

## Are Africans States Willing to Ratify and Commit to Human Rights Treaties? The Example of the *Maputo Protocol*

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Résumé de l'article

Cet article met en lumière les facteurs affectant la ratification et l'engagement des pays africains à l'égard des traités, afin de changer et d'améliorer leur conduite conformément aux obligations présentes dans ces derniers. À titre d'exemple, ce travail utilise le *Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes* (« *Protocole de Maputo* »), considéré comme le pilier de la protection des droits des femmes en Afrique. Cet article examine l'effet des violations sur les droits souverains des États africains à déterminer le contenu de leur droit interne et évalue s'ils ont fait des progrès dans la protection des droits des femmes sur le continent. Cela est pertinent puisque la manière dont le *Protocole de Maputo* peut être mis en oeuvre est préoccupante étant donné que, par exemple, plusieurs droits inscrits dans le *Protocole* sont en contradiction avec les traditions culturelles et nationales établies. C'est pourquoi bon nombre des dispositions contenues dans le *Protocole de Maputo* ne sont actuellement pas réalisables compte tenu, également, des conditions socio-économiques actuelles dans de nombreux pays du continent. En outre, le *Protocole de Maputo* ne reconnaît pas plusieurs droits, jugés particulièrement pertinents pour les réfugiées en Afrique, tels que le droit à un procès équitable et les droits des femmes condamnées et détenues. Lorsque des normes relatives aux droits humains émergent, comme c'est le cas avec celles contenues dans le *Protocole de Maputo*, un engagement juridique international fort génère un plus grand soutien du public pour la conformité qu'un engagement faible. À l'inverse, lorsqu'une norme de droits humains est domestiquée, un engagement plus fort de l'État ne génère pas toujours un plus grand soutien public qu'un engagement plus faible. C'est pourquoi l'effort de promotion du *Protocole de Maputo* doit se faire au niveau continental et ne doit pas être laissé à un seul pays ou à un petit groupe d'entre eux.

# ARE AFRICAN STATES WILLING TO RATIFY AND COMMIT TO HUMAN RIGHTS TREATIES? THE EXAMPLE OF THE *MAPUTO PROTOCOL*

*Cristiano d'Orsi\**

This paper sheds light on factors affecting the ratification and commitment of African countries to treaties, to change and to improve their conduct according to the obligations present in those treaties. As a way of example, this work uses the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* ("*Maputo Protocol*"), considered as the pillar of women's human rights protection in Africa. This paper considers the effect of the breaches on the sovereign rights of African states to determine the content of their domestic law and if they have made any progress in the protection of women's rights on the continent. I wonder that because there is significant concern as to how the *Maputo Protocol* can be implemented given that, for example, several rights in the *Protocol* clash with established cultural and national traditions. That is why many of the provisions contained in the *Maputo Protocol* are not currently achievable given also the present socio-economic conditions in many countries of the continent. In addition, the *Maputo Protocol* fails to recognise several rights, deemed particularly relevant for refugees in Africa, such as the right to a fair trial and the rights of convicted and detained women. When human rights norms are emerging, as it is the case with those contained in the *Maputo Protocol*, strong international legal commitment generates greater public support for compliance compared to weak commitment. Conversely, when a human rights norm is domesticated, stronger state commitment does not always generate greater public support compared to a weaker commitment. That is why the effort to promote the *Maputo Protocol* should be done at a continental level and not leaving it to a single country or to a small group of them.

Cet article met en lumière les facteurs affectant la ratification et l'engagement des pays africains à l'égard des traités, afin de changer et d'améliorer leur conduite conformément aux obligations présentes dans ces derniers. À titre d'exemple, ce travail utilise le *Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes* (« *Protocole de Maputo* »), considéré comme le pilier de la protection des droits des femmes en Afrique. Cet article examine l'effet des violations sur les droits souverains des États africains à déterminer le contenu de leur droit interne et évalue s'ils ont fait des progrès dans la protection des droits des femmes sur le continent. Cela est pertinent puisque la manière dont le *Protocole de Maputo* peut être mis en œuvre est préoccupante étant donné que, par exemple, plusieurs droits inscrits dans le *Protocole* sont en contradiction avec les traditions culturelles et nationales établies. C'est pourquoi bon nombre des dispositions contenues dans le *Protocole de Maputo* ne sont actuellement pas réalisables compte tenu, également, des conditions socio-économiques actuelles dans de nombreux pays du continent. En outre, le *Protocole de Maputo* ne reconnaît pas plusieurs droits, jugés particulièrement pertinents pour les réfugiées en Afrique, tels que le droit à un procès équitable et les droits des femmes condamnées et détenues. Lorsque des normes relatives aux droits humains émergent, comme c'est le cas avec celles contenues dans le *Protocole de Maputo*, un engagement juridique international fort génère un plus grand soutien du public pour la conformité qu'un engagement faible. À l'inverse, lorsqu'une norme de droits humains est domestiquée, un engagement plus fort de l'État ne génère pas toujours un plus grand soutien public qu'un engagement plus faible. C'est pourquoi l'effort de promotion du *Protocole de Maputo* doit se faire au niveau continental et ne doit pas être laissé à un seul pays ou à un petit groupe d'entre eux.

Este artículo arroja luz sobre los factores que afectan la ratificación y el compromiso de los países africanos con los tratados, para cambiar y mejorar su conducta de acuerdo con las obligaciones presentes en dichos tratados. Como ejemplo, este trabajo utiliza el *Protocolo a la Carta Africana de Derechos Humanos y de los Pueblos sobre los Derechos de las Mujeres en África* ("*Protocolo de Maputo*"), considerado como el pilar de la protección de los derechos de las mujeres en África. El presente artículo examina el efecto de los incumplimientos en los derechos soberanos de los Estados africanos para determinar el contenido de su

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derecho interno y evalúa si han hecho algún progreso en la protección de los derechos de la mujer en el continente. Es relevante porque existe una gran preocupación sobre cómo puede aplicarse el *Protocolo de Maputo* dado que, por ejemplo, varios derechos del *Protocolo* chocan con tradiciones culturales y nacionales establecidas. Por eso, muchas de las disposiciones contenidas en el *Protocolo de Maputo* no son actualmente realizables, dadas también las actuales condiciones socioeconómicas de muchos países del continente. Por otra parte, el *Protocolo de Maputo* no reconoce varios derechos, especialmente relevantes para las refugiadas en África, como el derecho a un juicio justo y los derechos de las mujeres condenadas y detenidas. Cuando las normas de derechos humanos son emergentes, como es el caso de las contenidas en el *Protocolo de Maputo*, un fuerte compromiso jurídico internacional genera un mayor apoyo público para su cumplimiento en comparación con un compromiso débil. A la inversa, cuando una norma de derechos humanos está domesticada, un compromiso estatal más fuerte no siempre genera un mayor apoyo público que un compromiso más débil. Por ello, el esfuerzo de promoción del *Protocolo de Maputo* debe realizarse a nivel continental y no dejarse en manos de un solo país o de un pequeño grupo de ellos.

This study sheds light on factors affecting the ratification and commitment of African countries to treaties, to change and possibly even improve their conduct according to the obligations of those treaties.

Due to the decentralised nature of international law, in recent years scholars have pondered why states comply with international law and whether international legal commitments can indeed result in greater compliance with human rights norms. On the one hand, there is a tendency to believe that human rights treaties invest domestic actors such as courts and non-governmental organisations (NGOs) with the power to ensure greater compliance with human rights norms, post-ratification. On the other hand, however, international human rights treaties can change the public perception of human rights norms, and in so doing, place pressure on policymakers to meet the terms of those treaties through a domestic compliance mechanism driven by the electorate.<sup>1</sup> Yet another view, expressed by scholars such as R. Aron, is that states ratify international conventions they are already inclined to follow, and international law is merely a reflection of the state's existing preferences instead of being a tool, capable of changing state behaviour.<sup>2</sup>

In examining the attitude of African states towards ratifying human rights treaties, this study uses the example of the 2003 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, better known as the '*Maputo Protocol*'.<sup>3</sup> The *Maputo Protocol* is considered 'the' pillar of women's human rights protection in Africa.

R. Manjoo affirms that the adoption of a comprehensive protocol on women's rights constitutes the starting point for a process of genuine engagement by states and an acknowledgment that "making rights a reality"<sup>4</sup> is not just an empty slogan recited by state and non-state actors (NSAs) when it is politically convenient to do so.<sup>5</sup> R. Mayanja confirms that the message conveyed by the *Maputo Protocol* is unequivocal, with African women determined to hold states responsible for the promotion and protection of their human rights.<sup>6</sup>

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<sup>1</sup> Matthew D Kim, "Legalization and Norm Internalization: An Empirical Study of International Human Rights Commitments Eliciting Public Support for Compliance" (2019) 7:2 Penn State JL & Intl Affairs 339.

<sup>2</sup> Raymond Aron, *Peace & War: A Theory of International Relations* (London & New York: Routledge, 1981) at 820.

<sup>3</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003, CAB/LEG/66.6 (entered into force 25 November 2005) [*Maputo Protocol*].

<sup>4</sup> In this regard, see "Making Rights a Reality: The Duty of States to Address Violence against Women" (June 2004) at 8, online (pdf): *Amnesty International* <[www.amnesty.org/download/Documents/80000/act770502005en.pdf](http://www.amnesty.org/download/Documents/80000/act770502005en.pdf)>. "States [have a] legal duty to take action to address violence against women. States have this duty, no matter what the context – war or peace, the home, the street or the workplace, no matter the identity of the perpetrator – parent, husband, partner, colleague, stranger, police officer, combatant or soldier, and regardless of the identity of the victim."

<sup>5</sup> Rashida Manjoo, "Women's Human Rights in Africa" in Manisuli Ssenyonjo, ed, *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (Leiden/Boston: Martinus Nijhoff Publishers, 2012) at 154.

<sup>6</sup> Rachel Mayanja, "The Protocol on the Rights of Women in Africa" in Abdulqawi A Yusuf and Fatsah Ougergouz, eds, *The African Union: Legal and Institutional Framework A Manual on the Pan-African Organization* (Leiden/Boston: Martinus Nijhoff Publishers, 2012) at 475.

During the last decades, African countries have gained a greater awareness of their obligations under international law. As a result, the implementation of international standards becomes almost inevitable where domestic responses do not resolve a crisis threatening regional or international stability. The next step is the need for these states to draft, for example, constitutions, laying down an effective foundation for democracy, the rule of law, the protection of fundamental human rights and good governance. Doing so, however, constrains the sovereign right of these states to determine the content of their national legislation as well as to govern themselves without any interference from external actors. In the diverse African context, there is an increasing need for a common legal ‘cover’, to enhance a sense of community and promote a more coherent legal system. The concept of general principles of law<sup>7</sup> is a possible conceptual tool to achieve this. The concept of general principles of law can be considered as a bridge between ‘hard law’ based on consensus, on one hand, and common interests and values, on the other hand, and also between international law and domestic law.<sup>8</sup>

This paper considers the effect of such infringements on the sovereign rights of African states to determine the content of their domestic law and, more importantly, whether they have resulted in any progress in the protection of women’s rights in Africa.

After this introductory note, the main features of the *Maputo Protocol* are presented, focusing the challenges faced by African states when they have the opportunity to adopt the *Protocol*. The discussion centres on adaptation and compliance, which is crucial in allowing states to implement the *Protocol*. The article then examines several initiatives, both regional and domestic, which have been adopted by states to comply with the *Protocol*. Concluding remarks are then made on the *Maputo Protocol* as well as general remarks on the position of African states *vis-à-vis* women’s rights on the continent.

## I. An Introduction to the *Maputo Protocol* and Beyond

As articulated in the *Maputo Protocol*, historically Africa’s record in terms of women’s rights has been poor, to say the least.<sup>9</sup> F. Banda argues that the *Protocol* is not so much a means of correcting normative deficiencies in existing human rights law regarding the protection of women but rather, a response to the lack of implementation of such provisions.<sup>10</sup>

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<sup>7</sup> UN, *Statute of the International Court of Justice* (18 April 1946), art 38(c) according to which the Court shall apply not only international conventions and international customary law but also “the general principles of law recognized by civilized nations”.

<sup>8</sup> Allan Rosas, “State Sovereignty and Human Rights: towards a Global Constitutional Project” (1995) 43:1 *Political Studies* 77.

<sup>9</sup> The preamble of the *Maputo Protocol* reads: “[The state parties are] 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.”

<sup>10</sup> Fareda Banda, “Blazing a trail: The African Protocol on Women’s Rights comes into force” (2006) 50:1 *J African L* 77.

The *Maputo Protocol*, which was adopted by the African Union (AU) Assembly of Heads of State and Government (Assembly) in Mozambique in July 2003, is a legally binding supplement to the 1981 *African Charter on Human and Peoples Rights*.<sup>11</sup> To date,<sup>12</sup> of the 55 AU Member States, 43 have ratified the *Maputo Protocol*, with Ethiopia being the most recent, ratifying the document on 17 September 2019. While most countries have at least signed the *Protocol*, three have neither signed nor ratified it, namely, Botswana, Egypt and Morocco.<sup>13</sup> Six other countries (Cameroon, Kenya, Mauritius, Namibia, South Africa and Uganda) have expressed reservations as to several articles upon ratification of the *Protocol*, which, they maintain, are incompatible with their national laws, traditions, religions or cultures.<sup>14</sup>

An example is the reservation expressed by Cameroon, which if on one side discourages the female genital mutilation (FGM), however it equates this harmful practice with homosexuality considered as another practice to avoid. It is clear that, in the mind of Cameroonian legislators, the cultural tradition that views homosexuals as criminals is still prevalent in society.<sup>15</sup>

The acceptance of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa should in no way be construed as endorsement, encouragement or promotion of homosexuality, abortion (except therapeutic abortion), genital mutilation, prostitution or any other practice which is not consistent with universal or African ethical and moral values, and which could be wrongly understood as arising from the rights of women to respect as a person or to free development of her personality. Any interpretation of the present Protocol justifying such practices cannot be applied against the Government of Cameroon.<sup>16</sup>

<sup>11</sup> *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) [*Banjul Charter*]. In this regard, as Rachel Murray observes: "[T]here is a sense that there was concern that women's rights would be accorded less attention by the ACHPR if anything other than a legally binding document was considered. Having a Protocol would at least make the Commission take note." See Rachel Murray, "Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa" in Doris E. Buss and Ambreena Manji, eds, *International Law Modern Feminist Approaches* (Oxford/Portland: Hart Publishers, 2005) at 261.

<sup>12</sup> 10 June 2020.

<sup>13</sup> "Ratification of the Maputo Protocol", online (pdf): *African Union* <au.int/sites/default/files/treaties/37077-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf>.

<sup>14</sup> In this regard, see Eric Neumayer, "Qualified Ratification: Explaining Reservations to International Human Rights Treaties" (2007) 36:2 J Leg Studies 398: "[Reservations] are a legitimate, perhaps even desirable, means of accounting for cultural, religious, or political value diversity across nations. Reservations, understandings, and declarations are set up by those countries that take human rights seriously, foremost the liberal democracies, while other countries need not bother because they do not intend to comply anyway. From the competing second account, however, [reservations] are regarded with great concern, if not hostility. This is because of the supposed character of human rights as universally applicable, which is seen as being undermined if countries can opt out of their obligations."

<sup>15</sup> *The Violations of the Rights of Lesbian, Gay, Bisexual, and Transgender (LGBT) Individuals in Cameroon*, October 2017 (submitted for consideration at the 121st Session of the Human Rights Committee by a number of NGOs) at 3.

<sup>16</sup> Lucy Asuagbor, Special Rapporteur on the Rights of Women in Africa, *Status of Implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, African Commission on Human and Peoples' Rights (18 March 2016) at 2-3.

In this regard, it is interesting to note that a 190-page periodic report released by the Cameroonian authorities for the African Commission on Human and People's Rights (ACHPR) in January 2020 on the status of the human rights in the country does not contain a single line on the situation of the LGBT community in the country.<sup>17</sup>

The reservations voiced by the Kenyan authorities are also of interest. Kenya has a different vision compared to that expressed in the *Maputo Protocol* on the health and reproductive rights of women. In particular, it appears to object to article 14(2)(c), according to which the reproductive rights of women should be protected by authorising medical abortion "in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." In Kenya, the debate on the matter is still huge. On the one hand, under section 26(4) (Right to Life) of the 2010 Kenyan constitution, abortion is allowed when there is a necessity for emergency treatment, or when the life or health of the mother is at risk.<sup>18</sup> On the other hand, however, a 2019 judgement by the High Court (Constitutional and Human Rights Division) in Nairobi reaffirms the general rule that abortion is illegal.<sup>19</sup> In the case of rape, abortion is permissible only under the exception of section 26(4). In the words of the judgment, "It is not the cause of the danger that determines whether an abortion is necessary but the effect of the danger."<sup>20</sup>

It is not by chance that this article has been also reserved by Rwanda and Uganda. Yet in Rwanda, the *Ministerial Order* of 8 April 2019 makes several concessions for the possibility of abortion. According to article 3, abortion is possible under the following conditions: a) the pregnant person is a child; b) the person requesting abortion became pregnant as a result of rape; c) the person requesting abortion became pregnant after being subjected to a forced marriage; d) the person requesting abortion became pregnant as a result of incest committed by a person to the second degree of kinship; e) the pregnancy puts at risk the health of the pregnant person or the foetus.<sup>21</sup> Since then, Rwandan President, Paul Kagame, pardoned several women who had been imprisoned for abortion.<sup>22</sup>

In Uganda, the legal situation is even harsher given that article 22(2) (Protection of Right to Life) of the national *Constitution* prescribes that no individual has "the right to terminate the life of an unborn child except as may be authorised by

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<sup>17</sup> *Single Report comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Report relating to the Maputo Protocol and the Kampala Convention* (3 January 2020).

<sup>18</sup> *The Constitution of Kenya* (28 August 2010) at 24.

<sup>19</sup> *Federation of Women Lawyers (Fida-Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others*, [2019] eKLR at para 397.

<sup>20</sup> *Ibid* at para 399.

<sup>21</sup> Ministerial Order, *Determining conditions to be satisfied for a medical doctor to perform an abortion*, N°002/MoH/2019, 2019 art 3.

<sup>22</sup> Christophe Hitayezu, "Rwanda to release 50 women jailed for having abortions", *The Guardian* (21 May 2020), online: <[www.theguardian.com/global-development/2020/may/21/rwanda-to-release-50-women-jailed-for-having-abortions](http://www.theguardian.com/global-development/2020/may/21/rwanda-to-release-50-women-jailed-for-having-abortions)>.

law”.<sup>23</sup> In addition, section 141 (Attempts to Procure Abortion) of the 1950 *Penal Code* clearly stipulates:

Any person who, with intent to procure the miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means, commits a felony and is liable to imprisonment for fourteen years.

This provision is mitigated by section 224 (Surgical Operation) which affirms that a person is not criminally responsible for performing, in good faith and with reasonable care and skill, a surgical operation upon an unborn child for the preservation of the mother’s life, if the performance of the operation is deemed ‘reasonable’.<sup>24</sup>

Kenya has also expressed reservations as to article 10(3) of the *Protocol*, stipulating that state parties adopt all necessary measures to reduce military expenditure in favour of expenditure promoting the rights of women. Kenya’s objection is consistent with the policies of a country that is constantly increasing expenditure on armaments in absolute terms (from US\$ 1,015 million in 2012 to US\$ 1,148 million in 2019) although as a percentage of its Gross Domestic Product (GDP), the expenditure decreased from 1.7 % in 2012 to 1.2 % in 2019.<sup>25</sup>

The majority of countries on the continent, however, have tried to give full effect to the principles of the *Maputo Protocol* through policies and programmes on gender equality. Nonetheless, significant gaps exist between the provisions of the *Protocol*, their domestication, and women’s enjoyment of their rights in practice.

The fact that this *Protocol* has obtained the number of ratifications to enforce it in a very short period (it entered into force on 25 November 2005 after the ratification of Togo) is noteworthy. It indicates an awareness in Africa of the need for a regionally specific legal framework for the protection of women’s rights.<sup>26</sup>

It is, however, perplexing that Botswana has not even signed the *Protocol* considering that this country is well known in Africa for its high standard of human rights protection. For example, Botswana has one of the oldest national legislation in Africa on refugee protection, which dates back to 1968<sup>27</sup>—only two years after the country achieved independence. In 2019, the United Nations (UN) Committee on the Elimination of Discrimination against Women (CoEDAW)<sup>28</sup> concluded its review of the fourth periodic

<sup>23</sup> *Constitution of the Republic of Uganda 1995*, S.I. 354/1995, Act 13/2000, 1995.

<sup>24</sup> *Uganda Penal Code Act 1950* (amended on 17 August 2007), Cap. 120, 1950, online: <[www.refworld.org/docid/59ca2bf44.html](http://www.refworld.org/docid/59ca2bf44.html)>.

<sup>25</sup> “SIPRI Military Expenditure Database”, online: *Stockholm International Peace Research Institute* <[www.sipri.org/databases/miùlex](http://www.sipri.org/databases/miùlex)>.

<sup>26</sup> Christine Ocran, “The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” (2007) 15:1 *African J Intl & Comparative L* 147.

<sup>27</sup> *Botswana Refugees (Recognition and Control) Act of 1968*, Cap. 25:03, 1968, online: <[www.refworld.org/docid/3ae6b4d60.html](http://www.refworld.org/docid/3ae6b4d60.html)>.

<sup>28</sup> The United Nations Committee on the Elimination of Discrimination against Women, an expert body, has been established in 1982. The Committee’s mandate is very specific: it watches over the progress for women made in those countries that are the states parties to the 1979 *Convention on the Elimination*



report of Botswana on measures adopted to implement the provisions of the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*.<sup>29</sup> In that review, the CoEDAW questioned why Botswana was not party to the *Maputo Protocol* and when it intended on ratifying the *Protocol*. The response of the Botswana delegation was that there was no reason for the government not to sign the *Maputo Protocol*, expressing regret at its slow response.<sup>30</sup>

When the *Maputo Protocol* was drafted and adopted, the two principal legal instruments for the protection of women in Africa—the *Banjul Charter* and the *CEDAW*—had already entered into force. In 2003, both had already garnered a substantial number of ratifications in Africa. The *CEDAW* finds one of its pivotal axes in article 1 which defines the term ‘discrimination against women’, which is similar to that provided in the *Maputo Protocol*.<sup>31</sup> It was, however, considered failing to adequately address African women’s needs.<sup>32</sup> Consequently, considering the similarity in its wording, the definition of ‘discrimination against women’ contained in the *Maputo Protocol* is also disappointing, bearing in mind that this duty was imposed only on state parties of the *Protocol* and did not take into consideration, for example, non-state actors (NSAs).<sup>33</sup>

The *Maputo Protocol* seems, however, to have been adopted for four main goals, which have by and large been reached: (i) to improve the protection guaranteed to women under the *Banjul Charter*;<sup>34</sup> (ii) to create a specific instrument to protect African women that could fill the existing gap in this regard;<sup>35</sup> (iii) to draft a specific African legal instrument that would consolidate international standards for African states, allowing African governments to fulfil the engagements to which they have subscribed; and (iv) to create an enforced mechanism for the present obligations to protect women on the continent.<sup>36</sup>

After the adoption of the *Maputo Protocol*, the AU Assembly adopted a *Solemn Declaration* in 2004, urging states to ratify the *Maputo Protocol*. This initiative was

*of All Forms of Discrimination against Women*. The Committee monitors the implementation of national measures to fulfil this obligation.

<sup>29</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [*CEDAW*].

<sup>30</sup> CoEDAW, “Committee on the Elimination of Discrimination against Women discusses the situation of women’s rights in Botswana” (1 March 2019), online: *United Nations* <[www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24243&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24243&LangID=E)>. See CoEDAW, *Fourth periodic report submitted by Botswana under article 18 of the Convention, due in 2014, C/BWA/4* (2017).

<sup>31</sup> Art 1(f) of the *Maputo Protocol* stipulates: “‘Discrimination against women’ means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women regardless of their marital status of human rights and fundamental freedoms in all spheres of life.”

<sup>32</sup> Kristin Davis, “The emperor is still naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination” (2009) 42:3 *Vanderbilt J Transnational L* 958.

<sup>33</sup> Danwood Mzikenge Chirwa, “Reclaiming (Wo)manity: The Merits and Demerits of the African Protocol on Women’s Rights” (2006) 53:1 *Netherlands Intl L Rev* 74.

<sup>34</sup> *Ibid* at 68: “The African Women’s Protocol was adopted principally to reinforce the provisions of the African Charter, which were considered as lending insufficient protection to women’s rights.”

<sup>35</sup> Davis, *supra* note 32 at 952.

<sup>36</sup> Murray, *supra* note 11 at 263–264.

successful in speeding up the rate of ratification of the *Protocol*.<sup>37</sup> The emphasis placed by the AU on this declaration<sup>38</sup> played an important role in convincing member states to adopt the *Protocol*.

However, this regional initiative should be analysed in conjunction with the gender units established by the sub-regional economic organisations. Of these, the most noteworthy is perhaps the *SADC Protocol on Gender and Development*, which entered into force in February 2013.<sup>39</sup> Its objective, made explicit in article 3(a), is to “provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender responsive legislation, policies, programs and projects.”

Moreover, compared to the *Maputo Protocol*, the *SADC Protocol* is more coherent in the formulation of its provisions, possibly thanks to its smaller numbers and the relative sociocultural homogeneity of the countries adhering to it.<sup>40</sup> However, M. Forere and L. Stone highlight that, ideally, the *SADC Protocol* should have adopted a plan of action to implement the *Maputo Protocol*. Hence, instead of directing scarce financial resources to overlap with the *Maputo Protocol*, the *SADC* should have reinforced the protection of women’s rights more concretely in Southern Africa. This is because the promotion of women’s rights has never been greater, yet their protection remains very low.<sup>41</sup>

## II. Addressing Challenging Issues: The Example of Female Genital Mutilation

International human rights standards and principles have become especially important in African countries with highly dysfunctional constitutional orders, including countries such as the Central African Republic, the Democratic Republic of Congo, Somalia and South Sudan where sectarian violence towards women remains pervasive and domestic legal responses are no longer capable of restoring peace and

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<sup>37</sup> Frans Viljoen, “An introduction to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” (2009) 16:1 Washington & Lee J Civil Rights & Social Justice 15.

<sup>38</sup> AU Assembly, *Solemn Declaration on Gender Equality in Africa*, Decl.12 (III), 2004, especially paras 6 and 9: “[We, the Heads of State and Government of Member States of the African Union agree to]: 6) Ensure the active promotion and protection of all human rights for women and girls including the right to development by raising awareness or by legislation where necessary; [...] 9) Undertake to sign and ratify the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa by the end of 2004 and to support the launching of public campaigns aimed at ensuring its entry into force by 2005 and usher in an era of domesticating and implementing the Protocol as well as other national, regional and international instruments on gender equality by all States Parties.”

<sup>39</sup> *SADC Protocol on Gender and Development*, 17 August 2008 (entered into force 22 February 2013) online (pdf): <[www.sadc.int/files/8713/5292/8364/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf)> [*SADC Protocol*].

<sup>40</sup> Viljoen, *supra* note 37 at 28.

<sup>41</sup> Malebakeng Forere and Lee Stone, “The SADC Protocol on Gender and Development: Duplication or Complementarity of the African Union Protocol on Women’s Rights” (2009) 9:2 African Human Rights LJ 457–458.

security.<sup>42</sup> C. Fombad argues that the application of international law standards and principles to any state is usually not intended as a replacement of domestic law. Instead, international law principles and standards are supposed to supplement domestic law and enhance good governance.<sup>43</sup> For example, where domestic law is poor and the country is incapable of adequately protecting human rights, international human rights norms may “replace deficient domestic laws or complement them.”<sup>44</sup>

This is crucial for many countries in Africa where domestic constitutions have yet to prohibit customs and traditions that intrude on the rights of women. One can examine the treatment of women under customary law in African countries to determine the extent to which domestic courts can now use international human rights law to challenge and invalidate customs and traditions that discriminate against women and violate their rights.

Examples of these kinds of traditions are the painful and harmful practices of ‘breast ironing’, an essential part of the culture of some ethnic and cultural groups; forced child labour on farms and mines; and forced sexual service by young girls in fetish shrines.<sup>45</sup> In this way, the *Maputo Protocol* can replace incomplete domestic laws.

To surmount the obstacles created by such traditions, a new understanding of ethics is necessary in those regions. This poses a significant challenge, particularly for the myriad African actors. These actors are both regional organisations and national governments, with the support of national and international NGOs operating in those areas, which are dedicated to women’s rights. One such example is represented by the NGOs committed to eradicating FGM, which is still practiced in several African countries. In this regard, L.J. Kouba and J. Muasher affirm that female circumcision has been widely practiced across Africa in a broad triangle, stretching from Senegal in the west to Egypt in the northeast and Tanzania in the southeast. However, the authors also highlight that not all inhabitants of those areas circumcise women. This practice is principally an ethnic one and has nothing to do with political boundaries. Hence, as

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<sup>42</sup> For example, see General Assembly (Third Committee), *Pervasive, Continued Violence against Women “An Appalling Human Rights Violation”; Eliminating Such Violence at Core of Women’s Empowerment, Third Committee Told*, SHC/4040, 2012. On that occasion, Cecile Mballa Eyenga, (Cameroon) speaking on behalf of the African states and aligning with the Group of 77 and China “[c]alled for intensified efforts against violence against women, noting that whether it was sexual abuse, commercial sexual exploitation, child pornography or child marriage, the result was the same: women and girls were prevented from fully enjoying human rights. Child marriage threatened the health of young girls. The Group reaffirmed that female genital mutilation was a serious threat to women’s and girls’ health, including their sexual and reproductive health, which could increase their risk of contracting HIV/AIDS. While states had a primary role in ending violence against women, religious leaders also played a role and she urged them to use their voices to enhance awareness about the detrimental impact of harmful practices on women and girls, and support social change to abandon such practices.”

<sup>43</sup> Charles Manga Fombad, “Internationalization of Constitutional Law and Constitutionalism in Africa” (2012) 60:2 *American J Comparative L* 463–464.

<sup>44</sup> *Ibid* at 463.

<sup>45</sup> In this regard, see Berhane Ras-Work, *Legislation to Address the Issue of Female Genital Mutilation (FGM)*, UN Doc EGM/GPLHP/2009/EP.01, 2009; Morissanda Kouyate, *Harmful Traditional Practices against Women and Legislation*, UN Doc EGM/GPLHP/2009/EP.07, 2009.

people move back and forth across borders or migrate from one country to another, they carry this tradition with them.<sup>46</sup> FGM is a form of gender-based violence and is therefore a source of possible persecution by states. Both the UN and the United Nations High Commissioner for Refugees (UNHCR)<sup>47</sup> consider it a practice that should be eradicated.<sup>48</sup> African countries ratifying the *Maputo Protocol* have expressed a patent willingness to put an end to those practices. Furthermore, they have also complied with the AU Assembly's decision adopted in 2019 as well as the decision of the Continental International Conference held in Ouagadougou in October 2018 by which member states commit to accelerate the elimination of female genital mutilation by 2030.<sup>49</sup>

It is not a coincidence that the 2018 conference was held in Ouagadougou, given that several states have adopted more decisive legal steps to curb FGM. Burkina Faso is one of the African states where FGM is punished under the criminal code.<sup>50</sup> In Gambia, the *Women's (Amendment) Act 2015* addressed the issue of harmful practices for the first time in the country by introducing section 32(A), clearly stipulating that female circumcision is prohibited. Sub section 1 of section 32(A) is even more direct, affirming that “[a] person shall not engage in female circumcision.”<sup>51</sup>

In terms of practices similar to FGM, an important factor in the decision to ratify a treaty is the nature of the information that is disseminated in society. The role of local authorities is essential in achieving this, although it is not always forthcoming. When human rights scholars and activists talk about the normative or cultural changes that must take place within a society before human rights laws can be effectively enforced, they are typically referring to the reframing of a social issue. It is widely believed that new legal rules and national policies will not be adopted, enacted or enforced until the social meanings attached to the targeted practices or people are changed.

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<sup>46</sup> Leonard J Kouba and Judith Muasher, “Female Circumcision in Africa: An Overview” (1985) 28:1 *African Studies Rev* 97.

<sup>47</sup> UNHCR, *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, 2009, para 7 at 5: “All forms of female genital mutilation violate a range of human rights of girls and women, including the right to non-discrimination, to protection from physical and mental violence, to the highest attainable standard of health, and, in the most extreme cases, to the right to life”. In this regard, see also UNHCR, *Guidelines on international protection N° 8: Child asylum claims under articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, 2009, para 31 at 13: “All forms of female genital mutilation are considered harmful and violate a range of human rights, as affirmed by international and national jurisprudence and legal doctrine. Many jurisdictions have recognized that female genital mutilation involves the infliction of grave harm amounting to persecution. As the practice disproportionately affects the girl child, it can be considered a child-specific form of persecution.”

<sup>48</sup> For example, UNGA, *Traditional or customary practices affecting the health of women and girls*, A/Res/54/133, 1999; UNGA, *Traditional or customary practices affecting the health of women and girls*, A/Res/56/128, 2001; UNGA, *Intensifying global efforts for the elimination of female genital mutilations*, A/RES/67/146, 2013; UN Commission on the Status of Women, *Ending female genital mutilation: report of the Secretary-General*, E/CN.6/2008/3, 2007.

<sup>49</sup> AU Assembly, *Decision on Galvanizing Political Commitment Towards the Elimination of Female Genital Mutilation in Africa*, Dec.737(XXXII), 2019.

<sup>50</sup> *Burkina Faso Code pénale de 1996*, Loi N° 043/96/ADP, c 3 arts 380–382.

<sup>51</sup> *Women's Amendment Act*, ISSN 0796-0298, 2015.

Nevertheless, social meanings can be changed without the support of local government. For example, opponents of female genital cutting (FGC) have been successful in changing the social meaning of that practice in a rural community in Egypt.<sup>52</sup> Opponents of the practice, mostly NGOs and members of civil society, undertook an education campaign targeting women, religious leaders and unmarried men, which reframed FGC as literacy, family planning and healthcare issue rather than one necessary for the chastity of young women.<sup>53</sup>

The *Maputo Protocol* enhances the ability of the law to recognise and protect human rights and improve the living standard of citizens, especially those of historically marginalised groups on the continent, such as women in this case. In the first instance, the *Maputo Protocol* challenges existing stereotypes about the role of women in society, viewing women as full, effective and equal partners with men in the development of their communities. It places a moral obligation on AU member states to promote equal opportunities for men and women to play meaningful roles in society. While it has become evident that international law can play a significant role in helping African countries to improve governance generally and to recognise and protect human rights in particular, its most important impact is likely to be seen in attempts to resolve conflicts between traditional and customary laws and practices and how they affect vulnerable groups.

### III. The Adaptation and Compliance Discourse

A main aspect of facilitating domestic enforcement of human rights treaties in Africa is the adoption and adaptation process. "States must adopt international legal rules by incorporating them into their domestic legal systems. Additionally, the international legal obligations are often translated into local terms using strategic frames that advantageously situate the obligations within the state's discursive opportunity structure."<sup>54</sup>

Adaptation refers to the fact that continuous exposure to a relatively constant stimulus results in change to meet the different conditions created by that stimulus. With rising expectations, this tendency accelerates greatly. "In some instances, a dramatic change in socioeconomic status or the social system is necessary before a given individual can relate to the social order in a conformant manner."<sup>55</sup>

A key feature of the political opportunity structure for an analysis of the *Maputo Protocol* provisions is the role of influential allies. In seeking to promote the adaptation process as related to the *Maputo Protocol* norms, the state has to identify or create interpretations that will adequately translate these norms into the local context. This is a challenging process, as individuals advancing such interpretations have to 'package' the

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<sup>52</sup> Lan Cao, "Culture Change" (2007) 47:2 *Virginia J Intl L* 405.

<sup>53</sup> *Ibid.*

<sup>54</sup> Angela M Banks, "CEDAW, Compliance, and Custom: Human Rights Enforcements in Sub-Saharan Africa" (2009) 32:3 *Fordham Intl LJ* 783.

<sup>55</sup> Nicholas P Pollis, "Conformity, Compliance and Human Rights" (1981) 3:1 *Hum Rts Q* 98.

international legal obligations and underlying norms in familiar terms that simultaneously confront existing understandings of power relationships. "Developing allies among customary legal officials can be useful in the adaptation process because it is the application of customary legal rules, which often creates the most significant barrier for failing to comply" with the *Maputo Protocol*. Adaptation first requires African states and their citizens to accept the legitimacy of international legal obligations.<sup>56</sup> In this context, not by chance, H. Koh emphasises the role of internalisation. He contends that states engage in a three-step process, culminating with the internalisation of international legal norms, which facilitates compliance with human rights treaties.<sup>57</sup> H. Koh identifies three types of internalisation: legal, political and social. Legal internalisation occurs when a norm is incorporated into a state's domestic legal system, through legislative or executive action, judicial interpretation or some combination of the above. When political elites accept the relevant norms and adopt them as a matter of government policy, political internalisation has taken place. In the case of the *Maputo Protocol*, this step is not always evident, often because of extreme reluctance by elites to change the status quo. Social internalisation exists when a norm gains widespread public legitimacy and general compliance.<sup>58</sup> Given the strong influence that African political elites still have on public opinion, in the case of the *Maputo Protocol*, social internalisation is only likely to follow political internalisation.

Yet, in an era of globalisation, universal cultural models, constructed and propagated through global cultural and associational processes, can persuade African states to ratify the *Maputo Protocol*. One such process that has recently been highlighted in legal scholarship is that of 'acculturation'. Acculturation refers to the process by which actors adopt the beliefs and behavioural patterns of the surrounding culture. Changes in behaviour are induced through social and cognitive pressure to assimilate.<sup>59</sup> It is also clear that the existence of legal institutions and social movements, which could either enhance or hinder compliance with human rights provisions, is influenced by the dominant culture or by a rupture with the dominant culture in a given African country. In both cases, it is either compliance or a clash with the dominant culture that influences the attitude of the legal institutions and/or the social movements. Referring back to the example of Cameroon mentioned earlier, the silence of Cameroonian authorities on LGBT rights in the 2020 report submitted to the ACHPR can almost certainly be attributed to the dominant culture in the country, where LGBT rights are deemed unworthy of protection and are indeed, criminalised. The criminalisation of consensual same-sex conduct under section 347(1) of the *Penal Code*, which punishes "sexual relations with a person of the same sex" can warrant up to five years in prison.<sup>60</sup>

Once adaptation to international norms has been achieved, the following step is to comply with the obligations of the *Maputo Protocol*. This is not always as a smooth

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<sup>56</sup> M Banks, *supra* note 54 at 796–98.

<sup>57</sup> Harold Hongju Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process" (1996) 75:1 *Nebraska L Rev* at 183–84.

<sup>58</sup> Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106:8 *Yale LJ* at 2656–57.

<sup>59</sup> Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law" (2004) 54:3 *Duke L Rev* 626.

<sup>60</sup> *Law N° 2016/007 of 12 July 2016 Relating to the Penal Code*, CM014, 2016, s 347-1.

process, however. As L. Henkin notes, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>61</sup> According to R.B. Bilder, states comply with international law because of the mutual gains from cooperation that ensure self-enforcing compliance in the realm of international trade law and the laws of war.<sup>62</sup> However, such a mechanism does not sufficiently explain compliance with human rights law. Just because one state does not comply with the stipulations of a human rights treaty should not and indeed, does not, encourage another state to abandon its commitment to human rights in order to punish the dissenting state. “There are no mutual gains to be shared or lost with human rights treaties.”<sup>63</sup>

Bodies such as the Special Rapporteur on the Rights of Women in Africa (Special Rapporteur),<sup>64</sup> which usually make three types of recommendations (structural, legal and programmatic), can be helpful in the process of compliance by African states.

To facilitate compliance with the *Maputo Protocol*, the Special Rapporteur supports the development of domestic enforcement mechanisms. A key feature for effective domestic enforcement is creating an enabling environment for law reform and enforcement. Recognising the role of norms and socialisation in this process of adaptation, the Special Rapporteur recommends that state parties implement educational measures and awareness-raising programmes to increase knowledge about the obligations of the *Maputo Protocol*. To support this aspect of domestic enforcement, the Special Rapporteur makes programmatic recommendations, which encourage states to act appropriately with the aim of respecting international norms and to adopt or implement programmes and/or policies that support particular obligations contained in the *Protocol*.

The Special Rapporteur, however, forms part of the ACHPR that is responsible for a wide range of human rights contained in the *Banjul Charter*, in addition to the *Maputo Protocol*. As such, the missions usually undertaken by the ACHPR need to be balanced and need to cover all the human rights that the Commission is accountable for. Even when the Special Rapporteur is part of a mission, she cannot solely focus on investigating the implementation of the *Maputo Protocol*, as it is essential to consider other rights in the ACHPR.<sup>65</sup> The formation of an African institution such as the CoEDAW, which is solely dedicated to the implementation of the *Maputo Protocol*,

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<sup>61</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed (New York: Columbia University Press, 1979) at 47.

<sup>62</sup> Richard B Bilder, “International Third-Party Dispute Settlement” (1989) 17:3 *Denver J Intl L & Policy* 471.

<sup>63</sup> Kim, *supra* note 1 at 343.

<sup>64</sup> The ACHPR appointed the Special Rapporteur on the Rights of Women in Africa through the resolution ACHPR/Res.38(XXV)99 retroactively as from October 1998. In detail, para 2 of the Rapporteur’s mandate is “[t]o assist African governments in the development and implementation of their policies of promotion and protection of the rights of the women in Africa, particularly in line with the domestication of the newly entered into force Protocol to the African Charter on Human and Peoples’ Rights, relative to the Rights of Women in Africa and the general harmonization of national legislation to the rights guaranteed in the Protocol.” The mandate was renewed four times with the adoption of *Resolution 63* at the 34<sup>th</sup> Ordinary Session, *Resolution 78* at the 38<sup>th</sup> Ordinary Session, *Resolution 112* at the 42<sup>nd</sup> Ordinary Session and *Resolution 154* at the 46<sup>th</sup> Ordinary Session.

<sup>65</sup> Ashwanee Budoo, “Analysing the Monitoring Mechanisms of the African Women’s Protocol at the Level of the African Union” (2018) 18:1 *African Human Rights LJ* 65.

could possibly help in assessing the situation of the respect of the human rights contained in the *Protocol*. Such a new institution can be created either by the adoption of a new protocol, under article 66<sup>66</sup> of the *Banjul Charter* which establishes the proposed institution, or by amending the *Maputo Protocol* accordingly. The *African Court Protocol*,<sup>67</sup> for example, has been adopted under the same article of the *Banjul Charter*.

#### IV. Complying with the *Maputo Protocol*: Initiatives of African Institutions

An important aspect of the commitment that states express in complying with a human rights treaty concerns the mechanisms guaranteeing the respect of its provisions. In Africa, treaty-monitoring bodies generally adopt a broader conceptualisation of compliance, which recognises state efforts aimed at changing the social meanings attached to particular practices and groups.<sup>68</sup>

According to article 26(1) of the *Maputo Protocol*, states parties are requested to allow inspection of their observance of the *Protocol* through the regular submission of state reports to be examined by the ACHPR.<sup>69</sup> As state parties accepted the *Maputo Protocol* as an addition to the *Banjul Charter*, they reported on the measures adopted to implement the rights of the *Protocol* concurrently with their periodic reports under article 62 of the *Banjul Charter*.<sup>70</sup> The provision contained in the *Maputo Protocol* is a reminder for states to submit periodical reports, but states parties to the two instruments may submit only one report dealing separately with both instruments.

During the examination of state reports under the *Banjul Charter*, the ACHPR typically leaves questions about women's rights to the Special Rapporteur, who also makes inquiries about women's rights under the *Maputo Protocol*.<sup>71</sup> Article 26(1) of the *Maputo Protocol* clearly shows that state reporting constitutes a means of monitoring the implementation of the *Protocol*.<sup>72</sup>

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<sup>66</sup> Art 66 of the *Banjul Charter* stipulates: "Special protocols or agreements may, if necessary, supplement the provisions of the present Charter".

<sup>67</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 10 June 1998 (entered into force 25 January 2004).

<sup>68</sup> Banks, *supra* note 54 at 786.

<sup>69</sup> Art 26(1) of the *Maputo Protocol* stipulates, "(1) States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realization of the rights herein recognized."

<sup>70</sup> Art 62 of the *Banjul Charter* stipulates, "Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter."

<sup>71</sup> Viljoen, *supra* note 37 at 36.

<sup>72</sup> M Chirwa, *supra* note 33 at 89. Regarding the cumulative report, at *ibid* the author points out that: "One may also assume that separate reports are not intended in respect of the African Women's Protocol but rather that it will be a combined report with that dealing with the provisions of the African Charter. If this assumption is correct, a substantial revision of the reporting guidelines under the African Charter is



However, and in spite of the double provisions, both non-reporting and the late submission of reports remains a significant problem in Africa,<sup>73</sup> particularly given that article 26 of the *Maputo Protocol* does not specify which institutions should review the reports.<sup>74</sup> Nevertheless, the 24th Ordinary Session of the AU Assembly entrusted the ACHPR with this task as well as the responsibility of preparing guidelines regarding the content and form of the periodic reports.<sup>75</sup>

The *Maputo Protocol* does not add any supplementary independent mechanism to its enforcement, preferring to rely on the existing mechanisms under the *Banjul Charter*.<sup>76</sup> This choice reflects a realistic approach and may have been dictated by several factors such as the avoiding the proliferation of too many African institutions.<sup>77</sup> The only reference made by the *Protocol* to an additional mechanism for its enforcement is mentioned in article 25, requesting states to adopt ‘appropriate remedies’ for any violation of the freedoms and rights of women recognised in the *Protocol*.<sup>78</sup>

Apart from the explicit provision requesting states to submit reports on measures adopted to give effect to *Maputo Protocol*, this instrument does not extend the scope of the ACHPR’s protective mandate. Article 27 of the *Protocol* provides that the African Court on Human and Peoples’ Rights (AfCHPR) will “[b]e seized with matters of interpretation arising from the application or implementation of this Protocol.” The expression ‘matters of interpretation’ is ambiguous, however, implying that this article grants the power to receive communications on violations of the *Maputo Protocol* to the AfCHPR, in compliance with the *Protocol to the African Charter on Human and Peoples’ Rights Establishing the African Court on Human and Peoples’ Rights*.<sup>79</sup> However, while international courts may help adjudicate disputes at times, the fact remains that no state is forced to appear before an international court. States that commit to the compulsory

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called for to ensure that states report more substantively on the implementation of the provisions of the Protocol.”

<sup>73</sup> Viljoen, *supra* note 37 at 35.

<sup>74</sup> Ntombizozuko Dyani, “Protocol on the Rights of Women in Africa: Protection of Women from Sexual Violence during Armed Conflict” (2006) 6:1 African Human Rights LJ 183.

<sup>75</sup> AU, Assembly of Heads of State and Government, *Resolution on the African Commission on Human and Peoples’ Rights*, AHG/Res.176 (XXIV), 1988, para 5: “[The Assembly] endorses the recommendations of the Commission relating to: [...] c) periodic reports.” During its third ordinary session (18 to 28 April 1988), the ACHPR adopted the recommendation AHCP/Recom.3(III)88: *Recommendation on Periodic Reports* (1988), which “[r]ecommended that the Assembly of Heads of State and Government: 1) Mandate the General Secretariat of the OAU to receive the said reports and communicate them to the Commission without delay; 2) Specifically entrust it with the task of examining the periodic reports submitted by the states parties pursuant to article 62 and other relevant provisions of the African Charter on Human and Peoples’ Rights; 3) Authorize it to give the States Parties general guidelines on the form and the contents of the said periodic reports.”

<sup>76</sup> Murray, *supra* note 11 at 269–70.

<sup>77</sup> Viljoen, *supra* note 37 at 39.

<sup>78</sup> In full, art 25 of the *Maputo Protocol* stipulates, “States Parties shall undertake to: provide for appropriate remedies to any woman whose rights or freedoms, as herein recognized, have been violated; ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.”

<sup>79</sup> M Chirwa, *supra* note 33 at 90. See *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*, 10 June 1998 (entered into force 25 January 2004).

jurisdiction of international tribunals usually do so with the strategic reservation that they retain the right to withdraw.<sup>80</sup>

Yet in the case of sexual violence against women during conflict, for example, the expression ‘matters of interpretation’ would mean that the AfCHPR would be legally empowered to condemn states for violations of international humanitarian law, as provided in the 1949 *Geneva Convention*, the two additional 1977 *Protocols* as well as the 1948 *Genocide Convention*.<sup>81</sup>

The AfCHPR has recently intervened in the matter of the violation of the minimum age of marriage for girls (article 6(b) of the *Maputo Protocol*), the violation of the right to consent to marriage (article 6(a) of the *Maputo Protocol*), and the violation of the obligation to eliminate traditional practices and attitudes that undermine the rights of women (article 2(2) of the *Maputo Protocol*) in the *APDF & IHRDA v Republic of Mali* case.<sup>82</sup> In the judgement delivered in May 2018, the AfCHPR holds that it lies with the Republic of Mali to guarantee compliance with the minimum age of marriage as well as the right to non-discrimination. By failing to do so, the respondent state violated article 6 (b) of the *Maputo Protocol*.<sup>83</sup> Additionally, the AfCHPR notes that, in the procedure for the celebration of marriage, the law called into question (the 2011 *Family Code*)<sup>84</sup> sanctions, in articles 283, 287 and 300, the application of religious and customary laws on the consent to marriage and permits different marriage regimes, depending on whether these are celebrated by a civil officer or a religious minister. These practices, however, are not consistent with the *Maputo Protocol*.<sup>85</sup> Finally, having established the violation of the provisions governing the minimum age for marriage and the right to consent to marriage, the AfCHPR notes that, by adopting the 2011 *Family Code* and upholding discriminatory practices, which undermine the rights of women, Mali has violated its international commitments.<sup>86</sup> Therefore, the AfCHPR not only holds that Mali must amend its legislation to bring it in line with the *Maputo Protocol*<sup>87</sup> but also that, in accordance with article 25 of the *Banjul Charter*, Mali must comply with the duty “[t]o promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as the corresponding obligations and duties are understood.”<sup>88</sup>

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<sup>80</sup> Michael Tomz, *Reputation and the Effect of International Law on Preferences and Beliefs* (Research Paper, Stanford University, 2008) at 4, online (pdf): <web.stanford.edu/~tomz/working/Tomz-IntlLaw-2008-02-11a.pdf>.

<sup>81</sup> Anne Pieter van der Mei, “The new African Court on Human and Peoples’ Rights: Towards an Effective Human Rights Protection Mechanism for Africa?” (2005) 18:1 *Leiden J Intl L* at 119.

<sup>82</sup> *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* (11 May 2018), N° 046/2016, AfCHPR.

<sup>83</sup> *Ibid* at para 78.

<sup>84</sup> Assemblée Nationale, *Loi N°2011–087 portant Code des Personnes et de la Famille* (30 Décembre 2011).

<sup>85</sup> *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF)*, *supra* note 82 at para 95.

<sup>86</sup> *Ibid* at para 124.

<sup>87</sup> *Ibid* at para 130.

<sup>88</sup> *Ibid* at para 131.

As noted by A. Budoo, however, although the AfCHPR could represent an effective means of holding state parties responsible for women's rights violations, its accessibility criteria can be challenging.<sup>89</sup> This can offer states a way out of complying with the provisions of the *Maputo Protocol*.

As a concluding remark in the analysis of how African institutions can encourage African states to adopt conventions and comply with their norms, article 46 of the *Banjul Charter* stipulates that the ACHPR can also undertake "any appropriate method of investigation"<sup>90</sup> regarding the rights enshrined in the *Maputo Protocol* since it is also competent to investigate complaints about the violation of rights by a state party to the *Maputo Protocol*. An example of such an investigation is the fact-finding mission to the Republic of Sudan in the Darfur region (8-18 July 2004) which detected a high number of women raped and abducted in the area because of the Janjaweed militia attacks.<sup>91</sup> Gross violations of the rights of women, rape and sexual violence have been committed during the Darfur conflict, even though the Sudanese government has denied this.<sup>92</sup> However, in other circumstances, the ACHPR delegates member states to conduct independent investigations into sexual and gender-based violence crimes during conflicts.<sup>93</sup> In one circumstance, however, the ACHPR—without any additional investigation—called on member states to end acts of intimidation against women and defenders of human rights because of their cooperation with various international human rights bodies.<sup>94</sup>

The ACHPR also promotes the adoption of General Comments, such as *General Comment No. 2 on article 14(1)(a), (b), (c) and (f) and article 14(2)(a) and (c)* (Health and Reproductive Rights), providing interpretive guidance on the obligations of state parties towards promoting the domestication and implementation of article 14 of the *Maputo Protocol*. In the comment, the ACHPR provides for both general and specific obligations for states, specifying that the obligation to fulfil rights requires that state parties adopt laws, policies and programmes guaranteeing the fulfilment of women's sexual and reproductive rights, including the allocation of sufficient and available financial resources for the full realisation of those rights.<sup>95</sup> In addition, the ACHPR also promotes missions in African countries to advance human rights over the continent, sometimes with a particular focus on women's rights. The most recent of these took place in Gambia in April 2017. The ACHPR delegates made several

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<sup>89</sup> Budoo, *supra* note 65 at 63.

<sup>90</sup> Art 46 of the *Banjul Charter* stipulates, "The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it."

<sup>91</sup> *Report of the African Commission on Human and Peoples' Rights' Fact-Finding Mission to the Republic of Sudan in the Darfur Region*, EX.CL/364 (XI) Annex III, July 2004.

<sup>92</sup> *Ibid* at para 115.

<sup>93</sup> ACHPR, *Resolution on the Situation of Women and Children in Armed Conflict*, Res.283(LV) (28 April-12 May 2014) para 1 (c).

<sup>94</sup> ACHPR, *Resolution on the Need to Adopt Legal Measures for the Protection of Women Human Rights Defenders in Africa*, Res. 409 (LXIII) (13 November 2018) para 4.

<sup>95</sup> ACHPR, *General Comment N° 2 on article 14(1)(a), (b), (c) and (f) and article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (28 April-12 May 2014) at para 45.

suggestions to the Gambian government, notably to enact a law stipulating a quota of at least 30 % of women in all decision-making positions, to implement laws against child marriage and FGM and to increase the economic activities of women.<sup>96</sup>

## V. Complying with the *Maputo Protocol*: Initiatives at the Domestic Level

Over the last ten years, states in Africa have undertaken important legal reforms in the area of gender equality yet gender discrimination appears to persist in the region. African countries are often considered to be among the worst in terms of compliance records in the area of gender equality and human rights.<sup>97</sup>

Although there is limited consensus as to why states adhere—or fail to adhere—to their international legal obligations, there is widespread agreement that domestic enforcement is one of the most effective means of implementing treaty obligations.<sup>98</sup> Treaties operate as binding law within ratifying states in one of two ways: either the treaty can be automatically incorporated into domestic law upon ratification or legislation can be introduced, giving legal effect to the treaty obligations.<sup>99</sup>

Scholars investigating domestic sources of compliance have highlighted the importance of the domestication of human rights instruments. For example, B. Simmons argues that signing a human rights treaty guarantees that the public opinion changes its perception of the norms contained in the treaty.<sup>100</sup> At that point, large segments of the local population expect government officials to respect what they have signed.<sup>101</sup> This shift in attitude of the population regarding human rights norms encourages civil society to advocate for compliance and courts to ensure compliance with the codified norm.<sup>102</sup> Other scholars such as A.S. Chilton explore the possibility of an electorate-driven domestic compliance mechanism whereby politicians pay an electoral cost for defaulting post-ratification; this is because treaties reshape public attitudes regarding international human rights norms.<sup>103</sup> In any event, although some studies claim that weak legal commitments are increasing their influence on various

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<sup>96</sup> ACHPR, *Report of the Human Rights Promotion Mission to the Republic of the Gambia* (19-24 April 2017) at 57.

<sup>97</sup> M Banks, *supra* note 54 at 804.

<sup>98</sup> Oona A Hathaway, “Between Power and Principle: An Integrated Theory of International Law” (2005) 72:2 U Chicago L Rev 497.

<sup>99</sup> Alan Brudner, “The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework” (1985) 35:1 U Toronto LJ 221. See in general, Joseph G Starke, “Monism and Dualism in the Theory of International Law” (1936) 17 British YB Intl L 66.

<sup>100</sup> Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009) at 80–81.

<sup>101</sup> *Ibid* at 135.

<sup>102</sup> *Ibid* at 129–30.

<sup>103</sup> Adam S Chilton, “The Influence of International Human Rights Agreements on Public Opinion: An Experimental Study” (2014) 15:1 Chicago J Intl L 118.

institutions, indeed even domestic institutions,<sup>104</sup> a broader consensus recognises the limitations of non-binding legal commitments, stressing the need for laws, which entail a high level of obligation, such as the *Maputo Protocol*.<sup>105</sup>

Human rights guarantees contained in the *Maputo Protocol* are extensive. However, there is still a wide gap between commitments pursuant to the ratification of the texts and the reality of women's lives. Harmonisation with domestic law in the countries, which have ratified the *Protocol*, is yet to be reached. This is largely due to the lack of real political will and the persistence of several other obstacles. Gender policies have, however, been developed in almost all countries and have resulted in the adoption of specific laws and reforms in areas such as education, family law, health and the judiciary, taking into consideration the gender dimension.

Recent constitutions, such as that adopted in Kenya in 2010 and in Zimbabwe in 2013, include a gender-sensitive dimension that improves women's rights.<sup>106</sup> Another example of a SADC country is Namibia; the *Maputo Protocol*, in accordance with article 144 of its *Constitution*, is an integral part of the Namibian domestic laws. This means that the rights and freedoms provided in the *Protocol* are enforceable by the Namibian judiciary and quasi-judicial bodies.<sup>107</sup>

Moreover, many AU member states have established special national bodies to promote and protect the rights of women. Along with human rights commissions, which are traditionally regarded as national mechanisms, there are also gender equality or equal opportunities commissions dedicated to the rights of women. These have been established in countries such as Kenya, South Africa, Uganda and Zimbabwe.<sup>108</sup> In 2008, Burkina Faso established a national commission to implement its commitment to women's rights. The mandate of the commission includes promoting the ratification of existing and pending legal instruments that enhance the socioeconomic, political and

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<sup>104</sup> In this regard, generally, Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (New York: Oxford University Press, 2000). See, for example, from the editor ("Introduction") at 18: "In the end, the international legal system appears to be a complex, dynamic web of interrelationships between hard and soft law, national and international regulations, and various institutions that seek to promote the rule of law. In this system, soft law is playing increasingly important and varied roles."

<sup>105</sup> Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press, 2008) 211–13.

<sup>106</sup> *Constitution of Kenya 2010*, supra 18 s 59 is dedicated to the establishment of the Kenya National Human Rights and Equality Commission which seeks to "promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development," The *Constitution of Zimbabwe Amendment (N° 20) Act* (22 May 2013) not only establishes a Gender Commission (Part IV, s 245–247), but 'gender equality' is considered as one of the founding principles and values of the nation (s 3). Moreover, s 17 confirms that 'gender balance' should be promoted by states in society.

<sup>107</sup> *Constitution of the Republic of Namibia* (21 March 1990) as amended by the *First Amendment* (Act 34, 24 December 1998), *Second Amendment* (Act 7, 7 May 2010) and *Third Amendment* (Act 8, 13 October 2014). Art 144: "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."

<sup>108</sup> For example, a Gender Equality Commission has been established in Kenya while Uganda has set up an Equal Opportunities Commission. In South Africa, this is called the Commission of Gender Equality while in Zimbabwe, it is known as the Gender Commission.

cultural advancement of women in the country.<sup>109</sup> As early as 1997, Burkina Faso had also set up a Ministry for the Promotion of Women.<sup>110</sup>

Many other countries have implemented legislative solutions to improve the rights of women, notably Benin, which adopted a *Family Code* in 2004 promoting gender equality and prohibiting polygamy<sup>111</sup> as well as introducing a *Sexual Harassment Act* in 2006.<sup>112</sup> Mozambique adopted a new *Penal Code* in 2014, which afforded rapists the chance to marry the victim to avoid prosecution, although this created an outcry amongst civil society organisations. The government has since reviewed this section and removed the provision. The *Penal Code* now includes marital rape as an offence.<sup>113</sup> Addressing another issue afflicting women in Africa, Angola adopted a *Domestic Violence Act* in 2011, which considers domestic violence as a public crime.<sup>114</sup> Lastly, Malawi has managed to comprehensively address all the aspects mentioned above. The country introduced the *Gender Equality Act* in 2013<sup>115</sup> and the *Marriage, Divorce and Family Relations Act* in 2015 in an effort to eradicate discrimination against women. The latter *Act* sets the legal age of marriage at 18.<sup>116</sup> Additionally, Malawi issued a ground breaking judgement in 2015, ensuring that women are protected from discrimination. In a case where sex workers were forced to have an HIV test, the High Court stated that compulsory HIV testing was unconstitutional. This case is important for several reasons. Firstly, it shows that it is possible for women to hold the government accountable when their rights have been violated. In addition, this judgment set a significant precedent in Malawi, recognising the right not to be subjected to mandatory HIV testing by the state.<sup>117</sup> However, while Malawi claims to have progressive laws and policies, there remains a wide implementation gap, with a persistent lack of awareness of women's rights among large sectors of the population.<sup>118</sup>

<sup>109</sup> *Status of Implementation, supra* note 16 at 4.

<sup>110</sup> *Rapport périodique du Burkina Faso à la Commission Africaine des Droits de l'Homme et des Peuples Relatif à la Charte Africaine des Droits de l'Homme et des Peuples Couvrant la Période 2003-2009* (Octobre 2010) at 42–43.

<sup>111</sup> *Loi N° 2002-07 du 14 juin 2004 portant Code des personnes et de la famille*, BEN-2004-L-75298.

<sup>112</sup> *Loi N° 2006-19 du 5 septembre 2006 portant répression du harcèlement sexuel et protection des victimes en République du Bénin* (5 septembre 2006).

<sup>113</sup> *Lei N° 35/2014* (31 December 2014), arts 199 and 224.

<sup>114</sup> *Lei N° 25/11 Contra la Violência Doméstica* (14 July 2011), art 6 (“Princípio da responsabilidade criminal”) citing art 3, that mentions the following types of violence: a) sexual, b) patrimonial, c) psychological, d) verbal, e) physical, and f) family abandonment.

<sup>115</sup> *Gender Equality Act*, Act N° 13 of 2013 (9 April 2013), s 2—arts 4–7—is explicitly dedicated to sex discrimination.

<sup>116</sup> *Marriage, Divorce and Family Relations Act*, Act N° 4 of 2015 (10 April 2015), s 14: “[T]wo persons of the opposite sex who are both not below the age of eighteen years, and are of sound mind, may enter into marriage with each other.”

<sup>117</sup> *State v Mwanza Police, Mwanza District Hospital, Ministries of Justice, Internal Affairs, Health, Attorney-General and Ex parte: HB, JM (o.b.o 9 others)*, Case N° 10 of 2011 (oral judgment 20 May 2015). In detail, the High Court of Malawi held that mandatory HIV testing violated a woman's constitutional rights to privacy, equality, dignity and freedom from cruel, inhuman and degrading treatment (s 19(1), 19(3), 20 and 21 of the *Malawian Constitution*. See *Constitution of the Republic of Malawi 1994*, Act N° 11 of 2010 (18 May 1994).

<sup>118</sup> *Periodic Report on the African Charter on Human and People's Rights and the Maputo Protocol*, May 2015 to March 2019, para 142.

Through the adoption of the *Maputo Protocol*, Africa seems to be witnessing the implementation of innovative laws, policies and other institutional mechanisms at a national level to advance women's human rights. Against this backdrop, customary legal officials remain key social actors in most communities throughout Africa. Excluding these individuals from the adaptation process would mean missing an important opportunity to successfully frame the *Maputo Protocol* obligations and norms in a way that would facilitate domestic enforcement.<sup>119</sup> The role of customary legal officials, for example, plays an important role in countries such as Sierra Leone, where the *2009 Registration of Customary Marriage and Divorce Act* protects people entering into customary marriage from forced marriage, in line with traditional customs and practices.<sup>120</sup>

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Although the *Maputo Protocol* has been in force since 2005, R. Murray is skeptical as to whether it can truly help to integrate women's rights into the 1981 *Banjul Charter* and AU structures.<sup>121</sup> C. Ocran concurs, expressing doubts that states parties will be able to incorporate the terms of the *Protocol* into their national legal systems when the provisions are not directly applicable domestically.<sup>122</sup> More generally, there is a significant concern as to how the *Maputo Protocol* can be implemented<sup>123</sup> given that, at times, several rights in the *Protocol* clash with established cultural and national traditions.<sup>124</sup> The *Protocol* recognises that equal opportunities between men and women in Africa are unfeasible unless certain cultural and traditional attitudes and stereotypes are corrected.<sup>125</sup> On the other hand, the continued violations of the *Maputo Protocol* can be attributed to financial constraints, which fail to provide adequate support for existing mechanisms.<sup>126</sup>

The majority of the provisions contained in the *Maputo Protocol* is not attainable now given the present socioeconomic conditions in many countries of the region.<sup>127</sup> Furthermore, the *Maputo Protocol* fails to recognise several rights, deemed particularly relevant for refugees in Africa, such as the right to a fair trial and the rights

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<sup>119</sup> Banks, *supra* note 54 at 845.

<sup>120</sup> *The Registration of Customary Marriage and Divorce Act, 2009*, Act N° 1, SLE-2009-L-87725 (23 January 2009). In particular, part II, s 2.

<sup>121</sup> Murray, *supra* note 11 at 272.

<sup>122</sup> Ocran, *supra* note 26 at 152.

<sup>123</sup> Davis, *supra* note 32 at 963.

<sup>124</sup> *Ibid* at 977. See also Kaniye S A Ebeku, "A new Dawn for African women? Prospects of Africa's Protocol on Women's Rights" (2004) 16 Sri Lanka J Intl L 130–31, where the author gave examples of practices still prevalent in several African countries, clashing with the provisions of the *Maputo Protocol*.

<sup>125</sup> M Chirwa, *supra* note 33 at 89. At 95, the author points out that "[t]he African Women's Protocol deserves merit for tackling explicitly some cultural and traditional issues, that have long raised human rights concerns including domestic violence, female genital mutilation, and child marriages."

<sup>126</sup> Budoo, *supra* note 65 at 74.

<sup>127</sup> Davis, *supra* note 32 at 952–53.

of convicted and detained women.<sup>128</sup> Nonetheless, the *Protocol* is described as the most progressive instrument on women's rights and human rights in the world.<sup>129</sup>

Article 31 of the *Maputo Protocol* is clear in privileging the conditions of women that could have been assured more favourably by other binding legal instruments.<sup>130</sup> From a theoretical perspective, the protection of women's rights is once again reaffirmed as the main thrust of the *Maputo Protocol*. Because it is based on the presumption that women's rights are of paramount importance, the prominence of the *Maputo Protocol* as a legal instrument may not be given effective legal protection unless women participate directly in the development, interpretation and enforcement of the law.<sup>131</sup> Until these aims have been met, the impact of the *Maputo Protocol* in protecting women's rights remains limited, falling short of the 'new dawn' for women on the continent.<sup>132</sup>

In order to promote the implementation of the *Maputo Protocol* and to make the ratifications of so many African countries a concrete reality, the mechanism of the Special Rapporteur should be reviewed. To achieve this, the AU needs to increase support for the Special Rapporteur to ensure that this role has the required tools to oversee the implementation of the *Maputo Protocol*.

In addition, state parties are encouraged to collaborate with civil society organisations, such as women's organisations and human rights organisations, in the adaptation process. Currently, there is no specific recommendation at any legal level requiring state parties to collaborate with those responsible for administering the customary legal system.<sup>133</sup>

As a general concluding remark, when human rights norms are emerging, as is the case with those contained in the *Maputo Protocol*, strong international legal commitment generates greater public support for compliance compared to weak commitment, although some of the content of the *Maputo Protocol* has also been the subject of criticism. Conversely, when a human rights norm is domesticated, stronger state commitment does not always generate greater public support compared to a weaker commitment.<sup>134</sup>

Domestic enforcement is paramount in this regard. A crucial aspect of facilitating domestic enforcement is the adoption and adaptation process.<sup>135</sup> This involves creating an enabling environment for law reform and enforcement. Given the important role of norms and socialisation in this process of adaptation, it is

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<sup>128</sup> M Chirwa, *supra* note 33 at 96.

<sup>129</sup> UN and AU Commission, *Women's Rights in Africa* (2016) at 52.

<sup>130</sup> Art 31 stipulates that "[n]one of the provisions of the present Protocol shall affect more favourable provisions for the realization of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties."

<sup>131</sup> M Chirwa, *supra* note 33 at 75.

<sup>132</sup> Ebeku, *supra* note 124 at 137.

<sup>133</sup> Banks, *supra* note 54 at 837.

<sup>134</sup> Kim, *supra* note 1 at 341.

<sup>135</sup> Banks, *supra* note 54 at 844.



recommended that state parties implement educational measures and programmes to raise awareness of the *Maputo Protocol*'s obligations. To support this aspect of domestic enforcement, programmatic recommendations by existing institutions, above all by the ACHPR, are sought. These recommendations should encourage states to 'take appropriate measures' and to adopt or implement programmes or policies which support the provisions of the *Maputo Protocol*.

As F. Viljoen affirms: "It is women's fundamental subordination embedded in socio-economic and cultural structures that underlies the denial of their rights, not the dearth of legal guarantees reaffirming their rights."<sup>136</sup> In summary, the *Maputo Protocol* should certainly be commended for its role in furthering the protection of women's rights in Africa; however, the full potential of this legal instrument has not yet been reached.<sup>137</sup> Despite their ostensible commitment to the *Maputo Protocol*, African states continue to be hamstrung by strong cultural legacies, which view women as inferior to men in many spheres of life.

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<sup>136</sup> Viljoen, *supra* note 37 at 46.

<sup>137</sup> Banda, *supra* note 10 at 84.