report of the Meeting of Experts (n 28) para 25.

42 Comments by the NGO Forum (n 25) Preamble. Emphasis added to show the revisions suggested. This amendment was based on references to: UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, A/47/38 (General Recommendation 19); the Beijing Platform; the Joint Declaration adopted by the Special Rapporteurs on Women’s Rights (including the Special Rapporteur of the African Commission on Human and Peoples’ Rights) and the American Convention of Belém do Pará (Convention of Belém do Pará).

43 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).

as adopted in July 2001. The former draws on article 4(l) of the AU Constitutive Act, stipulating that the AU must function in accordance with the principle of promoting gender equality. By introducing the latter, the Preamble draws specific attention to the full participation of African women as equal partners in Africa's development. This paragraph, similar to paragraph 11, furthermore refers to relevant declarations, resolutions, and decisions, with specific reference to the position of women in development.

The reference to women's position in development moreover draws on comments made by the NGO Forum where a separate paragraph was suggested that would read, 'committed to the full participation of African women as equal partners in Africa's development'. This suggestion, in turn, referred to a number of important international instruments, such as the United Nations Declaration on the Right to Development,⁴⁴ the Beijing Platform,⁴⁵ and the Copenhagen Declaration on Social Development.⁴⁶ This suggestion was incorporated in the Addis Ababa Draft, which refers to the 'commitment of the African States to ensure the full participation of African women as equal partners in Africa's development'.

3.4 The continuation of discrimination against women in Africa

Similar to paragraph 6 of the Preamble to CEDAW, paragraph 12 of the Preamble to the Maputo Protocol recognises that notwithstanding the ratification of the African Charter and other international instruments, women in Africa continually suffer from discrimination. This paragraph existed from the very outset of the drafting, in the Nouakchott Draft, and attracted very few revisions. The Final Draft added a reference to harmful practices as a result of the merger between the Kigali Draft and the Draft Convention on Harmful Practices. In its Preamble, the Draft OAU Convention on Harmful Practices referred to the fact that 'in spite of these various instruments, the health and basic human rights of women and girls, such as the right to life, health and bodily integrity, continue to be impinged upon by harmful practices, which include widowhood rites, nutritional taboos, female genital mutilation (FGM), forced and/or early childhood marriage'.⁴⁷ This paragraph was subsumed under the reference to 'harmful practices'. Paragraph 9 of the Preamble, as it was in the Final Draft, was adopted without amendment by the first ministerial meeting. The NGO Forum suggested that the reference to discrimination should be amended to include a reference to 'discrimination including violence and other harmful practices'.⁴⁸ This amendment was based on references to CEDAW General Recommendation 19,⁴⁹ the Beijing Platform,⁵⁰ the Joint Declaration adopted by the Special Rapporteurs on Women's Rights (including the Special Rapporteur of the African Commission on Human and Peoples' Rights)⁵¹ and the American

44 UN General Assembly, Declaration on the Right to Development: resolution, adopted by the General Assembly, 4 December 1986, A/RES/41/128 art 1.

45 The Beijing Platform (n 38) provides that women's 'full participation on the basis of equality' is 'fundamental for the achievement of equality, development and peace' para 13; and that 'eradication of poverty based on sustained economic growth, social development, environmental protection and social justice' requires 'the full and equal participation of women and men as agents and beneficiaries of people-centred sustainable development' para 16.

46 World Summit for Social Development, Copenhagen Declaration on Social Development Annex I A/CONF.166/9. The Copenhagen Declaration acknowledges that 'social and economic development cannot be secured in a sustainable way without the full participation of women and that equality and equity between women and men is a priority for the international community and as such must be at the centre of economic and social development' para 7.

47 Draft OAU Convention on Harmful Practices (n 30) Preamble para 7.

48 Comments by the NGO Forum (n 25) Preamble.

49 General Recommendation 19 (n 42) para 1.

50 Beijing Platform for Action (n 38) para 118.

51 The UN Special Rapporteur on violence against women, its causes and consequences, and the Special Rapporteurs on women's rights of the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights met for the first time on 28 February-1 March 2002. Joint Declaration of the Special Rapporteurs on Women's Rights 8 March 2002, <http://www.cidh.org/women/declaration.women.htm> (accessed 2 May 2023).

Convention of Belém do Pará. This suggestion was not adopted by the following meetings of experts and ministers, and the draft remained the same through to the Addis Ababa Draft.

3.5 Women's contributions and position

As was briefly mentioned in the introduction to this chapter, there is a lack of reference to the negative gender stereotypes that influence women's position in society in the Preamble to the Maputo Protocol and the need for change in the traditional gender roles of women and men to achieve substantive equality. Critical to recognising negative gender stereotypes and changing traditional gender roles is the focus on, and recognition of, women's contributions in society, culturally, politically, within the family, and to development broadly. Paragraph 13 of the Preamble to CEDAW recognises the 'great contribution of women to the welfare of the family and to the development of society', 'the social significance of maternity and the role of both parents in the family and in the upbringing of children', and 'that the upbringing of children requires a sharing of responsibility between men and women and society as a whole'. Paragraph 14 further acknowledges the need for a 'change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'. While much of the focus of these provisions is on the family, they showcase states' commitment to the transformation of gender roles and stereotypes.

The Nouakchott Draft briefly references women's contributions in paragraph 8, noting that 'many people in Africa continue to perceive human and peoples' rights as being the exclusive preserve of men even though women play a fundamental role in peace and development in Africa'. As women play a fundamental role in all areas of life, the same paragraph, slightly revised, appeared as paragraph 9 in the Kigali Draft, indicating that 'many people in Africa continue to perceive human and peoples' rights as being the exclusive preserve of men despite the fact that women play a fundamental role in all spheres'. This paragraph did not feature in the Final Draft.

Therefore, the NGO Forum's commentary unsurprisingly provided several suggestions to strengthen the recognition of women's contribution, participation, and position in the Preamble. It suggested a new clause that would read, 'repudiating the inequality of the sexes wherever it exists, rejecting all notions and institutions of superiority and inferiority on the basis of sex, and affirming the equal humanity of men and women'.⁵² Such a clause, the NGO Forum suggested,⁵³ would mirror the language of the Preamble to the Universal Declaration, the African Charter,⁵⁴ CEDAW⁵⁵ and the Convention of Belém do Pará.⁵⁶ It further suggested a new paragraph that would recall that, 'discrimination against women is an obstacle to the participation of women in the political, social, economic and cultural life of their countries and constitutes an obstacle to development in the continent'.⁵⁷ The NGO Forum made the point that the Preamble to CEDAW recognises that 'discrimination against women ... is an obstacle to the participation of women ... in the political, social, economic and cultural life of their countries' and that the 'full and complete development of a country ... requires participation of women on equal terms with men in all fields'.⁵⁸ The NGO Forum furthermore pointed out to the drafters that all major international human rights conventions 'virtually universally' include preambular statements of substantive values that the instruments are set to further. It reiterated that a '[f]ailure to include any such statement would be a significant departure from the standard practice of other international

52 Comments by the NGO Forum (n 25) Preamble.

53 Comments by the NGO Forum (n 25) Preamble.

54 Preamble and art 2.

55 Preamble and arts 2 & 5(a).

56 Preamble and art 6.

57 Comments by the NGO Forum (n 25) Preamble.

58 CEDAW Preamble paras 7 & 12.

instruments'.⁵⁹ Notwithstanding these comments, none of these suggestions were included in the Addis Ababa Draft.

3.6 Harmful practices

As discussed in Chapter 1, and as referred to above, the text of the Maputo Protocol, including the Preamble, was affected by the merger between the Kigali Draft and the Draft OAU Convention on Harmful Practices. Thus, the Preamble includes two references to harmful practices: a direct reference in paragraph 12, in referring to the continual discrimination against African women and in a separate statement in paragraph 13. The Final Draft included a new clause which stated, 'that any practice that hinders or endangers the normal growth and affects the physical, emotional and psychological development of women and girls should be condemned and eliminated'. This stems from article 2 of the Draft OAU Convention on Harmful Practices, which stipulated that 'States Parties to this Convention condemn all practices which hinder or endanger the normal growth, and affect the physical, emotional and psychological development of women and girls'. The first meeting of ministers removed the reference to 'emotional' but left the rest of the statement intact.⁶⁰ This statement remained unchanged throughout the rest of the drafting process.⁶¹ It is interesting to note that the language in this paragraph was not aligned with the definition of harmful practices in article 1(g), defining 'harmful practices' to mean 'all 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'.

3.7 African values

The Final Draft effectively contained 11 paragraphs, while the Addis Ababa Draft contained 14 paragraphs. As discussed above, references to the AU Constitutive Act and NEPAD were added alongside a paragraph with reference to UN Security Council Resolution 1325. These additions recognised contemporary instruments of importance that were developed or adopted after the Final Draft was presented. Thus, the history and significance of these additions, even though not specifically mentioned in the drafting document, can be traced. However, one paragraph in the Preamble that cannot be traced is the reference to the recognition of the 'crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy'. As mentioned above, there is little reference in the Preamble to women's contributions and none to the important commitment to dismantle gendered stereotypes and traditional roles that do not support equality between women and men. However, a much-contested reference to 'African values' appears for the first time in the Addis Ababa Draft as paragraph 10. It is safe to assume that had this statement occurred in the Final Draft, it would have attracted much attention from the NGO Forum.

3.8 To ensure that the rights of women are protected

As also mentioned above, the Nouakchott and Kigali Drafts contained nine paragraphs each. The Final Draft added two paragraphs, one on harmful practices as referred to above, and one, final paragraph that affirmed the purpose of the Maputo Protocol to 'ensure that the rights of women are protected in order to enable them to enjoy fully all their human rights'. In the Addis Ababa Draft, the words 'promoted, realised and' was added before 'protected' to further elaborate on the state obligations in the Protocol. This paragraph, which is further addressed in the following section, constitutes an

59 Comments by the NGO Forum (n 25) Preamble.

60 Report of the Meeting of Experts (n 28) para 28.

61 The NGO Forum suggested the omission of 'and girls' in this paragraph but this suggestion was not incorporated. Comments by the NGO Forum (n 25) Preamble.

essential part of the objective and purpose of the Maputo Protocol, to ‘ensure’ the elimination of all forms of discrimination and harmful practices against women in Africa.

In conclusion, compared to the effort that went into drafting the different provisions of the Maputo Protocol, the drafting history reveals much less input into the Preamble. The Preamble to the Maputo Protocol follows the format of the African Charter and CEDAW to some extent, but, as indicated above, it also differs in some essential ways. While anchoring the Maputo Protocol in the legislative framework existing at the time, the Preamble to the Maputo Protocol lacks the essential statements about women’s roles and positions housed within the Preamble to CEDAW. Instead, it references African values, with reference to principles of equality, peace, freedom, dignity, justice, solidarity, and democracy. This arguably raises important questions as to the meaning of African values and, as is further discussed in Chapter 19, how to define a positive cultural context.⁶²

4 Content and concepts of the preambular paragraphs

The states parties to this Protocol,

4.1 Paragraph 1⁶³

CONSIDERING that article 66 of the African Charter on Human and Peoples’ Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the Assembly of Heads of State and Government of the Organization of African Unity meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples’ Rights to elaborate a Protocol on the Rights of Women in Africa.

The first paragraph refers to the creation of the Maputo Protocol as a protocol to the African Charter under article 66 of the African Charter. The consequences of the close relationship between the African Charter and the Maputo Protocol were discussed in detail in Chapter 1.⁶⁴ Thus, it suffices to conclude that placing this reference first in the Preamble frames and contextualises the Maputo Protocol as supplementing the procedures and rights in the African Charter.

Similar to the Preamble to the African Charter, paragraph 1 of the Preamble to the Maputo Protocol’s presents the OAU Assembly’s decision to create the Protocol stipulating the details of this decision.⁶⁵ However, the decision setting out the mandate to draft the African Charter explicitly calls on the Secretary-General of the OAU to ‘[o]rganise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an “African Charter on Human and Peoples’ Rights” providing *inter alia* for the establishment of bodies to promote and protect human and peoples’ rights’.⁶⁶ In contrast, Resolution 240 approved the Eighth Activity Report of the African Commission, which in turn refers to the seminar on the African Woman and the African Charter on

62 See A Johnson ‘Article 17’ in this volume.

63 The numbering of the paragraphs has been added for ease of reference and does not appear in the original text of the Maputo protocol. The same is true for the numbering of the paragraphs of the African Charter and CEDAW.

64 See A Rudman ‘Introduction’ sec 3 in this volume.

65 Paragraph 2 of the Preamble to the African Charter recalls ‘Decision 115 (XVI) of the Assembly of Heads of State and Government at its 16th ordinary session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a “preliminary draft on an African Charter on Human and Peoples’ Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples’ rights”’.

66 AGH/Dec115(XVI)Rev 1 1979 in C Heyns *Human rights law in Africa 1999* (2002) 127-128.

Human and Peoples' Rights.⁶⁷ Compared to the direct statement in the decision of the OAU Assembly to endorse the drafting of the African Charter, the actual decision to instruct the African Commission to start the process of drafting a protocol on African women's rights is less obvious.⁶⁸

4.2 Paragraph 2

CONSIDERING that article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The second paragraph cites verbatim the non-discrimination clause in article 2 of the African Charter referring to 'race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.

The African Commission has acknowledged that article 2 lays down a principle that is 'essential to the spirit of the African Charter' and that this principle is 'necessary in eradicating discrimination in all its guises' thus fittingly appearing in the Preamble to the Maputo Protocol.⁶⁹ The principle of non-discrimination in article 2, read together with the principles of equality before the law and the equal protection of the law under article 3 of the African Charter, are, according to the African Commission non-derogable and must be respected in 'all circumstances in order for *anyone* to enjoy all the other rights provided for under the African Charter'.⁷⁰

Although the reference to 'sex' in article 2, as in biological male or female sex, is commonly referenced as one of the points of origin of the drafting of the Maputo Protocol, 'sex' is not used to define womanhood in the Protocol where the broader reference to gender is applied. The term 'sex', referring to the different biological and physiological characteristics of males and females, is used twice in the Maputo Protocol, once in the Preamble and once in the definition of discrimination. While 'gender' is referenced seven times, two of which are located within the Preamble.

It is problematic that the terminology in the Preamble, the definition clauses defining 'women' and 'discrimination' and some of the substantive provisions do not correlate. However, as is further discussed below, the statement in the AU Constitutive Act, as referenced in the Preamble, to promote 'gender equality' point to an overarching approach to equality as gender equality, substantiating a diverse and inclusive approach to womanhood.⁷¹

Moreover, the reference to the non-exhaustive list of grounds in the Preamble supports the open-ended intersectional approach of the Protocol, where age and disability, as examples of 'other' grounds are protected. Thus, some of the prohibited grounds in article 2 are directly relevant to some of the more progressive rights in the Protocol. Article 24, for example, referring to 'poverty' and 'female headed households' is arguably linked with the reference to 'social origin' and 'fortune' in article 2 of the African Charter. The open-endedness in reference to 'other status' is also indicative of the statement in the last paragraph of the Preamble with reference to the protection of the right of women, meaning *all* women.

67 Resolution 240 (n 24). 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.

68 See 3.1.

69 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit and Moore*) para 49.

70 *Purohit and Moore* (n 69) para 49. My emphasis.

71 See 4.8.

4.3 Paragraph 3

FURTHER CONSIDERING that article 18 of the African Charter on Human and Peoples' Rights calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions.

The references to article 18 of the African Charter in the third paragraph and not specifically to article 18(3) to which the text quoted in the Preamble refers is intriguing. In comparison, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (Protocol on the Rights of Older Persons) and 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) contain specific references in their Preambles to article 18(4) of the African Charter referring to the rights of the aged and the disabled respectively.

Article 18 of the African Charter consists of four sub-articles, each with a different focus. Article 18(1) refers to the centrality of the family, which is appointed as the natural unit and basis of society. The state is thus obligated to protect the family and take care of its physical health and moral needs. In the same vein, article 18(2) expresses that the state has a duty to assist the family, which in turn is the custodian or morals and traditional values recognised by the community. The reference to 'traditional values' in this article and further in the Preamble is discussed below in relation to paragraph 10. The 'family', as is referred to in both as 18(1) and (2), is, as was discussed in Chapter 1, a contested space within which to protect women's rights.⁷² This is so because morals and traditional values created and re-created within the family setting often establish the stereotypes that enable gender-based discrimination and violence.

4.4 Paragraph 4

NOTING that articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter.

The fourth paragraph pays specific attention to articles 60⁷³ and 61⁷⁴ of the African Charter. In the context of the African Charter, article 60 enables the Commission to draw inspiration from international instruments on human and peoples' rights, while article 61 leaves the subject matter and sources of law open for interpretation. Article 61 stipulates that the Commission shall

take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and Peoples' Rights, customs

⁷² See A Rudman 'Introduction' sec 3.4 in this volume.

⁷³ Art 60 states that '[t]he Commission shall *draw inspiration* from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members' My emphasis.

⁷⁴ Art 61 states that '[t]he Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine'.

generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

The two articles are distinguishable from each other; the instruction in article 60 serves to instruct the Commission to draw inspiration from international human rights treaties beyond the Charter, while article 61 serves to indicate that the Commission may consider sources outside the human rights domain that can contribute towards the interpretation of the Charter.⁷⁵ Presented within the context of the Preamble, the references to articles 60 and 61 showcase the broad source material that inspired the drafting of the Maputo Protocol and links with the sources referenced in paragraphs 5, 6 and 11.

4.5 Paragraph 5

RECALLING that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights.

Paragraph 5 gives an indication as to how deeply the provisions of the Maputo Protocol are anchored in international law. It defines the scope in the broadest possible way by referring to 'women's rights' and drawing on the Vienna Declaration's conclusion that women's human rights are an inalienable, integral, and indivisible part of universal human rights.⁷⁶ The references to international instruments are specific, referencing the Universal Declaration, the ICCPR, the ICESCR, CEDAW, the Optional Protocol to CEDAW⁷⁷ and the African Children's Charter, thereby referring both to the global and regional levels. It also extends the scope to 'all other international and regional conventions and covenants relating to the rights of women'. As both 'convention' and 'covenant' refer to an international agreement, one of the terms is redundant. However, the extension of the scope to 'all other' treaties is important because it encompasses, for example, the Convention on the Political Rights of Women, the United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education, the Convention on the Nationality of Married Women, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, ILO Convention No 100 on Equal Remuneration,⁷⁸ ILO Convention No 111 on Discrimination (Employment and Occupation), ILO Convention No 156 on Workers with Family Responsibilities, ILO Convention No 183 on Maternity Protection, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. It further covers all AU agreements relevant to women's rights when the Maputo Protocol was adopted, for example, the African Charter on Democracy, Elections and Governance with its specific references to women and gender⁷⁹ and the African Youth Charter.⁸⁰

75 A Rudman 'The African Charter: just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights' (2021) 21 *African Human Rights Law Journal* 720.

76 Para 5.

77 Setting out the individual complaints mechanism under CEDAW.

78 During the drafting of the Protocol, the ILO suggested that the Preamble specifically mention ILO Convention 100 alternatively include a reference to ILO Conventions relevant to women workers. Interoffice memorandum Subject: Draft Additional Protocol for African Women to the African Human Rights Charter ES/WU/COL/JOI26.99 to which ILO Comments on the Draft additional Protocol for African Women to the African Human Rights Charter ref ILS/GEN/1, EAMAR/3-18 is annexed. On file with the author.

79 See T Mkali and A Rudman 'Article 9' sec 3.3 in this volume.

80 See arts 8, 9, 11, 12, 13, 15, 20, 22 & 23.

In relation to paragraph 5 of the Preamble, it is further of interest to reflect on the symmetry between its broad statement on the international legal context within which the Maputo Protocol should be understood and the extensive material jurisdiction of the African Court over ‘relevant human right treaties ratified by the states concerned’.⁸¹ This synergy is relatable as the Court Protocol was drafted and adopted before the Maputo Protocol. From this perspective, it is further essential to approach this collection of norms, mentioned both in the Preamble to the Maputo Protocol and the Court Protocol, in a manner that advances African women’s rights at the time. In the subject area of African women’s rights, the Maputo Protocol is *lex specialis* (a treaty governing a specific subject matter) and *lex posterior* (a later treaty) and should be preferentially applied in relation to women’s issues where a state is party to, for example, both to CEDAW and the Maputo Protocol. This is so because important aspects of the protection under the Maputo Protocol may be lost if such an approach is not favoured.⁸²

4.6 Paragraph 6

NOTING that women’s rights and women’s essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995.

There are a number of references to women’s role and participation in development in the Preamble and in the substantive rights that follow. Paragraph six focuses on women’s role in development, paragraph 8 refers to the full participation of women in development; article 2(1)(c) obligates states to integrate a gender perspective in their development plans, programmes and activities; article 9(1)(c) refers to women as ‘equal partners with men at all levels of development and implementation of state policies and development’; article 10(3) speaks about reducing states’ military spending in favour of spending on social development; and article 19 ultimately provides the right to sustainable development. Hence, development is at the forefront of the Maputo Protocol.

As a point of origin, the reference to the four world conferences on human rights that took place in the early to mid-1990s creates an important backdrop to the right to development in the Maputo Protocol. The Protocol was conceived against the background of an evolving human rights standard-setting at the UN, focusing at the time on big plans for historical challenges: environmental degradation – and the need for sustainable development; cultural relativity – and the need for a universal understanding of human rights; population growth – and the need for safe access to sexual and reproductive health; and the massive onset of poverty – and the need for people-centred development.

The first of the world conferences mentioned in paragraph 6 is the United Nations Conference on Environment and Development, also known as the ‘Earth Summit’.⁸³ The Earth Summit focused on the impact of human socio-economic activities on the environment. The main achievement of the Earth Summit was the creation of the United Nations Plans of Action on the Environment and Development.⁸⁴ Women’s role and participation feature specifically in section 24 of this plan of action, titled ‘Global action for women towards sustainable and equitable development’.

81 Article 3(1) of 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).

82 See eg *Association Pour Le Progrès et la Défense des droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* (merits) (2018) 2 AfCLR 380.

83 Held in Rio de Janeiro, Brazil, in June 1992.

84 The aim of the Plans of Action on the Environment and Development ‘Agenda 21’ was to achieve global sustainable development by the year 2000, with the ‘21’ in Agenda 21 referring to the original target of the 21st century. The ‘Earth Summit’ also brought forward the Rio Declaration, the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity and the Declaration on the principles of forest management.

The second world conference mentioned in paragraph 6 is the World Conference on Human Rights, as discussed in Chapter 1.⁸⁵ The main outcome was the Vienna Declaration which underlines the importance of the integration and full participation of women as both agents and beneficiaries in the development process.⁸⁶

The third world conference mentioned in paragraph 6 is the International Conference on Population and Development (ICPD).⁸⁷ The conference adopted the ICPD Programme of Action,⁸⁸ emphasising the integral linkages between population and development. The ICPD Programme of Action emphasised the fundamental role of women's interests in population matters and affirmed the concepts of sexual and reproductive health and reproductive rights.⁸⁹

The final world conference mentioned in paragraph 6 is the World Summit for Social Development, also known as the 'Social Summit'.⁹⁰ In the Copenhagen Declaration⁹¹ that resulted from this conference, states acknowledged that social and economic development could not be secured in a sustainable way without the full participation of women and that equality and equity between women and men is a priority for the international community and as such must be at the centre of economic and social development.⁹²

In conclusion, it is worth noting the problems that may arise in relation to the listing of so many programmatic initiatives whose relevance may be overtaken over time in an instrument which is expected to continue to apply in the long term.

4.7 Paragraph 7

RECALLING ALSO United Nations Security Council's Resolution 1325 (2000) on the role of Women in promoting peace and security.

The UN Security Council adopted its first resolution focusing specifically on women and peace and security in October 2000. UN Security Council Resolution 1325 affirms the important role of women in preventing and resolving conflicts, peace negotiations, peacebuilding, peacekeeping, humanitarian response and in post-conflict reconstruction. It furthermore stresses the importance of women's equal participation and full involvement in all efforts to maintain and promote peace and security as a key objective of the UN. Importantly for the development of the Maputo Protocol, UN Security Council Resolution 1325 urges states to increase the participation of women and incorporate gender perspectives in all peace and security efforts. It also calls on states to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, in situations of armed conflict. The influence of UN Security Council Resolution 1325 is visible in the

85 Held in Vienna, Austria, in June 1993. See further A Rudman 'Introduction' sec 2.2 in this volume.

86 Para 36.

87 Held in Cairo, Egypt, in September 1994.

88 United Nations Population Fund (UNFPA), Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, 1995, A/CONF.171/13/Rev.1 (ICPD Programme of Action). The ICPD Programme of Action built upon the World Population Plan of Action, adopted at the World Population Conference held in Bucharest in 1974, and the recommendations adopted at the International Conference on Population, held in Mexico City in 1984. It also built on the outcomes of the World Summit for Children (1990), the Earth Summit (1992), and the World Conference on Human Rights (1993).

89 See eg ICPD Programme of Action (n 88) para 4.25 objectives.

90 Held in Copenhagen, Denmark in March 1995.

91 United Nations World Summit for Social Development, Copenhagen Declaration on Social Development A/CONF.166/9 Annex I, 14 March 1995.

92 Copenhagen Declaration (n 91) para 7.

two unique provisions on the right to peace and the protection of women in armed conflict in articles 10 and 11 of the Maputo Protocol, respectively.⁹³

4.8 Paragraph 8

REAFFIRMING the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development.

The eighth paragraph of the Preamble to the Maputo Protocol features two different interlinked perspectives: the reiteration of the principle of gender equality at the highest institutional level and commitment to the full participation of women in development, which is also the focus of paragraph six.

The OAU Charter did not contain any reference to women's rights or gender equality but focused mainly on the equality of states, sovereignty, and territorial integrity. The reference to the promotion of gender equality as a foundational principle of the AU, together with the pledge to promote and protect human and peoples' rights, ultimately changed the operational framework of the AU. The reference in the Preamble to the Maputo Protocol to the AU Constitutive Act thus creates symmetry between these two treaties. From the perspective of the Maputo Protocol, it confirms the institutional recognition of the key principle of the Maputo Protocol: that is, gender equality, and from the perspective of the AU Constitutive Act it brings the Maputo Protocol within the realm of article 3(h) to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.⁹⁴

The latter perspective, women's participation in development, is closely related to the outcomes of the Earth and Social Summits and features in a multitude of ways in the operative part of the Protocol as mentioned above. Paragraph 8 specifically references NEPAD.⁹⁵ The objectives of NEPAD are to reduce poverty, put Africa on a sustainable development path, halt the marginalisation of Africa, and to empower women. In terms of declarations, resolutions and decisions relevant in this context, the UN Declaration of the Right to Development,⁹⁶ especially article 8 referring to the implementation of '[e]ffective measures ... to ensure that women have an active role in the development process', has specific reference. Other initiatives such as the Nairobi Forward-looking Strategies,⁹⁷ the Abuja Declaration on Women in Development⁹⁸ and the Kampala Action Plan on Women and Peace,⁹⁹ are also of relevance.

93 Resolutions of the UN Security Council are binding on UN member states under art 25 of the UN Charter. For further discussion see A Budoo-Scholtz 'Article 10' and TM Makunya & JM Abelungu 'Article 11' in this volume.

94 My emphasis.

95 Adopted by African Heads of State and Government of the OAU in 2001 and ratified by the AU in 2002.

96 Declaration on the Right to Development Adopted by General Assembly resolution 41/128, 4 December 1986.

97 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.

98 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.

99 The Regional Conference on Women, Peace and Development Kampala, Uganda 22-25 November 1993. Adopted by the Economic and Social Council, Economic Commission for Africa E/ECA/ATRCW/ARCC.XV/94/7 April 1994.

4.9 Paragraph 9

FURTHER NOTING that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women.

As mentioned in Chapter 1, the Fifth African Regional Conference on Women was held in Dakar in November 1994 in preparation for the Fourth World Conference on Women. The conference adopted the Dakar Platform,¹⁰⁰ a synthesis of regional perspectives and priorities as well as a framework for action for the formulation of policies and implementation of concrete and sustainable programs for the advancement of African women. The Dakar Platform was developed in consonance with the Nairobi Forward-looking Strategies, the Abuja Declaration and the Kampala Action Plan. The Fourth World Conference on Women was then held, which resulted in the Beijing Platform. The Beijing Platform covers 12 critical areas of concern regarding women's rights, most of which are featured in the Maputo Protocol.¹⁰¹

Importantly, paragraph 9 reiterates the main object and purpose of the Maputo Protocol, to eliminate all forms of discrimination and specifically brings the elimination of gender-based violence into the framework of the Preamble as a main objective alongside the elimination of gender-based discrimination and harmful practices.

4.10 Paragraph 10

RECOGNISING the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy.

As mentioned, under the drafting history, paragraph 10 was inserted at the very end of the drafting process. It is one of three paragraphs that acknowledges the role of women in different fields. As mentioned with regard to the previous paragraphs, the UN Security Council recognises the role of women in peace-making through Resolution 1325 and the Dakar and Beijing Platforms, alongside the references to the four world conferences, recognises women's role in development. Paragraph 10 adds to this by acknowledging women's agency or function in preserving African values.

The reference to 'African values' in the Preamble must be viewed in the context of the many different references to 'values' in the African Charter. The Preamble to the African Charter stipulates that states should consider the 'virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights'. Article 17 of the African Charter establishes that states are obligated to 'promote and protect the morals and traditional values recognized by the community'; article 18(2) appoints the family as the custodian of morals and traditional values recognised by the community; and article 29(7) spells out that it is the duty of every individual to 'preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society'.

100 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.

101 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.

The Preamble to the Maputo Protocol picks up on the principle of positive culture in article 29(7) of the Charter, and this concept is then revisited in article 17 of the Maputo Protocol. However, as was discussed in Chapter 1 the concept and reference to ‘values’ or ‘African values’ are contested issues as some stereotypical values exist as an expression of tradition, culture or religion which discriminate against women.¹⁰² Much of such discrimination, including harmful practices and gender-based violence takes place within an intimate family or community setting.

In the Preamble, it is clear that African culture is to be interpreted and understood based on the principles of equality, peace, freedom, dignity, justice, solidarity, and democracy, which points to a positive cultural expression. The problem with this reference is not so much the reference to such positive culture *per se*, even though this concept largely remains undefined in the Protocol, but rather the lack of recognition, as was presented above, of the less favourable position of women in society and the acknowledgement of their contributions to breaking stereotypical perceptions of women’s capacity. Moreover, appointing women in this role without enabling them to play it actively and successfully is problematic. It should also be noted that ‘African values’ was used by the AU Executive Council in 2015 as a ground to request the African Commission to withdraw the observer status before the Africa Commission of the Coalition of African Lesbians and again in 2022 to deny three other NGOs observer status, an interpretation of ‘African values’ which clearly and without substance in law, limits the reach of the protection of the Maputo Protocol.¹⁰³

4.11 Paragraph 11

BEARING IN MIND related Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between women and men.

As mentioned above, the Preamble to the Maputo Protocol contains two paragraphs – 5 and 11 – that focus on treaty law and other international instruments. These are distinguishable from one another by the scope of international law referred to in each paragraph. Paragraph 5, as discussed above, refers to the broader scope of instruments ‘relating to the rights of women’; while paragraph 11, as is further discussed here, refers to instruments aimed at ‘eliminating all forms of discrimination and at promoting equality between women and men’. Arguably, a convention relating to the rights of women, as referred to in paragraph 5, is also aiming, in one way or another, to eliminate all forms of discrimination and to promote equality between women and men, as referred to in paragraph 11, thus creating some overlap. Moreover, while paragraphs 5 and 11 both refer to international and regional conventions, paragraph 11 also includes sub-regional instruments.

Paragraph 11 introduces the reference to regional and sub-regional soft law into the Preamble. The references in paragraph 11 are similar to those of paragraph 5 of the Preamble to CEDAW, which reference ‘resolutions, declarations and recommendations adopted by the United Nations and the

102 See A Rudman ‘Introduction’ sec 3.4 in this volume.

103 Decision of the AU Executive Council on the 38th Activity Report of the African Commission, EX.CL/Dec.887 (XXVII) para 7, in EX.CL/Dec.873-897(XXVII), 27th ordinary session 7-12 June 2015, Johannesburg South Africa. AU Executive Council, at its 2015 meeting the AU Executive Council requested the African Commission to ‘take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values’. In the Final Communiqué of its 73rd ordinary session held in Banjul, The Gambia, from 20 October to 9 November 2022, the African Commission further stated that it rejected the applications for observer status of Alternative Côte d’Ivoire, Human Rights First Rwanda, and Synergía – Initiatives for Human Rights, on the ground that ‘sexual orientation is not an expressly recognized right or freedom under the African Charter’ and is ‘contrary to the virtues of African values’. For further discussion on the Coalition of African Lesbians see A Rudman ‘“Recognition” by the African Union as a locus standi requirement in advisory opinions before the African Court: An analysis of NGOs’ access to justice under the African regional human rights system’ (2021) 35 *Speculum Juris: Special Issue on African Courts and Contemporary Constitutional Developments* 11-12.

specialized agencies'. The Preamble to CEDAW uses the word 'consider' with regard to the binding instruments referred to in its paragraph 4 and 'noted' with regard to the soft law referred to in paragraph 5 creating a hierarchy between hard and soft law. The Preamble to the Maputo Protocol does not create such a hierarchy as 'recalling' the conventions and 'bearing in mind' the soft law instruments arguably carry the same weight and meaning. Soft-law instruments of relevance existing at the conception of the Maputo Protocol are, for example, SADC Declaration on Gender and Development, the Maseru Declaration on the fight against HIV and Aids¹⁰⁴ and the Economic Community of West African States Declaration on the fight against trafficking in persons.¹⁰⁵

4.12 Paragraph 12

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

Similar to paragraph 6 of the Preamble to CEDAW, paragraph 12 of the Preamble to the Maputo Protocol turns from the normative background in paragraphs 5 and 11 to the reality that discrimination against women continues across the continent. Paragraph 12 focuses on the prevailing challenges that existed (and arguably continue to exist), although at the time the Maputo Protocol was adopted, all AU members except Morocco (that had withdrawn from the OAU in 1984) had ratified the African Charter. In fact, only Ethiopia, Eritrea and Eswatini had yet to ratify the African Charter when the Lomé Seminar took place in 1995.¹⁰⁶

It is interesting to note the difference in wording between the Preambles to CEDAW and the Maputo Protocol, where paragraph 6 of the Preamble to CEDAW refers to the 'extensive discrimination against women [that] continues to exist' while paragraph 12 of the Preamble to the Maputo Protocol simply indicates that 'women in Africa still continue to be victims of discrimination and harmful practices'. The statement in CEDAW arguably implies that discrimination against women is widespread and far-reaching. Nonetheless, underscoring the continuation of discrimination against women despite the various instruments alluded to in the earlier paragraphs justifies the adoption of the Maputo Protocol aimed at eliminating discrimination against women in all fields. Compared to CEDAW, this paragraph also makes an important addition in that it refers to 'discrimination *and* harmful practices'.¹⁰⁷

As mentioned above with regard to the drafting history, this paragraph was part of the Preamble from the Nouakchott Draft and onwards and attracted very little discussion. This is contrary to the drafting of paragraph 6 of the Preamble to CEDAW, where a number of States opposed the inclusion of this paragraph. Some states argued in favour of restricting the broad geographic scope through alternative wording such as 'in a number of regions' or 'in parts of the world', while others bolstered the idea that they had already successfully eliminated discrimination against women.¹⁰⁸ The unrestricted wording that was finally adopted in CEDAW and which is also similarly referred to in the reference to 'Africa' in the Preamble to the Maputo Protocol is an important reminder that no state or society is free

104 4 July 2003.

105 25th Ordinary session of Authority of Heads of State and Government Dakar, 20-21 December 2001.

106 Eswatini deposited its document of ratification on 9 October 1995; Ethiopia deposited its document of ratification on 22 June 1998; and Eritrea deposited its document of ratification on 15 March 1999.

107 My emphasis.

108 LA Rehof *Guide to the travaux préparatoires of the UN Convention on the Elimination of All Forms of Discrimination against Women* (1993) 36.

from gender-based discrimination.¹⁰⁹ This message has been repeated in, for example, the Preamble to the Niamey Guidelines, which states that ‘sexual violence remains widespread throughout Africa, in peacetime as well as in wartime, in public and in private’.¹¹⁰

4.13 Paragraph 13

FIRMLY CONVINCED that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated.

As established under the drafting history above, this paragraph stems from article 2 of the Draft OAU Convention on Harmful Practices urging states to ‘condemn all practices which hinder or endanger the normal growth, and affect the physical, emotional and psychological development of women and girls’. The fact that the terminology was not harmonised throughout the Protocol was briefly highlighted above. The reference to ‘harmful practices’ in the previous paragraph and the provision of a much more comprehensive definition in article 1(g) of the Protocol is curious. The reference in the Preamble arguably focuses on a more limited understanding of practices harmful to women, concentrating on physical alterations such as FGM and force-feeding while leaving out other behaviour, attitudes and practices which negatively affect the fundamental rights of women, such as child marriage, widowhood practices and witchcraft.¹¹¹ It is also important to note the use of ‘should be’ instead of ‘must be’ in paragraph 13. The word ‘should’ is generally used in relation to obligations that states consider optimal for the concerned subject but not compulsory. The word ‘must’ is generally used for obligations that are considered compulsory. It is, however, important to acknowledge that this reference, read together with the reference to ‘harmful practices’ in the previous paragraph, is important in determining the object and purpose of the Protocol. There is no equivalent reference to harmful practices in the Preamble to CEDAW.

4.14 Paragraph 14

DETERMINED to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights.

The final paragraph of the Preamble speaks to the comprehensive state obligations that are established through the operative provisions of the Maputo Protocol. Using the word ‘ensure’ to guarantee women’s rights indicates the far-reaching obligations that states undertake once they ratify the Protocol. By becoming parties to the Maputo Protocol, States assume four tiers of obligations and duties: the duty to respect, protect, promote, and fulfil these rights.¹¹² As stipulated by the African Commission, these obligations apply universally to all human rights and entail a combination of negative and positive duties. Each layer of obligation is equally relevant to the substantive right in question.¹¹³

109 See eg UN HRC Res 15/23 (8 October 2010) UN Doc A/HRC/RES/15/23 where the Human Rights Council states that it is ‘[d]eeply concerned by the fact that women everywhere are still subject to significant disadvantage as the result of discriminatory laws and practices and that de jure and de facto equality has not been achieved in any country in the world’.

110 African Commission on Human and Peoples’ Rights Guidelines on Combating Sexual Violence and its Consequences in Africa adopted during its 60th ordinary session held in Niamey, Niger from 8-22 May 2017 (Niamey Guidelines) Preamble.

111 See S Nabaneh ‘Article 5’ in this volume.

112 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 44-46.

113 *SERAC* (n 112) para 44.

5 Conclusion

With an article specifically dedicated to definitions – article 1 – and more than 20 comprehensive provisions following these definitions, the Preamble to the Maputo Protocol will arguably have a limited role to play in the process of interpreting the Protocol. However, questions relating to the definition of ‘women’ and the protection of ‘other’ intersectional grounds, such as sexual orientation and gender identity or expression, are bound to arise as they have in the international system and in other regional human rights systems.¹¹⁴ It is at such times that the Preamble may become critical.

Regardless of what questions may arise, the object and purpose of the Maputo Protocol, which guide the interpretation of the Protocol, is clearly set out in the Preamble: to eliminate *all* forms of discrimination and harmful practices against *all* women, including gender-based violence, and to promote women’s role in development and peace-making. This object and purpose is firmly anchored in the universality of human rights and the dignity of all women. Understood within the context of the four tiers of state obligations referred to in the Preamble, this creates the framework within which any interpretation of the text, context and object and purpose of the Maputo Protocol must take place.

114 See eg *Toonen v Australia* UN Doc CCPR/C/50/D/488/1992 (1994), *Karen Atala and Daughters v Chile* IACHR (23 July 2008) Ser L/Doc 22 Rev 1; *ADT v The United Kingdom* (App No 35765/97) (2000) 31 EHRR 803; *Alekseyev v Russia* (App Nos 4916/07, 25924/08 and 14599/09) (2010); *C and LM v UK* (App 14753/89) unpublished, *Cossey v UK* (App No 10843/84) (1990) 13 EHRR 622; *Dudgeon v The United Kingdom* (App No 7525/76) (1982) 4 EHRR 149; *EB v France* (App No 43546/02) (2008) 47 EHRR 509; *Fretté v France* (App No 3651/97) (2002) 38 EHRR 438; *Gas and Dubois v France* (App No 25952/07) (2010) ECHR 444; *Goodwin v UK* (App No 28957/95) (2002) 35 EHRR 18; *Hämäläinen v Finland* (App No 37359/09) (2014) ECHR 877; *Handyside v The United Kingdom* (App No 5493/72) (7 December 1976); *I v UK* (App No 25680/94) (2003) 36 EHRR 53; *Karlheinz Schmidt v Germany* (Judgment of 18 July 1994) Series A No 291-B; *Karner v Austria* (App No 40016/98) (2003) 38 EHRR 24; *Kozak v Poland* (App No 13102/02) (2010) 51 EHRR 16; *L and V Austria* (App Nos 39392/98 & 39829/98) (2003) 36 EHRR 55; *Lustig-Prean and Beckett v The United Kingdom* (App Nos 31417/96 and 32377/96) (2000) 29 ECHR 548; *Marckx v Belgium* (App No 6833/74) (1979) 2 EHRR 330; *Modinos v Cyprus* (App No 15070/89) (1993) 16 EHRR 485; *Mugenzi v France* (App No 52701/09) (2014) ECHR 752; *Neulinger and Shuruk v Switzerland* (App No 41615/07) (2010) ECHR 1053; *Norris v Ireland* (App No 10581/83) (1988) 13 EHRR 186; *PB and JS v Austria* (App No 18984/02) (2012) 55 EHRR 31; *Popov v France* (App 39470/07) (2012) ECHR 2070; *Rees v UK* (App No 9532/81) (1986) 9 EHRR 56; *S v UK* (App 11716/85) 47 DR 274; *Salguiero Da Silva Mouta v Portugal* (App No 33290/96) (2001) 31 EHRR 47; *Schalk and Kopf v Austria* (App No 30141/04) (2011) 53 EHRR 20; *Sheffield and Horsham v the United Kingdom* (App No 23390/94) (1999) 27 EHRR 163; *Smith and Grady v The United Kingdom* (App Nos 33985/96 and 33986/96) (1999) 29 EHRR 493; *Tyrer v UK* (App No 5856/72) (25 April 1978) 2 EHRR 1 xxi; *Vallianatos v Greece* (App Nos 29381/09 and 32684/09) (2014) 59 EHRR 12; *WB v Federal Republic of Germany* (App No 104/55) (1955); *X v Austria* (App No 19010/07) (2013) ECHR 425; *X and Y v UK* (App No 9368/81) 32 DR 220; *X, Y and Z v The United Kingdom* (App No 21830/93) (1997) 24 EHRR 1071; and *Yousef v The Netherlands* (App No 33711/96) (2002) ECHR 716. See also Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, Inter-American Court on Human Rights (2017), OC-24/17.