

**The impact of the  
African Charter and the  
Maputo Protocol in selected  
African states**

Editor

**Victor Oluwasina Ayeni**

LLM HRDA (Pretoria), LLB (Akungba), BL (Abuja)  
Doctoral Candidate, Centre for Human Rights, University of Pretoria

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Seventeen countries covered in this book



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## PREFACE

This book assesses the impact and effectiveness of the African Charter on Human and Peoples' Rights (African Charter) and the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) in 17 African countries, namely Burkina Faso, Cameroon, Côte d'Ivoire, Ethiopia, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda and Zimbabwe.

Apart from the introductory and concluding chapters, each chapter of the book is devoted to the impact of the African Charter and the Maputo Protocol in a particular state. The chapters are structured according to the 15 research questions included in the study questionnaire that was provided to researchers. Typically, each chapter begins with an introduction which provides a background and overview of the general context of human rights and the situation of women in the study country. The concluding part of each country chapter highlights the factors which have impeded or enhanced the impact of the African Charter and Maputo Protocol in that country.

The Centre for Human Rights intends to use this research as the basis for a continuously updated database on the impact of the African Charter and Maputo Protocol. The 'first edition' of this book, published under the title 'The impact of the African Charter and Women's Protocol in selected African states', appeared in 2012 and covered the following 19 countries: Benin, Burkina Faso, Cameroon, Chad, Congo, Côte d'Ivoire, Eritrea, Gambia, Kenya, Lesotho, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa and Zimbabwe. This edition is essentially an extension and a reworking of the first edition. Some new country chapters - Ethiopia, Ghana, Malawi, Swaziland, Tanzania and Uganda - have been introduced, while some country chapters - Benin, Chad, Congo, Eritrea, Mozambique, Niger and Senegal - have been dropped due to our inability to find suitable researchers from those countries within the period the research was carried out.

We therefore invite anyone who has any information to supplement, update or correct the information in this publication to contact us at [chr@up.ac.za](mailto:chr@up.ac.za) or [hrda.alumni@up.ac.za](mailto:hrda.alumni@up.ac.za). Information about the impact of the African Charter and Maputo Protocol in countries not covered in this publication is also welcome.

The researchers for both editions are mostly alumni of the Master's programme in Human Rights and Democratisation in Africa, presented by the Centre for Human Rights, Faculty of Law, University of Pretoria.

The first edition of this publication was based on research conducted as part of 'The State of the Union' initiative, supported by OXFAM whose financial contribution is gratefully acknowledged. The support of the Norwegian government in developing and publishing this edition of the publication is also gratefully acknowledged.



## ACRONYMS

ACDHRS	African Centre for Democracy and Human Rights Studies
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Reports
AIDS	Acquired Immune Deficiency Syndrome
APRM	African Peer Review Mechanism
AU	African Union
CALS	Centre for Applied Legal Studies
CANGO	Co-ordinating Assembly of Non-Governmental Organisations
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Centre for Human Rights
CHRAGG	Commission for Human Rights and Good Governance
CHRPA	Commission on Human Rights and Public Administration
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation

CSVR	Centre for the Study of Violence and Reconciliation
ECCJ	ECOWAS Community Court of Justice
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
EHRC	Ethiopian Human Rights Commission
ESCR	Economic, Social and Cultural Rights
EVD	Ebola Virus Disease
FGM	Female Genital Mutilation
FIDA	International Federation of Women Lawyers
FLAG	Female Lawyers Association of Gambia
HIV	Human Immunodeficiency Virus
HRCSL	Human Rights Commission of Sierra Leone
HRDA	Human Rights and Democratisation in Africa
ICCPR	International Covenant on Civil and Political Rights
IHRDA	Institute for Human Rights and Development in Africa
ILO	International Labour Organisation
KNCHR	Kenya National Commission on Human Rights
LLM	<i>Legum Magister</i> (Master of Laws)
LRC	Law Reform Commission
LRC	Legal Resources Centre
NCHRF	National Commission on Human Rights and Freedoms
NEPAD	New Partnership for Africa's Development
NGO	Non Governmental Organisation
NHRC	National Human Rights Commission
NHRI	National Human Rights Institutions
NIA	National Intelligence Agency

NRM	National Resistance Movement
OHCHR	United Nations Office of the High Commissioner for Human Rights
OSIWA	Open Society Initiative for West Africa
SAHRC	South African Human Rights Commission
SALC	Southern Africa Litigation Centre
SERAC	Social and Economic Rights Action Centre
SERAP	Socio-Economic Right Accountability Project
SRRWA	Special Rapporteur on the Rights of Women in Africa
UDHR	Universal Declaration of Human Rights
UHRC	Uganda Human Rights Commission
UN	United Nations
UPR	Universal Periodic Review
US	United States
ZLHR	Zimbabwe Lawyers for Human Rights
ZSC	Zimbabwe Supreme Court
ZWLA	Zimbabwe Women Lawyers Association



# INTRODUCTION AND PRELIMINARY OVERVIEW OF FINDINGS

*Victor Oluwasina Ayeni\**

## 1 Background

One of the most explicit and accurate predictors of the effectiveness of an international human rights treaty regime is the extent to which the treaty has influenced policy making, legislative actions, court decisions and civil society activities at the domestic level.<sup>1</sup> Easy as it may sound, establishing a causal link between a treaty regime and an observable behaviour of state actors is a very difficult yet important task. As Cassel has rightly pointed out, ‘the institutions of human rights deserve our energetic support only to the extent that they contribute meaningfully to protection of rights, or at least promise eventually to do so’.<sup>2</sup> In Africa where the scourge of poverty, sectarian crisis, political instability, corruption and poor governance

have turned many countries into theatres of war, the importance of periodic review of the domestic impact of human rights treaties cannot be overemphasised. This book singles out two of the main regional human rights treaties in Africa – the African Charter on Human and Peoples' Rights (African Charter or Charter) and the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol or Protocol) – and assesses the extent to which 17 states in Africa have given effect to their obligations under these two treaties.

The extent to which human rights treaties have been effective at the domestic level is an important enquiry not only to take stock of the progress so far made but also to better understand the potential roles and challenges of human rights treaties in the future. For these and other reasons, the domestic impact of human rights treaties has continued to receive sustained attention from academic writers, research centres and donor organisations in the last two decades. Some of the existing studies on the impact of international human rights treaties involve quantitative analysis of the impact of selected treaties in a numbers of countries over a period of

\* LLM HRDA (Pretoria), doctoral candidate, Centre for Human Rights, University of Pretoria. Email: victorayeni7@gmail.com.

1 CH Heyns & FJ Viljoen (eds) *The impact of the United Nations human rights treaties on the domestic level* (2002) 1; F Viljoen *International human rights law in Africa* (2007) 529.

2 D Cassel ‘Does international human rights law make a difference?’ (2001) 2 *Chicago Journal of International Law* 121.

## 2 Introduction

time.<sup>3</sup> There are also qualitative country-specific studies analysing the domestic effects of global, regional and sub-regional human rights treaties.<sup>4</sup> In recent times, there has been growing engagement with 'second-order compliance' at the global, regional and sub-regional level.<sup>5</sup> Second-order compliance refers to compliance with the decisions of an authoritative body charged with the responsibility of interpreting provisions of a treaty or resolving disputes arising from implementation of

the treaty.<sup>6</sup> This is in sharp contrast to first-order compliance which is limited to compliance with the substantive provisions of a treaty.<sup>7</sup>

What have we learned from the various studies on the domestic effects of human rights treaties? While international human rights law is generally assumed to have a constraining effect on state behaviour,<sup>8</sup> empirical evidence tends to suggest that the effect of treaties on human rights practices at the state level is negligible.<sup>9</sup> In fact, some studies find that human rights practice at the domestic level may actually worsen or degenerate following ratification of human rights treaties.<sup>10</sup> These findings prompt the question: why would states invest such great resources into adopting human rights treaties if these treaties make no difference to their citizens? Thankfully, qualitative studies<sup>11</sup> and more recent quantitative research have shown some optimism, suggesting that human rights treaties do give rise to positive consequences.<sup>12</sup> However, a

- 3 EM Hafner-Burton & K Tsutsui 'Human rights in a globalizing world: The paradox of empty promises' (2005) 110 *American Journal of Sociology* 1373; OA Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935; LC Keith 'The United Nations International Covenant on Civil and Political Rights: Does it make a difference in human rights behavior?' (1999) 36 *Journal of Peace Research* 95-95.
- 4 Heyns & Viljoen (n 1 above); C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 484; OC Okafor *The African human rights system, activist forces and international institutions* (2010); VO Ayeni 'Domestic impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: A case study of Nigeria' unpublished LLM Dissertation, University of Pretoria, 2011; FN Kabata 'Impact of international human rights monitoring mechanisms in Kenya' unpublished LLD thesis, University of Pretoria, 2015; Centre for Human Rights *Impact of the African Charter and the Women's Protocol in selected African states* (2012).
- 5 See C Paulson 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 434; C Hillebrecht *Domestic politics and international human rights tribunals: The problem of compliance* (2014) 3; J Donnelly *International human rights* (2007) 1; F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and People's Rights, 1994-2004' (2009) 7 *International Journal of Civil Society Law* 22; HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: Compliance and influence' unpublished LLD thesis, University of Pretoria, 2013 8.

- 6 See C Romano, K Alter & Y Shany (eds) *Oxford handbook of international adjudication* (2014) 377; R Fisher *Improving compliance with international law* (1981); MP Ryan 'The logic of second order compliance with international trade regimes' *Working Paper No 694 of the University of Michigan* (1992) 2-3.
- 7 As above.
- 8 BA Simmons & D Hopkins 'The constraining power of international treaties: Theory and methods' (2005) 99 *American Political Science Review* 623; BA Leeds 'Alliance reliability in times of war: Explaining state decisions to violate treaties' (2003) 57 *International Organization* 801; BA Simmons 'International law and state behaviour: Commitment and compliance in international monetary affairs' (2000) 94 *American Political Science Review* 819.
- 9 Hafner-Burton & Tsutsui (n 3 above); Hathaway (n 3 above); Keith (n 3 above).
- 10 As above.
- 11 Heyns & Viljoen (n 1 above); T Risse, SC Ropp & K Sikkink *The persistent power of human rights* (2013); T Risse, SC Ropp & K Sikkink *The power of human rights* (1999).
- 12 E Neumayer 'Do international human rights agreements improve respect for human rights?' (2005) 49 *Journal of Conflict Resolution* 925; BA Simmons *Mobilising for human rights* (2009); Hillebrecht (n 5 above).

key finding of all major research on the domestic effects of international human rights treaties is that treaty effects are seldom unconditional. Treaty effects are believed to be conditional on state-level characteristics and factors related to the treaty regime.<sup>13</sup>

What mechanisms and conditions make domestic effect or impact of international human rights treaties more likely? Several theories have been proposed to explain the process by which international law may have effects at the domestic level. These theoretical approaches may be divided broadly into two, namely rational choice theory and constructivist theory, also referred to as the normative theory. While the rational choice theory emphasises material incentives, hegemonic power, sanctions and self-interest as the primary drivers of states' compliance with treaty obligations, constructivists argue that states comply with human rights treaties because of normative considerations such as the persuasive powers of human rights obligations, repeated transnational interactions, argumentation and states' continuous exposure to norms.<sup>14</sup>

One of the earliest strands of the rational choice theory is realism. For realists, states generally comply with their international obligations whenever it is in their interests or in the interests of a more powerful state for them to do

so.<sup>15</sup> Power, coercion and self-interest are what make international human rights treaties have an effect at the domestic level, according to realists. Another strand of the rational choice theory – institutionalism – relies on states' cooperation instead of power or coercion. While institutionalists agree that states are self-interested rational actors, they differ from realists in that they believe cooperation between states is possible, and that states may comply voluntarily with their international obligations within the framework of that cooperation if it is in their interests to do so.<sup>16</sup> One important consequence of institutionalism as a theory is that it draws the attention of international lawyers to the role of two important factors of international cooperation – reputation and reciprocity.<sup>17</sup> For Guzman, states comply with international human rights treaties mainly because of reputational concerns and fear of sanctions.<sup>18</sup> Hathaway argues that states comply with international law as a result of enforcement and 'collateral consequences' such as reputation, development assistance and trade

13 DW Hill 'Estimating the effects of human rights treaties on state behaviour' (2010) 72 *Journal of Politics* 1161; GW Downs, DM Rocke & PN Barsoom 'Is the good news about compliance good news about cooperation?' (1996) 50 *International Organization* 379; Simmons (n 12 above).

14 ES Bates 'Sophisticated constructivism in human rights compliance theory' (2015) 25 *European Journal of International Law* 1170.

15 See generally, OR Young 'The effectiveness of international institutions: Hard cases and critical variables' in JN Rosenau & E-O Czempiel (eds) *Governance without government: Order and change in world politics* (1992) 160; OR Young *Compliance and public authority: A theory with international applications* (1979); L Henkin *How nations behave* (1979); HJ Morgenthau *Politics amongst nations: The struggle for power and peace* (1978); H Simon *Models of man: Social and rational-mathematical essays on rational human behaviour in a social setting* (1957) 200-204.

16 RO Keohane *After hegemony* (1984); D Snidal 'The limits of hegemonic stability theory' (1985) 39 *International Organization* 579.

17 A-M Slaughter 'International relations, principal theories' [www.princeton.edu/~slaughr/Articles/722\\_IntlRelPrincipalTheories\\_Slaughter\\_20110509zG](http://www.princeton.edu/~slaughr/Articles/722_IntlRelPrincipalTheories_Slaughter_20110509zG) (accessed 18 November 2015).

18 AT Guzman 'A compliance-based theory of international law' (2002) 90 *California Law Review* 1849.

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interests.<sup>19</sup> Based on the rational choice theory, Hafner-Burton argues that human rights treaty obligations are most likely to be complied with by states when such obligations are tied to economic benefits, for instance trade.<sup>20</sup>

Another variety of the rational choice theory is liberalism.<sup>21</sup> The main thrust of the liberal theory is that state-level characteristics matter in determining whether or not human rights treaties will have an effect at the domestic level.<sup>22</sup> Liberal theorists believe the unique nature of 'liberal states' make human rights treaties more likely to have greatest effect in those states.<sup>23</sup> However, more recent work by liberal theorists has demonstrated that the conditions that make human rights treaties effective at the domestic level are complex and go further than merely categorising states as liberal or illiberal. Moravcsik, for instance, found that human rights treaties are more likely to attract support and have an impact in newly established and unstable democracies than in long-standing democracies and autocratic states.<sup>24</sup> The reason for this is that newly established and unsta-

ble democracies tend to support human rights treaty regimes to 'lock in' democratic gains and 'signal' human rights commitment as well as an intention to consolidate democratic institutions.<sup>25</sup>

More recently, Simmons has confirmed Moravcsik's findings. She argues that treaties do not have the same effects in all countries and that the international human rights system will have its greatest domestic impact in countries which are neither stable autocracies nor stable democracies but are partial democracies and transitioning regimes.<sup>26</sup> This, she reasons, is because in stable democracies, although citizens have the means to employ human rights treaties for social mobilisation, the motive is usually absent. In stable autocracies, by contrast, citizens have the motive to use international human rights treaties to demand change but generally lack the means to do so.<sup>27</sup>

Constructivist or normative theories, on the other hand, focus primarily on identity, ideas, beliefs, the role of social norms, non-state actors and international institutions.<sup>28</sup> One of the earliest normative theories came from Chayes and Chayes. They argued that states' non-compliance with international treaties is an endemic problem rather than the result of a cost-benefit analysis as the rational choice theorists claimed.<sup>29</sup> The causes of non-compli-

19 OA Hathaway 'Between power and principle: An integrated theory of international law' (2005) 72 *University of Chicago Law Review* 506.

20 EM Hafner-Burton 'Trading human rights: How preferential trade agreements influence government repression' (2005) 59 *International Organization* 633.

21 Hathaway (n 3 above) 1952.

22 Slaughter (n 17 above).

23 Slaughter (n 17 above); Hathaway (n 3 above); A Moravcsik 'Taking preferences seriously: A liberal theory of international politics' (1997) 51 *International Organization* 513; A-M Slaughter 'The liberal agenda for peace: International relations theory and the future of the United Nations' (1995) 4 *Transnational and Contemporary Problems* 377; A-M Slaughter 'International law in a world of liberal states' (1995) 6 *European Journal of International Law* 503.

24 A Moravcsik, 'The origins of human rights regimes: Democratic delegation in Postwar Europe' (2000) 54 *International Organization* 228.

25 Moravcsik (n 24 above); Simmons (n 12 above) 65; T Ginsburg 'Locking in democracy: Constitution, commitment and international law' (2006) 38 *New York University Journal of International Law and Politics* 707; DH Moore 'A signalling theory of human rights compliance' (2003) 97 *Northwestern University Law Review* 879.

26 Simmons (n 12 above) 16-17 & 360.

27 As above.

28 Slaughter (n 17 above). See also JT Checkel 'The constructivist turn in international relations theory' (1998) 50 *World Politics* 324.

29 A Chayes & AH Chayes 'On compliance' (1993) 47 *International Organization* 204.



ance, according to Chayes and Chayes, are ambiguity and indeterminacy of treaty language, lack of capacity, and the temporal dimension of the obligations imposed by treaties.<sup>30</sup> In order to improve state's compliance with treaty obligations, Chayes and Chayes proposed that the 'enforcement model' should be replaced with a 'managerial model' that entails the use of 'iterative process of justificatory discourse'. They recommended the following instruments to manage states' compliance with their obligations: transparency, reporting, monitoring, dispute settlement and strategic review, amongst others.<sup>31</sup>

Another normative theorist, Thomas Franck, contends that fairness and legitimacy are the elements of a treaty that exerts a compliance pull on states.<sup>32</sup> A relatively recent normative perspective called the 'transnational legal process' theory was offered by Howard Koh.<sup>33</sup> Transnational legal process is a three-part process of *interaction*, *interpretation*, and *internalisation* whereby international treaties are interpreted through the interactions of transnational actors and then internalised into the domestic legal system.<sup>34</sup> Koh believe the reasons states fail to comply with international law include vagueness of the norms, toothless mechanisms, weak regimes

and the lack of economic interest and political will.<sup>35</sup>

More recent scholarship on the domestic effects or impact of international human rights treaties tends to integrate constructivist perspectives with rational choice models. This new approach has been described as modern constructivism.<sup>36</sup> For instance, in his analysis of how democratic states respond to judgments of the European Court of Human Rights (ECtHR), Von Staden concluded that states demonstrate a normative sense of obligation to abide by the ECtHR's judgments yet exploit various instrumental and cost-saving options to comply as little as possible.<sup>37</sup> Risse, Ropp and Sikkink proposed a 'spiral model' of human rights change.<sup>38</sup> The spiral model is a five-phase process involving state repression, denial, tactical concession, prescriptive status and rule-consistent behaviour.<sup>39</sup> State repression activates transnational activist networks that use information politics to pressure repressive governments. At first, the government denies repression before making some tactical concessions. Using the concessions, activist networks push for more concession by urging the government to recognise and embrace more human rights and democratic governance standards. The final stage of the spiral model is the rule-consistent behaviour phase, where the state begins to internalise human rights norms through behavioural change and sustained

30 As above.

31 A Chayes & AH Chayes *The new sovereignty: Compliance with international regulatory agreements* (1995) 135.

32 T Franck *Fairness in international law and institutions* (1995); T Franck *The power of legitimacy among nations* (1990) 24.

33 See HH Koh 'How is international human rights law enforced?' (1999) 74 *Indiana Law Journal* 1398; HH Koh 'The 1998 Frankel Lecture: Bringing international law home' (1998) 35 *Houston Law Review* 626; HH Koh 'The 1994 Roscoe Pound Lecture: Transnational legal process' (1996) 75 *Nebraska Law Review* 181.

34 As above.

35 See Koh 'How is international human rights law enforced?' (n 33 above) 1398.

36 Bates (n 14 above) 1181.

37 A von Staden 'Rational choice within normative constraints: Compliance by liberal democracies with the judgments of the European Court of Human Rights' *SSRN eLibrary* 6 February 2012.

38 Risse, Ropp & Sikkink *The power of human rights* (n 11 above) 8.

39 Risse, Ropp & Sikkink *The power of human rights* (n 11 above) 6.

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compliance.<sup>40</sup> Although the spiral model is largely a constructivist proposition, the authors juggle both instrumental and normative incentives in their theory. The spiral model, for example, comprises the following mechanism of social action and human rights change: coercion, sanctions, incentives, persuasion and capacity building.<sup>41</sup>

This hybrid constructivist-rationalist approach is also noticeable in recent works of Simmons,<sup>42</sup> Hillebrecht,<sup>43</sup> Goodman and Jinks,<sup>44</sup> Cardenas,<sup>45</sup> Alter,<sup>46</sup> and Hafner-Burton,<sup>47</sup> all of which view compliance with human rights treaties as largely a function of domestic politics, rather than transnational interactions. One important theme that is common to all domestic politics theories is the integration of constructivist perspectives with rationalist propositions.

## 2 The African Charter and the Maputo Protocol

The African human rights system is based mainly on the African Charter.<sup>48</sup> The Charter was adopted by the Organi-

zation of African Unity (OAU), now the African Union (AU), on 27 June 1981, and came into force on 21 October 1986. All 54 member states of the African Union, with the exception of the newcomer South Sudan, are state parties to the African Charter.<sup>49</sup>

When compared with human rights instruments at the global level and with other regional systems, the African human rights system and the African Charter are unique in a number of ways.<sup>50</sup> The Charter contains both civil and political rights as well as economic, social and cultural rights, and both of these two 'generations of rights' are justiciable. Another distinctive feature of the African Charter is the notion of peoples' rights or what some writers refer to as 'solidarity rights'.<sup>51</sup> Unlike other international human rights treaties, the African Charter does not allow

40 As above.

41 Risse, Ropp & Sikink (n 11 above) 12-16.

42 Simmons (n 12 above).

43 Hillebrecht (n 5 above).

44 R Goodman & D Jinks *Socializing states: Promoting human rights through international law* (2013).

45 S Cardenas *Conflict and compliance: State responses to international human rights pressure* (2007).

46 K Alter 'Tipping the balance: International courts and the construction of international and domestic politics' (2011) 13 *Cambridge Yearbook of European Legal Studies* 1.

47 E Hafner-Burton *Making human rights a reality* (2013).

48 Other human rights instruments in Africa include: OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, Cultural Charter for Africa 1976, African Charter on the Rights and Welfare of the Child 1990, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998, the

Constitutive Act of the African Union 2000, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Convention on Prevention and Combating Corruption 2003, African Charter on Democracy, Elections and Good Governance 2007, and the AU Convention for the Protection of and Assistance of Internally Displaced Persons 2009, amongst others.

49 South Sudan has signed the Charter but yet to ratify it. See <http://www.au.int/en/treaties> (accessed 15 November 2015).

50 M Mutua 'The Banjul Charter and the African cultural fingerprint: An assessment of the language of duties' (1995) 35 *Virginia Journal of International Law* 339.

51 P Alston 'A third generation of solidarity rights: Progressive development or obfuscation of international human rights law?' (1982) 29 *Netherlands International Law Review* 307; K Vasak 'For the third generation of human rights: The rights of solidarity' *Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights Strasbourg, 2-27 July 1979*; BE Winks 'A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) 11 *African Human Rights Law Journal* 447. See arts 19-24 of the African Charter.

derogations from its provisions, even in situation of emergency.<sup>52</sup>

The African Charter established the African Commission on Human and Peoples' Rights (African Commission or Commission) as its primary supervisory mechanism and vests in the Commission both promotional and protective mandates.<sup>53</sup> The Commission is mandated by the Charter to promote and protect human rights in Africa, interpret the provisions of the Charter and perform any other tasks assigned to it by the OAU Assembly of Heads of States and Government (now AU Assembly).<sup>54</sup> The Commission was formally inaugurated on 2 November 1987. As of November 2015, the Commission has received close to 500 communications, of which more than half have been finalised; and has found violations in 83 communications, involving 27 states that are parties to the African Charter.<sup>55</sup> The Commission has also issued at least 41 concluding observations, 72 mission reports and not less than 293 thematic, administrative and

country-specific resolutions.<sup>56</sup> More recently, the African Court on Human and Peoples' Rights (African Court) was established to complement the Commission's protective mandate.<sup>57</sup> Assessing the impact or the extent to which states have given effect to the innovative provisions of the African Charter, the various works of the African Commission and the emerging jurisprudence of the African Court is certainly an interesting inquiry.

One of the major shortcomings of the African Charter is that its normative content with respect to the protection of women's rights is inadequate.<sup>58</sup> The only specific reference to women in the Charter is a provision dealing with the family.<sup>59</sup> Some writers have argued that this implies that the drafters of the Charter viewed women only within the family context.<sup>60</sup> In order to compensate for this normative inadequacy and also to improve the implementation of the human rights provisions enshrined in the Charter, the Maputo Protocol was adopted.<sup>61</sup> The Protocol was adopted on 11 July 2003 in Maputo, the capital

52 See *Commission nationale des droits de l'Homme et des libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21.

53 See art 45 of the African Charter.

54 As above.

55 See African Commission on Human and Peoples' Rights 'Communications' <http://www.achpr.org/communications/> (accessed 26 August 2015); IHRDA *African human rights case law analyser* <http://caselaw.ihrda.org/body/acmhpr/> (accessed 26 August 2015). In its 32nd and 33rd (joint) activity report adopted by the Executive Council of the AU in January 2013, the Commission reported that since inception, it has handled a total of 426 Communications and concluded 210 Communications. As at December 2014, the Commission had 89 pending communications. See Statement by the Chairperson of the African Commission on Human and Peoples' Rights on the human rights situation in Africa (28th Session of The United Nations Human Rights Council) <http://www.achpr.org/news/2015/04/d171> (accessed 8 September 2015).

56 African Commission 'Documents' <http://www.achpr.org/search/> (accessed 15 November 2015).

57 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998) art 1.

58 See I Eze-Anaba 'Domestic violence and legal reforms in Nigeria: Prospects and challenges' (2007) 14 *Cardozo Journal of Law & Gender* 31; F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington & Lee Journal of Civil Rights & Social Justice* 17; Viljoen (n 1 above) 269.

59 See art 18 of the African Charter.

60 K Stefiszyn & A Prezanti *The impact of the Protocol on the Rights of Women in Africa on violence against women in six selected Southern African countries: An advocacy tool* (2009) 2.

61 See Viljoen (n 1 above) 268. See also Preamble to the Protocol; F Banda 'Brazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72; MS Nsibirwa 'A brief analysis

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city of Mozambique. This is why the Protocol is often referred to as the Maputo Protocol. After achieving the required 15 ratifications, the Maputo Protocol came into force on 25 November 2005. Just over ten years later, in 2016, the Protocol has been ratified by 36 states.<sup>62</sup> Fifteen states signed but have not yet ratified the Protocol and three states have neither signed nor ratified the Protocol.<sup>63</sup>

Like the African Charter, the Maputo Protocol also contains innovative provisions. These include the legal prohibition of female genital mutilation (FGM) and an authorisation of medical abortion in instances of rape, incest, sexual assault and where a pregnancy endangers the health or life of the mother. The Protocol is also the first legally binding human rights treaty to make explicit reference to HIV/AIDS. In addition to these innovative provisions, the Protocol addresses human rights issues such as polygamy, violence against women, child marriage, harmful practices, widowhood practices, women's inheritance, women's economic empowerment, the political participation of women, women in distress and women in situations of armed conflict. Although 36 countries have ratified both the African Charter and the Maputo Protocol, not much is known about the measures these states have taken to bring their domestic legal systems and policies in line with the Charter and the Protocol. One of the first major studies on the domestic impact of the Maputo

Protocol was carried out by Stefiszyn and Prezanti in 2009, but the study was limited to only six Southern African countries.<sup>64</sup>

In 2011, on the occasion of 25 years since the entry into force of the African Charter, the Centre for Human Rights, through its network of alumni, conducted a study on the impact of the African Charter and the Maputo Protocol in selected African states.<sup>65</sup> The findings included that lack of awareness and use of the African Charter and the Maputo Protocol, as well as the jurisprudence of the African Commission, were primary causes of the minimal impact of the African Charter and the Maputo Protocol in the selected states. The study, however, noted the growing use of the Charter and the Protocol by civil society organisations in the study countries. One of the points that came out clearly from the study was the need for periodic review of the impact of the African Charter and the Maputo Protocol in all member states of the African Union. This book, which is a follow up edition of the same study, is intended to update the existing research database on the impact of the African Charter and the Maputo Protocol in selected African states.

### 3 Conceptual clarification and methodology

A number of terminologies are used in this book. These concepts are likely to be misunderstood unless their contextual meaning is clarified. These include 'compliance', 'implementation', 'follow-up', 'impact' and 'effectiveness' of human rights treaties.

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* 41.

62 African Union 'List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples' Rights' <http://www.au.int/en/treaties> (accessed 15 November 2015).

63 As above.

64 Stefiszyn & Prezanti (n 60 above).

65 See Centre for Human Rights (n 4 above).

In simple terms, compliance with a human rights treaty may be defined as conformity between the provisions of a treaty and observed behaviours at the domestic level. In the context of international human rights adjudication, compliance is conformity between a remedial order prescribed in a decision of an international human rights monitoring body on the one hand, and state behaviour or factual situation at the domestic level, on the other hand. Implementation of treaties entails the process of taking steps or measures, whether legislative, judicial or administrative, to give effect to the provisions of a treaty, including the decisions of a tribunal established under that treaty.<sup>66</sup> Implementation is the process while compliance is the outcome. Ideally, compliance results from implementation. This however is not always the case. As Okafor has noted, compliance may not happen in the same way a twist to the hand causes pain.<sup>67</sup> More often than not, compliance is the result of coincidence, inadvertence or reasons extrinsic to a legal rule.<sup>68</sup> Follow up is a process of facilitating implementation.<sup>69</sup> It is assumed that follow up improves implementation, which in turn increases the compliance rate. Both domestic and transnational actors may be involved in follow up, whereas implementation and compliance are essentially domestic affairs.

The impact of an international treaty is the totality of effects that the treaty has on the actions of state and non-state

actors.<sup>70</sup> It comprises both direct and indirect effects of a treaty.<sup>71</sup> Direct effects of a treaty refer to the conscious and deliberate measures taken to implement or comply with treaty norms, including decisions of treaty monitoring bodies. Indirect effects on the other hand consist of more than mere compliance with or implementation of the provisions of a human rights treaty. Indirect effects encompass the incremental use and more subtle influences of the treaty – for instance through academic writing, references to the treaty in news reports, use by civil society and the general level of awareness by members of the public. A treaty may have a low compliance rate but very high impact.

Throughout this book, the following terms – ‘impact’, ‘effect’ and ‘influence’ – are used interchangeably. When we talk about the impact of the African Charter and the Maputo Protocol, we refer to the totality of effects or influences that these treaties have had at the domestic level. These terms should however be distinguished from ‘effectiveness’. In the context of international human rights treaties, effectiveness is the extent or degree to which a treaty induces a desired change that furthers the goals of such treaty.<sup>72</sup> Arguably, a treaty may have effects which do not significantly advance the goals of the treaty.<sup>73</sup> In fact, some empirical studies have shown that a treaty may have a negative impact on the situation of human rights in a particular state even

66 See M Burgstaller *Theories of compliance with international law* (2004) 4.

67 Okafor (n 4 above) 116-117.

68 K Raustiala ‘Compliance and effectiveness in international regulatory cooperation’ (2000) 32 *Case Western Reserve Journal of International Law* 391.

69 See R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples’ Rights* (2015) 28.

70 Heyns & Viljoen (n 4 above) 484-485.

71 As above.

72 See Murray & Long (n 69 above) 29; Raustiala (n 68 above) 393-394.

73 The African Charter arguably has had a huge impact on tourism in The Gambia. However, improving tourism in The Gambia is not one of the goals of the African Charter. This is one of the instances where high impact does not correspond to effectiveness.

in instances where compliance is high.<sup>74</sup> Thus, a treaty which has a very high compliance rate and a great impact may nevertheless be low on effectiveness. On the other hand, a treaty regime may be effective even though its compliance rate and overall impact is low.<sup>75</sup> Thus the ultimate goal of assessing the status of implementation, compliance or impact of any international human rights treaty regime is to determine the extent to which it may be effective.

The research presented in this book was carried out by human-rights scholars, activists and practitioners, all whom have in-depth knowledge of the various issues discussed in their respective chapters. The primary objective of the research is to determine the extent to which two main regional human rights treaties in Africa have been effective and impactful. Each of the chapters in the book sets out to answer three overarching questions: what is the status of the implementation of the African Charter and the Maputo Protocol in a particular country; what indirect effects, if any, have the Charter and the Protocol had in that country; and what factors or mechanism enhance or impede the impact of the two instruments in that country?

The study, which was conducted under the overall supervision of the Centre for Human Rights, began with an invitation to alumni of the Centre's Master of Laws programme in Human Rights and Democratisation in Africa, seeking their involvement and participation in the research project. A number of alumni responded to the call and in some cases, there were two or more alumni seeking to collaborate on

research in a particular country. The final selection of country researchers was made on the basis of the researcher's personal knowledge of the country's legal system and human-rights situation, as well as the alumni's availability and capacity to carry out the research. A questionnaire was developed to guide the research and each researcher was provided with a copy of this questionnaire and other relevant documents. A copy of the questionnaire used for the study is included in the annexure to this book. Researchers were required to study existing literature, official documents as well as news reports and conduct semi-structured interviews based on the questionnaire provided. Interviews were conducted with government officials, members of civil society (especially NGOs whose activities relate to the African Charter and the Maputo Protocol), and members of the public. After conducting field research, researchers submitted their preliminary reports, which were reviewed by the editors.

#### 4 Overview of study results

The evidence and findings presented in this book suggest that the overall impact of the African Charter and the Maputo Protocol are difficult to establish conclusively. The question whether the African Charter and the Maputo Protocol have led to an improvement in the human rights conditions at the domestic level cannot be answered with a simple yes or no.<sup>76</sup> However, while direct causal links may be difficult to establish, the evidence does suggest that the African Charter and the Maputo Protocol have had a modest impact in the 17 countries

74 Hafner-Burton & Tsutsui (n 3 above); Hathaway (n 3 above); Keith (n 3 above).

75 Raustiala (n 68 above) 387-397.

76 E Neumayer 'Do international human rights treaties improve respect for human rights?' (2005) 49 *Journal of Conflict Resolution* 950.

selected for the study. Laws have been adopted, policies formulated, resources allocated, institutions created and remedies provided as a direct consequence of states parties obligations under the African Charter and the Maputo Protocol.

The influence of the African Charter and Maputo Protocol in the 17 studied countries is consistent with three main theories of compliance with international law: the domestic politics theory, the spiral model of human rights change and the transnational legal process theory. Evidence from the various chapters shows that domestic actors – policy makers, legislators, judges and domestic civil society organisations – are the primary drivers of impact of the African Charter and the Maputo Protocol. The chapters also reveal that state-level characteristics such as the level of political stability in a state and the extent of openness, transparency and citizen participation in governance are useful predictors of the impact and effectiveness of the relevant treaties.

Findings also illustrate the role of state repression within the framework of the spiral model: in countries such as Kenya, Malawi, Nigeria, Uganda and Zimbabwe, state repression has propelled domestic activist forces to demand human rights change, in particular by connecting with transnational activist networks.<sup>77</sup> Governments of these countries initially responded by denying that human rights abuses were taking place in their countries but eventually made tactical concessions, for instance by freeing political prisoners, recognising some basic human rights

and opening up the democratic space. Activist forces and networks capitalised on these initial concessions to press for change until international human rights norms are accepted, internalised and cascaded into domestic systems.

Consistent with the transnational legal process theory, evidence in various chapters also reveals that repeated interaction between state and non-state actors in domestic and international fora has intensified the impact of the African Charter and the Maputo Protocol. Côte d'Ivoire, where the African Commission's session and promotional activities have had more impact than the protective activities, is an example of this.

The transnational legal theory holds the key to understanding why human rights treaties, particularly the African Charter and Maputo Protocol, may or may not have the desired effect in a particular state. According to Koh, treaty effects may take three pathways: political internalisation, legal internalisation and social internalisation.<sup>78</sup> Political internalisation occurs when political elites accept a norm. This is usually a prerequisite for legal internalisation, which involves incorporation of the norm into domestic laws. Legal internalisation may be administrative, legislative or judicial. The final stage of human rights norm internalisation is social internalisation and this is attained when a norm has obtained public legitimacy, support and widespread adherence.<sup>79</sup> While there is no particular sequence for this internalisation process, it is important for activist networks at the domestic level to understand the level of internalisation in a particular state. Evidence in this book shows that

77 See ME Keck & K Sikkink *Activists beyond borders* (2008); M Finnemore & K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organization* 892.

78 HH Koh 'Bringing human rights home' (1998) 35 *Houston Law Review* 642.

79 As above.

norms cascade much more easily into the domestic system if political internalisation is followed by legal internalisation and then social internalisation. It is more difficult – although not impossible – where this process is reversed.

The most significant impact of the African Charter, and to a large extent the Maputo Protocol, has been recorded in new democracies and during times of political transition. This is consistent with findings of Moravcsik and Simmons that international human rights treaties will have their most significant impact in new democracies or transitioning regimes. Evidence from Côte d'Ivoire, Kenya, Nigeria and South Africa support this conclusion. Notable influence of the African Charter was recorded in Nigeria, Kenya and Côte d'Ivoire amongst others immediately before or during transition from one regime to another. Conversely, the evidence in this book reveals that the 'constraining effect'<sup>80</sup> of the African Charter and the Maputo Protocol on state behaviour, or the degree to which these treaties can be said to constrain state behaviour, is relatively limited in countries such as The Gambia, Zimbabwe and Uganda, where political transition has not taken place in the last two decades. The findings in this book therefore support the view that democratic political transition and treaty effects are related.<sup>81</sup>

The findings also support the argument of Simmons, Murray and Long that international human rights treaties will be impactful only if they have 'added value'.<sup>82</sup> According to Simmons, 'treaties are causally meaningful to the extent that they empower individuals, groups, or parts of the state with different rights preferences that were not empowered to the same extent in the absence of the treaties'.<sup>83</sup> The creative use of the African Charter by local activists and judicial actors in Nigeria during the country's worst military dictatorship supports this view. The direct domestication of the African Charter in Nigeria provided activist forces with an added advantage, which was used creatively. In South Africa, courts have relied on the African Charter's protection of the family in judicial decisions because the South African Constitution has no explicit provision for the protection of the family. When asked why civil society organisations in South Africa do not take cases to regional human rights bodies, most respondents indicated that they are generally satisfied with available domestic remedies. Accordingly, dissatisfaction with domestic legal frameworks and judicial remedies seems to be one of the most important preconditions for reliance upon and ultimately impact of human rights treaties, particularly the African Charter and the Maputo Protocol.

Several factors have enhanced or impeded the impact of the African Charter and the Maputo Protocol in the selected countries, and most of these factors converge at the state level. This leads to the conclusion earlier alluded to that treaty effects at the domestic level are essentially a domestic affair. One of

80 The phrase is used to refer to the ability of a treaty to constrain state behaviour, domestic laws and policies brought about as a result of the African Charter or in response to a decision of the African Commission or other regional human rights monitoring bodies. See BA Simmons & D Hopkins 'The constraining power of international treaties: theory and methods' (2005) 99 *American Political Science Review* 623.

81 See Moravcsik (n 24 above) 228; Simmons (n 12 above) 16 – 17.

82 Murray & Long (n 69 above) 10-26; Simmons (n 12 above) 125.

83 Simmons (n 12 above) 125.



the most interesting findings of this study is that just as some positive factors at the domestic level may impede the impact of the African Charter and the Maputo Protocol, negative factors may equally enhance their impact. For instance, creative use of the African Charter is relatively lacking in countries such as South Africa, Ghana and Tanzania amongst others that have relatively progressive Bills of Rights. The availability of satisfactory domestic remedies in South Africa has been identified as a factor that impedes use of the communication procedure under the African Charter. Although a negative record, the atrocities and human rights abuses perpetrated by military administrations in Nigeria was also identified as a factor which enhanced the impact of the African Charter in that country. In Zimbabwe, the increase in human rights abuses between 2000 and 2008 led to an increase in the number of individual communications filed against Zimbabwe and the number of country-specific resolutions adopted by the African Commission regarding that country.

The most important factor that has contributed to the limited yet significant impact of the African Charter in Nigeria is its direct domestication. In South Africa, it is the rich network of civil society organisations, academic institutions and research centres. In Côte d'Ivoire, the 42nd ordinary session of the African Commission which was held in that country, coupled with the African Commission's concluding observations and special mechanisms, are what have left an imprint on the country's human rights landscape.

Findings from this study also support the views of Hill and Neumayer that the least contentious human rights provisions are the ones most likely to be

complied with by states.<sup>84</sup> For instance, adoption of the Maputo Protocol in the National Gender Policy of Zimbabwe was affected on the basis that it is regarded as the least contentious issue in Zimbabwe and hence supported by politicians. This analysis underscores the importance of cost-benefit calculations to states' compliance and domestic treaty effects. The costs that influence domestic treaty effects may be political, financial or ideological. For instance, rights which require huge financial outlay for their realisation, or those that threaten the political survival of state actors, are often least likely to be complied with or implemented by states.

The various reports also underscore the significance of the African Human Rights Moot Competition in raising awareness about the African Charter, Maputo Protocol and more generally the jurisprudence of the African Commission. The evidence also suggests the steady influence of the Master of Laws (LLM) in Human Rights and Democratisation in Africa (HRDA) programme of the Centre for Human Rights at the University of Pretoria on the promotion and protection of human rights at the domestic level.

In the various chapters, contributors agree that the most important requirement for improving the impact of the African Charter and the Maputo Protocol is increased awareness at the domestic level. The chapters point out that awareness should be aimed not only at sensitising policy makers, legislators, judges, civil society and members of the public about the provisions of these instruments but also on how these provi-

84 See Hill (n 13 above); Neumayer (n 12 above).

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sions may be used to solve human rights problems in specific contexts.

### 4 Best practices and areas of concern

The following practices were found to have greatly enhanced the impact of the African Charter and Maputo Protocol:

- In 1983, Nigeria directly domesticated the African Charter through national legislation entitled 'the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act'. The author of the chapter on Nigeria noted that this is the most important factor for the relatively high impact of the African Charter in Nigeria.
- Kenya, though traditionally a dualist state, amended its constitutional instruments to make duly ratified international treaties directly applicable within Kenya with or without legislative domestication.
- The African Charter, Maputo Protocol and other duly ratified international treaties have a higher status than the Constitution in Côte d'Ivoire. In Ethiopia, international human rights treaties, including the African Charter and the Maputo Protocol, have a status higher than ordinary legislation, and are equal in status to the Constitution.
- The government of Tanzania usually conducts 'dissemination workshops' after receiving copies of concluding observations of the African Commission.
- The Ethiopian Human Rights Commission has translated the African Charter into the major local language (Amharic) and disseminated copies to the public. Similarly, the Maputo Protocol was translated into indigenous languages in Nigeria prior to ratification.
- The highest courts in Ghana, Lesotho and several other dualist states allow and support the use of undomesti-

cated international treaties before domestic courts.

- South Africa submitted an interpretive declaration on the Maputo Protocol which requires that the South African Bill of Rights shall not be interpreted to offer any less favourable protection of human rights than the Maputo Protocol.
- The government of Uganda ensures equal or fair representation of women in its delegation during its presentation of state reports before the African Commission.
- In Zimbabwe, women have a defined quota of 50 per cent in the composition of constitutional commissions and other government bodies, although it is unclear if government abides by this requirement at all levels of governance.
- In Kenya, the President is required by the Constitution to submit, every year, a report for debate on how the government is meeting its obligations with regard to international treaties.

The following are noteworthy areas of concern around the impact of the African Charter and Maputo Protocol in the countries under study:

- In Ethiopia, the government requires civil society organisations working in the area of human rights to raise 90 per cent of their funding from local sources or face risk of legal consequences. This law promotes double standards and violates several human rights principles. Both the government of Ethiopia and the African Union rely heavily on foreign aid to finance expenditure. Arguably, African governments lack the moral authority to deny civil society organisations access to external funding, since governments also rely heavily on foreign donors.
- The Gambia and Lesotho are yet to set up dedicated national human rights institutions, despite repeated calls by the African Commission and other international human rights

mechanisms requesting them to do so.

- The Republic of Mauritius is yet to ratify the Maputo Protocol and there is no defined structure of government responsible for coordinating responses and reporting obligations to international human rights bodies in that country.
- No civil society organisations based in Mauritius or Sierra Leone have observer status with the African Commission.
- Courts in several Francophone countries such as Cameroon, Côte d'Ivoire and Burkina Faso have to date never cited or made reference to the African Charter, Maputo Protocol or any other regional human rights treaty in Africa.
- An example was given in the chapter on Zimbabwe that the Maputo Protocol was incorrectly cited in the Zimbabwean National Gender Policy as 'Protocol to the 2003 African Charter on Human and People's Rights on the Rights of Women'.
- A practice was reported in the Burkina Faso chapter that the *Conseil africain et malgache pour l'éducation supérieure (CAMES)* does not consider publications on human rights when evaluating academics for promotion and career advancement. This has a negative implication for academic writing on the African Charter and Maputo Protocol in that country.
- It is also noted that in a majority of the countries, NHRIs are not directly involved in the implementation of decisions and concluding observations of the African Commission. The African Commission must encourage NHRIs to include implementation of the decisions of the African Commission and African Court in their thematic focus and programmes.

After a careful review of the evidence and findings presented in the various chapters in this book, it is the view of this author that the African Charter has had modest yet significant impact in all the 17 selected states. However, the two

instruments have not had a uniform effect in all states. The effects of these two treaties have largely been conditional on a combination of three factors: state level characteristics, the nature of the treaty and the level of interaction, persuasion and pressure applied on states by domestic and international compliance partnerships.

In order to improve the impact of the African Charter and the Maputo Protocol in the selected states and across Africa more generally, it is recommended that the focus should be on increasing awareness about these instruments and how they may be used to solve human rights problems in specific domestic contexts. There is empirical support for the proposition that the domestic effect of the African Charter and the Maputo Protocol corresponds to the level of awareness of them at the state level. Domestication of human rights treaties is meaningless if members of the public do not have basic information about these instruments. This is the case in most Francophone countries selected for this study where duly ratified treaties, including the African Charter and the Maputo Protocol, are directly applicable but rarely applied because of the lack of awareness not only by ordinary citizens but also policy makers, legislators, judges and legal practitioners.



# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN BURKINA FASO

*Kounkinè Augustin Somé\**



## 1 Introduction

Burkina Faso has ratified most of the international treaties on human rights. The country was amongst the first African states to make the declaration (pursuant to article 34(6) of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights [African Court]), allowing direct access of individuals and NGOs to the African Court. However, many challenges remain that impede the full enjoyment of the rights contained in the African Charter and the Maputo Protocol. The political crisis that the country experienced in 2014 was the consequence of multifaceted social discontent. Although many claims related to the equitable distribution of resources, unemployment, access to health and housing were raised, the main objective of the social unrest was to oppose the change in the Constitution to allow President Compaoré to remain in office after 27 years of reign. Several violations of human rights occurred during the October 2014 uprising. The

*Mouvement Burkinabè des Droits de l'Homme et des Peuples (MBDHP)* recorded that 34 people were killed across the country, including 21 in Ouagadougou, seven in Sebba, three in Ouahigouya, two in Bobo-Dioulasso and one in Léo. Amongst the victims, at least 19 were shot dead. Unfortunately, at the time of this report, no clear and credible investigation had yet been conducted to establish the exact circumstances of the deaths and to determine responsibilities.

The transitional institutions established following the crisis were intended to facilitate the organisation of credible elections scheduled for October 2015. The revised electoral law excludes all those who supported the unlawful project to change the Constitution.<sup>1</sup> This has been contested by political parties close to the former regime, including before the ECOWAS Court of Justice, which found that the general nature of this provision may lead to discrimination.<sup>2</sup>

Nonetheless, both civil and political rights and economic, social and cultural

\* LLM HRDA 2004; Coordinator, Citizens Information and Documentation Centre (CIDOC), Ouagadougou; asomes@yahoo.fr infocidoc@yahoo.fr

1 Art 166 of the amended Electoral Code.  
2 Judgment ECW/CCJ/JUG/16/15 [http://www.courtecowas.org/site2012/pdf\\_files/decisions/judgements/2015/Aff\\_CDP\\_c\\_1\\_Et\\_at\\_du\\_Burkina.pdf](http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2015/Aff_CDP_c_1_Et_at_du_Burkina.pdf) (accessed 6 September 2015).

rights (ESCR) are guaranteed in the current Constitution. Title I of the Constitution, comprised of two chapters and 30 articles, is dedicated to fundamental rights and duties. Although it is clear that economic, social and cultural rights (ESCR), such as the right to property (article 15) can be claimed before a court, not all ESCR are justiciable.

With regard to the status of women's rights, progress continues to be noted in policy and legislative reform. Still, women continue to be victims of violence and discrimination. Child marriage, harmful traditional practices, maternal mortality and weak participation in political processes, among other things, are still daunting challenges to the full translation of Charter-based rights into reality.

## **2 Ratification of the African Charter and the Maputo Protocol**

Burkina Faso ratified the African Charter on 6 July 1984 and the Maputo Protocol on 9 June 2006. Both the Legislature and the Executive play a role in the process of ratification of international agreements. Depending on the nature of the treaty, the relevant ministerial department initiates a draft request for ratification, the draft is discussed in a Cabinet meeting and when endorsed, it is passed on to Parliament for adoption. Article 149 of the Constitution reads that only Parliament can authorise the ratification of an international convention. According to the Constitution, the President negotiates, signs and ratifies international conventions.<sup>3</sup>

3 Art 148 of the Constitution.

However, the African Charter was ratified by the Executive alone in 1984. At that time, there was no Parliament as the country was under a revolutionary military regime. The instruments of ratification of the Maputo Protocol were deposited on 21 September 2006 according to the process explained above. The ratification process for the Protocol was as follows: the Ministry in charge of the promotion of human rights submitted a draft law to Cabinet and after endorsement, the draft was tabled before Parliament for adoption into law. Act 021-2005/AN of 19 May 2005 authorising government to ratify the Maputo Protocol was adopted on 19 May 2005, promulgated through a presidential decree and published in the Official Journal. The ratification document was sent to the African Union Commission by the Ministry of Foreign Affairs.

During the presentation of the draft bill before the Parliamentary Committee on Foreign Affairs, the Minister in charge of the promotion of women contended that 'given the issues covered by the Maputo Protocol, it is without any doubt the most suitable fundamental legal instrument to the context of African women'.<sup>4</sup> She explained that its ratification by Burkina Faso is in line with the country's will and constant commitment to promoting women's rights and would translate the good will of national authorities to promote and protect the rights of women. She concluded that the ratification of the Maputo Protocol will fill the gaps and lacunas revealed in the implementation of national and international human rights instruments already ratified by the country. In the submissions tabled and defended before Parliament, the Minis-

4 *Exposé des motifs* presented before Parliament by the Minister in charge of the promotion of women.

ter highlighted the value added by the Maputo Protocol and stressed its progressive nature and how it would help advance women's rights.<sup>5</sup>

### 3 Government focal points

The Ministry of Justice, Human Rights and Civic Promotion (*Ministère de la Justice des Droits humains et de la promotion civique – MJDHPC*) is the focal point for interaction on the Charter and the Protocol. It has a specific Directorate tasked with ensuring follow up on international conventions: the *Directorate in charge of following up international agreements*. When it comes to the Protocol, the MJDHPC is assisted and supported by other ministerial departments, including in particular the Ministry of Women and Gender Promotion.

In general, the MJDHPC, being a cross-cutting structure for this matter, collaborates with other departments at different levels. The Ministry hosts the Inter-ministerial Committee on Human Rights and International Humanitarian Law, the *Comité Interministériel des droits humains et du droit international humanitaire (CIMDH)*.<sup>6</sup> It is a technical consultative body that supports and advises government on policies and strategies for the promotion, protection and respect of human rights and international humanitarian law. The CIMDH is tasked to amongst other things: (a) facilitate coordination of human rights promotion and protection activities initi-

ated by government ministries; (b) review and advise on government policies and strategies on human rights; and (c) provide technical support in the drafting of Burkina Faso's state reports to human rights mechanisms, including the UN human rights bodies and the African Commission.

In accordance with the country's international human rights obligations, the CIMDH is also tasked to: review and advise on any dispute involving the state; contribute to the introduction of human rights and international humanitarian law in the formal and non-formal education system; and disseminate human rights and international humanitarian law culture amongst government structures, including the national armed forces.

Besides the CIMDH, there are human rights focal points in each ministry. Nonetheless, the responsibility of implementation of human rights is disputed by several line ministries with reference to the subject matters they cover.

The focal points communicate with the African Commission through diplomatic channels. The Ministry of Foreign Affairs and Regional Integration is therefore a very key transit point. Interviewed stakeholders feel that this way of communicating with the Commission could be quite burdensome. Some commented that direct informal contacts, including through emails are increasingly being established for the purposes of work, but diplomatic channels remain favoured.

### 4 Domestication or incorporation

Article 151 of the Constitution established the principle of the supremacy of

<sup>5</sup> As above.

<sup>6</sup> The inter-ministerial committee on human rights and international humanitarian law (CIMDH) was established by the décret 2005-100/PRES/PM/MPDH du 23 février 2005 portant création, attributions, composition et fonctionnement du Comité interministériel des droits humains et du droit international humanitaire and later on amended by the décret 2008-740/PRES/PM/MPDH du 17 novembre 2008.

international law provisions to those of national law, provided that they are applied by the other party. In the Burkinabe legal system, duly ratified international conventions are directly applicable when they directly recognise the rights of citizens. In cases of conflict, international law is considered superior. Upon publication of the instruments of ratification, the provisions of international law can be invoked by the judge as well as by third parties. Thus, the provisions of the Maputo Protocol can be invoked directly by individuals before national courts. Reliance no longer requires a particular incorporation act or law.

Paragraph 8 of the Preamble to the Constitution reaffirms 'solemnly our engagement vis-à-vis the African charter of human and peoples' rights of 1981'. With this, the Charter is an integral part of the Constitution and this confers a constitutional value to its provisions. As such, they are normally directly applicable. The Maputo Protocol, which was ratified in 2006 as explained in the section below, remains a treaty and therefore is considered at the level of legislation under the Constitution. Almost all the rights provided for by the Charter are included in the Bill of Rights, although only civil and political rights have direct application while economic, social and cultural rights are to be promoted, in the sense of their progressive realisation. In fact, the Charter was ratified at a time when Burkina Faso had no constitution. The Bill of Rights that followed included the Charter rights. The Charter has influenced the new Constitution and the Bill of Rights contained therein.

Burkina Faso, like most civil law traditions, has a monist approach to international treaties. There are no

specific domestication requirements. The African Charter was directly incorporated and forms an integral part of the Constitution.<sup>7</sup> The Preamble of the Constitution refers expressly to the Charter, and the Bill of Rights contained almost all the Charter's rights. However, there is no specific legislation with the intention to give effect to the Charter or the Protocol. A few specific Acts refer to the Charter. Notwithstanding, there are national laws which by their content, are a translation of a combination of various UN and regional human rights instruments. These include among others the law on reproductive health (21 December 2005); a law on the fight against HIV/AIDS and the protection of the rights of persons living with HIV/Aids (20 May 2008); and the law instituting quotas for legislative and municipal elections in Burkina Faso (16 April 2009).

## 5 Legislative reform and adoption

The African Charter was ratified in 1984 when the country was under military rule, and therefore had no constitution. For the Maputo Protocol, a compatibility test was conducted before its ratification in 2006. In the first instance, a legal opinion was sought from the Constitutional Council as to whether the Maputo Protocol is in conformity with the Constitution. The answer was positive.<sup>8</sup> This paved the way for the ratification process to proceed. Furthermore, and in

7 Paragraph 8 of the Preamble of the Constitution reads that 'reaffirming solemnly our engagement vis-à-vis the African charter of human and peoples' rights of 1981'. With this, the Charter is an integral part of the Constitution and this confers a constitutional legal value to its provisions; they are normally directly applicable and opposable to government.

8 Avis juridique no 2006-001/CC du 24/02/2006 sur la conformité à la Constitution du 02 juin 1991, du Protocole à la Charte



general, a project was initiated by the Ministry in charge of the promotion of human rights to align national legislation with international norms with regard to civil and political rights.

Several pieces of legislation have been amended or adopted since ratification of the Maputo Protocol with a view to take women rights into account. These include:

- (a) Law 033-2012/AN of 11 June 2012 on the review of the Constitution;
- (b) Law 0034-2009/AN of 24 July 2009 on rural lands: It gives men and women the same rights to access and enjoyment of land;
- (c) Law 010-2009/AN of 16 April 2009 instituting quotas in the parliamentary and municipal elections, intended to promote women's political rights. This law requires all political parties to include at least 30 per cent of either sex on the list of candidates for legislative and local elections. Failure to abide by this rule will result in the said party losing half of the public funding for electoral campaign activities. The important role played by the African Commission in the adoption of this provision on quotas should also be highlighted; the Commission has sent advocacy letters to several state authorities requesting them to adopt or facilitate the adoption of legislation on quotas;
- (d) Law 029-2008/AN of 15 May 2008 on the fight against human trafficking and similar practices, which provides for particularly severe sanctions when the victim of trafficking is a vulnerable person (such as a pregnant woman or child) or when it has resulted in mutilation or permanent infirmity.

More so, the Constitution was reviewed in 2012 and the issue of gender promo-

africaine des droits de l'homme et des peuples relative aux droits de la femme en Afrique, adopté par la Conférence des Chefs d'Etat et de Gouvernement de l'Union Africaine le 11 juillet 2003 à Maputo.

tion has been incorporated. The Preamble of the Constitution now recognises gender promotion as a factor for the realisation of gender equality as a right and gender promotion has since become a constitutional norm.<sup>9</sup>

## 6 Policy reform and adoption

Several policies and strategies have been developed with a view to taking women's rights into account and which can be considered as aiming to give effect to the Maputo Protocol. These include:

- (a) The National Policy for the Promotion of Human Rights and Civic Education (PNDHPC) 2013-2022 is regarded as a reference document which explains the foundations of government action in the area of human rights and civic promotion. It envisions contributing to the consolidation of the rule of law for better enjoyment of human rights in the service of peace, civism and sustainable development of Burkina Faso by 2022.<sup>10</sup> The policy was adopted through a decree and published in the Official Gazette of Burkina Faso.<sup>11</sup>
- (b) Special Fund for women's initiatives: with regard to women's access to funding and loans, government has established a special Fund to support women's initiatives as well as a special job creation programme to fund women's activities.
- (c) National Gender Policy: the adoption of the National Gender Policy '*Politique Nationale Genre*' in July 2009.<sup>12</sup>

9 See the Preamble and arts 101 of the loi 033-2012/AN du 11 juin 2012 portant révision de la Constitution

10 <http://www.ilo.org/dyn/natlex/docs/SERIAL/97958/116409/F1316129139/BFA-97958.pdf> (accessed 21 November 2015).

11 *Journal Officiel*, 2013-06-06, 23.

12 Ministry of Women and gender promotion website <http://www.mpf.gov.bf/index.php/faqs/1-latest/197-ministere-de-la-promotion-de-la-femme-et-du-genre-le-guichet-special-l-appui-a-l-entreprenariat-feminin-r-expliqueau-x-jeunes-filles> (accessed 21 November 2015).

- (d) FGM Policy: the adoption in 2008 of the Zero tolerance policy on female genital mutilations for an initial period of 2009-2013.
- (e) The Accelerated growth and sustainable development Strategy (SCADD) was adopted in 2011. In this document, the government had planned strategic actions to take into account the specific rights of women mentioned in the SCADD. The country's development plan was reviewed in 2015 with human rights having a central place.

Other documents that have been adopted to boost the objectives of the SCADD include: the National Policy of Human Rights and Civic Promotion; the National Policy on Health; the National Policy on Employment; the National Policy on Finance; and the Program for the Strategic Development of Education, amongst others. All these policies and programmes have been developed for the realisation of women's rights and the welfare of Burkina people.

In general, the government of Burkina is doing its best to improve the conditions and enjoyment of women's legal rights. Although the above mentioned policies are not explicitly said to give effect to the African Charter and the Maputo Protocol, they contribute tremendously to the advancement of women's legal rights, including those provided for in the Charter and Maputo Protocol. Besides the Action Plan for the Promotion of Human Rights and Civic Education, the Minister of Justice and Human Rights has also developed a methodology note to guide the elaboration of sectoral policies with the view to ensuring that they are human rights-based. This was acknowledged by the Human Rights Council during Burkina Faso's review at the second cycle of the UPR.

## 7 Court judgments

In general, domestic courts tend to refer predominantly to national legislation, and in this sense, judges in Burkina Faso, like in most civil law systems, are strongly attached to the local law. To date, the African Charter has not expressly been mentioned in any judgment by a domestic court. The only mention of the Protocol is in the Constitutional Court 2006 legal opinion,<sup>13</sup> confirming that the Protocol was in conformity with the Constitution.

To create more awareness and educate the legal profession on the use of international human rights instruments, the Ministry of Justice is working to sensitise judges and other actors on best practices in the use of international conventions in domestic courts. This work is supported by civil society organisations.

## 8 Awareness and use by civil society

In general, very few NGOs in Burkina Faso are aware of or sensitised on the Maputo Protocol and the Charter. Amongst them, the Burkinabé Human and Peoples' Rights Movement (MBDHP) regularly monitors and advocates for the actual implementation of the Charter. The MBDHP, which has observer status with the African Commission, frequently submits shadow reports. It also issues an annual report on the human rights situation in the country, using the Charter as a basis

13 Avis juridique 2006-001/CC du 24/02/2006 sur la conformité à la Constitution du 02 juin 1991, du Protocole à la Charte africaine des droits de l'homme et des peuples relative aux droits de la femme en Afrique, adopté par la Conférence des Chefs d'Etat et de Gouvernement de l'Union Africaine le 11 juillet 2003 à Maputo.

for review. Women's rights groups such as the Female Lawyers Association (*Association des femmes juristes du Burkina Faso*) also use the Maputo Protocol, mostly in their advocacy work and for their training activities. The Citizen Information and Documentation Center (Cidoc)<sup>14</sup> trained civil society organisations on the rights contained in the Maputo Protocol and how to use the instrument for advocacy and monitoring activities.

During a sensitisation mission to Burkina Faso in March 2006, the African Commission's delegation called on civil society and NGOs in particular to further consolidate their activities in the area of sensitisation of the population on human rights issues through the promotion of the African Charter.

National NGOs which have observer status with the African Commission include: the Mouvement Burkinabé des Droits de l'Homme et des Peuples (MBDHP); the Union Interafricaine des Droits de l'Homme; the Association de Protection et de Sauvegarde de L'Enfance en Danger; the Association d'Appui et d'Eveil 'PUGSADA' (ADEP); the Association des Femmes Juristes du Burkina Faso; the Antenne Social Alerte Burkina (ASAB); the Association Burkinabè pour la Survie de l'Enfance (ABSE); the Centre pour la Gouvernance Démocratique (CGD); and the Fondation pour l'étude et la promotion des droits humains en Afrique (FEPDHA).<sup>15</sup>

Not all of the organisations listed above comply with their observer status

holder's obligations.<sup>16</sup> On the occasion of the periodic report of Burkina Faso reviewed at the 49th ordinary session of the African Commission held in Banjul, The Gambia, only FIACAT and ACAT Burkina presented a shadow report. At the 53rd ordinary session of the Commission, the MBDHP made an oral intervention concerning the human rights situation in Burkina Faso.

It is observed that local NGOs are much more aware of the United Nations human rights mechanisms than those of the African Union. For instance, there are more shadow reports submitted to the UN treaty bodies on Burkina Faso than to treaty bodies established under the African regional human rights system.

## **9 Awareness and use by lawyers and judicial officers**

Many lawyers in Burkina have little awareness of African human rights instruments, including the Charter and the Maputo Protocol, and therefore their effective use is still developing. In conducting this research, we could not find instances where lawyers have used the Charter or Protocol in their submissions or in any other way before domestic courts. The only instances where provisions of regional human rights mechanisms are invoked are when they are used to defend a case before a regional court such as the ECOWAS

14 [www.centrecitoyen.net](http://www.centrecitoyen.net) (accessed 21 November 2015).

15 <http://www.achpr.org/network/ngo/> (accessed 6 September 2015).

16 The Commission started granting observer status to NGOs in 1988. It took a decision at its 11th Session requiring all NGOs with observer status to submit their activity reports to the African Commission at least once every two years – see <http://www.achpr.org/sessions/24th/resolutions/30/> (accessed 13 January 2016). Yet, most NGO's in Burkino Faso with observer status have yet to comply with this requirement.

Court of Justice. In *Decision 2015-021/CC/EL*,<sup>17</sup> the Constitutional Council of Burkina Faso commented on the recent decision of the ECOWAS Court of Justice regarding the compatibility of the electoral code with regional human rights instruments.

Talking to some of the legal practitioners pursuant to this study, they argued that national laws are comprehensive enough to provide them with arguments to defend their cases. However, most of them admitted that they have little or no knowledge of the regional instruments. The Ministry of Justice is organising training to enhance the promotion of the Charter in law societies and to increase the knowledge of these important instruments. Some NGOs are also intervening on this matter.

## 10 Higher education and academic writing

In general, universities do not sufficiently take into account the issue of human rights in their curricula. Even when this is dealt with, it remains very succinct. Law schools teach Civil Rights and Human Rights Law in the third year. This is where the African human rights system is taught. In addition, private universities began offering LLM courses on human rights studies.

Human rights law is also taught at the National School of Administration (*Ecole Nationale d'Administration et de Magistrature – ENAM*) to public officers, especially civil servants recruited to work with the Ministry in charge of human rights. The African human rights system, together with the African Char-

ter and Maputo Protocol, is taught in this course.

However, and within the UN-backed world programme for human rights education,<sup>18</sup> government has introduced human rights education in the curricula of all branches of educational structures, including at the ENAM, Universities and high schools.<sup>19</sup> Training modules and programmes are also developed for state-run professional education institutions and training centres.<sup>20</sup>

Apart from some articles, no publication has been registered specifically concerning the African Charter and the Maputo Protocol in Burkina Faso. Academic practitioners explained that this is due to the system put in place by the *Conseil africain et malgache pour l'éducation supérieure (CAMES)*, which does not consider publications on human rights when evaluating candidates for promotion. Due to this, some university professors have limited themselves to theoretical teaching with almost no publication on the topic. However, Yarga Larba and Professor Salif Yonaba have written on human rights though not with a specific focus on the African Charter and the Maputo Protocol. Law students have equally written their dissertations on various human rights issues, including on the African human rights system. When talking about the Charter, the views generally expressed are that it is an African instrument which is based on African values and perspectives.

17 <http://www.zoodomail.com/spip.php?article10944> (accessed 6 September 2015).

18 <http://www.ohchr.org/EN/Issues/Education/Training/WPHRE/ThirdPhase/Pages/ThirdPhaseIndex.aspx> (accessed 16 November 2015).

19 Burkina Faso report to the African Commission covering the period of 1998-2002.

20 As above.

## **11 National human rights institutions (NHRIs)**

Burkina Faso has both a National Human Rights Commission (NHRC) and an Ombudsman Office, known as the *Mediateur du Faso*. Both institutions are created by Acts of Parliament, but the NHRC is considered as the primary national human rights institution. The Acts establishing both institutions do not make specific mention of the African Charter or the Maputo Protocol.

The plan of action of the National Human Rights Commission of Burkina Faso has outlined several projects aimed at promoting and protecting human rights. Though the plan does not refer directly to the Charter or the Protocol, its implementation will favour the realisation of the rights articulated therein. The *Mediateur du Faso* traditionally strives to ensure respect of the human rights of the citizenry and its mandate focuses on repairing, through mediation, violations that a citizen may have suffered at the hands of the state. It does not expressly refer to the Charter or the Protocol.

The NHRC is affiliated to the African Commission and therefore submits reports to the Commission, but it is not engaged in direct follow up of the implementation of the Commission's recommendations, decisions or general comments. The yearly reports of the *Mediateur du Faso* have hardly referred to the Charter or the Protocol.

Both the National Human Rights Commission and the *Mediateur du Faso* participate in the national validation workshops before state reports are submitted. Apart from that, their opinions or views are not directly sought. Their participation in the validation

workshops is regarded as an instance of involvement in the preparation of state reports to the African Commission.

## **12 State reporting**

The MJDHPC is the focal point for state reporting to international human rights mechanisms. The *Direction du Suivi des Accords Internationaux – DSAI*, within the MJDHPC, plays a vital role in this process. This Ministry is in charge of monitoring implementation of the African Charter and the Maputo Protocol. However, it relies on many other state ministries in this task, through human rights focal points.

In practice, the state reporting process is as follows: (a) the technical departments of the MJDHPC in collaboration with relevant government ministries generate the first draft, taking into account initial or previous reports; (b) the draft is validated in a workshop with the participation of public structures as well as human rights-based civil society organisations; (c) the validated draft is submitted to the CIMDH for review; and (d) the report is tabled for adoption in a cabinet meeting. This cabinet-adopted version will then be sent to the relevant human rights mechanism through the Ministry of Foreign Affairs and Regional Integration.

For instance, for the most recent reports presented to the African Commission, the MJDHPC established a committee for the preparation of the report and a multi-sectoral committee for the monitoring of the reports drafting process. This committee consisted of representatives from various ministries (the human rights focal points), institutions and civil society organisations. The ministry of women and gender promotion (MPFG) which is in charge

of the implementation of government policies for women rights was heavily involved.

So far, Burkina Faso has presented four state reports. The reports have, however, not always been submitted on time. For instance, the third and fourth cumulated periodic report (2011-2015)<sup>21</sup> was submitted on 11 May 2015. Though it ratified the Maputo Protocol in 2006, Burkino Faso has yet to submit a specific report on the Maputo Protocol. However, in its May 2015 report on the African Charter, Burkina Faso did address implementation of the Maputo Protocol.

Government delegations for the presentation of the report are usually made up of officials from the ministries of justice and human rights and those in charge of women and gender promotion. The delegations usually demonstrate equitable representation of women.

Pertinent concluding observations concerning women's rights made pursuant to the previous report submitted by Burkino Faso include the following. The Commission requested the Government of Burkina Faso:

- (a) Make family planning programmes accessible and increase efforts to reduce maternal and infant mortality;
- (b) Implement support measures of the law on quotas to increase women's representation in decision-making areas;
- (c) Ensure effective implementation of the law on female genital mutilation and strengthen measures to eradicate the practice of female genital mutilation;

- (d) Increase the number of Reception centres for women victims of witchcraft accusation and adopt specific measures for their protection; and
- (e) Facilitate registration procedures and the establishment of supplementary judgment of birth certificates for non-reported children.

Some actions have been taken to give effect to these concluding observations. These include:

- (a) The continuation of the free prenatal care policy for women and child immunisation through the acquisition of drugs and consumables worth 650 million CFA francs;
- (b) The adoption of a national plan for the elimination of female genital mutilation in the perspective of a zero tolerance policy;
- (c) The establishment of shelters for women accused of witchcraft and excluded from their communities. There are 13 reception centres recognised by the Ministry of Social Action and National Solidarity. Furthermore, government adopted a national action plan in 2012 to fight against the social exclusion of people accused of witchcraft; and
- (d) The 2012, adoption of a National civil status strategy covering 2012-2016. This strategy aims to improve the performance and efficiency of the system of registration through computerised registration in all registry offices.

Furthermore, several pieces of legislation and policies have been amended or adopted to take into consideration some of the recommendations made by the African Commission, including the law and quotas for women's political participation. These legislative and policy initiatives may not be specifically taken as a response to the recommendations but they contribute to a solid framework on women's human rights.

21 <http://www.achpr.org/files/sessions/57th/state-reports/3-2011-2015/staterep3.pdf> (accessed 6 September 2015).

### 13 Communications

In total, three cases have been decided on Burkina Faso by the AU human rights monitoring mechanisms.<sup>22</sup> In communication 204/97, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*,<sup>23</sup> the African Commission found that Burkina Faso was in violation of articles 3, 4, 5, 6, 7(1)(d) and 12(2) of the African Charter, and recommended that Burkina Faso heed the legal consequences of such a finding, including by taking specific measures enumerated by the Commission. Very little was done, however, to implement the decision of the Commission. In another case, *Norbert Zongo v Burkina Faso*,<sup>24</sup> the African Court ordered the State of Burkina Faso to resume investigations and prosecute the perpetrators of the murder of Norbert Zongo and his three companions. It also asked the government to compensate the families of the victims.<sup>25</sup>

It should be noted that in recent months, the interaction of Burkina Faso with the AU and ECOWAS human rights mechanisms has been intensive around the application of the AU Charter on Democracy, Elections and Governance. In the case *Congrès pour la Démocratie et le Progrès (CDP) & Autres v L'Etat du Burkina*, the ECOWAS Court

of Justice, in its Judgement ECW/CCJ/JUG/16/15,<sup>26</sup> warned Burkina Faso against mass exclusion of political opponents in the electoral process which may be a violation of the AU Charter on Democracy, Elections and Governance.<sup>27</sup>

### 14 Special mechanism – Promotional visits of the African Commission

To date, none of the special mechanisms of the African regional human rights system have visited the country. Only two promotional missions of the African Commission were conducted to Burkina Faso: one in 2001, and the other in 2007. These promotional missions coincided with the period when Salamata Sawadogo of Burkina Faso was the Chairperson of the African Commission. Amongst other pertinent recommendations, the government of Burkina Faso was asked to:

- (a) Implement reforms, including in the field of justice and ensure the effective implementation of commitments made as part of the quest for solutions to the problems of human rights violations;
- (b) Take all necessary measures to combat illiteracy and poverty affecting the enjoyment of human rights; and
- (c) Take the necessary steps to transform the Secretariat for the Promotion of Human Rights into a full Ministerial Department and establish a National Human Rights Commission of Burkina Faso.

After this promotional mission, Burkina Faso created the Ministry of Human

22 <http://caselaw.ihrrda.org/fr/country/burkina-faso/> (accessed 6 September 2015).

23 <http://www.achpr.org/communications/decision/204.97/> (accessed 13 January 2016).

24 Case 013/11, African Court on Human and Peoples' Rights.

25 As above.

26 [http://www.courtecowas.org/site2012/pdf\\_files/decisions/judgements/2015/Aff\\_CDP\\_c\\_1\\_Etat\\_du\\_Burkina.pdf](http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2015/Aff_CDP_c_1_Etat_du_Burkina.pdf) (accessed 6 September 2015).

27 [http://www.au.int/en/sites/default/files/traties/7790-file-african\\_charter\\_on\\_democracy\\_elections\\_and\\_governance.pdf](http://www.au.int/en/sites/default/files/traties/7790-file-african_charter_on_democracy_elections_and_governance.pdf) (accessed 13 January 2016).

Rights. However, currently, human rights are again merged with justice into a single ministry. The country has improved the literacy and school enrolment rates.

### **15 Factors that may impede or enhance the impact of the African Charter and the African Commission**

Poverty, ignorance and lack of awareness of existing human rights instruments and mechanisms, as well as insufficient political commitment impede negatively on the positive impact of the Charter, the Maputo Protocol and activities of the African Commission in Burkina Faso. With the popular insurrection of 30-31 October 2014, the situation is changing and changing fast. Many political and civil society actors are conducting sensitisation campaigns in favour of respect for human rights and women's rights in particular. After the events of October 2014 which led to a change in regime, the different actors are fighting for the revision of some laws in order to improve women's political participation. These actions will contribute to enhanced impact of the African Charter and Maputo Protocol in Burkina Faso. For instance, a quota was set aside for women in the National Transitional Council (CNT) which serves as legislative body. Their participation in the CNT has led to pro-women's rights reforms being initiated.

In general, the existing legal and institutional frameworks, including the human rights commission which enjoys observer status with the African Commission, and the national commission established to follow up on Burkina Faso's commitments in favour of

women are expected to strengthen impact of the Charter and Protocol in Burkina Faso. Translation of the African Charter into local languages and the renewed interest of civil society for the respect of human rights norms, are factors that could further boost impact of the Charter and Protocol in Burkina Faso.

Apart from the 19th ordinary session of the African Commission that it hosted from 26 March to 4 April 1986, Burkina Faso has hosted no other sessions of the African Commission in recent years. Indeed, holding another session of the Commission in the country may help to boost people's understanding of the greater awareness and use of the Charter and its protocols by the legal profession.

To date, only Ms Salamata Sawadogo has been a member of the African Commission. She chaired the Commission from 2003 to 2007. Since then, Burkina Faso has not had another national serve as a member of the Commission. During the chairpersonship of Ms Sawadogo, citizens of Burkina Faso learned more of the Commission and relevant documentation and information were provided to national NGOs. As Chair of the Commission, she also played a vital advocacy role in the adoption of legislation allocating gender-based quotas for parliamentary and local elections.

The role of the media in implementation of the African Charter and Maputo Protocol is limited. The media cover the activities of civil society and publish their press releases, but there is no specific programme developed by the press on promotion of the African Charter. Some radio and TV stations hold debates on women's rights themes, but



these are not always clearly linked to the Charter or the Protocol. It would be interesting to organise training activities for the benefit of media practitioners on use of African instruments for the protection of human rights.



# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN CAMEROON

*Polycarp Ngufor Forkum\**



## 1 Introduction

The Preamble of Cameroon's Constitution states that 'the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights' and further that 'the state shall guarantee all citizens of either sex the rights and freedoms set forth in the Preamble of the Constitution'. Articles 12 and 13 of Decree 94/199 of October 1994, on the General Status of the Public Service, amended by Decree 2000/287 of 12 October 2000, specifies that the public service is open, without discrimination, to every Cameroonian fulfilling age requirements. Electoral eligibility and voting rights are equally guaranteed to every person of Cameroonian nationality, without distinction of sex; provided they meet the voting age requirement, which is 20 years in Cameroon.<sup>1</sup> The principles of equality and non-discrimination are further guaranteed by article 16 of the Civil Code, article 1 of the Penal Code and article 84 of the Labour Code.

\* LLM HRDA (Pretoria), Superintendent of Police and Head, Human Rights Unit, National Advanced Police School, Yaoundé – Cameroon/Independent Researcher.

1 National Commission on Human Rights and Freedoms *Report on the state of Human Rights in Cameroon* (2009) 73.

In Cameroon, there are several institutions that deal with human rights. These institutions include the Ministries of External Relations, Promotion of the Family, Social Affairs and Justice and also the Cameroon National Commission on Human Rights and Freedoms (NCHRF). As per the decree establishing the Ministry of Women and the Promotion of the Family,<sup>2</sup> there is an entire directorate for the Promotion and the Protection of the Family and the Rights of the Child. Cameroon has acceded to the major international and regional human rights treaties.<sup>3</sup>

2 Decree 2012/0638 of 21 December 2012 on the Organisation of the Ministry of Women and the Promotion of the Family.

3 These include: International Covenant on Civil and Political Rights (Accession 27 June 1984); Optional Protocol to the International Covenant on Civil and Political Rights (Accession 27 June 1984); International Convention on the Elimination of All Forms of Racial Discrimination (Ratification 24 June 1971); Convention on the Elimination of All Forms of Discrimination against Women (Ratification 23 August 1994); Optional Protocol to the Convention on the Elimination of Discrimination against Women (Accession 7 January 2005); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Accession 27 June 1984); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Accession 19 February 1982); Convention against Torture and Other Cruel, Inhuman

Major civil and political rights are guaranteed and protected in Cameroon. Socio-economic rights are justiciable in spite of governments' constant justification of compliance difficulties on the economic situation of the country. Initiatives at the level of protecting women against FGM and gender-based violence include the draft Code of the Person and the Family, which contains favourable provisions on the rights of women, and provides a major opportunity for gender equality and equity. Moreover, the draft bill on the Prevention and Punishment of Violence on Women and Gender based Discriminations protects women and establishes legal equality between men and women. Also worth mentioning is the update of the National Action Plan to fight Female Genital Mutilation (FGM) which focuses mainly on sensitisation of both victims and actors of the phenomenon. Areas of concern for women's rights in Cameroon include the promotion of equal and equitable access of women and men, and girls and boys to education, training and information; the promotion of equal opportunities between women and men in the domain of the economy and employment; and the increase in the participation and representation of women in the

or Degrading Treatment or Punishment (Accession 19 December 1986); Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Signature 15 December 2009); Convention on the Rights of the Child (Ratification 11 January 1993); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (Ratification 4 February 2013); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Ratification 5 June 2002); Convention relating to the Status of Refugees (succession 23 October 1961); African Charter on Human and Peoples' Rights (Ratification 20 June 1989); and African Charter on the Rights and Welfare of the Child (Ratification 5 September 1997).

spheres of decision making and elective offices.

## 2 Ratification of the African Charter and the Maputo Protocol

The Republic of Cameroon signed and ratified the African Charter on 23 July 1987 and 20 June 1989, respectively. The Maputo Protocol was signed on 25 July 2006, ratified on 13 September 2012 and the instrument of ratification deposited on 28 December 2012.<sup>4</sup> In terms of the Constitution of Cameroon,<sup>5</sup> the executive, through the President of the Republic, has the responsibility to ratify all international treaties. Article 43 provides as follows:

The President of the Republic shall negotiate and ratify treaties and international agreements. Treaties and international agreements falling within the area of competence of the Legislative Power as defined in Article 26 above shall be submitted to Parliament for authorisation to ratify.

On its part, article 44 states the following:

Where the Constitutional Council finds a provision of a treaty or of an international agreement unconstitutional, authorisation to ratify and the ratification of the said treaty or agreement shall be deferred until the Constitution is amended.

Further still, article 45 suggests that Cameroon is a monist state as it stipulates that:

Duly approved or ratified treaties and international agreements shall, following their publication, override national laws,

<sup>4</sup> Decree 2009/143 of 28 May 2009.

<sup>5</sup> Constitution of the Republic of Cameroon, Law 96-06 of 18 January 1996 amending the Constitution of 2 June 1972.

provided the other party implements the said treaty or agreement.

The organ in charge of implementation of the African Charter is the Sub-Directorate of NEPAD at the Ministry of External Relations. Regarding the Maputo Protocol, there is no specific organ in charge of implementation in Cameroon. However, the government has created an institutional framework that protects and promotes the rights of women and girls. In 1975, the Ministry of Social Affairs was created and this later became the Ministry of Women Affairs, and then the Ministry of Promotion of Women and the Family and today exists as the Ministry of Women Empowerment and the Family. The mandate of the Ministry is to put in place measures aimed at respect for the rights of women in Cameroon, the elimination of all forms of discrimination against women and the promotion of equality in political, economic, social and cultural life.<sup>6</sup>

The Ministry is mandated to study and propose strategies and measures aimed at reinforcing the promotion and protection of the rights of the child so as to take into account the definition of woman given by the Maputo Protocol which is child inclusive. In this context, girls are victims of for example forced marriages, sexual abuse and discrimination in educational opportunities.<sup>7</sup>

### **3 Domestication or incorporation**

There is no separate section in the Constitution that could be referred to as a bill of rights. The revised Constitution of 1996 (1996 Constitution) gives full

effect to the fundamental rights and freedoms spelt out in the Universal Declaration on Human Rights (UDHR), the African Charter and other ratified international treaties. The 1996 Constitution limits itself to, in the Preamble, enumerating human rights such as the rights to life, physical and moral integrity and to humane treatment; the right to freedom and security; the right to education; the protection of minorities; the rights of indigenous populations in accordance with the law; freedom of movement; privacy; the right not to be unduly prosecuted, arrested or detained; the right to a fair hearing before the courts; the right to presumption of innocence; the right not to be harassed on grounds of one's origin, religious, philosophical or political opinions or beliefs, freedom of religion and worship; freedom of communication, of expression, of the press, of assembly, of association, and of trade unionism, as well as the right to strike; the right to a healthy environment; and the obligation to work.

Article 65 clearly states that the Preamble shall be part and parcel of the Constitution. Therefore, fundamental rights mentioned in the Preamble as per article 45 have primacy over every domestic law. It is the duty of lawmakers to ensure that, prior to ratification, no provisions of an international convention conflict with existing national laws. The Parliament of Cameroon neither made reservations while ratifying the Maputo Protocol nor modified domestic laws before ratification. However, the adoption in 2010 of a National Plan of Action for the Elimination of Female Genital Mutilation in Cameroon is a genuine example of an explicit measure adopted to give effect

6 Decree 2011/408 of 9 December 2011 organising the government.

7 Report by the Ministry of Justice on Human Rights in Cameroon in 2012 (2013) 284.

to the African Charter and the Maputo Protocol.<sup>8</sup>

#### 4 Legislative reform or adoption

There is no available information about a compatibility study of domestic law with the African Charter that was undertaken before its ratification. Though a monist state, Cameroon does not have a real problem in matters of domestication as treaty ratification cannot occur without Parliament's authorisation,<sup>9</sup> which process should ensure that there is no conflict between a treaty proposed for ratification and the Constitution. The compatibility test is by way of consulting the Foreign Affairs Committee of the National Assembly which has the duty to control the constitutionality of international treaties and agreements. There is no particular law that was adopted to facilitate implementation of the African Charter or Maputo Protocol.

However, the government says that in keeping with international human rights law, the Maputo Protocol is in conformity with the national law in force by reaffirming the traditional civil, political, economic, social and cultural rights of women. Some of the rights have been consolidated while others reinforced with the aim of wiping out gender inequality in family management, institutionalisation of political equality, greater involvement of women in decision-making processes and the drawing up and implementation of development programmes.<sup>10</sup>

The draft Code of the Person and the Family, which contains favourable provisions on the rights and aspirations of women, provides a major opportunity for gender equality and equity. The Bill provides amongst other things that: dowry and gifts cannot be returned;<sup>11</sup> spouses owe each other mutual love, respect, fidelity, help and assistance, and in the case of polygamy, each wife has the right to equal treatment in relation to other wives;<sup>12</sup> each spouse has freedom to work without obtaining the consent of the other;<sup>13</sup> in case of dissolution of a marriage, the wife is entitled to her share of the marriage property before the husband;<sup>14</sup> and in cases of polygamy, all the widows have the right to inheritance shared between them in proportion to the number of years in marriage with the deceased.<sup>15</sup>

In addition, the draft bill on The Prevention and Punishment of Violence on Women and Gender based Discriminations, protects women and establish legal equality between men and women.<sup>16</sup> The content of the right to health has been updated as per the Maputo Protocol by highlighting the right of women to control reproductive functions and more specifically through recognition of a legal right to medical abortion.<sup>17</sup>

Finally of importance is the creation by Order 081/CAB/PMd of 15 April 2011 of an inter-ministerial monitoring

8 National Commission on Human Rights and Freedoms *Report on the state of Human Rights in Cameroon* (2012) 69.

9 Art 43 of the Constitution.

10 Report by the Ministry of Justice on Human Rights in Cameroon in 2009.

11 Draft Code of the Person and the Family, sec 215.

12 Draft Code of the Person and the Family, sec 234(3).

13 Draft Code of the Person and the Family, sec 240.

14 Draft Code of the Person and the Family, sec 459(2).

15 Draft Code of the Person and the Family, sec 545(2).

16 Report of the Ministry of Justice 2005 (2006) 252.

17 Penal Code of Cameroon, sec 339.

committee for the implementation of international and regional human rights promotion and protection mechanisms including the African Commission. This inter-ministerial Committee, which reports to the Prime Minister, is vested with the power to draw up a list of the different cases before these bodies, propose ways of addressing the recommendations and/or decisions of these bodies, ensure the implementation of validated proposals, brainstorm on the possibility of reducing or avoiding situations where the government is blamed in cases investigated by these bodies and encourage and oversee training schemes relating to the promotion and protection of human rights.<sup>18</sup>

## **5 Policy reform or formulation**

The Ministry of Women's Empowerment and the Family has carried out several actions for the promotion of women's rights which resulted in an update of the National Action Plan to fight Female Genital Mutilation (FGM) which focusses mainly on sensitisation of both victims and actors of the phenomenon; calling on opinion leaders and public authorities on the issue; multi-form support to the actors and their socio-professional reconversion; and the psychological management of victims.<sup>19</sup> This has been followed up by a series of activities and events.

The government admits that the promotion and protection of the rights of women according to the norms established under the Maputo Protocol is a progressive process that calls on all

stakeholders to ensure their effective implementation. Significant progress has been made towards the promotion and protection of the rights of vulnerable classes although much is still to be done.<sup>20</sup>

Also worth mentioning is a three sector National Gender Policy set up in 2012 by government, with the support of GTZ and SNV. This policy concerns the promotion of equal and equitable access of women and men, girls and boys to education, training and information; the promotion of equal opportunities between women and men in the domain of the economy and employment; and the increase in participation and representation of women in the spheres of decision making and elective offices. This invaluable led to lofty initiatives. More than ever before, gender equality is considered to require women's access to elective posts as in the Electoral Code which includes a gender provision in the electoral process.<sup>21</sup> The Electoral Code states that for the election of parliamentarians to the National Assembly, municipal counsellors and senators, 'each list shall take into consideration the various sociological components of the constituency concerned. It shall also take into consideration gender aspects'.<sup>22</sup>

The United Nations Secretary General initiated a campaign known as *Africa Unite* to end violence against women and the girl child in Cameroon in 2013.<sup>23</sup> Efforts to improve the living conditions of women are discussed in

18 Fifty-third ordinary session of the African Commission *Third Periodic Report of Cameroon within the framework of the African Charter on Human and Peoples' Rights* Banjul, 9 to 24 April 2013.  
19 Report of the Ministry of Justice (n 16 above) 284.

20 Report of the Ministry of Justice (n 16 above) 287.

21 Law 2012/001 of 19 April 2012 relating to the Electoral Code.

22 Electoral Code (n 21 above) art 151(3).

23 National Commission on Human Rights and Freedoms *Report on the state of Human Rights in Cameroon* (2013) 55.

framework documents for Cameroon's development, including most notably, the Poverty Reduction Strategy Paper, which is in line with the Millennium Development Goals (MDGs).<sup>24</sup>

Generally, to ensure better incorporation of the recommendation on the need to take measures for the total and effective implementation of the African Union (AU) Solemn Declaration on Gender Equality on the one hand, and the need to formulate a policy on gender representation in positions of responsibility on the other, it must be underscored that though the 50 per cent quota prescribed by the African Commission has not yet been achieved, initiatives taken by the government in this regard must be noted. These initiatives include, amongst others, an overall brainstorming on the status of the woman in Cameroon. Thus, a National Gender Policy (NGP) has been formulated, the vision of which is consistent with the general vision of Cameroon for 2035. It seeks to guarantee the enjoyment of the same rights by men and women including equitable and equal participation in the development of the country.<sup>25</sup>

The developments described above have been in spite of condemnation by the Catholic Church. At the 34th general assembly of the National Episcopal Conference of Cameroon, the Bishops of Cameroon adopted and published, on 27 June 2009, a Declaration which in substance states that the Church disapproves the will of the law to protect women against all forms of social injustice and abuse. The Conference stated:

Article 14 of the Maputo Protocol really endangers life at birth by granting women

24 National Commission on Human Rights and Freedoms (n 23 above) 73.

25 Third Periodic Report of Cameroon (n 18 above) para 32.

excess reproductive rights. In other words, this Article is an open door legalizing abortion in Africa; we condemn it ... This law is repugnant to the Cameroon law which prohibits abortion and its legalisation.<sup>26</sup>

In a press conference on 23 September 2009 and carried by Cameroon Tribune of 24 September 2009, the Minister of Women's Empowerment and the Family explained why Cameroon ratified the Maputo Protocol. She declared:

The Maputo Protocol is in line with the Head of State's blueprint project for the society and, consequently, with the policy orientations thereto. Its ratification is a further indicator of the continuous harmony between the national policy and the development directives of the international community.<sup>27</sup>

## 6 Court judgments

In the famous Cameroonian case of *Immaculate Vefonge v Sammuell Lyonga Yukpe*, the Court of Appeal of Buea ruled to sustain a Bakweri custom whereby a husband is forbidden to send away a nursing mother from the matrimonial home or worse still contemplate divorce proceedings against her.<sup>28</sup>

Furthermore, the NCHRF registered some cases in which the African Charter was violated.<sup>29</sup>

For example:

- *Nzecke Marie v Ngo Etogo Apollinaire* in which on 23 January 2012, the NCHRF received a report by the Ngo Etogo family denouncing the violation of physical integrity suffered by Ms Nzecke Marie, on the part of Mr Etogo

26 Le jour 484 of 13 July 2009 10.

27 Cameroon Tribune No 243 of 24 September 2009 9.

28 National Commission on Human Rights and Freedoms (n 23 above) 104.

29 National Commission on Human Rights and Freedoms (n 23 above) 67-69.



Appollinaire, her father, who inflicted burns on her;

- *Ms Otteh Ernestine Ndam*, in which a teacher in a government primary school in Yaoundé filed a report to the NCHRF to denounce the physical, moral and psychological abuse she suffered regularly at the hands of her husband, alongside his failure to contribute in any way to running of the household; and
- *Ms Ewane Njombo Dora Claire, widow of late Ewane Nnoko* who died in a road accident in 2002 in Lagos (Nigeria), filed a report to the NCHRF to denounce the violation of her right to compensation by the management of African Reinsurance Corporation (AFRICA-RE), which had not fulfilled its contractual obligations relative to the case of her late husband's fatal accident.

The NCHRF having a quasi-judicial status settled these matters by reconciling the parties with reference to the African Charter and the Maputo Protocol.

## **7 Awareness and use by civil society**

The categories of rights that emerge from the Maputo Protocol have been classified by the Ministry of Justice into the following three categories: protection of women against violence, prohibition of poor treatment of women, and the right of women to control reproductive functions.<sup>30</sup> Civil society organisations in Cameroon are well aware of the African Charter and the Maputo Protocol. As will be illustrated below, the African Charter has been used in NGOs' work and its provisions mentioned as well. As stated above, ratification of the Maputo Protocol in Cameroon has been met with stiffness on the part of the Catholic Church with

respect to article 14 of the Protocol on health and reproductive rights. However, following the Bishops' Resolution, a protest was held in the Douala Archdiocese.<sup>31</sup>

Article 14(2)(c) of the Maputo Protocol on health and reproductive rights, often regarded as a bone of contention, calls on governments to

... protect the reproductive rights of women 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.

Article 337 of the Cameroonian Penal Code which deals with abortion severely sanctions the practice. In terms of this provision, abortion can only be undertaken in the case of pregnancy resulting from rape and subject to judicial approval. Abortion may also be carried out for medical reasons as stipulated in article 339 of the Penal Code. Given the clearly defined circumstances in which abortion is permissible, the Maputo Protocol cannot be used to justify infanticide or similar practices.<sup>32</sup>

Nevertheless, the Catholic Church gained the support of the Cameroonian youth, who through youth associations opposed this aspect of the Maputo Protocol. By extensive means, including social media, they expressed their indignation, arguing that the Maputo Protocol legitimises homosexuality in the country, contrary to the law in force.

30 Report of the Ministry of Justice (n 16 above) 252.

31 [http://goliath.ecnext.com/coms2/gi\\_0199-12086493/Cameroon-abortion-the-Catholic-hierarchy.html](http://goliath.ecnext.com/coms2/gi_0199-12086493/Cameroon-abortion-the-Catholic-hierarchy.html) (accessed 1 September 2011).

32 <http://www.leffortcamerounais.com/2009/10/female-empowerment-and-family-minister-says-cameroon-has-not-legalised-abortion-and-homosexuality.html?cid=6a00d83451c73369e20120a8e780dd970b> (accessed 21 November 2015).

Faced with this lack of understanding of the provisions of the Protocol and as a way to enlighten the public on the matter, the NCHRF organised, on the occasion of the International Day of the African Woman on 31 July 2009, a panel discussion on the stakes and challenges of ratification of the Maputo Protocol.<sup>33</sup>

Civil society organisations in Cameroon have had occasion to submit shadow reports before treaty-monitoring bodies. For instance, the International Working Group on Indigenous Affairs (IWGIA) submitted complimentary information in 2006 to the African Commission in preparation of the revision of Cameroon's periodic report. The information presented was on the rights of indigenous people in Cameroon.

In preparation for the examination of Cameroon's periodic report by the African Commission in May 2010, the Centre for Environment and Development (CED), in collaboration with local partners, undertook consultations with communities in Eastern and Southern Cameroon. The consultations took place in March 2010. The purpose of the consultations was to gather information on the situation of indigenous women in Cameroon's forests in order to better inform the elaboration of a supplementary report to the African Commission and to report on the situation of indigenous women and peoples in the country. Later in March 2010, indigenous women in Cameroon also had the opportunity to voice their concerns at the National Forum on Forests which welcomed the participation of 11 indigenous women.

Building on their supplementary report submitted to the United Nations Committee on the Elimination of Racial Discrimination (CERD), in January 2010, the *Réseau Recherches Actions Concertées Pygmées* (RACOPY), and FPP included the issues raised by indigenous women and their communities during the consultations and at the National Forum on Forests in their supplementary report to the African Commission. These issues included the multiple forms of discrimination faced by indigenous women in society; violation of their reproductive rights; indigenous women's increasing lack of access to health care, water, and traditional resources; and the obstacles to conducting traditional and income-generating activities, which contribute to food insecurity, greater marginalisation, and extreme poverty. The report recommended that the African Commission urge the government of Cameroon to take concrete measures to protect doubly marginalised indigenous women.

The concluding observations that followed the consideration of Cameroon's state report are remarkable for the number of recommendations relating to the rights of indigenous peoples. Many of the recommendations can be said to draw on the information outlined in the supplementary report submitted to the African Commission. In addition to recommending that Cameroon 'harmonize the national legislation with the regional and international standards on the rights of indigenous populations or communities' and 'work towards the consideration of their cultural peculiarities', the African Commission also expressly urged Cameroon to 'take special measures to guarantee the protection and implementation of indigenous women's rights due

33 National Commission on Human Rights and Freedoms (n 1 above) 74.

to their extreme vulnerability and the discrimination to which they are subject'. These recommendations constitute important legal standards and a significant step for indigenous peoples and women. They can now be used at the national level for the recognition and realisation of rights.<sup>34</sup>

## **8 Higher education and academic writing**

The law faculty of the University of Dschang conducts training on human rights. Before 2009, the programme was a *Diplôme d'Etudes Supérieures Spécialisées* (DESS) in human rights and humanitarian action. Since the University Reform in 2009, this programme is the equivalent of a masters' degree and has a module in African human rights law which draws content from the African Charter as well as the Maputo Protocol.

At the University of Buea, there is an introductory course on human rights, which also touches on the African human rights system. However, the course is an elective for students with a specific interest in the discipline of human rights. In the same vein, the *Association pour la Défense des Droits de l'Homme en Afrique Centrale* (APDHAC), an NGO based at the Catholic University of Central Africa (UCAC), has a fully-fledged programme on human rights in Africa. This institution, through UCAC, offers master's degree and doctorate programmes in human rights. The institution also offers year-long short courses on different aspects of

human rights in the African human rights system and beyond.

The National Advanced Police School, Yaoundé, has human rights as a subject and human rights is also mainstreamed into other subjects. In classroom lectures, especially on gender and policing, reference is made on the provisions of the Maputo Protocol. Recently, some students in their end course dissertation for the award of the diploma of Superintendent of Police, included in their writing ideas which drew on the gender provisions of the Maputo Protocol in assessing whether police efficiency might be enhanced if gender concerns are more expressly considered during recruitment, training, deployment and promotion. Such thoughts are often regarded as contrary to opposing views that more women in the police academy will make the service less efficient.

## **9 National human rights institutions (NHRIs)**

The NCHRF frequently refers to Cameroon's ratification of the African Charter and the Maputo Protocol amongst other international conventions relating to the rights of women but regrets that the social and cultural context in which Cameroonian women live is characterised by long lasting practices that largely emanate from customs and religious precepts that encourage or justify distinction, exclusions or gender based restrictions, instead upholding the primacy of men at all levels.<sup>35</sup>

The NCHRF is, however, keen on implementation of the concluding observations and decisions of the African

34 See Forest Peoples Programme 'Advocacy efforts lead to African Commission's increased consideration of indigenous women's rights' 3 June 2011 <http://www.forestpeoples.org/topics/gender-issues/news/2011/06/advocacy-efforts-lead-african-commission-s-increased-consideration> (accessed 1 September 2011).

35 National Commission on Human Rights and Freedoms *Report on the state of Human Rights in Cameroon 2007-2008* (2008) 39.

Commission. For example, as part of national capacity building in human rights, the NCHRF organised a training workshop for its focal points in the various state administrations and institutions on the universal system for the submission of reports and follow up on recommendations issued by treaty bodies.<sup>36</sup>

## 10 State reporting

Cameroon has submitted one initial report and three periodic reports on the African Charter to the African Commission.<sup>37</sup> The goal of periodic reports is to present the progress and difficulties in implementing human rights in a country. In the case of Cameroon, periodic reports have been cited as a means to show that international conventions constitute domestic legislation and could be invoked in a court of law in Cameroon.<sup>38</sup> To date, no specific, separate reports on the Maputo Protocol have been submitted.

A state report in Cameroon is prepared by inter-ministerial collaboration between the Ministry of Foreign Affairs and the Ministry of Justice. More specifically, the report is prepared by the Division of International Cooperation and the Division of Human

Rights in the Ministry of Justice. The African Affairs Division at the Ministry of Foreign Affairs also takes part in this process.

However, in its concluding observations, the African Commission regretted the fact that Cameroon's second periodic report did not take into account the concluding observations adopted at the 39th ordinary session of the Commission following presentation by Cameroon of its last periodic report. In addition, the African Commission noted that there is no reference in the report to the conditions under which the report was prepared and as to the involvement of civil society in the drafting process.<sup>39</sup>

## 11 Communications

To date, the African Commission has received 11 communications against Cameroon filed by civil society organisations on behalf of individuals and by individuals themselves.<sup>40</sup> Of these 11 communications, six communications were declared inadmissible on grounds ranging from the fact that Cameroon had not yet ratified the Charter at the time the communications were filed,<sup>41</sup> to non-exhaustion of local remedies.<sup>42</sup>

Of all the communications brought before the African Commission against Cameroon, the *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v*

36 National Commission on Human Rights and Freedoms *Report on the state of Human Rights in Cameroon 2008* (2009) 22.

37 The initial report was presented in 2002 in Pretoria, South Africa. The first report was presented in Banjul, The Gambia in 2006 and the second report, which covered the period 2003-2008, was presented during the 47th ordinary session of the Commission in May 2010 in Banjul, The Gambia. The third periodic report was submitted during the 15th extraordinary session held from 7 to 14 March 2014.

38 BR Guimdo Dongmo 'Le droit d'accès à la justice administrative au Cameroun: Contribution à l'étude d'un droit fondamental' *Revue de la recherche juridique-droit prospectif* (2008) 463.

39 Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Cameroon, adopted at the 47th ordinary session of the African Commission held from 12 to 26 May 2010, Banjul, The Gambia.

40 See [http://www.achpr.org/english/\\_info/index\\_Decision\\_Cameroon.html](http://www.achpr.org/english/_info/index_Decision_Cameroon.html) (accessed 21 November 2015).

41 See *International PEN v Malawi, Ethiopia, Cameroon and Kenya* (unreported) Communication 19/88 7th Activity Report.

42 See *Miss A v Cameroon* (2004) AHRLR 39 (ACHPR 2004).

Cameroon has received the greatest, most intensive and continuous media attention – for over a decade now.<sup>43</sup> This case was finalised by way of an amicable settlement between the parties. The complaint lodged by an NGO maintained that following the liberalisation of airwaves in 2000, an application to the Ministry of Communications of Cameroon for a licence to operate a radio station was put forward. After the six months period prescribed by law, the Ministry did not respond favourably to the request, arguing that the application was still being considered. The complainant started broadcasting programmes, the Ministry of Communication banned the radio station and the police and army then sealed the premises of the radio station.

The complainant requested the African Commission to consider the above facts as a violation of articles 1, 2, 9 and 14 of the African Charter and pleaded with the African Commission to request Cameroon to pay adequate compensation to the victim for multiple violations of their rights and freedoms. At the 36th ordinary session of the African Commission, the Minister of Justice at the time offered his good offices with a view to facilitating an amicable solution to the matter. At the 38th ordinary session, the complainant informed the African Commission that the government of Cameroon dropped the criminal charges against the director of the radio station and released the equipment that was earlier confiscated. The government also granted provisional authorisation to broadcast. On its part, the director of the radio station agreed to discontinue the communication before the African Commission. The African Commission

took note of the above request and closed the file.

## **12 Special mechanisms and promotional visits by the African Commission**

In September 2002, Dr Vera Chirwa, the then Special Rapporteur for Prisons and Detention Conditions of the African Commission, visited prisons and detention centres in Cameroon. The objective of the visit was to assess and document the conditions of detention in Cameroon, make immediate recommendations where necessary and initiate cooperation with the government of Cameroon towards the improvement of prison conditions in the country.<sup>44</sup>

In February 2011, the Chairperson of the African Commission, Reine Alapini-Gansou headed a delegation to Cameroon with a special focus on the conditions as well as the rights of women and journalists who were held in detention. In the delegation was Justice Lucy Asuagbor, a Cameroon national, who served previously as the Special Rapporteur on Human Rights Defenders in Africa for the African Commission and who has just recently assumed the mandate of Special Rapporteur on the Rights of Women in Africa. The visit to Cameroon was essentially intended to assess the human

43 (2006) AHRLR 75 (ACHPR 2006).

44 Prisons in Cameroon report of the Special Rapporteur on prisons and conditions of detention in Africa – The African Commission on Human and Peoples' Rights Report to the government of the Republic of Cameroon on the visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa from 2 to 15 September 2002.

rights situation in the country.<sup>45</sup> Commissioner Reine Alapini Gansou noted with satisfaction that Cameroon opened its doors to the mission without any restraints. The mission met with ministers of external relations, justice, territorial administration and decentralisation, defence as well as the general delegate for national security, Supreme Court representatives and the Prime Minister of Cameroon.

### **13 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission**

There are indeed factors that play in favour or against implementation of the African Charter and the Maputo Protocol in Cameroon. There are shortcomings both at the level of penal law and at a civil level. The penal law for example does not define the concept of discrimination against women and does not repress it either. Article 242 of the Penal Law prohibits discrimination on grounds of race and religion only.

Moreover, we note the persistence of customary and religious practices that impede the full enjoyment of rights by women, especially those that deny women and girls their rights to inheritance; the practice of inhuman and degrading widowhood rites; female genital mutilation; and the primacy of masculinity and the patriarchal system.

To add to these challenges, poverty and ignorance of women constitute a

real obstacle to the full enjoyment of rights. Despite the measures taken to ensure the peace of the population, the growing insecurity in some parts of Cameroon is a major concern that is likely to affect the effective promotion and protection of human rights in general and the African Charter and the Maputo Protocol in particular.<sup>46</sup>

Above all, Cameroon has not yet complied with the directive which requires 50/50 gender parity in parliament and in other leadership positions. Women and especially indigenous women are still marginalised despite adoption by the African Commission of the Resolution on the Protection of Rights of Indigenous Women in Africa.

Cameroon has also not yet implemented the concluding observations and recommendations by the African Commission with necessary speed, which amongst other recommendations include the call for ratification of the African Charter on Democracy, Elections and Governance<sup>47</sup> and the Protocol to the African Charter on Human and Peoples' Rights on Establishing the African Court on Human and Peoples' Rights, and to lodge the declaration under article 34(6) of this Protocol.

Some laws or the absence thereof are in conflict with the Maputo Protocol. For instance, marital rape is still not punishable under Cameroonian law. Cultural and customary beliefs seem to be at loggerheads with the Maputo Protocol. Female genital mutilations still exists in some parts of the country as well as child marriage and wife inheritance. In spite of the above, Cameroon

45 'Commission verifies human rights in Cameroon' *Cameroon Today* February 2011 <http://news.cameroon-today.com/commission-verifies-human-rights-in-cameroon/4122/#ixzz1WhTGA41l> (accessed 21 November 2015).

46 Concluding Observations on the 3rd Periodic Report of the Republic of Cameroon (2014) 47.

47 Cameroon has since ratified this treaty thereby launching it into force.

has been cooperative in submitting periodic reports on the African Charter to the African Commission and has received several delegations from the African Commission on fact-finding missions without restraints as indicated earlier in this report.

Although Cameroon has not hosted any sessions of the African Commission, Chief Justice Lucy Asuagbor, a native of Cameroon, was appointed the African Commission's Special Rapporteur on Human Rights Defenders in Africa in 2010 and as stated earlier, she shortly after assumed the mandate of Special Rapporteur on the Rights of Women in Africa. Amongst other duties, Commissioner Asuagbor was allocated Benin, Rwanda, Guinea Bissau and Togo as countries where she will have to undertake promotional missions during her tenure. Her appointments have helped to create more awareness about the African Charter and the Maputo Protocol in Cameroon.





# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN CÔTE D'IVOIRE

*Kounkinè Augustin Somé\**  
*Armand Tanoh\*\**



## 1 Introduction

Côte d'Ivoire became independent in 1960 and the independent country's first constitution was adopted on 3 August 1960. This Constitution made reference to both the French Declaration of the Rights of the Man and the Citizen and the United Nations' Universal Declaration of Human Rights (UNHR). The Constitution, however, did not contain any specific human rights provision.<sup>1</sup>

The second constitution of Côte d'Ivoire was adopted on 1 August 2000 and is still in force. Title I of the Ivorian Constitution enshrines human rights. Twenty-two articles of the Constitution protect human rights. This is a major move in comparison to the first constitution. In addition, the Preamble of the Ivorian Constitution also proclaims the

attachment of the state to the African Charter as well as the Universal Declaration of Human Rights meaning therefore that the rights contained therein are directly enforceable within the state of Côte d'Ivoire.<sup>2</sup>

Côte d'Ivoire ratified the African Charter on 6 January 1992. With relative success, it has endeavoured to give effect to the provisions of the African Charter as required by article 1 of the Charter, which calls upon member states to take steps in this regard.<sup>3</sup> In the past decade, Côte d'Ivoire has witnessed several political crises, the latest being the post-election conflict in 2010 which claimed the lives of more than 3000 people between December 2010 and April 2011. Women suffered most during the crisis, which left massive human rights violations unaccounted for.

Since April 2011, and for the first time in its recent political history, the country has been able to organise non-

\* LLM HRDA (Pretoria), serving as a Human Rights Officer with the United Nations Operation in Côte d'Ivoire. He is the Coordinator of the Technical Cooperation Unit of the Human Rights Division.

\*\* LLM HRDA (Pretoria), Advocate at the Paris Bar, France.

1 The first Ivorian Constitution only provided for key provisions about state organisation, type of government and the main institutions.

2 Para 1 of the Constitution of Côte d'Ivoire of 1 August 2000 (the Constitution).

3 Art 1 of the Charter reads that: 'The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.'

violent elections. A lot has also been done in recent years with regards to Côte d'Ivoire's interactions with international human rights mechanisms. Since 2011, new ratifications of human rights conventions have taken place and the country submitted overdue reports to international mechanisms, including the initial and cumulated reports under the African Charter in 2012,<sup>4</sup> the initial and cumulated reports under the International Covenant on Civil and Political Rights (ICCPR), a second review by the UN-led Universal Periodic Review (UPR),<sup>5</sup> and the creation of a Special Procedure for Côte d'Ivoire under the UN Human Rights Council, with the appointment of an independent expert on the situation of human rights in Côte d'Ivoire.<sup>6</sup>

With regard to the situation of women and the enjoyment of their rights, several initiatives have been taken both at legislative and policy level. Nonetheless, women in Côte d'Ivoire continue to suffer discrimination. This impedes their full enjoyment of the rights stipulated in the African Charter

and the Maputo Protocol. Côte d'Ivoire currently faces many human rights challenges which are mostly connected to the political crisis the country experienced between 1999 and 2011. During this time, thousands of people were killed and so far only a few perpetrators have been formally identified. Due to this crisis, all civil and political rights as well as socio-economic rights remain priority areas in Côte d'Ivoire.<sup>7</sup>

## 2 Ratification of African Charter and the Maputo Protocol

Côte d'Ivoire ratified the African Charter in 1992. The Ivorian Constitution stipulates that the President of the Republic negotiates and ratifies treaties and other international agreements to which the state seeks to become a party.<sup>8</sup> The President requires, however, authorisation by parliament before ratifying any international treaty. More importantly, the Constitutional Council needs to decide whether the treaty does or does not violate any provisions of the Constitution.<sup>9</sup> It is only after the approval by the National Assembly and the decision of the Constitutional Council authorising the President of the Republic to ratify a treaty that the President may proceed with the ratification

4 The African Commission held its 52nd ordinary session in October 2012 in Yamoussoukro, Côte d'Ivoire. It was during this session that the country submitted its first ever state report to the African Commission.

5 Côte d'Ivoire was reviewed twice by the UN Human Rights Council in 2009 and 2014 under the UPR.

6 The Independent Expert mandate on Côte d'Ivoire was created in 2011. The current and second Independent Expert, Mr Mohamed Ayat visited Côte d'Ivoire twice. After his last visit in January 2015, he held a press conference during which he paid tribute to the government of Côte d'Ivoire for progress made with regard to respect for and protection of human rights, while urging that the harmonisation of the national legal framework with international standards be strengthened. He emphasised the importance of prosecuting all persons responsible for human rights violations and the need to continue to address sexual violence against women and the situation of children, including children in conflict.

7 From 1999 to 2011, extrajudicial killings occurred in Côte d'Ivoire. Thousands of people were killed. Many Ivorian lost their property; some remain homeless or internally displaced or were granted refugee status in neighbouring countries. Young people are still highly unemployed.

8 Art 84 of the Constitution.

9 As an illustration, the President of the Republic seized the Constitutional Council to ask whether the Rome Statute did not violate the Constitution. In its decision 002/CC/SG of 17 December 2003, the Constitutional Council held that the Rome Statute violates the Constitution as it undermines state sovereignty. This decision in essence was not legally motivated well but it indicates the power of the Constitutional Council in the ratification process.

process. This procedure was followed for ratification of the African Charter on 6 January 1992 and the Maputo Protocol on 5 October 2011.

Decree 61-157 of 18 May 1961 instituted a specific mechanism to monitor the implementation of conventions, resolutions and other instruments ratified by Côte d'Ivoire.<sup>10</sup> According to this decree, the Ministry of Foreign Affairs prepares the instruments of ratification. After signature by the President, the instrument is published in the Official Gazette and is incorporated *ipso facto* into the domestic legal system, taking precedence over domestic legislation.<sup>11</sup> Normally, the Ministry of Foreign Affairs dispatches to the relevant ministry information concerning the implementation of thematic instruments. With regard to gender equality issues and women's empowerment, the relevant ministry is the Ministry of solidarity, family, women and children affairs.

However, as recommended by the UPR mechanisms during Côte d'Ivoire's second review in 2014, the government committed to reviewing Decree 61-157 of 18 May 1961 with a view to establishing an inter-ministerial body in charge of ensuring coordinated interaction with the UN and African Union human rights mechanisms. Human rights focal points within government ministries and national institutions are of the view that such a body will help rationalise the

communication channels with treaty bodies.<sup>12</sup>

It should also be noted that the procedure for the preparation of state reports to human rights treaty bodies has evolved over the years. In the past, the Ministry of Foreign Affairs took charge of the preparation of human rights reports. From 2003, however, a ministry of human rights was established with the clear mandate of contributing to the promotion and protection of human rights. This ministry is now in charge of coordinating the preparation of reports to human rights treaty bodies.

### 3 Domestication or incorporation

According to the Constitution, a treaty, once ratified, has a higher status than any other law of the land.<sup>13</sup> Like most civil law countries, Côte d'Ivoire has a monist tradition. Therefore, ratified treaties are theoretically directly applicable at the domestic level provided that they have been formally published in the *Journal Officiel* and subject to reliance by the other litigating party.<sup>14</sup> Therefore, treaties, once ratified, form part and parcel of the law in Côte d'Ivoire. The Maputo Protocol enjoys the same higher status as the African Charter. Following ratification and publication, like any other convention, the Charter and the Protocol were incorporated directly into the domestic legal system. Further, in accordance with the Constitution,<sup>15</sup> they take precedence over domestic laws. Consequently, in principle, the Charter and the Protocol prevail over national legislation in case of a conflict.

10 Côte d'Ivoire's state report to CEDAW [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=29](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=29) (accessed 10 September 2015).

11 Art 87 of the Constitution.

12 Views expressed during discussions at the workshop to present the report and recommendations of Côte d'Ivoire's second review by the UPR.

13 Art 87 of the Constitution.

14 As above.

15 As above.

The Constitution of Côte d'Ivoire makes reference to the African Charter in its Preamble<sup>16</sup> and provisions similar to the provisions of the African Charter can be found throughout the Constitution. The Constitution enshrines civil and political rights as well as socio-economic rights from articles 2 to 22.

The Constitution was not amended following ratification of the Maputo Protocol.

The Ivorian Constitution of August 2000 does incorporate a great number of human rights. Chapter I, made of the first 22 articles, can be seen as the 'Bill of Rights'. As mentioned above, Côte d'Ivoire has a monist tradition wherein duly ratified treaties are theoretically directly applicable provided that they have been regularly published in the *Journal Officiel* and subject to reciprocity.<sup>17</sup> As such, there is no need to adopt specific legislation in order to give effect to international norms. Nevertheless, there is no clear indication as to whether and how the human rights proclaimed therein can be claimed directly before Ivorian courts of law.

#### 4 Legislative and policy reform

In the Ivorian system, compatibility studies take the form of a decision by the Constitutional Court as to whether an international agreement contradicts the Constitution. When such a decision of the Constitutional Council confirms a contradiction between the two texts, Parliament's authorisation to ratify the

convention would be given after the Constitution is revised or amended, to solve the contradiction.<sup>18</sup> For both the Charter and the Protocol, the Constitution was not amended to comply with the provisions of the Charter or the Protocol, indicating that its provisions were not regarded as being in conflict with the provisions of the Constitution.

After the decade of political crisis, during which very few laws were made by parliament, legislative activities have intensified in recent years, with several pieces of new legislation aiming to give effect to the provisions of both the African Charter and the Maputo Protocol.

In recent years and mostly under the leadership of the Ministry of Solidarity, Family Women and Children Affairs (MSFFE), several policies have been adopted with a view to giving effect to women's rights. On 26 March 2012, Côte d'Ivoire adopted the national development plan (*Plan National de Développement – PND*).<sup>19</sup> The PND is a comprehensive framework of all national development policies. It is built around six axes, including defence, security, justice and the rule of law, education, health, employment, and social affairs. A draft national policy for the promotion and protection of human rights is under finalisation by the Ministry of Justice, Human Rights and Public Liberties (MDJHLP).

The government of Côte d'Ivoire also adopted a National Action Plan on UN Security Council Resolution 1325 on women, peace and security and created the Ministry of Solidarity, Family Women and Children Affairs, as well

16 Para 6 of the Constitution reads as follows: 'The people of Côte d'Ivoire ... Proclaim their adherence to the rights and freedoms defined in the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights of 1981'.

17 Art 87 of the Constitution.

18 Article 86 of the Constitution.

19 The PND was adopted in 2012 and has been reviewed in 2015 along the same axes and for the period covering 2016-2020.

as a Directorate of equality and gender promotion to work on gender equality issues. This Directorate within the MSFFE is aimed at ensuring implementation of the national policy on equal opportunities, equity and gender, and at instilling an enabling environment for gender mainstreaming in all sectors and at all levels. In 2014, the Directorate was transformed into an Observatory on equity and gender. The *Observatoire National de l'Équité et du Genre* (ONEG), which is located within the Office of the Prime Minister, was created by Decree No-842 of 17 December 2014 with the mandate to monitor, evaluate and make recommendations for the promotion of gender equality in all public policies.<sup>20</sup> The government also created a *Compendium* of women competences with a view to providing government with a comprehensive database of qualified Ivorian women for the purpose of appointing them to high level decision making positions. Government has also set up a National Committee to fight violence against women and children and adopted a National Strategy to fight sexual and gender-based violence.

## **5 Court judgments**

Unfortunately, the African Charter has not been mentioned specifically in any judgment by a domestic court. Judges in Côte d'Ivoire, as in many Francophone countries, still rely heavily on domestic law. There could be many reasons for

<sup>20</sup> The ONEG is tasked with, amongst other things: advising government on issues of equity and gender; implementing of the national policy on equal opportunities, equity and gender; identifying obstacles to gender equality in public policies; monitoring and evaluating the implementation of Côte d'Ivoire's international agreements relating to equity and gender equality; suggesting gender-sensitive legislative and policy reforms; and collecting and providing credible data on the issues of gender equality.

this. Firstly, most of them are not aware of the international human rights instruments ratified by Côte d'Ivoire. Lawyers have also, however, neglected to mention or make reference to human rights provisions in their written submissions. The Human Rights Division of the United Nation Operation in Côte d'Ivoire (ONUCI) has been organising training and capacity building workshops for judicial actors on the use of international human rights mechanisms.

One of the main challenges for popularisation of the African Charter is that lawyers who are supposed to take human rights issues to Court do not really play their part. Most of the time, they are focused on issues connected to the usual legal subjects such as commercial law, civil law and penal law. Only a few lawyers who are human rights activists, or are involved in human rights activities, know about the Charter, the Maputo Protocol and other human rights instruments and use these instruments in their work. The other factor is that lawyers may not be familiar with international law as well as international human rights law. ONUCI's Human Rights Division together with the Institute for Human Rights and Democracy in Africa (IHRDA) has been providing briefings and training to judges on the use of international instruments and mechanisms to protect human rights. During such training, it came out that only a few lawyers know about the instruments and fewer have ever used human rights conventions in their arguments before domestic courts.

## **6 Awareness and use by civil society**

Civil society and human rights organisations have been very active in Côte

d'Ivoire, especially in recent years. They are aware of both the Charter and the Protocol, although they might not use it or refer to it systematically. The political instability and the massive extra judicial killings that went with it contributed to the development of many human rights organisations in the country. The United Nations Operation in Côte d'Ivoire through the Human Rights Division has conducted sensitisation activities and contributed to strengthening the capacities of civil society organisations. Civil society organisations have organised many activities on human rights and are now involved in different campaigns with various human rights agenda's.

With the scepticism expressed recently with regard to the prosecution of crimes relating to the post-election crisis by domestic courts, local NGOs and human rights organisations are increasingly vocal on respect for international conventions. They regularly refer to the Charter in their press releases, monitoring activities and advocacy efforts. After Côte d'Ivoire was reviewed by the African Commission in December 2012, some NGOs referred to the concluding observations formulated by the Commission in their advocacy for more equitable justice as well as in policy and law reform.<sup>21</sup>

Eleven NGOs from Côte d'Ivoire enjoy observer status with the African Commission. These are: *Ligue Ivoirienne des Droits de l'Homme* (LIDHO), *Association Chrétienne Pour l'Abolition des Tortures et pour le Respect des Droits de l'Homme*,

*Association Internationale pour la Démocratie en Afrique* (AID-AFRIQUE), *Association Ivoirienne pour la Promotion des Droits de l'Homme* (APDH), *Mouvement Ivoirien des Droits Humains* (MIDH), *Club Union Africaine Côte d'Ivoire* (Club UA/CI), *Association des Femmes Juristes de Côte-d'Ivoire* (AFJCI), and *Centre Feminin pour la Démocratie et les Droits Humains, Soutien aux prisonniers en Côte d'Ivoire*, (SOPCI), *Action pour la Protection des droits de l'homme*, and *Ngo Playdoo - CI*.<sup>22</sup>

## 7 Higher education and academic writing

Human rights education in primary and secondary schools in Côte d'Ivoire is still developing. Within the framework of the UN World programme for human rights education,<sup>23</sup> the government of Côte d'Ivoire adopted a Decree in 2012, formally introducing human rights education in the curricula of educational systems at the primary and high school levels. This is being pursued at higher levels, in the professional training academies, Police and *Gendarmerie Academies* as well as at the National School of Administration (ENA), which trains civil servants.

At university level, human rights education has really evolved over the last few years with the development of various master's degrees by the National University as well as different human rights institutes. The African Charter and the Maputo Protocol are part of the curricula of the university as well as the institutes. Several public and private

21 NGOs have referred to the concluding observations of the 52nd ordinary session of the Commission as well as other treaty bodies' recommendations to advocate for the Human Rights Defenders' Act, the law on the national human rights commission and the ongoing discussions on the draft law of freedom of association.

22 African Commission on Human and Peoples' Rights 'NGOs with observer status' <http://www.achpr.org/network/ngo/#> (accessed 9 September 2015).

23 <http://www.ohchr.org/EN/Issues/Education/Training/Pages/Programme.aspx> (accessed 13 September 2015).

universities now offer master's programmes in human rights law.

Many Ivorian academics have discussed the African Charter and Maputo Protocol but these discussions are mostly philosophical and too academic to have a wider impact in Côte d'Ivoire. The literature in Côte d'Ivoire with respect to the African Charter and Maputo Protocol is thus limited. Tanoh and Adjolohoun, in their article on the problems of human rights litigation in Côte d'Ivoire and Benin,<sup>24</sup> pointed out the lack of decisions from Ivorian courts with respect to human rights. Lecturers at the National University have written and published a few articles, which have unfortunately not received wider distribution.

## **8 National human rights institutions**

Côte d'Ivoire has a national human rights commission and an Ombudsman Office known as the *Médiateur de la République*. The current human rights commission, the *Commission nationale des droits de l'homme de Côte d'Ivoire (CNDH-CI)* was established by Law 2012-1132 of 13 December 2012. The CNDHCI appears to be an independent consultative body whose functions are to ensure consultation, evaluation, and make recommendations in the area of human rights. The new law was supposed to make the Commission compliant with the Paris Principles on the establishment and functioning of national human rights institutions. However, and despite several advocacy efforts and advices, the new law does not comply with the

agreed principles in several respects, and renders the Commission more of a consultative body. After more than two years of operation, the Commission is yet to agree on a national action plan and internal governance documents, which so far remain at draft level. Neither Law 2012-1132 nor the draft action plan make clear reference to the African Charter or the Maputo Protocol. Even though the Commission has plans to increase the level of awareness about the Charter, only some projects and planned activities of the Commission mention these instruments in the context and justification sections.

The *Médiateur de la République* is an independent administrative body. It enjoys constitutional status<sup>25</sup> and is an alternative dispute resolution mechanism. Neither the law, nor the 2014-2015 plan of action of the *Médiateur de la République*<sup>26</sup> make any reference to the Charter or the Maputo Protocol.

The law on the CNDHCI is not very explicit regarding its role on the follow up on implementation of concluding observations and/or decisions of international human rights mechanisms. However, article 2 of the law which enumerates the powers of the Commission could be interpreted to include such prerogatives.<sup>27</sup>

24 A Tanoh & H Adjolohoun 'International law and human rights litigation in Côte d'Ivoire and Benin' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010).

25 The *Mediateur de la Republique* was instituted by the Constitution.

26 <http://mediateur-republique.ci/> (accessed 15 November 2015).

27 Article 2 of Law 2012-1132 of 13 December 2012 establishing the Ivorian National Human Rights Commission reads, amongst other things, that the Commission is tasked to: ensure the ratification of international human rights instruments or adhesion to such instruments, as well as their implementation at national level and to contribute to the elaboration of reports as prescribed by the international legal instruments to which Côte d'Ivoire is party.

## 9 State reporting

Despite the mechanism instituted by Decree 61-157 of 18 May 1961 to monitor the implementation of conventions, resolutions and other instruments, there is no clarity on who does what when it comes to state reporting. The responsibility is rather based on the thematic issues being reported on. For instance, the reporting process under the African Charter was led by the ministry in charge of human rights and public liberties. Indeed, the Ministry generated the first draft with contributions from human rights focal points designed within ministries and institutions. The draft was discussed and validated with the participation of civil society organisations.

The ministry responsible for gender equality issues and women's empowerment is tasked with implementing the Maputo Protocol and the Convention on the Elimination of All Forms of Discrimination against Women. In practice, it will follow the same process as above.

Côte d'Ivoire submitted its initial and cumulated reports to the African Commission at its 52nd Session in Yamoussoukro in 2012.<sup>28</sup> This was the only time the country has submitted a state report to the Commission. Therefore, reports have not been submitted within the agreed timeframe. Although the 52nd Session was held in Yamoussoukro, the capital city of Côte d'Ivoire, the delegation was mainly constituted by staff of the then ministry of human

rights, led by the minister. There were no women in the delegation.<sup>29</sup>

Amongst the issues of concern raised in the concluding observations were: non-ratification of several human rights treaties, including the Convention for the Protection and Assistance of Internally Displaced Persons in Africa; the African Charter on Democracy, Elections and Good Governance; the Protocol to International Covenant on Civil and Political Rights (ICCPR) on the abolition of death penalty; the absence of the declaration pursuant to article 34(6) of the Protocol to the African Charter on the Establishment of the African Court; the lack of specific legislation protecting human rights defenders; the presence of discriminatory provisions against women in national legislation; the presence of harmful traditional practices that affect women; the low level of resources for the implementation of Resolution 1325 on women, peace and security; the lack of disaggregated data in the reports; and the non-functioning of the human rights commission, amongst others.

Côte d'Ivoire was also encouraged to repeal all discriminatory provisions in its national legislation and revise civil law relating to the status of persons; to put in place legislative measures and programmes to resolve the problem of sexual and domestic violence; to bring to justice all perpetrators of sexual violence; to put in place legislative measures to ensure the protection of human rights defenders; to include in its next state report up-to-date and disaggregated data per sex and thematic human rights areas; and to produce the

28 The fact that Côte d'Ivoire was hosting the session of the African Commission could be one of the reasons that motivated the submission of these reports.

29 [http://www.achpr.org/files/sessions/52nd/conc-obs/1-1994-2012/cbservations\\_concluesives\\_cote\\_divoire.pdf](http://www.achpr.org/files/sessions/52nd/conc-obs/1-1994-2012/cbservations_concluesives_cote_divoire.pdf) (accessed 13 September 2015).



next report in line with the Guidelines for the submission of state party reports on the African Charter and the Maputo Protocol.

Many of the above observations and recommendations have been implemented by Côte d'Ivoire. These include the declaration pursuant to article 34(6) of the Protocol to the African Charter on the Establishment of the African Court to allow individuals and NGO to have direct access to the Court, the Law 2012-1132 establishing the national human rights commission which in many regards, complies with some of the Paris principles; the accommodation of the Rome Statute through revision of the Constitution (Law 2012-1134 of 13 December 2012 integrating article 85 *bis* on the International Criminal Court in the Constitution; the adoption in June 2014 of Law 2014-388 on the protection and promotion of human rights defenders; the enactment of the law on marriage adopted in 2013; adoption of a National Action Plan on UN security Council Resolution 1325 on women, peace and security; and the creation of a National Committee to fight violence against women and children.

## 10 Communications

There are four decided communications against Côte d'Ivoire before the African Commission,<sup>30</sup> three before the ECOWAS Court of Justice<sup>31</sup> and one before the African Court of Human and Peoples' Rights. In two instances, the

African Commission found that Côte d'Ivoire has violated its obligations under the African Charter. The first of these communications deals with access to land in Côte d'Ivoire by foreigners,<sup>32</sup> and the second communication deals with the eligibility criteria for the office of President.<sup>33</sup> With regard to the first communication, the law on access to land was not amended and still remains a critical issue. With regard to the eligibility criteria to the presidency, one could first mention that a special decree was adopted in 2005 to allow all political parties' leaders to run for Presidency.<sup>34</sup> However, article 35 of the Constitution which restricts the eligibility criteria to the Presidency is still applicable. The newly elected President has made a commitment to organise a referendum in order to amend this provision.

These issues are amongst the reasons Côte d'Ivoire went through such a serious military and political turmoil. The resolution of these issues is still partial as far as criteria for eligibility is concerned as the constitutional provisions have not been fully dealt with. The reaction of Côte d'Ivoire in this respect has been confirmed by the African Commission which held that the country has not taken serious steps to comply with its recommendations.

30 Communications 289/04 *Maîtres Brahima Koné et Tiéoulé Diarra v Côte d'Ivoire*; 246/02 *Mouvement ivoirien des droits humains (MIDH) v Côte d'Ivoire*; 262/02 *Mouvement ivoirien de droits de l'Homme (MIDH) v Côte d'Ivoire*; 138/94 *International PEN (on behalf of Senn and Sangare) v Côte d'Ivoire*.

31 *Simone Ehivet and Michel Gbagbo v Côte d'Ivoire* (2013) ECW/CCJ/JUD/03/13; *Amouzou*

*Henri & 5 Others v Côte d'Ivoire* (2009) ECW/CCJ/JUG/04/09; *The National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD) v Côte d'Ivoire* (2009) ECW/CCJ/JUD/05/09.

32 Communication 262/02 *Mouvement ivoirien de droits de l'Homme (MIDH) v Côte d'Ivoire*.

33 As above.

34 Decision 2005-1/PR of 5 June 2005 regarding the designation of presidential candidates at the elections of October 2005 (décision 2005-1/PR du 5 juin 2005 relative à la désignation à titre exceptionnel des candidats à l'élection présidentielle d'octobre 2005).

## 11 Special mechanisms – Promotional visits of the African Commission

The fact that Côte d'Ivoire hosted the 52nd ordinary session of the African Commission in October 2012 helped disseminate the Charter, Maputo Protocol and the Commission's work amongst NGOs and the broader human rights community.

In addition, the African Commission has organised three promotional visits in Côte d'Ivoire in 2001 and 2003. The first visit took place from 4 to 8 February 2001 and the delegation of the Commission was headed by Mrs Julienne Ondziel-Gnelenga, a member of the Commission and former Special Rapporteur on the Rights of Women in Africa. Given the political context of that time, the mission in its recommendations urged the Ivorian government to conduct investigations about allegations of rape of women in the police college in 2001 and other human rights violations that occurred during the electoral protests. So far, no trials have been organised and the perpetrators of these violations are yet to be identified. The second visit took place from 2 to 4 April 2001. The Chairperson of the Commission at that time, Prof EVO Dankwa, was the head of the delegation. The delegation met different high level officials, amongst them the President and ministers, to assess the human rights situation in Côte d'Ivoire. Different recommendations were made to the government of Côte d'Ivoire, amongst them, the setting up of commissions of inquiry on the massive human rights violations, the trial of the perpetrators of human rights violations and the submission of periodic reports under article 62 of the Charter. The Commission itself

admitted that no satisfactory measures had been taken in respect of the recommendations made. The third promotional visit of the African Commission took place from 24 to 29 May 2003, and recommendations of the Commission were connected to peace building and conflict resolution. These recommendations were in line with recommendations issues after the two preceding visits. Nothing has been done so far with regard to the investigation and identification of perpetrators.

The Commission's Special Rapporteur on Human Rights Defenders, Madam Reine Alapini-Gansou visited Côte d'Ivoire on two occasions in 2014 and 2015.<sup>35</sup> She played an impressive advocacy role in the adoption of the law on human rights defenders in Côte d'Ivoire. She is still supporting civil society groups in Côte d'Ivoire to disseminate and sensitise members of the public on the law.

## 12 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission

The government of Côte d'Ivoire has the primary responsibility to respect, protect and fulfil the rights enshrined in the African Charter and the Maputo Protocol. In order to respect its international human rights obligations, the Ministry of Human Rights was established in 2003 with the mandate of promoting and protecting human rights. Despite different campaigns and activities organised on the ground, the general

35 <http://ci-ddh.org/2015/01/visite-de-la-rapporteuse-speciale-des-defenseurs-des-droits-de-lhomme-aupres-de-la-cadhp/> (accessed 13 September 2015).

feeling of civil society organisations is that Ivoirians in general are not aware of the existence of the Charter as well as the Protocol. Other factors which impede the impact of the African Charter and the Maputo Protocol in Côte d'Ivoire are as follows:

- (a) Political environment: Côte d'Ivoire was a very unstable country for more than ten years (1999-2011). The civil war as well as the economic meltdown has brought the country to its knees. This instability complicates any action or effort aimed at the promotion of the African Charter in the country. Human rights violations are prominent and remedies or access to justice are not really available. But as mentioned above, the Ivorian authorities are fully aware of the work of the Commission as they regularly attend the sessions of the Commission. The challenge is to convey the messages or to promote the Charter at a wider scale. Initiatives are being taken but are not sufficient considering the different problems.
- (b) Lack of awareness and strong reliance of the judiciary on domestic law: As mentioned above, the judiciary plays a very important role in the recognition and justiciability of human rights. But, so far, no judgment has been rendered outlining violations of provisions of the Charter or Maputo Protocol. The judges still rely heavily on domestic law because this is the law they know better. There is no serious initiative or judicial activism despite different training organised by international NGOs and international human rights organisations. The training of judges does not include human rights and international law as such. The Constitutional Council which is the supreme judicial institution in Côte d'Ivoire with the mandate of protecting the Constitution (which includes human rights provisions) has not rendered any specific decisions on human rights.
- (c) Lack of serious involvement of lawyers: Having decisions on human rights cases also requires the involvement of lawyers when writing or

presenting their submissions to the courts. Lawyers in Côte d'Ivoire have not really been able to submit cases on human rights violations. Only a few lawyers who are members of different human rights organisations have a good knowledge of human rights principles and treaties. In the two communications brought before the African Commission, the *Mouvement Ivoirien des Droits Humains* (MIDH) did not have the opportunity of exhausting local remedies as MIDH contended they were not available.<sup>36</sup> If remedies were available, this could have been a very good test for the Ivorian judiciary with respect to human rights.

- (d) Poor media coverage: One of the means of popularisation of a human rights instrument is the media. In Côte d'Ivoire, the media has not been very active in the coverage of human rights activities because of the lack of resources and the limited number of private media agencies. The African Charter and the Maputo Protocol are only discussed during commemorations and anniversaries.

### 13 Conclusion

It can be said that the promotion of the African Charter as well as the Maputo Protocol still has a very long way to go. The large scale of human rights violations that occurred in the country this past decade is a clear indication of the importance of the African Charter and the Maputo Protocol as well as other human rights instruments.

Whilst Côte d'Ivoire demonstrated great ability to comply with the African Charter and the Maputo Protocol, the adoption of domestic legislation is still undermined by the general lack of coordination and the absence of a concrete plan of action to domesticate all interna-

36 Communications 246/02 *Mouvement ivoirien des droits humains (MIDH) v Côte d'Ivoire*; 262/02 *Mouvement ivoirien de droits de l'Homme (MIDH) v Côte d'Ivoire*.

tional instruments ratified by the state. The establishment of the Ministry of Justice and Human Rights will definitely help in the enforcement of international human rights norms in general.

In addition, regular reports to the African Commission are also very important to measure the real impact of the African Charter and the Maputo Protocol. The Ivorian State must take concrete, specific and targeted measures in order to give effect to the African Charter and the Maputo Protocol. Popularisation of the African Charter as well as the Maputo Protocol remain essential as most of the citizens are not aware of the existence of these instruments.

# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN ETHIOPIA

*Meskerem Geset Techane\**



## 1 Introduction

Known as one of the earliest and autonomous continuing states in the world, Ethiopia claims the oldest modern and independent constitution in Africa that dates back to 1931. The history of the legal regime of human rights in Ethiopia starts from the imperial era of Emperor Haile Selassie's modernisation of criminal law and the introduction of basic human rights in the 1955 Constitution. After one of the longest legacies of indigenous monarchical rule in Africa, Ethiopia became a republic under the 1987 Constitution of the Mengistu regime, which also dedicated a chapter to 'basic freedoms and rights' that emphasised economic, social and cultural rights, owing to the socialist orientation of the regime. The country is currently governed by the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution or Constitution) which established

a federal parliamentary multi-party democracy – a fundamental shift from the previous centralised form of governance. The Federal Democratic Republic of Ethiopia (FDRE) is composed of the Federal Government and nine self-governing National Regional States. The FDRE Constitution – the most liberal constitution the country has seen – is the supreme law of the land and provides extensive protection for individual as well as group rights and for the pillars of democracy, as it was intended 'to address the ills of the previous regime and the political turmoil that preceded it'.<sup>1</sup>

Ethiopia is party to a number of international and regional human rights treaties. The Ethiopian Constitution incorporates a Bill of Rights that reflects the norms of the African Charter, the Maputo Protocol and other international human rights instruments. A number of laws enabling the implementation of human rights were promulgated and encourage an environment for the promotion of human rights and democ-

\* LLM HRDA (Pretoria); doctoral candidate, Human Rights Centre, University of Padova and former Deputy Executive Director of the Institute for Human Rights and Development in Africa (IHRDA). The researcher acknowledges the instrumental assistance provided by Ayalew G Assefa, Deborah H Birhanu & Haile B Daba.

1 TS Twibell 'Ethiopian constitutional law: The structure of the Ethiopian government and the new constitution's ability to overcome Ethiopia's problems' (1999) 21 *Loyola of Los Angeles International and Comparative Law Review* 369.

racy. These are nurtured by the creation of national human rights institutions and a growing number of civil society organisations (CSOs), opposition political parties and private media. The FDRE Constitution also commendably incorporated both general and specific provisions on the rights of women.<sup>2</sup> Following this, the adoption of the revised Family Law of 2000 was a landmark step forward in addressing comprehensive issues concerning the rights of Ethiopian women in marital and family affairs. The (Revised) Criminal Code of 2004 was introduced to provide better protection from discrimination and violations such as rape, abduction, Female Genital Mutilation (FGM), domestic violence, sexual exploitation and harassment. The government formulated the Women's National Policy (1993) and promoted gender mainstreaming in all its development policies and strategies to tackle gender inequality. Equally, affirmative action measures in education and politics have been implemented and the participation of women in higher education and politics has grown noticeably.

Despite notable positive steps, restrictions on freedom of expression, assembly, association, and movement continue to be alarming matters in Ethiopia. As repeatedly criticised by international commentators, suppression of the media (both print and online media), harassment, intimidation, arrest and detention of journalists, human rights defenders, supporters and members of opposition political parties and peaceful protesters shattered the human rights record of the country.<sup>3</sup> The past decade

also saw the introduction of repressive laws in Ethiopia that have been increasingly condemned for violating international standards, such as the notorious Charities and Societies Proclamation (CSOs Law) and the Anti-Terrorism Proclamation which restrict the activities of civil society, political parties, human rights defenders and journalists.<sup>4</sup> The treatment of suspects, accused persons and detainees, and prison conditions fall short of international standards.<sup>5</sup> Though the Constitution guarantees judicial independence, Ethiopian courts have continuously been criticised for tainted independence.<sup>6</sup> Impunity is also a problem; failure of the government to enforce accountability of the armed forces and the police for abuses perpetrated especially in relation to the 2005 post-election violence is a case to rest.<sup>7</sup> Moreover, in spite of the progress recorded in relation to women's rights, female genital mutilation, early marriage, abduction, domestic violence, child trafficking and sexual

<sup>2</sup> See arts 34 & 35 of the Constitution.

<sup>3</sup> See 'Amnesty International Report 2014/2015' <https://www.amnesty.org/en/countries/africa/ethiopia/report-ethiopia/> (accessed 20 September 2015.); Human

Rights Watch 'World Report 2015: Ethiopia' <https://www.hrw.org/world-report/2015/country-chapters/ethiopia> (accessed 20 September 2015).

<sup>4</sup> As above.

<sup>5</sup> See Ethiopian Human Rights Commission (EHRC) 'Monitoring Report on the treatment persons under police custody' (Amharic) (2013); see also African Commission on Human and Peoples' Rights *Report of the Mission of the Special Rapporteur on Prisons to Ethiopia* (2004) [www.achpr.org/.../mission-reports/ethiopia/misrep](http://www.achpr.org/.../mission-reports/ethiopia/misrep) (accessed 17 August 2015).

<sup>6</sup> World Bank 'Ethiopia legal and justice sector assessment' (2004) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EthiopiaSA.pdf> (accessed 2 September 2015), See also Freedom House 'Freedom in the World: Ethiopia' (2014) <https://freedomhouse.org/report/freedom-world/2015/ethiopia> (accessed 21 September 2015).

<sup>7</sup> See Amnesty International & Human Rights Watch (n 3 above).

exploitation of girls remain key areas of concern.<sup>8</sup>

The Ministry of Foreign Affairs (MoFA) of Ethiopia is the responsible government body mandated by law to deal with all communications with international human rights bodies as per the pertinent treaties.<sup>9</sup> MoFA, being the focal point, consults with other relevant government bodies in accordance with their mandates and areas of expertise. Accordingly, MoFA has been reporting to as well as communicating with the African Commission on matters related to the implementation of the African Charter in Ethiopia.

## **2 Ratification of the African Charter and the Maputo Protocol**

Ethiopia ratified the African Charter on 15 June 1998 without reservation.<sup>10</sup> According to the accession Proclamation,<sup>11</sup> the rationale behind the ratification of the African Charter is the conviction that ratifying the African Charter supports the principal international human rights instruments Ethiopia is already a party to; and will complement Ethiopia's consistent support for regional and international efforts to achieve normative standards for basic human rights.

Ethiopia signed the Maputo Protocol on 1 June 2004 but has not ratified

it.<sup>12</sup> There have been lobbying efforts from government and non-government stakeholders towards ratification. The Ministry of Women, Children and Youth Affairs (MoWCYA) in particular initiated a ratification process in 2010 which was stalled at the Cabinet level.<sup>13</sup> There was another proposal instigated by MoFA in 2014 that successfully passed the approval of the Cabinet and made it to Parliament, where it is currently under scrutiny.<sup>14</sup>

International treaties in Ethiopia are concluded by the executive and then submitted to the House of People's Representatives (Parliament) for ratification as per article 55(12) of the Constitution. The Constitution bestows the power of negotiating and signing international treaties to the executive;<sup>15</sup> and MOFA is specifically mandated by law to coordinate this process.<sup>16</sup> The power to ratify any international treaty, including human rights treaties, is given to the Parliament.<sup>17</sup> The Parliament ratifies those treaties, signed and submitted by the executive, after thorough deliberation and forwards them to the president of the republic for signature.<sup>18</sup> The process of ratification of a certain treaty starts either at the MoFA or the responsible Ministry. Studies are normally done on the effects of a certain treaty by the Ministry initiating the ratification and the proposal for ratification together with the relevant study will be submitted

8 Committee on the Elimination of Discrimination against Women, Concluding observations: Ethiopia (2011) <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-ETH-CO-7.pdf> (accessed 21 August 2015).

9 See Proclamation 708/2010.

10 <http://www.achpr.org/instruments/achpr/ratification/> (accessed 23 August 2015).

11 See Preamble of Proclamation 114/1998: Accession to African Charter on Human and Peoples' Rights Charter.

12 <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 23 August 2015).

13 Interview with Mr Dereje Tegyebele, Director, Legal Affairs Directorate, MoWCYA (2 November 2015).

14 Interviews with MoFA officers (24 September 2015).

15 Art 55(12) of the Constitution.

16 See art 25(2) of Proclamation 4/1995.

17 As above.

18 Art 57 of the Constitution. The signature by the President is more of ceremonial as the treaty will come into force after 15 days irrespective of signature by the President.

to cabinet. Once it achieves the assent of cabinet, a treaty will be passed to Parliament for consideration and decision.

### 3 Domestication of the African Charter and the Maputo Protocol

The African Charter is incorporated in the Ethiopian legal system by virtue of article 9(4) of the Constitution which clearly states that international agreements ratified by Ethiopia are integral parts of the law of the land. In practice, the African Charter and all international instruments ratified by Ethiopia are fused into national law through a 'ratification proclamation' – a piece of legislation promulgated by Parliament in the official law gazette (the *Federal Negarit Gazeta*). By such legislation, Parliament simply declares the ratification of the instrument without reproducing and domesticating its text. Consequently, this study did not find any domestic legislation that explicitly domesticated the provisions of the African Charter.

Though article 9(4) of the Constitution as above prescribes a monist approach as to domestication of international instruments, a deep rooted culture of dualism prevailed in practice as a result of legislation requiring publication of all laws in the *Federal Negarit Gazeta* to effect judicial notice of those laws.<sup>19</sup> This brought tendencies that publication of the text of a ratified treaty in the official gazette in the official language is a requirement for that treaty to become a directly applicable law of the land just like other legislation enacted by Parliament. The controversy seems to be resolved by the Federal Supreme Court

Cassation Division<sup>20</sup> which directly invoked the provisions of the Convention on the Rights of the Child (CRC) in a landmark judgment of 2007.<sup>21</sup> The status of international treaties in the Ethiopian legal regime has been a subject of debate as no clarity has been provided either in the Constitution or other legislation. Article 9(1) of The FDRE Constitution provides that the Constitution is the supreme law of the land with the effect that any contradictory law shall be void. On the other hand, article 13(2) of the Constitution provides that the Bill of Rights shall be interpreted in a manner conforming to international instruments adopted by Ethiopia. The Constitution elevated international human rights treaties binding Ethiopia to a status higher than any ordinary legislation, and equal to the Constitution.<sup>22</sup> The Federal Supreme Court (Cassation Division) recently established a precedent in the famous case of *Tsedale Demissie v Kifle Demissie* wherein it settled a case of child custody by giving primacy to the best interest of the child principle of the CRC over the provision of the family law.<sup>23</sup> Thus, as one of the human rights instruments ratified by Ethiopia, the African Charter hence is not only part of Ethiopian law

19 Arts 2(2) and (3) of Proclamation 3/ 1995.

20 It must be noted that the Cassation Division has the final judicial power over fundamental errors of law as per art 80(3)(a) of the Constitution.

21 In *Tsedale Demissie v Kifle Demissie* Federal Cassation File 23632 (6 November 2007), the Court directly applied the provision of the CRC arguing that '... the UN Convention on the Rights of the Child – one of the Conventions which Ethiopia has ratified in 1992 – and which has become the integral part of the law of the land by virtue of art 9(3) ...'

22 See I Idris 'The status and application of international treaties in Ethiopia' (2000) 20 *Journal of Ethiopian Law* 113; T Soboka 'The monist-dualist divide and the supremacy clause: Revisiting the status of human rights treaties in Ethiopia' (2009) 23 *Journal of Ethiopian Law* 132.

23 *Tsedale Demissie* (n 21 above).



with a higher status in the hierarchy, but also authoritative text for the interpretation of the Bill of Rights. This notwithstanding, the status of international human rights instruments vis-à-vis the Constitution remains tricky in light of the supremacy of the Constitution. It may logically follow that the provisions of the African Charter (and other international human rights instruments) have equal importance with the Bill of Rights provisions to the extent that they do not contradict the Constitution.<sup>24</sup>

The Constitution of Ethiopia recognises a long list of rights ranging from civil and political rights to socio-economic and group rights. The African Charter cannot be said to have played a significant role during the drafting of the Bill of Rights, as the adoption of the 1995 Ethiopian Constitution precedes the ratification of the Charter by Ethiopia in 1998. It is also important to note that the Bill of Rights was not changed after Ethiopia became a party to the African Charter. Most importantly, the majority of the rights recognised under the African Charter, the Maputo Protocol and other international human rights instruments are enshrined in the Constitution.

The traditional civil and political rights, mostly replicated from the Universal Declaration of Human Rights, are comprehensively provided for. These range from equality before the law and protection against discrimination to the rights to life, liberty, physical security and integrity; protection

from torture, inhuman and degrading treatments; access to justice; due process and fair trial rights; and freedoms of movement, religion, opinion, expression, assembly and association. Though the limited nature of this study does not allow exhaustive description and in-depth analysis of each of these rights, a close reading affirms that the provisions maintain conformity with the norms of the African Charter.

The Bill of Rights incorporated specific provisions that address women's rights and gender equality issues in a manner corresponding with the norms of the Maputo Protocol and the African Charter. The FDRE Constitution can, in fact, be cited as one of the more progressive constitutions in Africa when it comes to women's rights. For instance, article 34 of the Constitution dealing with family rights provides for equality of women and men in conclusion, duration and dissolution of marriage; and article 35 of the Constitution, devoted to the rights of women, guarantees equality in marital affairs, employment rights, property rights (including equal rights over land and inheritance), maternity rights in employment, access to family planning information and services, protection from harmful traditional practices, the right to consultation, and entitlement to affirmative measures. The Bill of Rights also provides ample protection to children under article 36 that conforms to the African Charter and the Maputo Protocol, as well as other relevant international instruments dealing with children's rights.

Social and economic rights (SER) are also covered under the Ethiopian Bill of Rights. Article 41(4) imposes a duty on the government to provide

24 This excludes the application of the interpretation clause (art 13(2) of the Constitution) to cases where clear discrepancies exist between the Constitution and international instruments. See AK Abebe 'Human rights under the Ethiopian constitution: A descriptive overview' (2011) 5 *Mizan Law Review* 48.

access to health, education and other social services 'to the extent the country's resources permit'. The Constitution also guarantees several socio-economic rights as part of the National Policy Principles and Objectives<sup>25</sup> that fall outside the Bill of Rights. The provisions of the Constitution dealing with SER, though arguably justiciable, are criticised for not being formulated in a clear cut 'rights language' that establishes individual or collective justiciable rights as in the African Charter and other international instruments.<sup>26</sup> A notable departure of the FDRE Constitution in respect of SER is that the provisions often refer to Ethiopians as subjects of the rights unlike the African Charter that guarantees the rights to all persons.<sup>27</sup> The Constitution also lacks provisions on individual cultural rights as it simply provides for the duty of government to protect cultural and historical heritage.<sup>28</sup>

The Ethiopian Bill of Rights is applauded for enshrining the rights of peoples' (nations, nationalities and peoples); becoming the only in Africa that guarantees the right to self-determination of peoples' in congruence with article 20 of the African Charter.<sup>29</sup> In addition to self-administration, it also preserves peoples' rights to freely express and develop their culture and language, and exercise their right to

development.<sup>30</sup> The importance of these rights for Ethiopia as a country with a rich and varied mix of ethnic groups is immense especially in the context of remedying past problems and upholding the equality of all peoples as enshrined under article 19 of the African Charter. However, the Bill of Rights falls short of recognising important peoples' rights as provided under the African Charter such as the rights of peoples to existence, to free disposal of wealth and natural resources, and to peace and security.<sup>31</sup>

The Constitution allows the possible suspension of most of the fundamental rights and freedoms to 'the extent necessary' with only very few exceptions.<sup>32</sup> What is dangerous is that the derogation provisions fall outside the Bill of Rights (Chapter 3 of the Constitution) and are not subject to the interpretations clause applicable to the Bill of Rights; there is no constitutional imperative for their interpretation in the light of international human rights instruments.

The Bill of Rights is justiciable as the Constitution clearly establishes the duty of courts to enforce fundamental rights and freedoms, and the right of everyone to bring a justiciable matter to court to get remedy.<sup>33</sup>

25 Arts 89 & 90 of the Constitution.

26 They are said to be formulated in a manner creating government obligations rather than rights which begs for arguments about their justiciability. See Abebe (n 24 above).

27 See art 41 of the Constitution and arts 15-17 of the African Charter. It is to be noted that art 4 of the ICESCR leaves room for developing countries to determine the scope of application of the rights to non-nationals.

28 Arts 44 & 91 of the Constitution.

29 See art 39(1); see also C Heyns & W Kagoungou 'Constitutional human rights law in Africa' (2006) 22 *South African Journal of Human Rights* 673-678.

30 See arts 39(2)(3) & 43 of the Constitution and art 22 of the African Charter.

31 Arts 20, 21 & 23 of the African Charter.

32 See arts 91-94 of the Constitution. The only exceptions are the protection against cruel, inhuman, and degrading treatment or punishment, and slavery or servitude, and trafficking (art 18), the right to equality and equal protection of the law (art 25), and the right to self-determination up to secession (art 39).

33 See arts 13(1) & 37(1). See also SA Yeshanew 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8 *African Human Rights Law Journal* 273-277-279.

#### **4 Legislative and policy reform**

Legislative measures have been taken by both the Federal and Regional States' legislative organs to enhance the protection of human rights in Ethiopia. In spite of the absence of any constitutional amendment since ratification of the African Charter, several laws and policies came in to effect afterwards. Some of these laws give effect to the African Charter by virtue of correspondence in norms (though no cases of direct causality found); and some derogate from the standards provided for in the African Charter.

Positive examples include the Revised Family Law of 2000 which guarantees equality of spouses during the conclusion, duration and dissolution of marriage, equality in common property management and administration of family matters, and sets the minimum age of marriage at 18 years for both males and females. The Revised Criminal Law of 2004 was a normative step forward in introducing wider safeguards against violence and exploitation of children and women, sexual crimes and crimes against humanity, amongst others. The Labour Proclamation of 2003 and its amendments, the Right to Employment of Persons with Disability Proclamation of 2008, the Public Servants Pension Proclamation of 2011 and the Private Organization Employees' Pension Proclamation of 2011 provided comprehensive legal frameworks for the implementation of employment related rights. In addition, several other proclamations such as the Higher Education Proclamation of 2009; the Social Health Insurance Proclamation of 2010; and Expropriation of Land Holdings for Public Purposes and Payment of Compensation Proclamation of 2005 addressed a range of social and

economic rights. A Proclamation on the Registration of Vital Events and National Identity Card has been issued to create a mechanism for the registration of vital events which was followed by establishing the Vital Events Registration Agency.<sup>34</sup> The list is clearly not exhaustive. These and other enabling pieces of legislation do not however make any explicit reference to the African Charter or the Maputo Protocol.

On the other hand, regressive laws were passed by Ethiopia in recent years leading to serious human rights violations which have been the subject of criticism at the national as well as international level. Notable examples include the Access to Information Proclamation of 2008 which imposes restrictions on freedom of expression, compelling journalists and the mass media to disclose their sources of information. The Anti-Terrorism Proclamation of 2009 stifles dissent through the use of accusations of terrorist activities mainly against journalists and members of opposition political parties. The Charities and Civil Societies Proclamation of 2009 curtails the exercise of freedom of association and assembly, and suppresses the activities of civil society. The Electoral Decree of 2014 also prohibited civil society organisations from 'campaigning', including providing human rights education, on any issue relevant to elections.

In line with the National Policy Principles and Objectives provided in the Constitution (Chapter 10), Ethiopia adopted a number of development-focused policies that facilitate the realisation of human rights in general; as well as specific policies relevant to the

34 See Proclamation 760/2012 and Regulation 278/2012.

implementation of human rights norms. The Democratic System Building Policy (2002) provides a framework for building democratic rule, good governance and social justice. The Criminal Justice Policy (2010) dealt with policy matters concerning crime prevention, criminal justice administration and the protection of vulnerable groups. The Women's Policy (1993) that laid down the policy framework for the realisation of women's human rights has been strengthened through subsequent national strategies and action plans.<sup>35</sup> National action plans that address social protection and the welfare of children, older persons and persons with disability were introduced.<sup>36</sup> The National Human Rights Action Plan (NHRAP) was adopted in 2013 to advance the respect, protection and fulfillment of the human rights guaranteed by the Constitution in a comprehensive and structural manner. Except for the NHRAP, none of these and other policies make direct reference to the African Charter (or the Maputo Protocol) but they reflect the norms therein and give effect to the same.

## 5 Court judgments

The practice of Ethiopian courts in general reflects rare use of international human rights instruments in adjudication at all levels within the judiciary. It is also worth noting that in Ethiopia, the

power of constitutional adjudication is not given to courts, but rather to the House of Federation (lower house of the Parliament) upon recommendation by the Council of Constitutional Inquiry (CCI).<sup>37</sup> This in practice limits to a large extent the use of international instruments as well as the interpretation of the Bill of Rights by Ethiopian courts.

There are some notable cases in which international human rights instruments are used by the CCI and the Federal Supreme Court (Cassation Division). The CCI referred to the African Charter in its decision concerning the constitutional question raised by the petitioners in the case between *Assefa Abrha and others v Federal Ethics and Anti-Corruption Commission*.<sup>38</sup> The Council illuminated that the right to bail has limitation under international and regional law, particularly the African Charter as well as other human rights instruments. It ruled that the law that denies bail in cases of some serious crimes is constitutional and in line with international human rights instruments.

The Federal Supreme Court cites international human rights instruments in only a few cases. Apart from the notable case of *Tsedale Demissie v Kifle Demissie*, the Supreme Court has also directly applied the African Charter on the Rights and Welfare of the Child in the case of *The House of the Federation of Democratic Republic of Ethiopia (the HOF)*

35 See S Demessie & T Yitbark 'A review of National Policy on Women' (2008) in T Assefa (ed) *Digest of Ethiopian National Policies, Strategies and Programs* (2008) 93-125. The National Action Plan on Gender Equality (2002-2006 and beyond), and the recent National Strategy and Action Plan on Harmful Traditional Practices against Women and Children launched in 2013 are notable frameworks.

36 See Ministry of Labour and Social Affairs <http://www.molsa.gov.et/English/SWD/Pages/index.aspx> (accessed 15 October 2015).

37 The Council of Constitutional Inquiry is a quasi-judicial body constitutionally mandated to examine constitutional disputes and submit interpretive recommendations to the House of the Federation which has the ultimate say on constitutional interpretation. See arts 82, 83, and 84 of the FDRE Constitution.

38 For a thorough discussion of the case see W Demissie 'The Right to Bail in Ethiopia: Respective Roles of the Court and the Legislature' (2009) 23 *Journal of Ethiopian Law* 2.

*and others v Rev Mamo Yitafèru* as a basis of remedy by setting aside the Civil Code provisions.<sup>39</sup> However, review of Supreme Court decisions shows that the African Charter has not been used in any binding decisions and is used occasionally in dissenting opinions. Lower courts are no exception to this general trend; their practice typically reflects only occasional reference to conventions by the International Labour Organisation (ILO) in employment related disputes.

Judges admit that use of the African Charter as a basis for interpretative guidance or remedy in binding judgments is rarely attributed, mainly due to limited awareness and access.<sup>40</sup> Inaccessibility of the instruments in working languages coupled with case backlogs are perhaps amongst the limiting factors which prevent judges from making 'extra efforts' to look for reference outside the 'hands-on' domestic laws.<sup>41</sup> For that matter, judges are mostly left unaware of the contents of ratified treaties as ratification proclamations do not publish full texts of the various treaties. In addition, availability of treaties in the working languages of the courts has been difficult. It is important at this juncture to note that none of the African Union or United Nations official languages is the language of Ethiopian courts, and that Ethiopian courts are required to take judicial notice only of those laws as they appear in the official gazettes.

The obvious reason for minimal usage of the Maputo Protocol, compounded by a lack of awareness, is the fact that it is not a ratified instrument. When it comes to case law, aside from the awareness deficit, the civil law tradition adopted by the Ethiopian legal system poses certain limitations, as much allegiance is directed towards codified law. As a result, the idea of reference to case-law of the African Commission has not yet been conceived by many judges. Irrefutably, the provisions of the African Charter and the findings of the African Commission in interpreting the provisions of the Bill of Rights will go a long way towards enforcing constitutional rights and enriching domestic human rights jurisprudence.

## **6 Awareness and use by lawyers**

The practice of lawyers in Ethiopia in respect of the application of international human rights instruments is no exception to that of judges. The study revealed that international instruments are rarely referred to by lawyers in their written submissions as well as oral arguments. Similarly, major reasons cited for the lack of reference to regional instruments are the lack of awareness and accessibility of these instruments.<sup>42</sup> The CRC and the ILO conventions are better utilised by lawyers in relative terms while use of the African Charter is almost non-existent. It has come up very clearly that only a few practicing lawyers are in fact aware of the African human rights system.

39 As above.

40 Interviews with Justice Bewket Belay & Justice Belachew Anshiso of the Federal Supreme Court (31 August 2015). Other judges who participated through questionnaires and group discussions also shared similar opinion.

41 As above.

42 Interviews with Attorneys Mr Hassabe Mulu (2 September 2015), Mr Fekadu Mola (30 October 2015) and Mr Amaha Mekonnen (12 November 2015). Other lawyers who participated through group discussions and questionnaires concurred with the statement.

The dearth of promotion of these instruments in legal trainings and national human rights activities highly contributes to the limited awareness amongst lawyers and consequently a lack of visibility of the African Charter in the Ethiopian legal practice.<sup>43</sup> It must be noted that many lawyers do not pursue human rights as a career as it is perceived to be the work of NGOs. Most lawyers focus on commercial and company law, which mostly does not require direct use of human rights instruments and generally does not involve active human rights litigation. There are only a few lawyers who specialise in human rights and even fewer who are affluent with knowledge and experience of the African human rights system and of these, many either do not engage in litigation practices or work outside Ethiopia. In this regard, the importance of sensitising workshops on the use of the African Charter and case law of the African Commission was underscored by lawyers.<sup>44</sup>

Lawyers' associations also do not incorporate activities that promote use of the African Charter. For instance, the Ethiopian Lawyers Association (ELA) provides continuous training for lawyers and also organises discussions on laws; but it has not included the African Charter or any of the African instruments in its activities.<sup>45</sup> Though ELA is a member of regional lawyers groups<sup>46</sup> which actively engage with the African human rights instruments and mechanisms, there has not been much collabo-

ration in terms of transfer of experiences around using relevant treaties.

## 7 Awareness and use by civil society

Currently, there is no adequate presence of human rights NGOs in Ethiopia. More so, the level of awareness and engagement of civil society groups in respect of the African Charter and the Maputo Protocol is low. The more notable Ethiopian NGOs do not have international human rights programmes that regularly engage with international human rights institutions and procedures.

There are only two Ethiopian NGOs that currently have observer status with the African Commission – the *Human Rights Council* (HRCO) and *Justice for All – Prison Fellowship Ethiopia*. These NGOs attend the African Commission's sessions from time to time though do not actively participate in the activities of the Commission. Moreover, they have not engaged much with the individual complaints procedure, the special mechanisms, shadow reporting or other platforms and mechanisms of the Commission.

CSOs in Ethiopia in general have rarely used the African Commission's communications procedure. Only four communications involving Ethiopia have been settled by the African Commission since the state ratified the African Charter and yet none of those were submitted by Ethiopian CSOs. One communication was in fact submitted by an Ethiopian NGO (the Ethiopian Women Lawyers Association – EWLA) in 2007 but it was not pursued due to initiation of an amicable settlement that was believed to be favourable

43 Interviews with representatives of the Ethiopian Lawyers Association, Mr Tamirat Kidanemariam, President & Mr Manyawkal Mekonnen, CEO (10 November 2015).

44 Interviews with Attorneys (n 42 & 43 above).

45 Interviews (n 43 above).

46 ELA is a member of the Pan African Lawyers Association (PALU) and an observer member of the East African Law Society.

to the victim.<sup>47</sup> The African Charter and the jurisprudence of the African Commission have not served as a key resource in the hands of Ethiopian NGOs, CSO's or human rights defenders. It is the writer's observation that there is a general hesitation or fear amongst CSOs, human rights advocates and lawyers when it comes to resorting to international mechanisms.

The use of the Maputo Protocol by women's rights organisations is invisible, and this is attributable to the fact that Ethiopia has not ratified the Protocol. A few NGOs such as EWLA and the Network of Ethiopian Women's Associations (NEWA) have been promoting the Maputo Protocol through awareness creation and lobbying forums. The 2012 *Maputo Protocol* ratification campaign organised by NEWA in collaboration with other women's rights groups is worth noting. There is however no awareness or promotion of the General Comments of the African Commission on the Provisions of the Protocol relating to women's rights.

The number of human rights NGOs in Ethiopia has decreased since the enforcement of the CSOs Law that requires local/human rights CSOs to raise 90 per cent of their funding from local sources.<sup>48</sup> As a result, many

NGOs that previously engaged in human rights work had to close their human rights programmes and shift their focus to service or development oriented programmes. A typical example is the Action Professional Association for the People (APAP), a prominent human rights advocacy NGO, which closed down its human rights programmes in order to survive the new funding requirements. Those who chose the path of human rights – such as EWLA and HRCO – had to downsize their programmes and maintain only minimal operations due to immense resource constraints.

## **8 Higher education and academic writing**

In Ethiopia, a revised and nationally harmonised new curriculum for undergraduate legal studies was introduced in 2008. Under this curriculum, courses on international human rights, African human rights and African Union law are offered in all law schools in the country. The African human rights law course is designed to deal directly with the regional human rights system in Africa; the major instruments covered being the African Charter, the Maputo Protocol and the African Charter on the Rights and Welfare of the Child. It is also noted that there are some postgraduate human rights programmes run by Ethiopian universities which incorporate the African human rights system as well. For instance, at Addis Ababa University, the oldest in the country, courses that deal with African human rights are offered by both the Faculty of Law and the Centre of Human Rights at an undergraduate and postgraduate level. Moreover, the African human rights system is fairly well represented in extra-curricular activities such as moot

47 Interview with Ms Zenaye Tadesse, Executive Director of EWLA (12 November 2015). The communication was submitted on behalf of a girl who was abducted and raped by a man, and yet did not get justice from domestic courts. EWLA reported that the case was dropped as the Ethiopian government recognised the violations and offered satisfactory remedies. Nevertheless, one of the co litigants before the Commission, Equality Now, continues to pursue this case.

48 See art 2(2) & (3) of Proclamation 621/2009. Those CSOs that receive more than 10 per cent of their funding from foreign sources are prohibited from engaging in human rights advocacy work by virtue of art 14(5) of the Proclamation.

court competitions. The growing participation of Ethiopian universities in the annual African Human Rights Moot Court Competition has not only helped to bring greater exposure to the African Charter but also to the case law and procedures of the African Commission.

There are no significant academic writings in Ethiopia on the subject of the African Charter, the Maputo Protocol or the African Commission, probably because of the late introduction of African human rights course in law school education. Though there are several articles that make reference to the African Charter or the Maputo Protocol, while discussing different human right issues, there are few published articles directly dealing with the said instruments or the African Commission.<sup>49</sup> Though there are a few scholars who have contributed notable academic writings on the African human rights instruments and mechanisms, their work is not widely published and disseminated locally.<sup>50</sup>

The study was unable to conduct countrywide exhaustive searches in all the law schools. It is however conclusively observed that the number of

dissertations by students that make use of the African Charter is increasing. Relevant scholarly articles in local journals are still very limited but more are being published in foreign journals.

## 9 National human rights institutions

The Ethiopian Human Rights Commission (EHRC) was established by law in 2000 and is armed with an extensive mandate around the promotion and protection of human rights in Ethiopia.<sup>51</sup>

EHRC was granted affiliate status with the African Commission in 2006,<sup>52</sup> and engages with the African Commission by attending sessions and collaborating with the special mechanisms. It has not, however, submitted any reports to the African Commission, as is required having regard to its affiliate status; though the first report is said to be under preparation.<sup>53</sup> Active participation by the EHRC in the activities of the African Commission is yet to be enhanced.

EHRC makes reference to the African Charter in its research, law reviews, training, public education and advocacy activities in the same manner as it does to other relevant African and international instruments. Remarkably, the EHRC has made the African Charter available in the local language (Amharic) and this version has been published and disseminated to relevant human rights actors, and exists as an online resource available on the EHRC

49 Some examples include, AJ Ali 'The admissibility of sub-regional courts' decisions before the African Commission or African Court' (2012) 4 *Mizan Law Review* 241; EH Mengesha 'Reconciling the need for advancing women's rights in Africa and the dictates of international trade norms: The position of the Protocol on the Rights of Women in Africa – Focus on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 208 168-187; FH Berhane 'Why Ethiopia should ratify the Maputo Protocol' (2010) 507 *Pamazuka News* <http://pambazuka.org/en/category/features/69059> (accessed 10 November 2015).

50 For example, TS Bulto extensively published on the African human rights system in international journals (see his publications available at [http://www.researchgate.net/profile/Takele\\_Bulto/publications](http://www.researchgate.net/profile/Takele_Bulto/publications) (accessed 5 February 2016)).

51 See Proclamation 210/2000. EHRC only became operational in 2005.

52 <http://www.achpr.org/sessions/40th/> (accessed 20 August 2015).

53 Interview with Mr Mitiku Mekonnen, Director, Human Rights Protection and Monitoring Directorate, EHRC (11 November 2015).



website. Wider dissemination to the public, and translation into and publication in other local languages is yet to be done. With regards to the Maputo Protocol, the EHRC is working closely with MoFA on lobbying for ratification. The rights of women being one of EHRC's main programmes under the Commissioner of Women's Rights, EHRC has provided technical assistance in preparing the relevant proposal to cabinet for purposes of initiating ratification of the Protocol.

Working closely with MoFA, EHRC also plays an active role in the preparation of periodic reports under human rights treaties to which Ethiopia is a party. Accordingly, the EHRC is greatly involved in the preparation of reports submitted to the African Commission and provides technical support and coordination assistance in the form of facilitating consultation with CSOs and other stakeholders. The EHRC, in fact, served in the National Drafting Committee that was tasked to draft the 5th and 6th periodic reports submitted to the African Commission by the government of Ethiopia.

Admittedly, there is not much done by the EHRC in so far as promoting the African Charter is concerned, and following up on implementation of the concluding observations, resolutions and decision of the African Commission is equally not a main activity of the EHRC. There is, in fact, no dialogue concerning implementation of the recommendations of the African Commission on the communication involving Ethiopia discussed below. It is noted, moreover, that there is greater focus on the Universal Periodic Review (UPR) process, the concluding observa-

tions of which are translated, published and disseminated by EHRC.<sup>54</sup>

## 10 State reporting

Ethiopia submitted two state reports to the African Commission in respect of the African Charter. The first was a combined initial and 1st-4th periodic report and was submitted in 2008 while the second was a combined 5th and 6th periodic report, submitted in 2014. In the light of article 62 of the African Charter, requiring states to submit reports every two years, Ethiopia's reporting record falls short of meeting the timeframes for each report. The reason for such delay, as indicated by the government, was inadequacy of resources<sup>55</sup> perhaps compounded by multiple reporting duties. However, having made remarkable effort in clearing its reporting backlog, Ethiopia is currently one of very few member states who have no outstanding reports under the African Charter.<sup>56</sup>

The legal department of MoFA is responsible for preparation of state reports under the African Charter and other international instruments. As the African Charter covers a range of human rights that fall under the mandate of different institutions, MoFA works closely with other government ministries to gather relevant information and coordinate the drafting process.

The preparation of the combined initial and 1st-4th reports was less participatory although broad participa-

54 EHRC 'Recommendations from 2nd UPR of Ethiopia' (Amharic) (2015).

55 See 'Ethiopia State Report '(2008) [http://www.achpr.org/files/sessions/46th/state-reports/1st-to-4th-1998-2007/staterep1to4\\_ethiopia\\_2008\\_eng.pdf](http://www.achpr.org/files/sessions/46th/state-reports/1st-to-4th-1998-2007/staterep1to4_ethiopia_2008_eng.pdf) (accessed 8 August 2015) 7.

56 <http://www.achpr.org/states/> (accessed 20 November 2015).

tion was noted in the case of the later, combined 5th and 6th report. Preparation of the combined 5th and 6th periodic reports was led by a National Committee composed of the EHRC and six relevant ministries,<sup>57</sup> and coordinated by the MoFA. The drafting process is said to have involved extensive stakeholder consultations to gather information on implementation of the African Charter. Consultative workshops were also organised at different stages of the drafting process and provided an opportunity to a wide range of stakeholders – from government, civil societies, international partners, the private sector and the media – to discuss the drafts and provide comments and inputs that were taken into consideration.<sup>58</sup>

The concluding observations issued by the African Commission and other treaty bodies are distributed to relevant government ministries and departments. Apart from inter-ministerial dissemination, there is no evidence of dissemination of the concluding observations to the public or any translation of the same into local languages. Similarly, specific steps taken towards implementing the recommendations in the concluding observations of the African Commission cannot be traced. In this regard, MoFA is said to be planning to institute a structured follow-up mechanism for recommendations of international human rights bodies including those of the African Commission.<sup>59</sup>

57 The six member ministries were the MoFA, Ministry of Justice, Ministry of Federal Affairs, MoWCYA, Ministry of Finance and Economic Development, Ministry of Communication Affairs. See Ethiopia State Report (2014) <http://www.achpr.org/states/ethiopia/reports/5-2009-2013/> (accessed 22 August 2015) 12.

58 Interviews with MoFA officers (n 14 above). See Ethiopia State Report (n 57 above).

59 Interviews with MoFA officers (n 14 above).

## 11 Communications involving the state

There have been some communications submitted to the African Commission involving Ethiopia. One of the communications involving Ethiopia was Communication 301/05 *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v Ethiopia*.<sup>60</sup> The complainants alleged violation of fair trial rights, amongst others, under the African Charter. The African Commission found the government of Ethiopia to be in violation of the said rights and consequently ordered Ethiopia to pay adequate compensation to the victims. Despite the importance of the communication in providing a remedy to the victims involved, no publicity has been given to the communication or decision at the domestic level. The concerned NGO and the lawyers involved in the communication have not used it for domestic level promotion of the outcome as well as the work of the African Commission. So far, no known steps have been taken by the Ethiopian government towards implementing the recommendations of the African Commission in respect of the communication and the government is yet to report to the African Commission on implementation.

The above case is the only communication involving Ethiopia that has been decided on its merits as at the time of this study. As for the rest, they were all dismissed or suspended at the admissibility stage of the communications process.<sup>61</sup> The study notes that a hand-

60 <http://www.achpr.org/communications/decision/301.05/20> (accessed 12 August 2015).

61 See details of the communications at African Human Rights Case Law Analyser: <http://caselaw.ihrda.org/country/ethiopia/> (accessed 5 February 2015).

ful of communications involving Ethiopia are pending before the African Commission, the details of which are not yet public due to the confidentiality clause under the Rules of Procedure of the African Commission.

## **12 Special mechanisms and promotional visits by the African Commission**

The only visit by a special mechanism of the African Commission to Ethiopia was held by the Special Rapporteur on Prisons and Conditions of Detention in Africa, in 2005. The mission was led by the then Special Rapporteur, Commissioner Dr Vera Chirwa, who visited several prisons in the country and held discussion with government authorities, prisoners, prison and detention center officials, and NGOs.<sup>62</sup>

The mission identified several positive aspects in relation to the treatment and conditions of prisons and detention centres, such as the proper separation of female sections from male sections that are also guarded by female wardens; and separate facilities for nursing and expectant mothers. It also, however, identified problems of overcrowding, lack of separation of children from adults, and suspects from convicted persons; lack of provisions of basic services and utilities; inadequate educational, medical and recreational facilities in prisons; poor sanitation in police detention centres; inadequate funding allocation to prisons; and unduly prolonged detention at the pre-trial and trial stages of the criminal justice system, amongst others. The recommendations of the Special Rapporteur included urging the government of Ethiopia to take necessary steps to tackle the

62 See African Commission Report (n 5 above).

above problems. In addition, government was urged to consider the release of persons above the age of 70, those who are seriously sick, expectant and nursing mothers, and political prisoners; to provide special dietary meals for children, the sick, and nursing and expectant mothers; to facilitate the regular inspection of prisons and detention centres by government authorities, the EHRC and NGOs; and to ensure proper investigation of complaints of abuse, amongst others.

Government has made attempts to address some of these recommendations. Measures to address prison crowding, separation of juveniles from adults, separation of convicts and suspects, and the provision of legal aid are progressively being enforced.<sup>63</sup> A National Prison Administrations Strategic Plan is also being implemented in order to standardise the treatment of and provision of services to prisoners at federal and regional levels. In 2007, the Council of Ministers has issued Regulations<sup>64</sup> to ensure respect for the human rights of prisoners and take measures in cases of violations. The EHRC also conducted monitoring visits to police detention centres that documented progress, gaps and recommendations.<sup>65</sup>

## **13 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission**

The availability of the African Charter in Amharic, which by virtue of being the working language of the Federal govern-

63 See Ethiopia State Report (n 57 above).

64 The Federal Prison Wardens Administration Regulation 137/2007 & the Treatment of Federal Prisoners Regulation 138/2008.

65 See EHRC Report (n 5 above).

ment and four other regional states is widely used throughout the country, is a positive factor. The translation of the Charter in as many local languages as possible would go a long way in promoting it.

The existence of a justiciable Bill of Rights and enabling subsidiary laws is instrumental in promoting and giving effect to the African Charter. In particular, the interpretation clause of the Constitution can play an immense role in catalysing application of the African Charter into the domestic legal practice involving human rights issues. However, it requires an active judiciary and lawyers who keenly initiate interpretations in the light of the provisions of the African Charter. The emerging practice of reference to international instruments by the Federal Supreme Court can also slowly erode the stalemate in the Ethiopian judicial tradition towards reference to international legal instruments. Such practice should be extended to the provisions of the African Charter and also be mainstreamed to lower and regional courts.

The existence of NGOs with observer status with the African Commission could also be a powerful resource if exploited effectively. It could be used to promote the African Charter and the work of the African Commission; to lobby for ratification of the Maputo Protocol; and proactively to engage with the Commission through available channels.

EHRC's comprehensive statutory mandates and its affiliate status with the African Commission could be useful in increasing the visibility of the African Charter, the Maputo Protocol and the work of the African Commission within the domestic

human rights system. In particular, incorporation in the EHRC's Strategic Plan of advocacy work around ratification of the Maputo Protocol is an important factor that can support the ratification and visibility of the Protocol. The EHRC should incorporate targeted projects to promote the African Charter, the Maputo Protocol and the work of the African Commission.

Available institutional frameworks such as the Justice Professionals Training Centre and the Justice and Legal Systems Reform Institute could be powerful tools for incorporating the African Charter and the jurisprudence of the African Commission in trainings and legal research.

Wider participation of government as well as non-government stakeholders in the reporting process and the important attention given by government bodies to reporting and concluding observations of the African Commission is a positive asset to intensify the impact of the African Charter and its protocols. Publication and wider dissemination of periodic reports and concluding observations can be instrumental in raising the awareness of grassroots actors and the general public, and should be prioritised.

The formal and harmonised incorporation of the African human rights system into law school curricula at national level, coupled with the growing number of university lecturers trained on the African human rights system, is already enhancing awareness and knowledge of regional human rights law among the new generation of legal professionals. Moreover, the increasing number of Ethiopians attending human rights courses at a postgraduate level is prov-

ing an asset for promoting and incorporating the African Charter in their respective fields of domestic human rights work.

Dr Solomon Ayele Dersso is the first Ethiopian to join the African Commission as a Commissioner. However, as he has just been appointed, in June 2015, it is premature to assess what role this factor has played in enhancing the influence of the African Charter and the African Commission in Ethiopia. It is hoped that it will have a positive influence in increasing the visibility of the African Charter and the work of the Commission in Ethiopia.

The presence of the African Union Headquarters should serve as a bridge between the African Commission and the people of Ethiopia. The African Commission as well as interest groups working with it can use the African Union Commission channels for the promotion of human rights.

The main factors that the study identified as impeding the influence of the African Charter, the Maputo Protocol and the African Commission in Ethiopia are summarised as follows:

- (a) The lack of widespread awareness of the African Charter and the work of the African Commission amongst key stakeholders such as judges, lawyers, academics, human rights advocates and government institutions constitutes a major factor that diminishes the use and influence of the African Charter. Training and awareness raising forums are highly desired.
- (b) The lack of publication of the African Charter in government law gazette in the official working languages of courts is a key practical factor impeding its use by judges and litigating lawyers. Though publication can no longer be used as a ground to exclude use of the Char-

ter in domestic litigation, it still creates practical problems. Thus, official texts of treaties should be made available to courts in relevant, various languages.

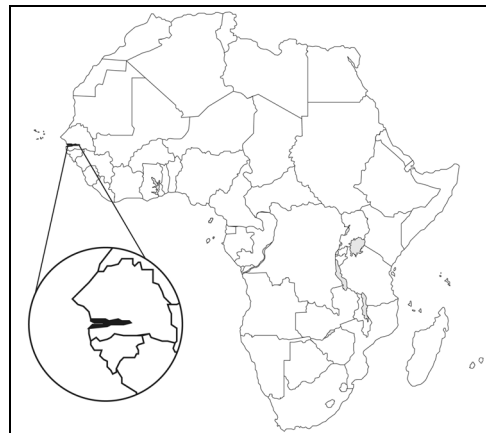
- (c) As for the Maputo Protocol, its status as a non-ratified instrument highly precludes any attention given to it at all levels. The MoFA, MoWCYA, EHRC and concerned NGOs should persist in their lobbying efforts to effect ratification that is pending before parliament.
- (d) The dearth of dynamic local or international human rights NGOs operating in Ethiopia that engage with the African Commission, aggravated by the restrictions imposed by the CSOs Law, is a major factor that limits the promotion of the African Charter in domestic human rights practice.
- (e) Laws that curtail freedom of association and expression which in effect suppress NGO's work and the freedom of academics, lawyers and journalists have negative bearings on the use and impact of the African Charter in Ethiopia.
- (f) The lack of media attention to the work of the African Commission contributes to the lack of public awareness. Review of major media coverage revealed that the interest of the mass media on African issues focuses on political and economic topics. Stakeholders should enhance the role of the media in promoting the African Charter and the work of the African Commission.
- (g) The fact that no sessions or promotional visits of the African Commission have been held in Ethiopia since ratification of the African Charter has also contributed to the disconnect between the Commission and local human rights actors.<sup>66</sup> Holding sessions and visits in Ethiopia could facilitate greater awareness and promote greater interaction with the African Commission if complemented by effective promotional strategies.

<sup>66</sup> Prior to ratification, the 1st Ordinary Session of November 1987 and the 14th Ordinary Session of December 1993 have taken place in Ethiopia.



# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN THE GAMBIA

*Satang Nabaneh\**



## 1 Introduction

The Gambia remains one of poorest countries in the world. The 2014 UNDP Human Development Report ranks the country 172 out of 187 countries.<sup>1</sup> The Gambia ranks at 139 on the Gender Inequalities Index (GII).<sup>2</sup> According to the Mo Ibrahim Index of African Governance, The Gambia ranks 23 out of 52 African states. Under the gender index score, the country ranks at 19<sup>th</sup> position with a 58.3 score out of 100.<sup>3</sup>

The Gambia is a common law country,<sup>4</sup> and is one of the smallest countries in mainland Africa. According to The Gambia's 2013 population and housing census preliminary results, the

population is estimated at 1.8 million.<sup>5</sup> The preliminary results indicate that women make up 50,5 per cent of the population with males constituting 49,5 per cent.<sup>6</sup>

The promulgation of the 1997 Constitution of the Republic of The Gambia heralded a new dispensation for the recognition and upholding of the dignity of the individual. The Preamble recognises the following:

The fundamental rights and freedoms enshrined in this Constitution will ensure for all time respect for and observance of human rights and fundamental freedoms for all, without distinction as to ethnic considerations, gender, language and religion.

Section 17(1) of the Constitution provides that the 'fundamental human rights and freedoms' enshrined in the Constitution 'shall be respected and upheld by all [government organs including] the Legislature'. The Constitution contains a comprehensive catalogue of rights and freedoms under Chapter IV. Section 37 of the Constitu-

\* LLM HRDA (Pretoria) & lecturer, Faculty of Law, University of The Gambia. Email: satang.nabaneh@gmail.com.

1 See UNDP Human Development Report 'Sustaining human progress: Reducing vulnerabilities and building resilience' (2014).

2 UNDP Human Development Report (n 1 above) 158.

3 Mo Ibrahim Index of African Governance (IIAG) 2014.

4 The Country attained her independence from Britain on 18 February 1964.

5 The Gambia Bureau of Statistics (GBOS) 'The Gambia 2013 Population and Housing Census Preliminary Results' (2014) 6 <http://dhsprogram.com/pubs/pdf/FR289.pdf> (accessed 20 August 2015).

6 GBOS (n 5 above) 8.

tion provides that any person who alleges that any of the provisions of Chapter IV have been, are being, or are likely to be contravened in relation to himself or herself by any person; he or she may apply to the High Court for redress.

Section 28 of the Constitution ensures that women are accorded full and equal dignity of the person with men; and have the right to equal treatment with men, including equal opportunities in political, economic and social activities. Despite their numerical strength, women's rights and gender equality issues continue to be systematically marginalised even after all the ratification and harmonisation of international human rights instruments and documents.

Women's representation in elective positions is significantly low. In the National Assembly, only three out of the 48 elected members are women with the addition of one nominated member being the current deputy speaker, making a total of four out of 53 members. Thus, the percentage of elected women members of parliament is 6,2 percent while the total percentage of women in parliament is 7,5 per cent. At the local level, as of April 2013, there were only 18 women councillors out of 137 councillors and only ten elected from a total of 109 elected councillors around the country, which is less than one per cent. These figures are far below The Gambia's commitment to attaining gender equality.<sup>7</sup>

7 See S Nabaneh 'Open letter on women's political participation' (April 2013).

## 2 Ratification of the African Charter and Maputo Protocol

The Gambian Constitution vests in the President the power to negotiate and conclude treaties and other international agreements. The President may exercise the power personally or through his Secretaries of State. Ratification of such treaties and international agreements is the prerogative of the National Assembly of The Gambia.<sup>8</sup> With regards to the procedure for transmitting treaties, the Ministry of Justice receives the resolution of ratification from the National Assembly and prepares the instrument of ratification for signature of the President. After signature, the instrument is deposited through the Ministry of Foreign Affairs.<sup>9</sup>

The Gambia is a state party to many international human rights instruments. It ratified the African Charter and the Maputo Protocol on 8 June 1983 and 25 May 2005, respectively. There is no available information on the reasons for ratifying the two instruments. However, it can be deduced that it might have been as a result of the involvement of Sir Dawda Jawara, The Gambia's first President, in the process leading to the adoption of the final draft version of the African Charter which was concluded in Banjul, the Capital of the Gambia.

However, it is important to note that The Gambia made a blanket reservation on articles 5 (elimination of harmful practices), 6 (marriage), 7 (separation, divorce and annulment of marriage) and 14 (health and reproductive rights) of the Maputo Protocol. In 2006, due to intense advocacy and The

8 Sec 79(1)(c).

9 Email from Cherno Marenah, Solicitor General and Legal Secretary on 30 October 2015.



Gambia hosting the African Union (AU Summit), the reservation was removed.<sup>10</sup> In its failure to provide an explanation around the reservation, The Gambia has shown that it made the reservation without any tangible justification.

### **3 Government focal point**

The Ministry of Justice is the focal point for all human rights issues under the leadership of the Attorney General and Minister of Justice including the implementation of the African Charter.<sup>11</sup> The Attorney General and Minister of Justice are usually present and deliver a statement during the opening of sessions of the African Commission that are held in The Gambia. The ministry is also responsible for fulfilling state reporting obligations such as reports for the Universal Periodic Reviews. They do this through the establishment of task forces comprising different government ministries and agencies. A final report is usually presented at a validation workshop before government officials, parastatals and various representatives of civil society organisations. In addition, they are also part of the delegation that presents these reports to the relevant human rights bodies. The ministry is one of the most critical of all state agencies with the mandate to ensure and safeguard fundamental freedoms and rights including popularising human rights laws amongst law enforcers and other professionals. However, it is also beset with institutional, financial and human resource capacity constraints.

The Ministry of Women's Affairs, headed by the Vice President, was creat-

ed in 1996. It is responsible for policy formulation, coordination, resource mobilisation, monitoring and evaluation at the highest level, addressing the needs and aspirations of women and girls within the confines of Constitution and national policies.<sup>12</sup>

The Women's Act, 2010 under sections 57 and 70 provide for the establishment of the National Women's Council and the National Women's Bureau as the main government gender machinery for implementation of the Maputo Protocol and other government laws and policies for the advancement of women. The Council and Bureau also work closely with the Gender Focal Points (GFPs) of the various ministries as gender mainstreaming is seen as a crosscutting issue. The GFPs support their respective ministries to assess their specific needs in the field of gender responsive planning, programming, implementation, monitoring and evaluation and make appropriate recommendations for capacity building. The Council and Bureau, with the support of and in collaboration with related institutional structures and civil society organisations (CSOs) strive to create an enabling environment for the full realisation of women's rights.

### **4 Domestication**

The Gambian legal system is based on English common law. It thus follows the dualistic approach. This is based upon the perception of two quite distinct systems of law, operating separately and also maintains that, before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifical-

10 F Viljoen *International human rights law in Africa* (2012) 256.

11 Email from Cherno Marenah (n 9 above).

12 Woman includes a 'girl-child' according to sec 2 of the Women's Act 12 of 2010.

ly 'transformed into municipal law by the use of the appropriate constitutional machinery, such as an Act of Parliament.'<sup>13</sup>

There is a strong presumption in common law systems that statutes and the common law will be read so as to be compatible with international law, except where the provisions of a statute or common law clearly preclude such an interpretation. This principle was specifically recognised in Gambian law by Moshood Adio J, on behalf of the pre-1994 Supreme Court (now the High Court), in the case of *Abdulrasheed Mohamed v The State*.<sup>14</sup> This approach is also in keeping with the principle of the Gambian constitutional interpretation set out by the Privy Council in the case of *Attorney General v Jobe (No 2)*<sup>15</sup> that the Constitution, 'in particular that part of it which protects and entrenches fundamental rights and freedoms to which persons in the State are to be entitled, is to be given a generous and purposive construction'.<sup>16</sup>

Section 216(3) of the Constitution obligates the state to be guided by international human rights instruments in making policies for the protection of fundamental rights and freedoms. Section 211(b) further empowers the courts to have regard to these state policies in interpreting any laws based on them. Section 219(c) and (d) of the Constitution also provide that:

The State shall endeavour to ensure that in international relations, it ... fosters respect for international law, treaty obligations ... and ... is guided by the principles and goals of international and regional

organizations of which The Gambia is a signatory.

As directive principles of state policy, these provisions do not confer legal rights and are not enforceable, but, all organs of government should be 'guided by and observe them.'

The first step to using the African Charter and the Maputo Protocol as tools for the enforcement of human rights in The Gambia is to have provisions of these instruments fully incorporated into national law, thereby creating legally enforceable obligations to which the government can be held accountable.<sup>17</sup> Although no specific Act of Parliament has directly domesticated the African Charter, provisions of the African Charter have been incorporated into The Gambian legal systems.

The Constitution is the supreme law of the land and any other law found to be in conflict with it is void to the extent of the inconsistency.<sup>18</sup> In addition to the Constitution, laws applicable in The Gambia include: Acts of the National Assembly, the common law and principles of equity, customary law, Shari'a law and any orders, rules, regulations and subsidiary legislation made by a person or authority conferred by the Constitution.<sup>19</sup> The different bodies of laws especially customary and Shari'a law create contradictions and inconsistencies in terms of personal law. The Gambian customary law is unwritten and consists of orally transmitted rules.<sup>20</sup> There are many discriminatory provisions in all these sources of law,

13 MN Shaw *International law* (1997) 100.

14 Unreported decision of the then Supreme Court, 1993 as cited in OAS Jammeh *The Constitutionnel Law of the Gambia, 1965-2010* (2011).

15 [1960-1963] GLR 226.

16 *Jobe (No 2)* (n 15 above) 241.

17 J Sallah & S Jahateh *Desk review of the national laws, international conventions, treaties and best practices, relating to Gender Based Violence (GBV)* 2011.

18 Sec 4.

19 Sec 7.

20 EA Agim *The Gambia legal system* revised edition (2010) 13.

particularly in the areas of family and property law. The application of both customary law and Shari'a law is not absolute.

The rights and freedoms provided in the Constitution include the right to life and personal liberty, freedom from slavery and forced labour, torture and inhuman treatment, the rights to privacy, property and fair trial, freedom of speech, conscience, assembly, association and movement, the right to political participation, right to marry, rights to education and culture as well as freedom from discrimination.<sup>21</sup>

Several of these rights are limited. An assessment of several of these rights has been seen to be violated and people have been subjected to punitive and arbitrary regulations without due process.

For example, nine death row inmates, eight men and one woman, were removed from their prison cells and executed on 27 August 2012. According to the news report,

all persons on death row have been tried by the Gambian courts of competent jurisdiction and thereof convicted and sentenced to death in accordance with the law. They have exhausted all their legal rights of appeal as provided by the law.<sup>22</sup>

The government's justification for the execution was that The Gambia was witnessing a high crime rate and becoming a safe haven for criminals. The executions were the first in The Gambia since 1985 although the military junta reinstated the death penalty in 1995. In September 2012, President Jammeh

announced a 'conditional' moratorium on executions, which would be 'automatically lifted' if crime rates increased. The UN Special Rapporteur on extrajudicial executions stated in his 2015 report that 'the only difference between those who lived and those who died, seems to be pure luck. The killings were, in other words, arbitrary and thus unlawful'.<sup>23</sup>

The African Commission, in response to the executions, noted that:

[the killings were in] total disregard of the obligations of The Gambia under the African Charter on Human and Peoples' Rights, other regional and international human rights instruments to which The Gambia is a party, as well as, the Constitutive Act of the African Union in which the 'respect for the sanctity of human life' is a principle that should be followed by each Member State.<sup>24</sup>

The Gambia has also witnessed major shrinking of the political space over the years. First, the Elections (Amendment) Act,<sup>25</sup> 2015 was passed on 7 July 2015 and assented to by the President on 20 July 2015. Section 43 of the Act increases the required deposits that candidates for election must make; candidates for President must pay 500 000 dalasis (approximately US\$12 500) up from 10 000 dalasis (approximately US\$250) previously required; candidates for the National Assembly must deposit 50 000 dalasis (approximately \$1000) which previously was 5000 dalasis (approximately

21 Secs 17-33 of the Constitution.

22 This was officially announced on Gambia Radio and Television Services (GRTS) News <https://www.youtube.com/watch?v=IHxZ Z6eKj8o> (accessed 10 October 2015).

23 UN Human Rights Council 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Mission to The Gambia' A/HRC/29/37/Add.2 (11 May 2015) para 25.

24 See ACHPR 'Press Statement on the Execution of Nine (9) Death Row Inmates in The Gambia' <http://www.achpr.org/press/2012/08/d127/> (accessed 30 November 2015).

25 Act 6 of 2015.

US\$125) and candidates for local council offices must pay about 10 000 dalasis (which is about \$200). Opposition political parties do not only regard the increases as unreasonably high but also as a ploy by the government to drastically limit the participation of the opposition in elections.

The Constitution contains several sections that guarantee women's rights although the framework thereunder is not as strong as it could be. For instance, the Constitution under sections 17(2) and 33 provide that every person is entitled to the enjoyment of rights without discrimination and equality before the law, but allows exceptions in terms of personal law. The CEDAW Committee recommended the:

amendment of section 33(5) of the 1997 Constitution, which explicitly exempts from prohibition of discrimination on grounds of gender areas governing personal status, particularly with regard to adoption, marriage, divorce, burial and devolution of property on death.<sup>26</sup>

The Constitution also does not protect the rights to health, work, food, shelter, development and satisfactory environment.

In its efforts to domesticate both CEDAW and the Maputo Protocol, The Gambia promulgated the Women's Act 2010 which was signed into law by the President on 28 May 2010. Generally, the Act is a very innovative piece of legislation which contains provisions on promoting and protecting the rights of women in The Gambia. However, some of its provisions are incompatible or not consistent with the provisions of the Maputo Protocol.

For example, section 15 of the Women's Act deals with temporary special measures to be adopted by every organ, body, public institution, authority or private enterprise aimed at accelerating *de facto* equality between men and women. This section of the Women's Act failed to introduce quotas in meeting the 30 percent target for women's political participation and representation in the National Assembly and public positions respectively.<sup>27</sup> This becomes more relevant in the political arena and decision-making at all levels, where women are not legally barred from participating effectively on an equal footing with men, but may not be able to do so due to cultural bias in favour of men and stereotypical perceptions of the role of women.<sup>28</sup>

The Maputo Protocol is the first of its kind to include a number of protections specific to women, including reproductive choice and autonomy. This is best articulated in article 14 of the Maputo Protocol, which provides for women's health and reproductive rights. In line with this obligation, section 30 of the Women's Act protects women against discrimination in reproductive health rights and services and provides for the right to medical abortion where the pregnancy endangers the life of the mother or the foetus. This is limited in scope contrary to article 14(2)(c) of the Maputo Protocol which provides for medical abortion in cases of assault, rape and incest.

On 24 November 2015, President Jammeh declared a ban on female genital mutilation (FGM) stating that it was a cultural and not a religious practice.

26 CEDAW 33rd Session 22 July 2005 CEDAW/C/GMB/CO/1-3.

27 AU Solemn Declaration.

28 See S Nabaneh *Women's political participation and representation in The Gambia: One step forward or two back?*(2013).

This was swiftly followed by the passing of the Women's (Amendment) Bill 2015 by the National Assembly on 2 December 2015 to prohibit female circumcision. The amendment addresses one of the key deficiencies of the Women's Act 2010 which was the absence of content intended to reflect the protections enshrined under article 5 of the Maputo Protocol, dealing with the 'elimination of harmful practices'. The Amendment Act added sections 32A and 32B to the Women's Act. With the enactment, The Gambia joined a number of African countries in adopting legislation as a reform strategy for ending FGM.

Section 32A makes it an offence for any person to engage in female circumcision and stipulates that whoever contravenes the prohibition is liable on conviction to imprisonment for a term of three years or a fine of 50 000 Dalasis (approximately \$1250) or both. The Act also stipulates a life sentence in prison if the circumcision results in death.

The Act also addresses those who commission the procedure in section 32B(1). The section states that

a person who requests, incites or promotes female circumcision by providing tools or by any other means commits an offence and is liable on conviction to imprisonment for a term of three years or a fine of fifty thousand Dalasis or both.

In addition, a fine of 10 000 Dalasis (approximately \$250) as provided in section 32B(2) of the Act is levied against anyone knowing about the practice and failing to report it.

However, there is a major lacuna in the Act, in so far as it makes no provision for cross-border circumcision addressing both circumcisers who perform the procedure outside the coun-

try as well as girls forced to undergo the procedure in countries with weaker FGM laws. Nevertheless, the Act constitutes a major step forward in terms of promoting and protecting the rights of women to bodily integrity and dignity.

## 5 Legislative reform

No information could be obtained on whether a compatibility study was conducted before the African Charter and the Maputo Protocol were ratified. However, several legislative reforms have been made through the enactment of laws that implicitly or explicitly give effect to the African Charter and Maputo Protocol. These include the Women's Act of 2010, Domestic Violence Act of 2013 and the Sexual Offences Act of 2013. Although the Legal Aid Act of 2008 does not expressly stipulate which treaty it incorporates, it was revealed during interviews that the Institute for Human Rights and Development in Africa (IHRDA), an international NGO based in The Gambia, fostered the enactment of the law in furtherance of the African Charter.<sup>29</sup>

The long title of the Women's Act states that it was enacted to incorporate and give effect to the provisions of CEDAW and the Maputo Protocol in The Gambia.<sup>30</sup> The Act however does not limit or restrict the incorporation and enforcement of any provisions of these two instruments. These two treaties will thus serve as an aid in the interpretation of the Act where there is a gap or where a particular provision is not

29 Interview with Edmund Foley and Humphrey Sipalla, respectively legal officer and communication officer of the Institute for Human rights and Development in Africa, 25 August 2011 conducted by Tem Fuh.

30 See Long Title, Women's Act of 2010.

provided for, in which instance recourse may be had on the original texts of these two instruments.

The Domestic Violence Act was passed by the National Assembly on 17 December 2013 and assented to by the President on 30 December 2013. The Act is aimed at combating domestic violence and thus provides protection for the victims of domestic violence, particularly women and children and for other related matters. The Act contains a number of progressive and rights-enhancing provisions. Domestic violence under section 3 is given a broad definition to include physical abuse as well as sexual and economic abuse, emotional, verbal and psychological abuse. Importantly, under section 4, the Act covers not just marriage but a whole range of intimate living conditions collectively termed as 'domestic relationships'. Section 6 stipulates that the consent of the victim is not a defence to a charge of domestic violence. Even though the government has complied with the provisions of the Domestic Violence Act in Part II section 3 by establishing the Victims of Violence Advisory Committee, it has failed to comply with sections 4, 5, 6 and 7 of the same Act to ensure effective functioning of the committee.

The Sexual Offences Act addresses the most common sexual offenses, and provides for punitive measures. This Act provides protection against sexual crimes against all persons especially vulnerable groups, including women, children and people who are mentally and physically disabled. The Act is applicable to the crime of rape and other sexual offences. However, the law fails to address marital rape. It further failed to have a provision for the review of the law as well as penalties for authorities

who do not act swiftly and effectively while respecting the human rights of the women affected within a required time frame. The former UN Special Rapporteur on Violence against Women stated that: 'in the context of norms recently established by the international community, a state that does not act against crimes of violence against women is as guilty as the perpetrators.'<sup>31</sup>

## 6 Policy reform<sup>32</sup>

Several policies have been formulated relating to the attainment of rights and freedoms in certain thematic areas such as education, agriculture, trade and employment, information and communication, population, reproductive health and youth. These include the National Gender and Empowerment Policy (2010-2020), Programme of Accelerated Growth and Employment (2012-2015), The Gambia National Action Plan on UNSCR 1325, the National Health Policy (2011-2015), National Strategic Plan for HIV and AIDS (2015-2020), and the National Education Policy (2004-2015), amongst others.

There is no evidence to suggest that government policies reflect the provisions of the African Charter. However, there are policies that explicitly mention CEDAW and the Maputo Protocol such as the National Gender and Empowerment Policy framework.

31 UN Human Rights Council 'Report of the Special Rapporteur on violence against women, its causes and consequences on intersections between culture and violence against women' UN Doc A/HRC/34 (2007).

32 For a more comprehensive analysis of policies see S Nabaneh 'Desk review of adequacy of laws, policies and vision 2020 for gender sensitivity' (2014) commissioned by Office of the Vice President & Ministry for Women's Affairs.

## 7 Court judgments

In The Gambia, there are no specialised courts that deal with violations of human rights. Different pieces of legislation have different courts exercising jurisdiction.

There have been several decided cases in which the Gambian courts have invoked decisions of the African Commission as well as the obligations of The Gambia under the African Charter examined.

In *Ousman Sabally v IGP & 2 Others*, Jallow JSC referred to the decision of the African Commission in *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, in interpreting the right to freedom of expression.<sup>33</sup> In *Mariam Denton v the Director General of the NIA and 5 Others*,<sup>34</sup> Justice Monageng made reference to the obligations of The Gambia under the African Charter. So also was the case in *Garrison v the Attorney General*.<sup>35</sup> Besides these, no other known case exists where the two instruments under study or a decision of the African Commission have been invoked.

In relation to litigating women's rights, the Women's Act is the legislation most often relied on and for the most part gives effect to the Maputo Protocol in The Gambia. In a landmark High Court case, the Court declared that distribution of joint property be in equitable shares accordance with section 43 of the Women's Act, which is a replica of article 7 of the Maputo Protocol on

equitable distribution of matrimonial property.<sup>36</sup>

In the aforementioned case, the woman was married to her husband for 26 years and had three children. At some point during their marriage, the couple occupied the matrimonial property. At the time they moved into the property, it was incomplete. The husband had lost his job and was unemployed. The woman personally expended a considerable amount of money into developing and completing the property, which was registered in her husband's name. She was able to produce some receipts of the materials she bought and other contributions she made towards the construction, completion and maintenance of the property. All contributions made towards the matrimonial home were on the clear understanding that it was a joint matrimonial property with the full consent of her husband. She also took responsibility of the family while her husband was sick and out of work.

The lady approached the Female Lawyers Association of The Gambia (FLAG) for assistance in 2010 when her husband summoned her to the *Kanifing Cadi* Court seeking a divorce. She was instructed by the *Cadi* to move out of the matrimonial bedroom until after the '*Idda*'.<sup>37</sup> FLAG intervened on her behalf and she stayed in the matrimonial bedroom as prescribed by Shari'a. In August 2011, she was locked out of the property on the instruction of her husband, and the husband further filed an eviction suit in the Magistrate's Court. FLAG represented her, sought

33 (2000) AHRLR 227 (ACHPR 1999).

34 HC/24/06 MF/087/F1.

35 Initial report of The Gambia to the UN Committee on the rights of the child, 1992.

36 HC 427/11/MF/059/F1.

37 This is a waiting period in which a woman must observe after the death of her spouse or after a divorce during which she may not marry another man.

for a stay of proceedings after a suit was filed on her behalf in the High Court seeking a declaration that she was entitled to an equitable share of the matrimonial property in accordance with the Women's Act 2010. This was granted.

This case clearly illustrates that the Women's Act 2010 can be instrumental in ensuring that women enjoy their rights in cases of separation, divorce or annulment of marriage. However, it is important to note that there is no official data to indicate how often the provisions of the Women's Act 2010, the Sexual Offences Act, 2013 and the Domestic Violence Act, 2013 have been invoked before the courts.

## **8 Awareness and use by civil society organisations**

The African Charter and the Maputo Protocol are well known amongst human rights NGOs that operate in The Gambia. The two most prominent are the African Centre for Democracy and Human Rights Studies (ACDHRS) and the Institute for Human Rights and Development in Africa (IHRDA), which both have observer status with the African Commission. The work of these two organisations is based principally on the instruments under study. There are numerous women's associations and organisations such as the Gambian Committee on Traditional Practices (GAMCOTRAP), the Foundation for Research on Women's Health, Productivity and the Environment (BAFROW), the Female Lawyers Association Gambia (FLAG), the Association for Promotion of Girl's and Women's Advancement in The Gambia, the Forum for African Women Educationalist (The Gambia) FAWE-GAM, the Gender Action Team and a

host of others, which all base their work on the Women's Act and by extension, the Maputo Protocol. The Think Young Women, a young-women-led organisation, has for example, organised a Joint Stakeholders Workshop on Sharing Best Practices in the implementation of the Women's Act for security officials, the judiciary, ministries and university students.

In separate activities and sometimes collaboratively, TANGO,<sup>38</sup> WANEP and ACDHRS have all led initiatives over the past few years to promote women's active participation and increased representation in decision making structures, using the Women's Act as well as the Maputo Protocol. These organisations supported women's candidature in parliamentary and local council elections, as well as, advocated for gender quota in politics. In 2013, TANGO convened a consultative meeting between women leaders from the major parties in the country to sensitise them and garner their support for gender quotas in representative institutions such as the parliament and local councils as well as within political parties. Earlier ACDHRS had conducted a review of manifestos of political parties to assess their gender sensitivity.

The domestication of CEDAW and the Maputo Protocol in the Women's Act of 2010 was largely as a result of lobbying and advocacy undertaken by these organisations, notably the ACDHRS. On its part, the Legal Aid Act of 2008 was the result of sustained efforts of the Institute for Human Rights and Development in Africa.

38 The Association of Non-Governmental Organisations in The Gambia (TANGO).



Furthermore only The Association of Non-Governmental Organisations in The Gambia (TANGO) and The Gambia Press Union (GPU) have observer status before the African Commission but have not yet submitted any shadow reports to the Commission. The NGOs have not used any resolutions or general comments adopted by the African Commission in their work in The Gambia.

However, CSOs are gradually becoming more proactive in submitting shadow reports. For instance, the Child Protection Alliance (CPA) submitted shadow reports for the UPR and the CRC Committee on the situation of Children's rights in The Gambia respectively. During the recent CEDAW Committee review of The Gambia's periodic report, TANGO with a group of women rights organisations, submitted a joint shadow report on the list of issues and questions in relation to the combined fourth and fifth periodic reports of The Gambia in July 2015. In addition, the Committee on Traditional Practices Affecting the Health of Women and Children (GAMCOTRAP) submitted an additional shadow report in the area of sexual and reproductive health of women and girls focusing on FGM.

Except for FLAG, no other non-governmental organisations (NGO's) are as heavily concerned with litigating women's rights cases. Most Gambian activists do not use the local courts and will not seek or use international avenues for redress. Most NGOs lack the adequate knowledge of international human rights law. Many are not aware of these procedures and how to file complaints, or think it is not worth the trouble if recommendations cannot be

enforced. Additionally and more importantly, they are also afraid of reprisals.<sup>39</sup>

## **9 Awareness and use by lawyers**

Although The Gambia hosts the secretariat of the African Commission and other international organisations, a major barrier in litigating women's rights in The Gambia is the lack of knowledge of international human rights law by both judges and lawyers. This means that most lawyers are unable to cite international human rights law while judges and magistrates are unable to draw conclusions through the application of relevant international human rights law.

This has also led to an absence of judicial activism within the legal community. Generally, lawyers are unable or unwilling to bring cases to address on-going women's rights violations in The Gambia. Strategic and impact litigation around women's rights, if improved, could promote consistent advocacy for women's rights and may encourage the government to comply with national and international standards, calling for the protection of these rights.

## **10 Incorporation in law school education**

Even though the Faculty of Law of the University of The Gambia (UTG) was only established in 2007, it has incorporated human rights law in the curriculum. International human rights law is taught with a focus on the African human rights system. These students

<sup>39</sup> Interview with Njundu Drammeh, National Coordinator, Child Protection Alliance (CPA), Madi Jobarteh, Programme Manager, TANGO and Haddy Dandeh Jabbie, Vice President, FLAG, 21 August 2015.

have gone on to become lawyers and magistrates. There is great hope that they will usher in a new dispensation in terms of utilising international human rights law. Currently, members of staff with expertise in this area, and with human rights degrees, lecture these courses.

The Faculty has also, with the support of the Centre for Human Rights at the University of Pretoria, participated in the annual African human rights moot court competition. Preliminary rounds are organised in the university with judges from the African Commission, raising awareness about the system. Three of the participants of these moot competitions have been awarded scholarships to pursue the LLM in Human Rights and Democratisation in Africa (HRDA) at the Centre in the University of Pretoria and have come back to lecture at the Faculty.<sup>40</sup>

In 2011, upon the return of two participants from the 21st African Human Rights Moot Court competition, they set up The Faculty of Law Student's Human Rights Committee that sought to promote human rights and build the knowledge of future human rights lawyers by fostering closer relationships between the Faculty and international, regional and national institutions working in the area of human rights. The Human Rights Committee concept entails a Student Human Rights Volunteer Corps (SHRVC) that targets, recruits and trains law students interested in human rights. The volunteers are linked with

human rights institutions to develop their skills and knowledge and encourage them to become human rights defenders.<sup>41</sup>

The Committee was officially launched in October 2011 by the Director of the Centre for Human Rights, University of Pretoria, Professor Frans Viljoen who presented a lecture on the 'African Charter at 30' which was graced by the then Vice Chancellor, Dean, lecturers and students of the faculty. The Committee was able to provide a pool of interns and volunteers for ACHDRS' NGO forums. This consequently led to internships at the secretariat and IHRDA. In partnership with IHRDA, they were able to organise a symposium on the IHRDA case analyser to help students become aware of its existence and how best to utilise it.

## 11 National human rights institutions

There is no national human rights institution in The Gambia. The Ombudsman does not have a human rights promotion or protection mandate as such and is established as a general public complaints body against injustice arising out of administrative mismanagement, mal-administration or discrimination.<sup>42</sup> There is also the National Council on Civic Education which has no explicit human rights mandate but does promote values contained in the African Charter and the Maputo Protocol. These institutions have no liaison with the African Commission.

In July 2015, the CEDAW Committee in its concluding observations on the

40 These students included Satang Nabaneh, class of 2012 who represented UTG at the 2011 Moot and Musubakoto Sawo, class of 2013 who was at the 2012 Moot. Henrietta M. Ekefre also a participant of the 2012 Moot graduated from the LLM (HRDA) programme in 2015.

41 The former chair and co-founder of the Student Human Rights Council is the author of this report.

42 See art 163 of the Constitution.

combined fourth and fifth periodic reports of The Gambia, urged the state:

to establish, within a clear time frame, an independent national human rights institution, in accordance with the Paris Principles, with a mandate on women's issues, strong linkages with the women's machinery and authority to consider and issue opinions on complaints submitted by women alleging violations of their rights.<sup>43</sup>

## 12 Academic writing

Academic writing on the African Charter and the Maputo Protocol is very sparse. However, Hassan B Jallow, a Gambian academic and prosecutor of the International Criminal Tribunal for Rwanda, has published a book that reviews the African Charter generally and the jurisprudence of the African Commission.<sup>44</sup>

This researcher during her study for the Centre for Human Rights LLM programme in 2012, was a member of the Women's Human Rights Clinical Group which drafted and submitted the pioneer work of a General Comment on Article 14(2)(d) and (e) of the Maputo Protocol on HIV to the African Commission which was adopted as the first ever general comment by the Commission. She, with her former colleagues in the group, authored 'The African Women's Rights Protocol and HIV: Delineating the African Commission's General Comment on article 14(1)(d) and (e) of the Protocol'.<sup>45</sup> She also has a chapter, 'Challenges in litigat-

ing the right to health in Mozambique: A critical analysis' in E Durojaye *Litigating the right to health in Africa: Challenges and prospects* (2015).

## 13 State reporting

The Gambia's record of fulfilling its state obligation of submitting reports is extremely poor. The Ministry of Justice is responsible for reporting to treaty bodies. The country submitted its initial, second and third reports to the CEDAW Committee in 2005. It submitted its fourth and fifth combined periodic reports on CEDAW in 2010.

The Gambia submitted its initial report on the African Charter in 1992. The first periodic report was submitted in 1994 and no more have been submitted since.<sup>46</sup> Since its ratification of the Maputo Protocol, The Gambia has never submitted an initial report or any periodic report.

It is important to note that the government of The Gambia gives greater priority to reporting under the UN than the African human rights system. There is clear manifestation of this. For instance, the country submitted its combined initial, second and third periodic reports to the CEDAW Committee in 2003 which was examined in 2005 while the combined fourth and fifth periodic report which was due in 2010 was submitted in 2012 and considered in 2013. The government submitted its initial report to the CRC committee in 1999. In 2011, it submitted its second and third periodic report which issued concluding observations on 4 January 2015.

43 CEDAW Committee 'Concluding observations on the combined fourth and fifth periodic reports of The Gambia' (July 2015) CEDAW/C/GMB/4-5 para 15.

44 See HB Jallow *The law of the African (Banjul) Charter on Human and People's Rights* (2007).

45 (2014) 14 *African Human Rights Law Journal* 681 [http://www.ahrlj.up.ac.za/images/ahrlj/2014/ahrlj\\_vol14\\_no2\\_2014\\_chapter17.pdf](http://www.ahrlj.up.ac.za/images/ahrlj/2014/ahrlj_vol14_no2_2014_chapter17.pdf) (accessed 24 August 2015).

46 [www.achpr.org/states/gambia](http://www.achpr.org/states/gambia) (accessed 24 August 2015).

In October 2014, the Human Rights Council (HRC) reviewed The Gambia's 2014 Universal Periodic Report (UPR) in which it issued 171 recommendations. In March 2015, the government submitted its written response to 78 of the 171 recommendations including on the maintenance of the moratorium on executions and the abolition of the death penalty, and on cooperation with special procedures. The Gambia also rejected recommendations concerning the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the non-criminalisation of sexual orientation or gender identity, and the removal of restrictions on freedom of expression.

#### 14 Communications involving this state

A total of ten communications have been submitted to the African Commission against The Gambia. Of these, seven were dismissed for non-exhaustion of local remedies, one was settled amicably and two were decided on the merits. In *Sir Dawda Jawara v The Gambia*,<sup>47</sup> the African Commission had found The Gambia in violation of articles 1, 2, 6, 7(1)(d) and (2), 9(1) and (2), 10(1), 11, 12(1) and (2), 13(1), 20(1) and 26 of the African Charter and recommended that The Gambia should bring its laws in conformity with the provisions of the Charter.

In *Purohit and Another v The Gambia*,<sup>48</sup> The Gambia was found to be in violation of various articles of the African Charter. The African Commission recommended that: The Gambia should repeal the Lunatics Detention

Act and replace it with a new legislative regime for mental health in The Gambia, compatible with the African Charter and international standards and norms for the protection of mentally ill or disabled person as soon as possible; create a body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release pending the first recommendation. It was also recommended that the state provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia. As a way to follow-up on progress in implementing the decision, it was recommended that The Gambia report back to the African Commission when it submits its next periodic report on the measures taken to comply with the recommendations of the African Commission.

These cases have not been given any exposure by the government and are only known within NGO circles. Beginning with the last recommendation, The Gambia has not submitted any report to the African Commission since 1994. The government in collaboration with the World Health Organization is currently drafting a Mental Health Bill. The African Commission has not been associated with this process and the Bill is not in the least informed by the decision in the *Purohit* case.<sup>49</sup> There have been many legislative reforms since these two cases were decided but there is no evidence that the decision to reform the laws was a result of the recommendations of the African Commission.

47 (2000) AHRLR 107 (ACHPR 2000).

48 (2003) AHRLR 96 (ACHPR 2003).

49 Interview with Dr Senghore who is also a member of the Law Reform Commission of The Gambia. This was also confirmed by Gaye Sow.

At the sub-regional level, there have been several decided cases before the ECOWAS Community Court of Justice dealing with violations of provisions of the African Charter against The Gambia. However, it is important to note the non-adherence to judgments of the Court by The Gambian government.<sup>50</sup>

In 2008, the ECOWAS Court of Justice in the case of *Chief Manneh v The Gambia*,<sup>51</sup> ordered the government of The Gambia to release 'Chief' Ebrima Manneh, a journalist who has been missing since July 2006, and pay his family damages of US\$100,000. Since 2006, the reasons for his arrest have not been disclosed by the government of The Gambia and efforts by his family, friends and lawyers to know his whereabouts or have access to him have proved futile. The plaintiff has not been seen since then.

A declaration was sought that his arrest on 11 July 2006 and his continual detention since then without trial, is unlawful and a violation of his right as guaranteed by articles 4, 5, 6 and 7 of the African Charter. In the absence of The Gambian's government failure to establish that the arrest and detention of the plaintiff was in accordance with the provisions of any previously laid down law, the Court held that such an action was clearly contrary to the provisions of articles 2 and 6 of the African Charter and that the plaintiff was entitled to the restoration of his personal liberty and the security of his person.<sup>52</sup> July 2015

marks nine years since the arrest of Chief Manneh whose whereabouts remain unknown and the government has not released him or pay the mandated compensation ordered by the Court seven years ago.

In the case of *Musa Saidykhan v The Gambia*,<sup>53</sup> the plaintiff filed an application against The Gambia at the ECOWAS Community Court of Justice in 2007 in which he complained of a violation of his human right to personal liberty, dignity of his person and fair hearing guaranteed by articles 1, 5, 6 and 7 of the African Charter. According to the plaintiff, the Editor of The Independent newspaper based in The Gambia, they published the names of alleged coup plotters on 21 March 2006. Six days later, he was arrested at night by a combined team of armed soldiers and policemen, without a warrant of arrest. They took him to a detention centre in the headquarters of the National Intelligence Agency (NIA) in Banjul. For the next 22 days, the plaintiff claimed he was held totally *incommunicado*.

In December 2010, having regard to article 4(g) of the ECOWAS Revised Treaty, which enables the court to apply the African Charter, and having regard to articles 5, 6, and 7 of the African Charter; and having regard to the findings of fact, the court decided that the plaintiff had established his case that he was arrested, detained and tortured by the defendant's agents for 22 days, without any lawful excuse and without trial.<sup>54</sup> The Court awarded the plaintiff damages in the sum of US\$200 000. There is no evidence to show that the government of The Gambia has adhered to the judgment of the court.

50 See HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: Compliance and influence' unpublished LLD Thesis, University of Pretoria, 2013.

51 (2008) AHRLR 171 (ECOWAS 2008).

52 Chief Manneh (n 51 above) paras 27 & 28.

53 ECW/CCJ/JUD/08/10.

54 Musa Saidykhan (n 53 above) paras 46 and 47.

In the case of *Etim Moses Essien v The Gambia*,<sup>55</sup> the ECOWAS court did not find any violation with regard to the plaintiff's rights as enshrined in article 5 on inherent human dignity and article 15 on the right to work under equitable and satisfactory conditions with equal pay for equal work of the African Charter respectively.

Recently, on 10 June 2014, in the case of *Deyda Hydara Jr & Others v The Gambia*,<sup>56</sup> the ECOWAS Court delivered judgment finding that the government had failed to conduct a proper investigation into the death of Deyda Hydara, the co-founder, publisher and editor of the Point Newspaper who was killed on 16 December 2004 in The Gambia. The Court held that The Gambia had allowed a culture of impunity in The Gambia. The Court further held that Deyda's death violated the right to life as guaranteed by articles 1 and 4 of the Charter, as well as the right to freedom and the press as provided under article 9 of the Charter and article 66 of the Revised Community Treaty. The Court awarded damages of US \$50,000 for the failure to properly investigate the assassination, as requested by the claimant.

There is no evidence to show that the government of The Gambia has adhered to the rulings of the court which are binding on them as a state party. This was reiterated by Christof Heyns, who stated that the government has failed to implement the three decisions of the ECOWAS Court.<sup>57</sup>

55 ECW/CCJ/JUD/05/07.

56 ECW/CCJ/PP/30/11. Judgment available at <https://www.opensocietyfoundations.org/sites/default/files/Hydara%20Judgment.pdf> (accessed 30 September 2015).

57 Report of the Special Rapporteur (n 23 above) para 15.

## 15 Special mechanisms and promotional visits by the African Commission

There have been limited promotional or fact finding missions to The Gambia by special procedures mandate holders both at the regional and international levels due to the non-cooperation of the government of The Gambia.

In terms of special mechanisms, Commissioner Dankwa, in his capacity as Special Rapporteur on Prisons and Conditions of Detention in Africa, undertook a special mechanism visit in the country from 21-26 June 1999.<sup>58</sup> There has been one promotional mission of the African Commission to The Gambia undertaken by Commissioner Jainaba Johm from 22 December 2001-5 January 2002. The report of this mission was not adopted by the African Commission.

It is important to note that NGOs have sent a letter to the African Commission requesting for a fact finding mission to The Gambia. This was discussed during its 17th Extra-Ordinary Session in February 2015 in The Gambia.<sup>59</sup> In the same session, through the Resolution on the Human Rights Situation in the Republic of The Gambia, the Commission called on the government to invite the African Commission to undertake a fact-finding mission to The Gambia.<sup>60</sup> There are no indications yet whether the government

58 The report is available at: <http://www.achpr.org/states/gambia/missions/prisons-1999/> (accessed 24 August 2015).

59 ACHPR 'Final Communiqué of the 17th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights' <http://www.achpr.org/news/2015/03d167/> (accessed 24 August 2015).

60 ACHPR/Res.299 (EXT.OS/XVII) 20 <http://www.achpr.org/sessions/17th-eo/resolutions/299/> (accessed 24 August 2015).

of The Gambia will extend an invitation.

At the UN level, in November 2014, the UN Special Rapporteur on Torture and the Special Rapporteur on Extra-Judicial Executions respectively, visited The Gambia. This was the first visit ever to the country by any of the special procedures of the Human Rights Council. However, it was greatly compromised by the unwillingness of the government to grant the Special Rapporteurs freedom of movement and inquiry in all areas of detention facilities. During their mission they were refused access to the Security Wing of Mile 2 Central Prison in the capital Banjul, where death row prisoners are held.<sup>61</sup>

#### **16 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission**

As evident in the foregoing information, it is clear that the African Charter, the Maputo Protocol and the African Commission which is actually located in Banjul have very minimal impact in The Gambia.

In the first place, The Gambian government has consistently demonstrated its willingness to disregard fundamental rights and freedoms of its citizens, particularly the rights of girls and women. There is limited political will and leadership to directly ensure that the rights of women are respected and protected. By law and practice,

government has placed numerous restrictions in the exercise of human rights, while necessary budgetary allocations to sectors that fulfil the needs of women remain low. Laws and policies need financial resources to meet their obligations and fulfil rights. The national budget is essentially the political embodiment of government's goals. The inadequate budgetary allocation to the Women's Ministry and its satellite institutions especially the Women's Bureau, as well as the social sectors, impede the implementation of programmes geared towards the realisation of the rights of women in The Gambia.

The Ministry of Women's Affairs, the National Women's Council and Women's Bureau are the lead advocates on women's rights. However, they face a plethora of administrative and institutional challenges, including inadequate gender expertise to ensure the full implementation of laws and policies on gender. Although the Ministry and the Women's Bureau have put in place various monitoring mechanisms such as Focal Points, these are not always effective. There are additional problems of relying on counterparts and implementing partners in collecting and monitoring data as well as the need to ensure the accuracy of information collected.

There is, generally, inadequate judicial activism and reliance on international human rights instruments. Mere existence of laws and policies cannot guarantee respect, promotion and fulfilment of women's rights. This raises the issue of the level of consciousness-raising that the gender machinery is engaged in with all the laws and policies in place. This requires the awareness and understanding of the laws and policies and the capacity to do their part in implementation. For example, lawyers,

61 UN Human Rights Council 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to The Gambia' A/HRC/28/68/Add.4 (16 March 2015) para 4.

judges, teachers, social workers, law enforcers amongst others should be continuously trained on women's rights and specific legislation. Women, men, children and youth must also be aware of these laws and policies to make sure they are respected and adhered to and so that duty bearers are held accountable.

Not only has The Gambia failed to criminalise several socio-cultural practices that harm the rights and dignity of women and girls, such as early and forced marriage, and wife inheritance, but has also failed to take deliberate measures to increase women's voices and representation in decision making processes and to put in place affirmative action measures in many sectors. This indicates the disinterest of the state in women's issues. Despite the fact that there is a woman Vice President, women's political representation is extremely low amidst an overall inability to influence policy and decision making processes. There are too few women in elective positions at both the National Assembly and local government levels and the district tribunals largely comprise of men.<sup>62</sup>

Regardless of the fact that the country hosts the African Commission, with most of its extraordinary sessions taking place in Banjul, The Gambia remains insulated against the decisions and voices that emerge in these processes. Against the backdrop of repressive laws and arbitrary arrest, a climate of fear hovers over the heads of The Gambian civil society and media practitioners thus limiting their ability to utilise the structures and processes of the African Commission to put pressure on the state. In fact, over the past few years,

many within the wider African and global civil society movement have called for the African Commission to be relocated elsewhere from The Gambia in response to its consistent abuse of rights.<sup>63</sup>

It should be acknowledged that The Gambia has made some progress that should be consolidated as evidenced by the enhancement of several legal and policy frameworks. A gender audit of all laws and policies has been conducted. This was in line with section 14 of the Women's Act 2010 which obliged the government, in line with its international obligations under CEDAW and the Maputo Protocol, to undertake such an audit. With the support of the UNDP, the Ministry of Women's Affairs commissioned a gender audit of existing laws and policies. The purpose of the review was to identify the gaps in national documents and make concrete recommendations to address gender inequalities and inequities. The audit made recommendations for review and harmonisation of laws in line with international obligations.<sup>64</sup>

There has also been a proliferation of CSOs, NGOs, and professional groups operating in the area of women's human rights and women's empowerment – a growing women's movement. Women's involvement in the promotion and protection of women's human rights has been on the increase. There have also been marked increases in efforts to raise the voices of women and to promote women's leadership and

62 Nabaneh (n 28 above) 48-57.

63 See blog post by F Viljoen 'A call to shift the seat: The Gambia is not a suitable seat for the African Commission on Human and Peoples' Rights' (27 May 2013) <http://africlaw.com/2013/05/27/a-call-to-shift-the-seat-the-gambia-is-not-a-suitable-seat-for-the-african-commission-on-human-and-peoples-rights/> (accessed 30 August 2015).

64 Nabaneh (n 32 above).



involvement in decision making, participation and representation.



# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN GHANA

Michael Gyan Nyarko\*



## 1 Introduction

Ghana was the first sub-Saharan African country to gain independence from British rule, in 1957. The constitutional history of Ghana is long and chequered. The Independence Constitution of 1957 established a parliamentary monarchy with Dr Kwame Nkrumah as Prime Minister.<sup>1</sup> Ghana became a republic in 1960 with a new constitution which established a presidential system of government based on multi-party democracy. Ghana became a one-party state in 1964 through a constitutional amendment which made Dr Kwame Nkrumah's ruling Convention Peoples' Party (CPP) the only party recognised by law.<sup>2</sup> The country slipped into dictatorship with this amendment which also declared Nkrumah president for life.<sup>3</sup> Nkrumah and his CPP were overthrown in a military *coup d'état* in 1966.

After a series of constitutional dispensations interspersed with four military *coup d'états*, the country returned to civil constitutional rule in 1993 under the 1992 Constitution (the Constitution) which established a unitary presidential system of government based on multi-party democracy. The Constitution establishes a constitutional supremacy<sup>4</sup> with a Supreme Court empowered to interpret the Constitution and strike down acts and omissions of the other branches of government which are inconsistent with the provisions of the Constitution.<sup>5</sup> The Constitution also dedicates a chapter to 'fundamental human rights and freedoms'<sup>6</sup> and guarantees civil and political rights as well as some economic, social and cultural rights, including the right to life,<sup>7</sup> liberty of the person,<sup>8</sup> dignity,<sup>9</sup> protection from cruel, inhuman and degrading treatment,<sup>10</sup> protection from slavery and forced labour,<sup>11</sup> equality before the law and non-discrimination,<sup>12</sup> the right to property,<sup>13</sup> the

\* LLB (KNUST-Ghana), LLM HRDA 2014 (Pretoria), LLD Candidate and Tutor, Centre for Human Rights, University of Pretoria.

1 K Quashigah 'The 1992 Constitution of Ghana' (2013) 2 [http://www.icla.up.ac.za/images/country\\_reports/ghana\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/ghana_country_report.pdf) (accessed 20 August 2015).

2 As above.

3 As above.

4 Art 1 of the Constitution of Ghana (1992).

5 Art 2.

6 Chap 5.

7 Art 13.

8 Art 14.

9 Art 15(1).

10 Art 15(2).

11 Art 16.

12 Art 17.

13 Art 18(1) & 20.

right to privacy,<sup>14</sup> and the right to a fair trial.<sup>15</sup> Others include freedom of expression,<sup>16</sup> freedom of thought and conscience,<sup>17</sup> freedom of religion,<sup>18</sup> freedom of assembly and protest,<sup>19</sup> freedom of association including to form or join trade unions,<sup>20</sup> the right to information,<sup>21</sup> freedom of movement,<sup>22</sup> the right to political participation,<sup>23</sup> property rights of spouses,<sup>24</sup> the right to fair administrative procedure,<sup>25</sup> the right to work under satisfactory, safe and healthy environment including the right to form or join trade unions,<sup>26</sup> the right to education,<sup>27</sup> the right to culture,<sup>28</sup> women's rights,<sup>29</sup> children's rights,<sup>30</sup> and rights of persons with disabilities and the sick.<sup>31</sup> The directive principles of state policy contained in chapter six of the Constitution also stipulate various rights, including the right to good health care,<sup>32</sup> the right to inheritance,<sup>33</sup> the right to effective participation in the development process including the formation of associations for such participation,<sup>34</sup> social assistance to the aged,<sup>35</sup> the right to secondary and tertiary education, subject to the availability of resources,<sup>36</sup> and the abolition of harmful cultural practices.<sup>37</sup>

14 Art 18(2).

15 Art 19.

16 Art 21(1)(a).

17 Art 21(1)(b).

18 Art 21(1)(c).

19 Art 21(1)(d).

20 Art 21(1)(e).

21 Art 21(1)(f).

22 Art 21(1)(g).

23 Art 21(3).

24 Art 22.

25 Art 23.

26 Art 24.

27 Art 25.

28 Art 26.

29 Art 27.

30 Art 28.

31 Arts 29 & 30 respectively.

32 Art 34(2).

33 Art 36(7).

34 Art 37(2)(a).

35 Art 37(6)(b).

36 Art 38(3)(a).

37 Arts 26(2) & 39(2).

It must be noted that the rights protected under the Constitution are not exhaustive and may include 'others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man'.<sup>38</sup> Such rights may include those guaranteed in 'treaties, conventions, international or regional accords, norms and usages',<sup>39</sup> including 'provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states'.<sup>40</sup>

As indicated above, the Constitution contains specific provisions which are applicable to women. For instance article 28 guarantees the right of mothers to be accorded 'special care' for a reasonable period before and after childbirth including paid maternity leave. Women are also 'guaranteed equal rights to training and promotion without any impediment'.<sup>41</sup> Other women's right related constitutional provisions include non-discrimination,<sup>42</sup> the prohibition of harmful customary practices<sup>43</sup> and the right of spouses to an equal share of property jointly acquired during marriage.<sup>44</sup> The Constitution also obliges the state to take 'appropriate measures to achieve regional and gender balance in recruitment and appointment to public offices'<sup>45</sup> and 'necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana'.<sup>46</sup> It

38 Art 33(5).

39 *Adjei-Ampofo v Attorney General* [2003-2004] SCGLR 418.

40 *Ghana Lotto Operators Association & Others v National Lottery Authority* [2007-2008] SCGLR 1088.

41 Art 28(3).

42 Art 17(2).

43 Arts 26(2) & 39(2).

44 Art 22.

45 Art 35(6)(b).

46 Art 36(6).

is also noteworthy that all the other rights enshrined in the Constitution are guaranteed on a non-discriminatory basis and therefore equally apply to women.

Even though there has been significant progress with regard to women's rights and women enjoy formal equality, substantive equality is far from being achieved. Discrimination against women and gender inequality is not uncommon in Ghana.<sup>47</sup> Domestic violence is widespread and an estimated 15-30 per cent of women and girls in northern Ghana still undergo female genital mutilation,<sup>48</sup> even though the practice is proscribed by law. Women still face substantial challenges especially with regard to political participation and decision making. Currently, women consist of a meagre 11 per cent of the members of parliament (30 out of 275) almost the same as the 10,4 per cent women representation in Ghana's first parliament in 1957.<sup>49</sup> Within the executive, women make up 29 per cent of ministers and 22 per cent of deputy ministers.<sup>50</sup> Ghana's Council of State, a presidential advisory body of 25 eminent persons has only three women.<sup>51</sup> In the judiciary, 29 per cent of judges of the Supreme Court and 25 per cent of those in the High Court are

women.<sup>52</sup> Within the civil service, 24 per cent of Chief Directors are women while in the local government service only 8,2 per cent Municipal and District Chief Executives are women.<sup>53</sup> 'Negative cultural perceptions of gender equality' persist, which continue to limit women's access to productive resources such as land and credit.<sup>54</sup> While female enrolment in school has improved considerably over the past decades at the pre-tertiary levels of education (48,9 per cent in primary school), gender parity in higher education has still not been attained, with current female enrolment figures at higher educational institutions stand at 33,6 per cent of public university students, 33,1 per cent of polytechnic students, and 43,3 per cent of Colleges of Education.<sup>55</sup>

## 2 Ratification of the African Charter and the Maputo Protocol

Ghana ratified the African Charter in 1989<sup>56</sup> and the Maputo Protocol in 2007,<sup>57</sup> without reservation.<sup>58</sup> The

Ghana' (2013) 8 [http://gwweb.jica.go.jp/km/FSubject1501.nsf/cfe2928f2c56e150492571c7002a982c/a0b426e5087691cf49257afe000cdf45/\\$FILE/%E8%8B%B1%E8%AA%9E%E7%89%88%202012.pdf](http://gwweb.jica.go.jp/km/FSubject1501.nsf/cfe2928f2c56e150492571c7002a982c/a0b426e5087691cf49257afe000cdf45/$FILE/%E8%8B%B1%E8%AA%9E%E7%89%88%202012.pdf) (accessed 9 August 2015).

47 Make Every Woman Count 'African Women's Decade 2010-2020: 2012 annual review' (2012) 69.

48 As above.

49 Network for Women's Rights in Ghana (NETRIGHT) 'Ghana NGOs Alternative Report for CSW 57' (2012) 6.

50 Ministry of Gender, Children and Social Protection 'Ghana's fourth progress report on the implementation of the African and Beijing Platform of Action and review report for Beijing +20' (2014) 30 [http://www.unwomen.org/~media/headquarters/attachments/sections/csw/59/national\\_reviews/ghana\\_review\\_beijing20.ashx](http://www.unwomen.org/~media/headquarters/attachments/sections/csw/59/national_reviews/ghana_review_beijing20.ashx) (accessed 9 August 2015).

51 Japan International Corporation Agency (JICA) 'Country gender profile: Republic of

52 Ministry of Gender, Children and Social Protection (n 50 above) 32.

53 As above.

54 Ministry of Gender, Children and Social Protection (n 50 above) 3.

55 Ministry of Gender, Children and Social Protection (n 50 above) 10.

56 Ratification Table: African Charter on Human and Peoples' Rights <http://www.achpr.org/instruments/achpr/ratification/> (accessed 9 August 2015).

57 Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 9 August 2015).

58 African Union Executive Council 'Report on the status of OAU/AU treaties' (2012) EX.CL/728(XXI) Rev.1 <http://www.peaceau.org/uploads/ex-cl-728-xxi-e.pdf> (accessed 9 August 2015).

power for executing treaties on behalf of Ghana is vested in the president as head of the executive, which may be exercised in person or caused to be exercised on behalf of the president.<sup>59</sup> The president's exercise of this power is however subject to ratification by an act of parliament or a resolution of parliament passed by more than half of all the members of parliament.<sup>60</sup> Parliament therefore exercises an oversight responsibility over the ratification of treaties, which are only binding on Ghana after parliamentary approval is secured. The process usually starts with the Minister responsible for the particular subject matter of the treaty consulting with the Attorney General. The outcome of this process is submitted to Cabinet which approves it and directs the treaty to be submitted to parliament for ratification. Once parliament ratifies, the instrument of ratification is forwarded to the Ministry of Foreign Affairs for onward transmission to the relevant treaty body.

No official statements were found with regard to the reasons for ratification of the African Charter or the Maputo Protocol.

### 3 Government focal points

Information was not readily available on the government department specifically responsible for the African Charter and Maputo Protocol. Review of state reports submitted to the African Commission in the past and other UN treaty bodies suggests that two main Ministries – the Ministry of Justice and Ministry of Foreign Affairs<sup>61</sup> are

59 Art 75(1) of the 1992 Constitution of Ghana.

60 Art 75(2) of the 1992 Constitution.

61 The Ministry of Foreign Affairs submitted Ghana's previous state reports to the African Commission. See African Commission 'Periodic report of Ghana', 13th Ordinary

responsible for corresponding and reporting on treaties which Ghana has ratified. Where the treaty relates to a specific theme, the sector Ministry responsible for that thematic area is also involved. Consequently, the Ministry of Justice, Ministry of Foreign Affairs and Ministry of Gender, Children and Social Protection<sup>62</sup> (which is responsible for women's rights issues) would be the 'natural' focal points for the African Charter and Maputo Protocol. Information was not available on the views of these Ministries on the channel of communication with the African Commission and the institutionalisation of the state's responsibilities in relation to the African Charter and the Maputo Protocol.

### 4 Domestication or incorporation

Ghana, like many common law countries, follows a dualist approach to treaty implementation. Thus, ratified treaties are not directly enforceable in Ghana unless and until domesticated through an act of parliament occurs.<sup>63</sup> That said, Ghana's notoriety for non-domestication of international human rights instruments is well known.<sup>64</sup>

Session 29 March-7 April 1993, Banjul, The Gambia ACHPR/MOC/XIII/008.

62 The Ministry of Gender, Children and Social Protection (formerly, Ministry of Women and Children's Affairs) generally reports to treaty bodies on women and children's rights issues.

63 AKP Kludze 'Constitutional rights and their relationship with international human rights in Ghana' (2008) 41 *Israel Law Review* 677 679; EK Quansah 'An examination of the use of international law as in interpretative tool in human rights litigation in Ghana and Botswana' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 37 39; Quashigah (n 1 above) 21.

64 F Viljoen *International Human Rights Law in Africa* (2012) 530-531; see also EVO Dankwa 'Implementation of international human rights instruments: Ghana as an illustration' (1991) 3 *ASICL Proc* 57; Kludze (n 63 above); Open Society Initiative for West Africa

Ghana has not explicitly domesticated most of the international and regional human rights instruments it has ratified including the African Charter and Maputo Protocol. The attention of the Attorney General was drawn to this anomaly during the African Commission's promotional mission to Ghana in 2008.<sup>65</sup> That notwithstanding, the Constitution of Ghana, which was adopted subsequent to Ghana's ratification of the African Charter, was significantly influenced by the African Charter.<sup>66</sup> There are therefore many provisions in the Constitution which directly correspond with provisions in the African Charter<sup>67</sup> and Maputo Protocol.<sup>68</sup>

The Constitution of Ghana does not clearly spell out the relationship between international law and national law.<sup>69</sup> Neither is international law included amongst the sources of law enumerated by the Constitution.<sup>70</sup> The

Constitution, however, expressly provides that the Constitution is the supreme law of Ghana and all other laws found to be inconsistent with its provisions are void to the extent of the inconsistency.<sup>71</sup> The Constitution, however, obliges the state to 'promote respect for international human rights law, treaty obligations and settlement of international disputes by peaceful means' and to adhere to treaties of international organisations to which Ghana is a member.<sup>72</sup> In this regard, the Supreme Court has held that ratified treaties are not binding until incorporated by law and even then the Constitution remains the supreme law of Ghana, having precedence (to the extent of any inconsistency) over ratified treaties<sup>73</sup> including the African Charter and Maputo Protocol. This traditionalist position notwithstanding, the Supreme Court has in recent years adopted a more progressive position towards the enforcement of international human rights treaties – holding that non-domestication of human rights treaties does not *per se* mean that they should be disregarded by national courts.<sup>74</sup> This was the Supreme Court's position in *NPP v Inspector General of Police*,<sup>75</sup> where the court held that the fact that Ghana had not domesticated the African Charter does not mean that it cannot be relied upon. The Supreme Court has also held that the non-exclusion clause in article 33(5) of the Constitution provides an avenue for provisions of international human rights instruments (and the practice under them) to be used where such rights are not expressly

(OSIWA) & Institute for Democratic Governance (IDEG) 'Ghana: Justice sector and the rule of law' (2007); K Appeagyei-Atua 'Ghana at 50: The place of international human rights norms in the courts' in H Mensa-Bonsu et al (eds) *Ghana law since independence: History development and prospects* (2007); Quansah (n 63 above); NA Anyidoho 'Review of rights discourse – Ghana' (2009) *Human rights, power and civic action research project, Universities of Oslo, Leeds and Ghana*.

65 African Commission 'Report of the promotion visit to the Republic of Ghana' (2008) para 58.

66 Kludze (n 63 above). See also Anyidoho (n 64 above) 12.

67 As above.

68 Human Rights Committee 'Consideration of reports submitted by States parties under article 40 of the Covenant: Ghana' (30 January 2015) CCPR/C/GHA/1 47. It must be clarified that the Maputo Protocol came into force a decade after the adoption of 1992 Constitution of Ghana and therefore its provisions could not have been contemplated in the drafting of the Constitution. This notwithstanding, many of the provisions of the Constitution corresponds with provisions of the Maputo Protocol.

69 Quansah (n 63 above).

70 Art 11 does not include international law as one of the sources of law in Ghana.

71 Art 1(2).

72 Art 40. See also Quansah (n 63 above) 41.

73 *NPP v Attorney-General* [1996-97] SCGLR 729 761.

74 *NPP v Inspector General of Police* [1993-94] 2 GLR 459.

75 As above.

guaranteed in the Constitution.<sup>76</sup> In addition, the Constitution mandates that the state 'be guided by international human rights instruments in development processes'.<sup>77</sup>

## 5 Legislative reform or adoption

No evidence of a compatibility study of domestic law with the African Charter or the Maputo Protocol conducted by the government of Ghana prior to the ratification of these instruments was found. Neither has legislation been adopted which explicitly mentions the African Charter or the Maputo Protocol. However many legislative reforms have been adopted which implicitly give effect to the African Charter and the Maputo Protocol.<sup>78</sup> As indicated in the immediately preceding section, the Bill of Rights in the Constitution corresponds with many of the rights in the African Charter. In addition to the Bill of Rights, many legislative amendments to the Criminal and Other Offences Act of 1960 have been adopted to enhance the full enjoyment of human rights. These include criminalisation of harmful practices such as female genital mutilation<sup>79</sup> and customary servitude (*trokosi*).<sup>80</sup> Abortion on the other hand has been decriminalised where the pregnancy results from rape, defilement of a

'female idiot' or incest; where the pregnancy would involve risk to the life or health of the women; and where the child may suffer substantial physical abnormalities when born.<sup>81</sup> Similarly, the repeal of criminal libel and sedition provisions in the Criminal and Other Offences Act enhanced the enjoyment of the right to freedom of speech, especially press freedom.<sup>82</sup> In terms of new legislation adopted, the Children's Act, 1998 criminalises underage and forced marriages, and fixes the minimum age of marriage at 18, providing protection for women and girls.<sup>83</sup>

Additionally, the Intestate Succession Law, 1985 protects the rights of spouses and children (women and the girl child were usually excluded under customary law prior to this) to inherit a substantial share (two-thirds) of the estate of a deceased spouse or parent who dies without a will. Both male and female children receive an equal share of the deceased parent's estate.<sup>84</sup> Similarly, the Labour Act, 2003 guarantees women equal pay for equal work on a non-discriminatory basis with men.<sup>85</sup> The Labour Act also prohibits the assignment of pregnant employees from the regular place of residence after the fourth month of pregnancy and guarantees a minimum of 12 weeks maternity leave.<sup>86</sup> The Public Order Act, 1994

76 *Ghana Lotto Operators Association & Others v National Lottery Authority* [2007-2008] SCGLR 1088 1096; *Adjei-Ampofo v Attorney-General* [2003-2004] 1 SCGLR 411; *NPP v Attorney-General* [1996-97] SCGLR 729 761.

77 Article 37(3).

78 It must be highlighted that many of these legislative reforms preceded Ghana's ratification of the Maputo Protocol which may have been done in anticipation of bringing the laws into conformity with the Maputo Protocol prior to ratification. On the hand, these reforms may also have been done to bring the laws in conformity with CEDAW which Ghana had earlier ratified.

79 Sec 69A of the Criminal & Other Offences Act, 1960 (Act 29).

80 Sec 314A of the Criminal & Other Offences Act.

81 Sec 58(2) of the Criminal & Other Offences Act.

82 Criminal Code (Repeal of criminal libel and seditious laws) (Amendment) Act, 2001 (Act 602). See also K Quashigah 'Trends in the promotion and protection of human rights under the 1992 Constitution of Ghana' in K Bofo-Arthur (ed) *Ghana: One decade of the liberal state* (2007) 21.

83 Sec 13 of the Children's Act, 1998 (Act 560); see also African Development Fund 'Ghana Country Gender Profile' (2008) vi.

84 Interstate Succession Law, 1985 (PNDC 111).

85 Secs 10(b) & 68 of the Labour Act, 2003 (Act 651).

86 Sec 57 of the Labour Act.



facilitates the enjoyment of the right to assembly and peaceful protest by removing the erstwhile requirement of police permit (this has been replaced with notification) to demonstrate and also guarantees the right of protesters to police protection.<sup>87</sup> The National Health Insurance Act, 2003 (Act 650) which established the national insurance scheme to provide affordable health insurance has improved access to health care.<sup>88</sup> The Legal Aid Scheme Act, 1997 (Act 542), provides legal aid in the form of ‘representation by a lawyer, including all such assistance as is given by a lawyer’ to indigent persons who earn less than the government minimum wage, to enable access to justice.<sup>89</sup> The Patient’s Charter spells out extensively the rights of patients including protection from non-discrimination, the right to quality health care and the right to information regarding treatment.<sup>90</sup>

Other promising legislative interventions include the Human Trafficking Act, 2005 (Act 694) which was passed to combat the growing menace of human trafficking (of mostly women and children); the Disability Act, 2006 (Act 715) to promote and protect the rights of persons with disabilities; the Domestic Violence Act, 2007 (Act 732)

which protects all persons, especially women and girls (usually the victims of domestic violence) from all forms of violence especially within the domestic setting;<sup>91</sup> and the National Peace Council Act, 2011 (Act 818) which establishes the National Peace Council with a core mandate to prevent, manage and resolve conflict and build sustainable peace.<sup>92</sup> Other bills currently in the process of being enacted to further enhance the enjoyment of human rights include the Property Rights of Spouses Bill 2013 – to ensure equitable distribution of property acquired during marriage;<sup>93</sup> the Right to Information Bill, 2013 – to facilitate the enjoyment of the right to information;<sup>94</sup> and the Affirmative Action Bill – to ensure women’s equality and participation in the public service.<sup>95</sup> The government of Ghana has also accepted a proposal by the Constitutional Review Commission to amend the Constitution ‘to provide that all

87 Secs 1 & 2 of the Public Order Act, 1994 (Act 491). See also Anyidoho (n 64 above) 9; OSIWA & IDEG (n 64 above).  
 88 NJ Blanchet, G Fink & I Osei-Akoto ‘The effects of Ghana’s National Health Insurance Scheme on health care utilisation’ (2012) 46 *Ghana Medical Journal* 76 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3426378/> (accessed 16 August 2015); PA Dalinjong & AS Laar ‘The national health insurance scheme: Perceptions and experiences of health care providers and clients in two districts of Ghana’ (2012) 2 *Health Economics Review* <http://www.healtheconomicsreview.com/content/2/1/13> (accessed 16 August 2015).  
 89 Sec 2 of the Legal Aid Scheme Act, 1997 (Act 542).  
 90 Sixth Schedule of the Public Health Act, 2012 (Act 851).

91 A-G Abdulai ‘Political context study-Ghana’ (2009) *Human rights, power and civic action research project, Universities of Oslo, Leeds and Ghana* 5.  
 92 National Peace Council Act, 2011 (Act 818). See also National Peace Council, ‘Five-year Strategic Plan for the National Peace Council 2013-2017’ (2013) 9; and Ministry of Gender, Children and Social Protection (n 50 above) 25.  
 93 GAS Evelyn & Women in Law and Development Africa (WILDAF-Ghana) ‘Property rights of spouses in relation to economic violence against women in Ghana’ (2013) [https://www.researchgate.net/publication/264051209\\_Property\\_Rights\\_of\\_Spouses\\_in\\_Relation\\_to\\_Economic\\_Violence\\_Against\\_Women\\_in\\_Ghana](https://www.researchgate.net/publication/264051209_Property_Rights_of_Spouses_in_Relation_to_Economic_Violence_Against_Women_in_Ghana) (accessed 20 August 2015).  
 94 Commonwealth Human Rights Initiative ‘The Right to Information Bill 2013 of Ghana: A critique and recommendation for improvement’ (2013) [http://www.humanrightsinitiative.org/postoftheday/2013/Dec/GhanaRTIBill2013\\_CHRI\\_Critique\\_ATI\\_Team\\_Dec13.pdf](http://www.humanrightsinitiative.org/postoftheday/2013/Dec/GhanaRTIBill2013_CHRI_Critique_ATI_Team_Dec13.pdf) (accessed 17 August 2015); KK Adu ‘Ghana’s Right to Information Bill: An opportunity for the implementation of digital preservation structure’ (2014) 4 *Journal of Emerging Trends in Computing and Information Sciences* 795.  
 95 Government of Ghana ‘Gender Ministry, stakeholders speak on Affirmative Action

public institutions must be composed of at least thirty per cent [30%] of each gender',<sup>96</sup> in a bid to increase the participation of women in public institutions which are currently dominated by men.

## 6 Policy reform or formulation

Although Ghana has not adopted a specific policy framework explicitly giving effect to the African Charter and the Maputo Protocol in totality, many government policies contain human rights commitments which are in line with the provisions of the African Charter and the Maputo Protocol. A few government policies explicitly mention the African Charter and the Maputo Protocol as instruments which influenced the policy objectives. For Instance, the National HIV and AIDS, STI Policy mentions amongst others the African Charter – on the right to highest attainable standard of health – as one of the international human rights instruments ratified by Ghana to which the policy seeks to align its objectives.<sup>97</sup> The objectives of the policy include eliminating mother to child transmission, improving access to treatment, alleviating the socio-economic effects of HIV and AIDS, ensuring that HIV and AIDS prevention and control are pursued in a gender sensitive manner and ensuring that the basic human rights of persons living with HIV and AIDS or other STIs are 'respected, protected and upheld'.<sup>98</sup> The Health Sector Gender Policy also

mentions the African Charter and Maputo Protocol amongst the instruments which the policy seeks to implement.<sup>99</sup> The goal of the policy is to improve access to health care for both men and women by giving due attention to gender consideration in health care delivery in order to promote equity and equality between men and women.<sup>100</sup>

In implicit terms, the Ghana Shared Growth and Development Agenda, 2010-2013 (GSGDA) set out amongst its objectives promotion of fundamental human rights and enforcement of ratified regional and international human rights instruments.<sup>101</sup> It also committed to ensuring protection of the rights of vulnerable groups such as children, persons with disabilities and women; improving access to justice; and improving human safety and security.<sup>102</sup> Other human rights commitments in the GSGDA include enhancing the participation of local communities in environmental and natural resource management;<sup>103</sup> improving human settlement development through improved access to housing and slum upgrading;<sup>104</sup> 'increasing equitable access to and participation in quality

Bill' <http://www.ghana.gov.gh/index.php/media-center/news/1802-gender-ministry-stakeholders-speak-on-affirmative-action-bill> (accessed 28 August 2015)

- 96 Government of Ghana 'White paper on the Report of the Constitution Review Commission of Enquiry' (2012) 14.  
 97 Ghana Aids Commission 'National HIV and AIDS, STI Policy' (2013) 5 [http://www.healthpolicyproject.com/pubs/153\\_Policyfinal.pdf](http://www.healthpolicyproject.com/pubs/153_Policyfinal.pdf) (accessed 22 August 2015)  
 98 Ghana Aids Commission (n 97 above) 7.

- 99 Ministry of Health 'Health Sector Gender Policy' (2009) 5 <http://www.moh-ghana.org/UploadFiles/Publications/Gender%20policy0912211049511203330053957.pdf> (accessed 10 October 2015).  
 100 Ministry of Health (n 99 above) 21.  
 101 Government of Ghana, National Development Planning Commission 'Medium term national development policy framework: Ghana Shared Growth and Development Agenda (GSGDA), 2010-2013' (2010) 158 [https://s3.amazonaws.com/ndpc-static/publication/%28GSGDA%29+2010-2013\\_December+2010.pdf](https://s3.amazonaws.com/ndpc-static/publication/%28GSGDA%29+2010-2013_December+2010.pdf) (assessed 15 August 2015).  
 102 Government of Ghana, National Development Planning Commission (n 101 above) 159-62.  
 103 Government of Ghana, National Development Planning Commission (n 101 above) 60-61.  
 104 Government of Ghana, National Development Planning Commission (n 101 above) 84-86.

education at all levels’;<sup>105</sup> and bridging the gender gap in access to education,<sup>106</sup> amongst others. These commitments are reiterated and renewed in the Ghana Shared Growth and Development Agenda 2014-2017 (GSGDA II).<sup>107</sup>

In addition, the Education Strategic Plan 2010-2020 in line with the Constitution commits to amongst other things providing free universal basic education (including providing free meals for learners in the most impoverished areas to ensure retention of learners);<sup>108</sup> bridging the gender gap in access to education;<sup>109</sup> and improving access and quality of education for persons with disabilities.<sup>110</sup> Ghana also introduced gender responsive budgeting in 2007 to ensure women’s rights issues are properly taken account of in the budget.<sup>111</sup> The National Social Protection Strategy (NSPS)<sup>112</sup> provides the framework for the Livelihood and Empowerment against Poverty (LEAP), a social protection programme of the Ministry of Gender, Children and Social Protection which aims to reduce food insecurity, malnutrition and extreme poverty in

targeted communities.<sup>113</sup> The National Gender and Child Policy of 2004 had amongst its objectives redressing gender inequalities, strengthening women’s role in economic development and promoting ‘women’s equal access to and control of economically significant resources and benefits’.<sup>114</sup>

The government has recently approved a new National Gender Policy which aims at mainstreaming gender equality concerns into the national development process’ and empower marginalised groups such as women, children and persons with special needs. The broad policy objectives of the policy include ‘women empowerment and livelihoods; women rights and access to justice; women leadership and accountable government; economic opportunities for women and gender roles and relations’.<sup>115</sup>

Under the Affirmative Action Policy guidelines of 1998, government committed itself to ensuring 40 per cent representation of women at all levels of governance, on Public Boards, Commissions, Councils, Committees and Official Boards including Cabinet and the Council of State.<sup>116</sup>

105 Government of Ghana, National Development Planning Commission (n 101 above) 94.

106 Government of Ghana, National Development Planning Commission (n 101 above) 96-97.

107 Government of Ghana, National Development Planning Commission ‘Medium-term national development policy framework: Ghana Shared Growth and Development Agenda (GSGDA) II, 2014-2017’ (2014) <https://s3.amazonaws.com/ndpc-static/publication/GSGDA+II+2014-2017.pdf> (accessed 15 August 2015).

108 Government of Ghana, Ministry of Education ‘Education Strategic Plan 2010-2020’ (2010) 15 <http://www.moe.gov.gh/assets/media/docs/ESP2010-2020Vol1Final.pdf> (accessed 15 August 2015).

109 As above.

110 As above.

111 African Development Fund ‘Ghana country gender profile’ (2008) 5.

112 Government of Ghana ‘National Social Protection Strategy’ (2007).

113 National Development Planning Commission/Government of Ghana & United Nations Development Programme (UNDP) Ghana ‘Ghana millennium development goals report’ (2010) 9; S Handa et al ‘Livelihood empowerment against poverty impact evaluation’ (2013) Carolina Population Center, University of North Carolina.

114 Ministry of Women and Children’s Affairs ‘National Gender and Children Policy’ (2004) <http://www.hsph.harvard.edu/population/womenrights/ghana.gender.04.pdf> (assessed 20 September 2015).

115 Government of Ghana ‘Gov’t approves national gender policy’ <http://www.ghana.gov.gh/index.php/media-center/news/1822-govt-approves-national-gender-policy> (accessed 30 September 2015).

116 Human Rights Committee (n 68 above) 28.

## 7 Court judgments

As indicated above, there is no direct constitutional provision on the use of international law in litigation before the courts.<sup>117</sup> Consequently, the courts in Ghana have not adjudicated on many cases in which international human rights instruments and especially the African Charter and Maputo Protocol are invoked as the primary bases of litigation. The Courts have, however, had the opportunity in a number of instances to find violations of the African Charter or at least use its provisions and the decisions of the African Commission as an interpretative guide.

In *New Patriotic Party v Inspector – General of Police*,<sup>118</sup> the applicants challenged provisions of the Public Order Decree of 1972 which provided that processions and public demonstrations could only be undertaken pursuant to a permit granted by the police. The applicant's contention was that these provisions were in contravention to the right to freedom of assembly and association guaranteed in the Constitution of Ghana. The Supreme Court in upholding the case of the applicant relied on amongst others provisions of the African Charter holding that non-domestication of the African Charter does not prevent the court from relying on it. In the words of Chief Justice Archer:<sup>119</sup>

Ghana is a signatory to this African Charter and member states of the OAU and parties to the Charter are expected to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the

Charter means that the Charter cannot be relied upon. On the contrary, article 21 of our Constitution, 1992 has recognised the right of assembly mentioned in article 11 of the African Charter.

The Court then proceeded to find that the requirement of obtaining a permit to exercise the right to demonstrate not only violates the Constitution of Ghana but also article 11 of the African Charter.<sup>120</sup>

This position was reiterated by the Supreme Court in *Ocansey and Others v The Electoral Commission and Another*,<sup>121</sup> in which applicants challenged the constitutional validity of sections of the Representation of The People Law of 1992<sup>122</sup> which disqualified prisoners from voting. Even though the Court did not find a substantive violation of the African Charter in this case, it cited article 5 of the African Charter in its discussion of the right to dignity guaranteed in the Constitution.<sup>123</sup> The Court also mentioned that the African Commission 'has often based its findings of breach of Article 5 on torture and cruel practices relating to imprisonment'; even though no specific jurisprudence or soft law of the African Commission was referenced.<sup>124</sup>

In *Asare & Others v Ga West District Assembly & Another*,<sup>125</sup> the applicants challenged the demolition of their

117 Quansah (n 63 above) 42.

118 [1993-94] 2 GLR 459.

119 *New Patriotic Party* 466.

120 As above.

121 *Ocansey and Others v The Electoral Commission and Another* (2010) 26 [http://www.chr.up.ac.za/images/files/documents/africancases/country/ghana/ocansey\\_others\\_electoral\\_commission\\_2010.pdf](http://www.chr.up.ac.za/images/files/documents/africancases/country/ghana/ocansey_others_electoral_commission_2010.pdf) (accessed 17 September 2015).

122 Representation of the People Law, 1992 (P N D C L 284).

123 Representation of the People Law 40.

124 As above.

125 *Asare and Others v GA West District Assembly & Another* (2009) AHRLR 343 (GhHC 2009) [http://opil.ouplaw.com/view/10.1093/law:ildc/1488gh08.case.1/law-ildc-1488gh08](http://opil.ouplaw.com/view/10.1093/law/ildc/1488gh08.case.1/law-ildc-1488gh08) (accessed 20 August 2015).

homes as a violation of their rights to life and property. The first respondent (the Ga West District Assembly) had earmarked the applicants' houses for demolition because they were built across water courses, leading to heavy flooding during heavy rains. The High Court cited article 4 of the African Charter and the African Commission's decision in *Aminu v Nigeria*<sup>126</sup> in its discussion of the right to life guaranteed in the Constitution.<sup>127</sup> On the right to property,<sup>128</sup> the Court further cited article 14 of the African Charter as well as the African Commission's decision in the *Constitutional Rights Project and Others v Nigeria*.<sup>129</sup> The Court concluded that article 14 of the African Charter allowed a limitation of the right to property where such limitation is in the general interest of the community. Consequently, since the location of the applicants' homes was not in the general interest of the community, their demolition was in line with the provision of article 14 of the African Charter.<sup>130</sup>

No evidence was found of the use of the resolutions or general comments of the African Commission or the Maputo Protocol by or in the courts. The examples above, however, indicate preparedness of the courts to rely on the African Charter, Maputo Protocol and other soft law instruments and decisions of the African Commission. The courts use of these instruments would be largely influenced by the frequency with which litigants and their lawyers cite them in their arguments before the courts.

## 8 Awareness and use by civil society

There is a substantial presence of civil society organisations in Ghana. Civil society in Ghana has evolved over the past few decades to increasingly playing quite a dominant role in public policy making in Ghana. This is as a result of the rather liberal and conducive environment created by the Constitution,<sup>131</sup> which encourages right-based activism by guaranteeing 'the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference ...'<sup>132</sup> NGOs, thus, actively engage with government and increasingly influence government policy.<sup>133</sup> Abdulai illustrates this with the example of a coalition on women's rights which in 2005 initiated a national discussion on the menace of domestic violence in Ghana – eventually leading to the enactment of the Domestic Violence Act in 2007 (the initial bill was drafted by the NGO coalition).<sup>134</sup>

A cursory review of the programmes and advocacy work of NGOs in Ghana indicates quite extensive use of the African Charter and to a greater extent the Maputo Protocol, especially by women's rights NGOs which are some of the most visible civil society organisations in Ghana. Several NGOs have observer status before the African Commission.<sup>135</sup> Records of shadow reports submitted by NGOs on Ghana's state reports to the African Commission could not be obtained – likely attributable to the fact that Ghana has not

126 *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000).

127 *Asare* (n 125 above) paras 25-35.

128 *Asare* (n 125 above) para 36-46.

129 *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999).

130 *Asare* (n 125 above) paras 45-46.

131 Abdulai (n 91 above) 16.

132 Art 37(2)(a) of the 1992 Constitution.

133 Abdulai (n 91 above) 17.

134 Abdulai (n 91 above) 16.

135 For a list of these NGOs, see <http://www.achpr.org/states/ghana/> (accessed 23 October 2015).

submitted its state reports since 2001. NGOs, however, submit shadow reports on Ghana's reports to various UN treaty bodies.

## 9 Awareness and use by lawyers and judicial officers

As indicated below, human rights law is taught in the majority of law faculties in Ghana at the undergraduate level. The awareness of the African Charter and the Maputo Protocol amongst practicing lawyers can therefore be reasonably inferred. However, while a good number of lawyers is aware of the African Charter and the Maputo Protocol, this has not resulted in their use in litigation before the courts. The use of the African Charter and the Maputo Protocol and indeed international human rights instruments in litigation generally is rather abysmal.

As indicated above, the African Charter has been utilised in litigation before the courts in at least three cases. It was, however, not clear from the judgments whether the reference made to the African Charter by the courts in all three judgements was as a result of their use in arguments of lawyers before the courts. The use of the provisions of the African Charter in arguments of lawyers before the courts was only discernible in one of the cases.

In *Asare & Others v GA West District Assembly & Another*,<sup>136</sup> counsel for the applicants<sup>137</sup> argued that the demolition of the applicant's houses was in violation of article 14 of the African Charter.<sup>138</sup> The second respondent, on the contrary, argued that demolition of the

applicants' homes did not constitute a violation of the right to property enshrined in article 18 of the Constitution and article 14 of the African Charter since the location of the houses were not in the general interest of the community. The demolitions were thus justified in terms of the public interest qualification of article 14 of the African Charter.<sup>139</sup> The Court agreed with the respondents.<sup>140</sup>

Specific information on awareness of the African Charter and Maputo Protocol amongst judicial officers was not readily available. However, in 2007, AfriMap, Open Society Initiatives for West Africa (OSIWA) and The Institute for Democratic Governance (IDEG) reported that 'judges in Ghana have little knowledge of international human rights law, and training to encourage the application of international law principles in national courts should be expanded'.<sup>141</sup> This call was reiterated by Justice SK Date-Bah (then Justice of the Supreme Court) in 2008.<sup>142</sup> In the course of the study, the researcher came across reports of human rights training of judges and other judicial officers often under the auspices of NGOs.<sup>143</sup> Evidence was also not available on whether the Judicial Training Institute which is responsible for training new and promoted judges has incorporated international human rights law into its curriculum. A specialised 'Human

136 *Asare* (n 125 above).

137 The applicants were represented by the Centre for Public Interest Law.

138 *Asare* (n 125 above) paras 38-40.

139 *Asare* (n 125 above) para 41.

140 *Asare* (n 125 above) para 146.

141 AfriMap, Open Society Initiatives for West Africa (OSIWA) and The Institute for Democratic Governance (IDEG) 'Ghana: Justice sector and rule of law' (2007) 4.

142 E Hanson 'Judges asked to sharpen skills in human rights matters' *Ghanaweb* 31 March 2008 [http://www.ghanaweb.com/public\\_agenda/article.php?ID=9713](http://www.ghanaweb.com/public_agenda/article.php?ID=9713) (accessed 30 September 2015).

143 Hanson (n 142 above). See also 'Judges attend seminar on emerging trends of human rights' *Ghanaweb* 22 September 2011.

Rights Division' of the High Court has been established to hear human rights cases. However, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises reported in 2014 that 'in some instances, judges of those courts lack adequate training'.<sup>144</sup>

## 10 Higher education and academic writing

Eight universities<sup>145</sup> in Ghana offer undergraduate courses leading to the award of a bachelor of laws degree in Ghana. The African human rights system including the African Charter and Maputo Protocol is taught as part of international human rights law in many of these faculties. In some faculties it is taught as a compulsory subject whilst in others it is an elective subject. The curriculum of the University of Ghana for instance devotes two academic semesters to the teaching of international human rights law, of which the African human rights system forms an integral part.<sup>146</sup> At the Faculty of Law of Kwame Nkrumah University of Science and Technology, international human rights law is taught as an elective subject.<sup>147</sup> This is also true of the Zenith

University College,<sup>148</sup> King's University College,<sup>149</sup> GIMPA Law School<sup>150</sup> and the University of Cape Coast.<sup>151</sup> In addition to the undergraduate programmes, the University of Ghana offers an LLM/MPhil programme in human rights and humanitarian law of which the African Charter and Maputo Protocol form an important part.<sup>152</sup>

A number of the law faculties are also regular participants of the African Human Rights Moot Court Competition organised annually by the Centre for Human Rights (University of Pretoria), which amongst others aims at creating awareness of the African human rights system and instruments amongst law students across the continent.<sup>153</sup> It can therefore be inferred that the African Charter and Maputo Protocol are not unknown to a good number of law students at the undergraduate level. This is however not the case with the Ghana School of Law where lawyers receive practical advocacy training before being called to the bar – human rights law is not a part of that curriculum.

144 Human Rights Council 'Report of Working Group on the issue of human rights and transnational corporations and other business enterprises – Visit to Ghana' A/HRC/26/25/Add.5 para 25.

145 These are University of Ghana, Kwame Nkrumah University of Science and Technology (KNUST), Ghana Institute of Public Administration (GIMPA), University of Cape Coast, Central University College, Mountcrest University College, Kings University College, Zenith University College.

146 University of Ghana, School of Law 'Course descriptions' [http://law.ug.edu.gh/academics/course\\_descriptions](http://law.ug.edu.gh/academics/course_descriptions) (accessed 5 September 2015).

147 KNUST, Faculty of Law 'Course description in LLB programme' <http://archive.knust.edu.gh/pages/sections.php?siteid=law&mid=258&sid=846> (accessed 5 September 2015).

148 Zenith University College 'The LLB programme' <http://www.zenithuniversitycollege.org/site/programmes/detail/6> (accessed 5 September 2015).

149 Kings University College 'LLB Law: Course Handbook 2014-2015' (2014) <http://www.kuc.edu.gh/images/phocadownload/llb.pdf> (accessed 5 September 2015).

150 <http://www.new2.gimpa.edu.gh/index.php?id=39> (accessed 5 September 2015).

151 University of Cape Coast <http://ucc.edu.gh/academics/view/5196/department/5198/programme/5391> (accessed 5 September 2015).

152 University of Ghana – School of Law 'Programmes' <http://law.ug.edu.gh/academics/programmes> (accessed 5 September 2015).

153 Notably the University of Ghana, Kwame Nkrumah University of Ghana and Ghana Institution of Management and Public Administration (GIMPA) have participated in the African Human Rights Moot Court Competition several occasions.

Academics have quite widely referred to the African Charter<sup>154</sup> and to a lesser extent the Maputo Protocol<sup>155</sup> mostly in highlighting the fact that Ghana has ratified these instruments as part of its commitment to human rights. Many of these academics have also discussed the African Charter in terms of how its provisions influenced the Constitution of Ghana and how the provisions of the African Charter may be enforced in Ghana. Others have discussed the practical implications of the African Charter on some of the laws of Ghana.<sup>156</sup> Evelyn Ankumah<sup>157</sup> and Professor Kuffour<sup>158</sup> on the other hand have extensively discussed the African Charter with regard to the procedures and practice of the African Commission.

## 11 National human rights institutions

The Commission on Human Rights and Administrative Justice (CHRAJ) was established in 1993 under Ghana's Constitution. CHRAJ has a tripartite

mandate as national human rights institution,<sup>159</sup> ombudsman<sup>160</sup> and anti-corruption agency.<sup>161</sup> The human rights mandate of CHRAJ includes monitoring Ghana's implementation of national and international human rights law.<sup>162</sup> Examinations of official policies and reports indicate that CHRAJ uses (though not very regularly) the African Charter and Maputo Protocol in its programmes. CHRAJ has for instance in its reports highlighted some of the obligations of Ghana in terms of the African Charter and Maputo Protocol.<sup>163</sup> CHRAJ follows up on the concluding observations and decisions of the African Commission in addition to making its own detailed recommendations to government on its obligations under various human rights treaties.<sup>164</sup> Information could not be obtained on the role of CHRAJ in the preparation of state reports to the African Commission given that Ghana has not submitted a state report since 2001. CHRAJ has, however, been involved in the preparation and submission of Ghana's Universal Periodic Review report.<sup>165</sup>

- 154 Abdulai (n 91 above); Kludze (n 63 above); Anyidoho (n 64 above); NKA Busia Jnr 'Ghana' in AA An-Na'im (ed) *Human rights in African constitutions: Realizing the promise for ourselves* (2013); Appegyei-Atua (n 64 above); SY Binpong-Buta 'The role of the Supreme Court in the development of constitutional law in Ghana' LLD thesis, University of South Africa, 2005; Quashigah (n 1 above); Quashigah (n 82 above); Quansah (n 63 above).
- 155 BT Torto 'Affirmative action and women's empowerment in Ghana: Challenges to a growing democracy' (2013) *Conflict Trends* 41; S Bawa 'Women's rights and culture in Africa: A dialogue with global patriarchal traditions' (2012) 33 *Canadian Journal of Development Studies* 90.
- 156 Dankwa (n 64 above).
- 157 EA Ankumah *The African Commission on Human and Peoples' Rights: Practices and procedures* (1996).
- 158 KO Kuffour *The African human rights system: Origin and evolution* (2010).

- 159 Article 218(a), (c) and (f) of the Constitution and sec 7(1)(a), (c) & (g) of the CHRAJ Act, 1993 (Act 456).
- 160 Articles 218(a), (b) of the Constitution and sec 7(1)(a), (b) of the CHRAJ Act, 1993 (Act 456).
- 161 Art 218(a) & (e); 284-288 of the Constitution and sec 7(1)(a), (e) & (f) of the CHRAJ Act, 1993 (Act 456).
- 162 CHRAJ [http://www.chrajghana.com/?page\\_id=43](http://www.chrajghana.com/?page_id=43) (accessed 24 October 2015).
- 163 CHRAJ 'State of human rights in Ghana' (2009) [http://www.chrajghana.com/wp-content/uploads/2012/08/sohr\\_2009.pdf](http://www.chrajghana.com/wp-content/uploads/2012/08/sohr_2009.pdf) (accessed 10 September 2015); CHRAJ 'State of human rights in Ghana' (2010); CHRAJ 'Gender assessment report' (2013); CHRAJ 'State of human rights in Ghana' (2013).
- 164 Email correspondence (9 October 2015) with Gloria Agyeman-Duah, Principal Investigator, CHRAJ.
- 165 As above.



## 12 State reporting

State reporting is generally the mandate of the Ministry of Foreign Affairs which represents Ghana at international and regional fora. However, the Ministry of Justice which is government's principal legal advisor is usually involved. On issues relating to specific themes, such as women's rights under the Maputo Protocol, the Ministry of Gender, Children and Social Protection plays a significant role in the compilation of state reports as well as presentation of reports.

Ghana has submitted two state reports to the African Commission on its obligations pursuant to the African Charter. Its initial report upon ratification of the African Charter was submitted to the African Commission in 1993 and this was followed by its second periodic report in 2001. No other report has been submitted by Ghana since then.<sup>166</sup> This was brought to the attention of the Attorney General during the African Commission's promotional mission to Ghana in 2008.<sup>167</sup> Ghana has eight overdue state reports.<sup>168</sup> The reports were submitted by the Ministry of Foreign Affairs on behalf of Ghana. Information on the delegation that submitted the report could not be obtained. The African Commission recommended that the government of Ghana amongst others amend national laws including the Constitution to bring them in line with the African Charter; improve the conditions of prisons; ratify the African Charter on the Rights and

Welfare of the Child and the Protocol on the establishment of the African Court on Human and Peoples' Rights; and take measures to eradicate all harmful practices.<sup>169</sup> As discussed above, many of the recommendations have been complied with through legislative and policy reforms.

Information could not be obtained on the process of preparing state reports presented to the African Commission. The experience of Ghana's recent report to the CEDAW Committee, however, indicates that the process commences with a consultative meeting of Ministries, Departments and Agencies (MDAs) and Civil Society Organisations (CSOs). A Drafters Committee is then constituted after which a request is made to various human rights institutions and the judiciary to provide information on their sectors. A Lead Consultant is then engaged to compile the report. The draft report is submitted to a validation workshop to enable MDAs, CSOs and development partners to discuss and comment on the draft report before it is finalised.<sup>170</sup>

No evidence of dissemination of concluding observations was found.

## 13 Communications

Six communications have so far been brought against Ghana.<sup>171</sup> Of these, two

166 African Commission 'Report of the promotion visit to the Republic of Ghana' (2008) para 22.

167 African Commission (n 166 above) para 58.

168 African Commission on Human and Peoples' Rights 'State reporting' <http://www.achpr.org/states/> (accessed 10 September 2015).

169 C Heyns & M Killander (eds) *Compendium of key human rights documents in the African Union* (3rd ed, 2007) 170-171.

170 Committee on the Elimination of Discrimination against Women 'Consideration of reports submitted by state parties under article 18 of the Convention on the Elimination of All Forms Discrimination against Women: Combined sixth and seventh reports of state parties – Ghana' 5 February 2013 CEDAW/C/GHA/6-7, para 38.

171 Communication 6/88 *Dr Kodji Kofi v Ghana*; Communication 4/88 *Coordinating Secretary of the Free Citizens Convention v Ghana*;

were ruled inadmissible because Ghana had not yet ratified the African Charter at the time the communications were submitted;<sup>172</sup> one was declared inadmissible for non-exhaustion of local remedies;<sup>173</sup> one was withdrawn,<sup>174</sup> and two have been decided on merits.<sup>175</sup> In *Abubakar*, the applicant had been held in prison custody for seven years without trial. He approached the Commission when he escaped from custody citing the fact that he could not return to Ghana because he would be subject to a penalty of six months to two years, notwithstanding the unlawfulness or otherwise of the original detention. The applicant alleged that his rights to liberty of person (article 6), the right to be tried within a reasonable time (article 7(1)(d)) and the right to return to his country (article 12(1)) had been violated. By reason of these events, the African Commission found Ghana in violation of articles 6 and 7(1)(d) of the African Charter.<sup>176</sup> Louw reported partial compliance with the decision in 2004.<sup>177</sup> The present status of the decision could not be obtained.

In *Tsikata*, the applicant alleged that he had been charged with amongst others a crime which did not constitute a known offence at the time it was committed, amounting to a retroactive

application of the criminal law. He also alleged that the High Court's failure to uphold his 'submission of no case' after the prosecution had closed its case was a violation of his right to be presumed innocent until proven guilty. Additionally, the government had acted in such a manner, namely by appointing new judges to the Supreme Court panel hearing his case, that the independence and impartiality of the judiciary in adjudicating his case had been compromised. This conduct, he argued, was in contravention of the Constitution of Ghana and articles 7(1)(b), (c), 7(2) and 26 of the African Charter.<sup>178</sup> The African Commission found Ghana to be in violation of article 26 of the African Charter and called on the state to desist from any measures which would undermine the independence of the courts. It does not appear that these decisions have been publicised within Ghana. Neither was information on compliance available. This is partly because the decision in *Tsikata* was only adopted by the African Commission in May 2014.

#### 14 Special mechanisms – Promotional visits of the African Commission

The African Commission undertook a promotional mission to Ghana from 1-5 September 2008.<sup>179</sup> The mission was led by Commissioner Musa Ngary Bitaye, then Commissioner responsible for human rights promotion in Ghana.<sup>180</sup> The delegation met and consulted with amongst others the Minister of Foreign Affairs, the Commission on Human Rights and Administrative Justice, NGOs, the Attorney General, the Chief

Communication 93/93 *International PEN v Ghana; Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996); Communication 221/98 *Alfred B Cudjoe v Ghana*; Communication 322/06 *Tsatsu Tsikata v Ghana*.

172 Communication 6/88 *Dr Kodji Kofi v Ghana* and 4/88 *Coordinating Secretary of the Free Citizens Convention v Ghana*.

173 Communication 221/98 *Alfred B Cudjoe v Ghana*.

174 Communication 93/93 *International PEN v Ghana*.

175 *Abubakar* and *Tsikata*.

176 *Abubakar*.

177 L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished doctoral thesis, University of Pretoria, 2004, 59.

178 *Tsikate* paras 95-103.

179 African Commission 'Report of the promotion visit to the Republic of Ghana' (2008).

180 As above.

Justice, the Law Faculty of the University of Ghana, Ghana Journalist Association, the Ghana Police Service, and Correctional Services.<sup>181</sup> The African Commission provided an elaborate list of recommendations including the need to domesticate the African Charter and other ratified international and regional instruments, make the declaration under article 34(6) of the Protocol on the Establishment of the African Court, submission of overdue state reports, abolition of the death penalty, decongestion of prisons, the need to address long pre-trial detentions, improved access to information, training of police officers in human rights and especially the use of force and resourcing the national human rights institution.<sup>182</sup> On women's rights issues, the African Commission recommended that more women be appointed to senior offices within the police service and testing female convicts for pregnancy before they are sentenced to prison custody.<sup>183</sup>

The promotional visit increased awareness about the mandate and activities of the African Commission, especially amongst NGOs, and generally enhanced the visibility of the African Commission in Ghana. The delegation for instance used the opportunity to provide responses to questions raised by NGOs during the visit, pertinent amongst which was around the establishment of formal relationships with NGOs through the granting of observer status, the role of the African Commission in the implementation of the Maputo Protocol, the legal status of the findings of the African Commission and

difficulties in exhausting local remedies.<sup>184</sup> Ghana also made the declaration under article 34(6) of the Protocol on the establishment of the African Court in 2011.<sup>185</sup> Beyond these, it is observed that not much has changed since the African Commission made recommendations to Ghana pursuant to the promotional mission of 2008. Ghana has still not submitted any further periodic reports on the African Charter nor the Maputo Protocol. Neither have these instruments been domesticated. The Right to Information Bill has been pending for over a decade; prison conditions have not changed and the police continue to resort to excessive use of force.

In addition to this, the Special Rapporteur on Freedom of Expression and Access to Information in Africa, Commissioner Pansy Tlakula, undertook an advocacy visit to Ghana from 1-2 July 2014. The purpose of the visit was to advocate for the prompt enactment of the Right to Information Bill which takes into account the African Commission's Model Law on Access to Information in Africa, currently before parliament.<sup>186</sup> The Special Rapporteur met with leaders of parliament and Ministers of various Ministries and received the assurance of Ghana's commitment to pass the Right to Infor-

181 As above.

182 African Commission (n 179 above) para 190.

183 As above.

184 African Commission (n 179 above) paras 48-56.

185 F Viljoen *International human rights law in Africa* (2012) 427; Ghana's declaration on article 34(6) [http://dev.ihra.org/doc/art\\_34\\_\(6\)\\_dec\\_ghana/view/](http://dev.ihra.org/doc/art_34_(6)_dec_ghana/view/) (accessed 5 October 2015).

186 African Commission 'Activity report of Advocate Pansy Tlakula, Special Rapporteur of freedom of expression and access to information in Africa' presented during the 56th ordinary session of the African Commission, Banjul, The Gambia 21 April-07 May 2015, paras 8-10 [http://www.achpr.org/files/sessions/56th/inter-act-reps\\_/219/56os\\_intersession\\_report\\_en.pdf](http://www.achpr.org/files/sessions/56th/inter-act-reps_/219/56os_intersession_report_en.pdf) (accessed 5 October 2015).

mation Bill before expiration of the tenure of the present government's term in 2016.<sup>187</sup> Subsequent to the visit, Ghana's Parliamentary Select Committee on Constitutional, Legal and Parliamentary Affairs recommended revisions to 'problematic' sections of the bill based on the African Commission's Model Law on Access to Information in Africa and submissions by NGOs.<sup>188</sup>

### **15 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission**

The following factors have enhanced the impact of the African Charter, the Maputo Protocol and the African Commission:

- The courts, especially the Supreme Court, have been progressive in their application of international human rights instruments, especially the African Charter despite its non-domestication and on occasion have relied on the jurisprudence of the African Commission. The progressive interpretation of the 'non-exclusion' clause in article 33(5) of the Constitution enables use of provisions of the African Charter and other human rights instruments where the relevant right has not been domesticated in the Constitution.
- Civil society (NGOs, the media, lawyers) have quite extensively used the African Charter and the Maputo Protocol in their programmes and advocacy activities, though less so in litigation. This has brought much awareness to the provisions of the African Charter and Maputo Protocol as well as put pressure on government to implement these instruments.

<sup>187</sup> As above.

<sup>188</sup> 'Ghana parliamentary panel praised for passing RTI Bill' *freedominfo.org* 11 September 2014 <http://www.freedominfo.org/2014/09/ghana-parliamentary-panel-praised-passing-rti-bill/> (accessed 5 October 2015).

- The work of academics in regularly highlighting Ghana's obligations under the African Charter and Maputo Protocol and the need to reform national laws to bring them in conformity with the provisions of these instruments also needs to be commended in enhancing their impact.
- The 41st ordinary session of the African Commission took place in Ghana from 16-30 May 2007. This brought awareness to the African Commission and allowed CSOs who had previously complained of lack of funding to attend the Commission's sessions in Banjul to participate.
- Professor Emmanuel Victor Owere Dankwa served as a member of the African Commission from 1996-2005, serving as Vice-Chair, Chair and as Special Rapporteur on Prisons and Detention Centres. Prior to his membership in the African Commission, he staunchly advocated for the domestication of the African Charter in the national laws of Ghana and for law reform to bring various laws in conformity with the African Charter.<sup>189</sup> He also served as a Member of the Committee of Experts which drafted proposals for the current Constitution of Ghana. This may account for similarities between many of the provisions of the African Charter and the Constitution of Ghana.

On the other hand, many factors have impeded the impact of the African Charter, Maputo Protocol and African Commission. These include:

- Non-domestication of Charter rights, while not completely incapacitating their use, has hampered their full and effective enforcement and consequently impact, especially in human rights litigation. Even though the Supreme Court has decided that the non-domestication of the African Charter and other international human rights treaties does not prevent their use in litigation on human rights and has found a violation of the African Charter in at

<sup>189</sup> See Dankwa (n 64 above).

least one instance, some lawyers are still reluctant to use them because they have not been domesticated.<sup>190</sup> In some instances, courts have rejected human rights claims based on international human rights instruments on grounds of non-domestication.<sup>191</sup>

- The uncertainty of the status of international law within the Constitution has also hampered the impact of international human rights instruments. Unlike the Constitution of South Africa which requires courts to consider international law in interpreting the Constitution, no comparable provision exists under the Constitution of Ghana. Consequently, use of the African Charter and Maputo Protocol in for instance human rights adjudication would depend on the industry of the presiding judge(s) or in some instances where parties before the court invoke and rely on these instruments as part of their case.
- As discussed earlier, international human rights law is taught as an elective subject in the majority of law faculties in Ghana, but is altogether absent in the curriculum of the Ghana School of Law. This state of affairs means that not all lawyers are aware of the African Charter and Maputo Protocol or how to use them in litigation. This may well be the reason for the rather abysmal use of the African Charter and Maputo Protocol in arguments of lawyers before the courts.
- In line with the immediately preceding point, the implementation of socio-economic rights have especially suffered because 'the legal profession in Ghana has not developed the aptitude of fashioning personal rights in terms of economic, social and cultural rights'.<sup>192</sup> The courts have therefore not developed expertise in adjudicating socio-economic rights cases.<sup>193</sup> Limited liti-

gation in terms of socio-economic rights has led to less than desired impact of these instruments in respect of the socio-economic rights enshrined therein.

- Limited knowledge of the African Charter and Maputo Protocol amongst judicial officers has also impeded the impact of these instruments.
- Failure to submit state reports which would enable the African Commission to comment on progress made and loopholes through concluding observations as well as NGO alternative reports has hampered the impact of the African Charter and Maputo Protocol. Since Ghana has not been reporting, the African Commission has rarely had the opportunity to assess Ghana's compliance with the African Charter and Maputo Protocol. NGOs have also not had the opportunity to submit alternative reports, usually done through a consultative process amongst NGO coalitions which creates greater awareness.
- 'Gender inequality is institutionalised in patriarchal traditional traditions' and attitudes continue to impede the effective realisation of women's rights.<sup>194</sup> These coupled with the rather 'gentle person' and 'give it to God' attitudes of the average Ghanaian means that even though elaborate rights are guaranteed many 'Ghanaians still find it difficult to demand accountability and transparency from government institutions', resulting in widespread tolerance and endurance of human rights violations.<sup>195</sup> These have become frontiers of resistance which impede the impact of the African Charter generally and more specifically, the Maputo Protocol.

190 Anyidoho (n 64 above) 12

191 In *Issa Iddi Abass & others v Accra Metropolitan Assembly and Another* (unreported) arguments on the right to housing based on international human rights instruments were rejected by the High Court.

192 Quashigah (n 82 above) 26.

193 Quashigah (n 82 above) 26-28.

194 Bawa (n 155 above) 102.

195 See Ghana's second periodic report to the African Commission (2001) 37.



# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN KENYA

Saoyo Tabitha Griffith\*  
Paul Ogendi\*\*



## 1 Introduction

The Constitution of the Republic of Kenya (2010 Constitution) provides that 'the general rules of international law shall form part of the laws of Kenya'<sup>1</sup> and further expressly states that, 'any treaty or convention ratified by Kenya shall form part of the laws of Kenya under this Constitution'.<sup>2</sup> To this end, the Kenya National Commission on Human Rights (KNCHR) is now the 'principal organ of the state in ensuring compliance with obligations under treaties and conventions relating to human rights'.<sup>3</sup> This is a notable change from

the previous Constitution where no such provisions existed.<sup>4</sup>

The previous Constitution also did not provide for the manner of ratification of international human rights instruments. The legislature had no express role in regard to signing and ratifying international treaties. In practice, the responsibility of signing and ratifying international treaties fell into the hands of the executive,<sup>5</sup> with the Cabinet leading the process.<sup>6</sup> Generally, Kenya's treaty signing and ratification history has been 'haphazard' with no

\* LLM HRDA (Pretoria), Sexual and Reproductive Health Rights Programme Manager, Kenya Legal and Ethical Issues Network on HIV&AIDS, Nairobi.

\*\* LLM HRDA (Pretoria), Researcher and doctoral candidate, Centre for Human Rights, University of Pretoria. This work essentially builds on V Lando, W Kaguongo & C Bosire 'Kenya' in Centre for Human Rights *Impact of the African Charter and the Women's Protocol in selected African states* (2012) 65-78.

1 Art 2(5).

2 Art 2(6).

3 Art 59(2).

4 Kenya adopted its first Constitution in 1963 upon independence which was then amended numerous times through Constitution of Kenya (Amendment) Acts 1964-2008. See N Kamunde 'Kenya's constitutional history' 2014 <http://www.4cmr.group.cam.ac.uk/filecab/redd-lawproject/20140821%20BP%20Kenyas%20Constitutional%20History.pdf> (accessed 16 November 2015).

5 Constitution of Kenya Review Commission (CKRC) 'The Final Report of the Constitution of Kenya Review Commission' (Final Draft) approved for issue at the 95th Plenary Meeting of the Constitution of Kenya Review Commission held on 10 February 2005 (2005) 150 states that 'The conduct of international law issues is deemed and implied to fall under the powers accorded to the President under sec 23 of the Constitution. In addition, the powers and functions of the legislature do not expressly provide for domestication of international law but again it is implied as one of the legislative powers'.

6 Interview with Senior State Counsel, State Law Office, Kenya, 26 August 2011.

clear answers as to why some treaties were signed or ratified and others not.<sup>7</sup>

Under the previous Constitution, the Office of the Attorney General was in charge of legal compliance with all international instruments that Kenya had signed and ratified.<sup>8</sup> This aspect was however clarified under the 2010 Constitution with KNCHR now taking charge as the principal organ of the state in ensuring compliance with obligations under treaties and conventions relating to human rights.<sup>9</sup> The process of signature and ratification is guided by the Treaty Making and Ratification Act that was enacted in December 2012. This Act requires Parliament to debate and approve treaties before Kenya ratifies any international treaty.<sup>10</sup> The 2010 Constitution clears doubts on the position of international law in Kenya and cases discussed below show a change in approach by Kenyan courts.<sup>11</sup>

It is noteworthy that as a result of the 2010 Constitution, civil, political, economic, social and cultural rights are all enunciated in the Constitution and therefore justiciable pursuant to articles 21(2) and 43. Women's rights are enacted in a wide variety of laws that prohibit violations such as domestic violence, sexual violence, female genital mutilation and trafficking in persons, amongst others. Furthermore, women's rights in Kenya are protected through a variety of

institutions including the National Gender and Equality Commission and the KNCHR.

## 2 Ratification of the African Charter and Maputo Protocol

Kenya ratified the African Charter on 21 January 1992 and deposited the instrument of ratification on 10 February 1992.<sup>12</sup> Discussions before signature and ratification took place at cabinet meetings, records of which meetings could not be accessed during this study.

Kenya signed the Maputo Protocol on 17 December 2003 and ratified it on 13 October 2010, thereby becoming the 29th state party to the Maputo Protocol.<sup>13</sup> Unlike the African Charter, parliamentary discussions took place on the ratification of the Protocol. On 13 April 2005, the Minister in charge of Gender Affairs stated that Kenya had delayed ratification of the Maputo Protocol despite signing it in 2003 because it had certain concerns regarding some of its provisions.<sup>14</sup> The Minister noted that while article 10(3) of the Protocol called on the Kenyan government to significantly reduce its military budget for purposes of facilitating women's development, the government was uncomfortable with this provision

7 CKRC (n 5 above) 151.

8 The Attorney General is the legal advisor of government and thus advises the government on Kenya's compliance with treaties that it has ratified.

9 Art 59(2)(g).

10 Sec 8(4) of the Treaty Making and Ratification Act 45 of 2012 stipulates that the National Assembly may approve the ratification of a treaty with or without reservations to specific provisions of the treaty.

11 *David Njoroge Macharia v Republic* Court of Appeal at Nairobi Criminal Appeal 497 of 2007.

12 African Union 'List of Countries which have signed, ratified/ acceded to the African Charter on Human and Peoples' Rights' <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> (accessed 20 September 2015).

13 African Union 'List of Countries which have signed, ratified/ acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> (accessed 20 September 2015). Correct link

14 Parliament of the Republic of Kenya 'National Assembly Official Report' (Wednesday 13 April 2005) 644-646.



and especially the exact meaning and impact of the term 'significant' as used in the Protocol. Secondly, the Minister noted that article 14(1)(b) of the Maputo Protocol gave women a choice to decide whether or not to have children and this had the potential of encouraging abortion. Nevertheless, the government bowed to pressure from lobby groups and ratified the Protocol on 13 October 2010.<sup>15</sup>

### 3 Government Focal Point

Article 152(1)(d) of the 2010 Constitution limits the number of cabinet secretaries to 22. This is a shift from the previous regime which provided for a cabinet of approximately 44 ministers.<sup>16</sup> As a result, several ministries under the then 2007-2012 government were absorbed as departments post the 2010 Constitution. In the circumstances, the then Ministry of Justice, National Cohesion and Constitutional Affairs that was previously responsible for legal policy, policy on administration of justice and constitutional matters was absorbed as a department under the Office of the Attorney General (AG). Whereas KNCHR is constitutionally mandated to ensure compliance with obligations under treaties and conventions, the Department of Justice under the AG's office is still responsible for reporting to the African Commission as well as other UN treaty monitoring bodies. These reports are generated in collaboration

with the National Gender and Equality Commission (NGEC), KNCHR and select civil society organisations working on human rights issues. As a government institution, NGEC is the focal point for the Maputo Protocol and has the obligation of representing the state and responding to concerns raised during state reporting to the African Commission, particularly on issues of women's equality and freedom from discrimination.<sup>17</sup>

### 4 Domestication

The African Charter and the Maputo Protocol are now part of Kenyan law under the 2010 Constitution.<sup>18</sup> However, the Constitution remains the supreme law.<sup>19</sup> The Constitution contains economic, social and cultural rights in the Bill of Rights which are justiciable,<sup>20</sup> thus placing Kenya amongst the few African countries that have expressly recognised socio-economic rights in their Bills of Rights.<sup>21</sup> In the case of *Satrose Ayuma*,<sup>22</sup> petitioners relied on the Bill of Rights in the 2010 Constitution, the African Charter and the *Ogoniland* case to argue against the eviction of squatters living on land belonging to the then Kenya

15 African Union (n 13 above). The ratification of the Maputo Protocol by Kenya coincided with the 'Africa Women's decade' which was organised by the African Union and was hosted in Nairobi. FIDH 'Kenya: Concrete steps required to demonstrate government's will to respect women's rights' 11 October 2010 <http://www.fidh.org/Kenya-Concrete-steps-required-to-demonstrate> (accessed 14 August 2011).

16 <http://www.businessdailyafrica.com/-/539546/1751972/-/qng29b/-/index.html> (accessed 24 September 2015).

17 Sec 8(n) of National Gender and Equality Act states the function of NGEC as producing periodic reports for national, regional and international reporting on progress in the realisation of equality and freedom from discrimination for these interest groups.

18 Art 2(6) Constitution of Kenya.

19 Art 2(3) provides that 'the validity or legality of this constitution is not subject to challenge by or before any court or other state organ' making it superior to international law in the domestic legal system of Kenya.

20 Art 43(1) provides for the right to health, housing, food, social security and education.

21 South Africa and Ghana remain some of the few countries that recognise socio-economic rights within their constitutions. See JC Mubanguzi 'Constitutional protection of socio-economic rights' (2006) 2 *African Journal of Legal Studies* 1.

22 Constitutional Petition 65 of 2010.

Railways enterprise without proper guidelines and alternative areas of settlement.<sup>23</sup> Similarly, in the ongoing case of *KELIN & Others v Médecins Sans Frontières and Others*, the petitioners have cited the provisions of article 43(1)(a) of the Constitution, the International Covenant on Economic, Social and Cultural Rights, the African Charter and the Maputo Protocol to argue against the forced and coerced sterilisation of women living with HIV.<sup>24</sup>

The adoption of the 2010 Constitution ended more than two decades of struggle for constitutional reform. The African Charter and other human rights instruments formed a basis for demands for political and constitutional reform.<sup>25</sup> In the process, important amendments to the previous Constitution were made, some of which implemented the African Charter provisions. These include introduction of multi-party politics in 1992,<sup>26</sup> gender considerations in nominating members of parliament,<sup>27</sup> and the addition of 'sex' as one of the grounds for prohibition of discrimination.<sup>28</sup> Subsequently, even as the country was in search of a new constitutional dispensation, much legislation was enacted that directly or indirectly recognised the

rights contained in the African Charter and the Maputo Protocol.<sup>29</sup>

Today, the African Charter and the Maputo Protocol continue to influence domestic legislation, including the recently enacted Marriage Act 2014, Matrimonial Property Act 2014, Kenya National Commission of Human Rights Act 2011, National Commission on Gender and Equality Act 2011 and the Protection against Domestic Violence Act 2015, which borrow from provisions of the African Charter, the Maputo Protocol and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).<sup>30</sup>

## 5 Legislative reform or adoption

Under the previous Constitution, the cabinet led the process of implementation of international treaties. A compatibility study would be carried out and discussed in cabinet,<sup>31</sup> and the relevant ministry would initiate drafting of the relevant legislation. In the constitution review process, the African Charter featured prominently in discussions on the Bill of Rights; for example, article 29 of the African Charter was highlighted as an important provision in regard to the need to preserve family cultural values such as respect for parents.<sup>32</sup>

23 The matter was determined by the Court which held that the First Respondent had violated the Petitioners' right to accessible and adequate housing contrary to art 43 of the Constitution. See <http://kenyalaw.org/caselaw/cases/view/90359/> (accessed 25 September 2015).

24 Constitutional Petition 605 of 2014. See also *Muigai vs John Bosco Kariuki & another* (2014) where the Court of Appeal relied on international instruments that prohibit discrimination against women to wit, the UDHR, CESC, CEDAW and ICCPR.

25 GK Kuria 'The rule of law in Kenya and status of human rights' (1991) 16 *Yale Journal of International Law* 217.

26 Sec 1A of the former Constitution (Act 5 of 1969).

27 Sec 33(3) of the former Constitution.

28 Sec 82(3) of the former Constitution.

29 Statutes such as the Childrens Act make direct reference to the UN Convention on the Rights of the Child. Sec 7(2) of the Act provides that: 'Every child shall be entitled to free basic education which shall be compulsory in accordance with Art 28 of the United Nations Convention on the Rights of the Child'.

30 The Protection against Domestic Violence Act 2 of 2015 [https://ke.boell.org/sites/default/files/uploads/2015/08/protectionagainstdomesticviolenceact\\_2015\\_1.pdf](https://ke.boell.org/sites/default/files/uploads/2015/08/protectionagainstdomesticviolenceact_2015_1.pdf) (accessed 25 September 2015).

31 See interview with Senior State Council (n 6 above).

32 CKRC (n 5 above) 91.

Legislative reform has typically taken the form of either piece-meal changes to national legislation through amendments<sup>33</sup> or the adoption of new legislation. The African Charter was used as the basis for repealing the provision on corporal punishment from the Kenyan Penal Code in 2003.<sup>34</sup> Many pieces of legislation that cover a wide spectrum of rights have been adopted over the years. These include the Sexual Offences Act, 2006 which aims at improving the protection of victims of sexual offences.<sup>35</sup> Amongst the new measures introduced was the comprehensive definition of the offence of rape and simplification of several rules of evidence to better protect victims.<sup>36</sup>

Kenya also established KNCHR in 2003 for more effective realisation of human rights.<sup>37</sup> While Kenya only ratified the Maputo Protocol in 2010, it had already established the National Commission on Gender and Development in 2003, meant to support the mainstreaming of gender in issues of national development.<sup>38</sup> In 2006, Parliament also enacted the HIV and AIDS Prevention and Control Act<sup>39</sup> which provides for a number of safeguards and measures aimed at protecting the rights

of persons living with HIV/ AIDS.<sup>40</sup> With regard to the right to a clean environment, the Environmental Co-ordination and Management Act (EMCA) which was enacted in 1999<sup>41</sup> was an important step for economic, social and cultural development.<sup>42</sup> The Act allowed wide access to courts for the enforcement of environmental rights which was initially restricted and narrowly construed.

Additionally, other recently enacted pieces of legislation that have been adopted to give effect to various articles of the African Charter and the Maputo Protocol include the Protection Against Domestic Violence Act 2015, the Counter Trafficking in Persons Act 2010<sup>43</sup> and the Prohibition of Female Genital Mutilation 2011<sup>44</sup> which speak to articles 4(2)(a), (g) and 5(b) of the Maputo Protocol.

## 6 Policy reform or formulation

As with legislative reform, a number of policies have been adopted which impact on different rights covered by the African Charter and the Maputo Protocol. Kenya has formulated a host of policies on a wide variety of issues that implicitly and explicitly touch on both

33 For instance, the Penal Code has been amended many times to delete provisions that go against international human rights standards.

34 Parliament of the Republic of Kenya 'National Assembly Official Report' (1 April 2003) 709.

35 Act 3 of 2006.

36 Sec 3 of the Sexual Offences Act.

37 Act 9 of 2002. Art 59(4) of the Constitution of Kenya transformed the KNCHR into a constitutional body with an enhanced human rights mandate. See [www.knchr.org](http://www.knchr.org) for more information on the activities of the Kenya National Commission on Human Rights.

38 Sec 6(2)(j).

39 Act 13 of 2006.

40 TO Ojienda 'HIV/AIDS and the labour sector: Examining the role of law in protecting the HIV positive worker in Kenya' Unpublished thesis, University of South Africa, 2010 128-132.

41 Act 8 of 1999.

42 Preamble to the EMCA.

43 Counter-Trafficking in Persons Act 8 of 2010 [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Counter-TraffickinginPersonsAct\\_No8of2010.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Counter-TraffickinginPersonsAct_No8of2010.pdf) (accessed 24 September 2015).

44 Prohibition of Female Genital Mutilation Act 32 of 2011 [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProhibitionofFemaleGenitalMutilationAct\\_No32of2011.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProhibitionofFemaleGenitalMutilationAct_No32of2011.pdf) (accessed 24 September 2015).

the African Charter and the Maputo Protocol.<sup>45</sup>

There is the National Policy for the Prevention and Control of HIV/AIDS and Sexually Transmitted Infections (STI)<sup>46</sup> which seeks to implement most of the matters covered under the HIV Prevention and Control Act of 2006. Further, Kenya adopted a Land Reform Policy in 2007. This Policy seeks to address critical issues such as communal land ownership schemes like those practised by most indigenous communities.<sup>47</sup>

Additionally, in a creative move, the Ministry of Public Health and Sanitation used the report of the African Commission's Working Group on Indigenous Populations and Communities<sup>48</sup> to develop strategies for public health needs to marginalised and vulnerable groups in Kenya. In pursuit of this policy, the Ministry set aside funds (Health Sector Services Funds) to support community health projects in arid and semi-arid areas where some of the groups identified by the African Commission Working Group are found.

In line with the African Charter, Kenya has also enacted a National Housing Policy which facilitates the

provision of adequate, affordable and quality housing in sustainable human settlements. There is also, currently, a Draft National Prevention of Slums Upgrading Policy which provides for better housing particularly for youth and women.<sup>49</sup> Moreover, there are several government policies that have been adopted to implicitly give effect to the provisions of the Maputo Protocol. These include the National Guidelines on the Management of Sexual Violence, 2014 and the Adolescent Reproductive Health and Development Policy, 2015. The latter aims to enhance the sexual and reproductive health and rights status of adolescents in Kenya and contributes towards realisation of their full potential in national development.

In addition to the above, there is also the Kenya Health Policy (2012-2030) which aims at 'attaining the highest possible health standards in a manner responsive to the population needs'. The Policy seeks to achieve this through supporting provision of equitable, affordable and quality health and related services at the highest attainable standards to all Kenyans.

## 7 Court judgments

Kenyan courts were initially reluctant to apply international law instruments directly to relevant domestic matters.<sup>50</sup> However, even under the previous constitutional regime that was strongly dualist, courts gradually softened their approach and are increasingly making direct reference to international and regional human rights instruments to which Kenya is party.<sup>51</sup> For instance, in

45 Key amongst the Policies include: the National Plan of Action against Sexual Exploitation of Children in Kenya 2013-2017; the Kenya National Health Policy and Guidelines; the Child Survival Development Strategy; the National Reproductive Health Policy; the National Disability Policy; the Draft Special Needs Education Policy; the Draft National Social Protection Policy; and the Draft National Policy on National Values and principles of Governance, amongst many others.

46 See <http://nascop.or.ke/is/> (accessed 14 August 2011).

47 Ministry of Lands 'National Land Policy' (Land Policy Secretariat) (May 2007).

48 African Commission 'Report of the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities'.

49 Kenya's Combined 8t-11th Periodic Report under the African Charter November 2014, para 117.

50 *Okunda v Republic* [1970] EA 453.

51 (2005) AHRLR 107 (KcCA 2005).

the celebrated case of *Rono v Rono*, the Court of Appeal stated that African customary succession laws that disinherited women contravened article 18 of the African Charter which Kenya voluntarily ratified without any reservation.<sup>52</sup> The judge noted that Kenyan domestic law was insufficient in regard to this aspect of discrimination of women and thus international human rights instruments that Kenya had ratified were necessary.<sup>53</sup> In a later case, *Re Andrew Musyoka (Deceased)*<sup>54</sup> the judge referred to the precedent that was set in *Rono v Rono* and used the African Charter and other human rights instruments to protect the rights of daughters to inherit their father's property and held that disinheriting daughters is contrary to article 18 of the African Charter and other human rights instruments that Kenya has ratified that protect and guard women's rights.<sup>55</sup>

In *Waweru v Republic*,<sup>56</sup> the court invoked article 24 of the African Charter and stated that the ministries in charge of local government and water affairs were obligated to construct a sewerage treatment plant to prevent environmental pollution.<sup>57</sup> In *Martha Karua v Radio Africa Ltd*,<sup>58</sup> the court noted that articles 11 and 12(2) of the African Charter do not allow derogation from the right to freedom of expression whereas the then Constitution of Kenya allowed for derogation. The court noted that any new constitutional dispensation should take into account the non-derogable nature of this freedom.<sup>59</sup>

The Court of Appeal has noted that while Kenya has had a strong dualist past, the position may have changed with the passing of the 2010 Constitution.<sup>60</sup> In the case of *David Macharia v R*, the court noted the fact that the African Charter has been ratified by 53 African states, which strengthens its place and legitimacy in domestic legal systems of states party to this Charter.<sup>61</sup> The court also made reference to the guidelines on fair trial adopted by the African Commission<sup>62</sup> and indicated that they were an authoritative interpretation of Kenya's obligations under the African Charter.<sup>63</sup>

Post the enactment of the 2010 Constitution, Kenyan courts have made a series of declarations, rulings and judgments that have both explicitly and implicitly referred to the provisions of the Maputo Protocol. Indeed, the courts have pronounced themselves on a wide array of rights including the appointment of women to public office under the Two-Thirds Gender Rule,<sup>64</sup> protection against violence, property inheritance and the prohibition against

52 As above.  
 53 *Rono* (n 51 above).  
 54 eKLR (2005).  
 55 As above.  
 56 (2007) AHRLR 149 (KeHC 2006).  
 57 As above.  
 58 High Court at Nairobi (Nairobi Law Courts) Civil Suit 288 of 2004.  
 59 As above.

60 *David Njoroge Macharia v Republic* Court of Appeal at Nairobi Criminal Appeal 497 of 2007.  
 61 As above.  
 62 African Commission on Human and Peoples' Rights 'Principles and guidelines on the rights to a fair trial and legal assistance in Africa' <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/> (accessed 10 October 2011).  
 63 As above.  
 64 The Constitution espouses the rights of women as being equal in law to men, and entitled to enjoy equal opportunities. Article 27 of the Constitution obligates the government to develop laws, including affirmative action programmes and policies to address the past discrimination that women have faced by ensuring that, not more than two-thirds of elective or appointive positions shall be of the same sex.

discrimination on the basis on HIV.<sup>65</sup>

The recent case of *MNN v Attorney General of Kenya*, brought on behalf of a woman who was mistreated in a private Kenyan hospital brought to light the severity of the harm suffered by women in Kenyan health facilities. MNN's story revealed the weaknesses of the accountability mechanisms that are meant to protect women from such abuse as well as provide remedies when rights violations occur. The *MNN* case is one of the first reproductive rights cases to be brought before the Kenyan High Court and highlights the state's failure to live up to its legal obligations under both domestic law and regional and international human rights standards. With this case, the High Court has an opportunity to demand stronger legal standards on female genital mutilation, to address the systemic accountability issues that underlie rights violations in healthcare facilities and to affirm Kenya's obligation to implement international human rights law.<sup>66</sup>

Similarly, in September 2015, the High Court of Kenya ordered the Ministry of Health to end the discrimination and abuse experienced by women in public maternity hospitals and provide financial compensation for two women who were illegally detained at Pumwani Maternity Hospital for their inability to

pay hospital fees and who were subjected to physical, mental, and verbal abuse.<sup>67</sup> In its decision, the Court noted that the two women were unlawfully detained and suffered numerous human rights violations, including their rights to liberty and dignity. The ruling also acknowledged that they were discriminated against on the basis of their socio-economic status and gender. The Court has ordered the Nairobi County government to pay reparations to both women and all legal fees.<sup>68</sup>

In *Richard Muasya v AG*, the petitioner relied on the non-discrimination provisions of the African Charter to fortify the argument that the constitutional provisions on non-discrimination were also applicable to intersex persons in Kenya.<sup>69</sup> Therefore, by and large, the new constitutional dispensation has shown signs of embracing the application of international human rights instruments in the resolution of disputes otherwise classified as national to which domestic laws should exclusively apply. Besides the African Charter, key amongst the international instruments frequently cited by the courts include the ICCPR, ICESCR and the Universal Declaration of Human Rights.

65 See also *FIDA Kenya & 5 Others v The Attorney General and the Judicial Service Commission* Petition 102 of 2011; *VMK v CUEA* (2013) eKLR; and *CK and 11 Others v The Commissioner of Police/Inspector General of the National Police Service and 2 Others* Petition 10 of 2012.

66 This case had been instituted by the Federation of Women Lawyers (Kenya), with the Centre for Reproductive Health applying to be enjoined as Amicus Curiae. To date, the matter is yet to proceed. Center for Reproductive Rights '*MNN v Attorney General of Kenya*' <http://www.reproductiverights.org/node/2435> (accessed 28 September 2015).

67 <http://www.reproductiverights.org/pressroom/crr-case-on-unlawful-detention-of-women-in-maternity-hospitals-in-the-high-court-of-kenya> (accessed on 28 September 2015) Correct link

68 The Center for Reproductive Rights filed this case in December 2012 to hold the Ministry of Health accountable for allowing rampant detention and abuse of women in health care settings.

69 High Court Petition 705 of 2007. The Court held that the petitioner had been subjected to inhuman and degrading treatment under the Constitution and article 5 of the UDHR and awarded damages of 500 000 Kenyan Shillings for the inhuman and degrading treatment he endured.

## **8 Awareness and use by civil society**

Most national human rights NGOs are aware of the African Charter and use it in their work alongside other international and regional human rights instruments and domestic law. Depending on their exact thematic focus, these NGOs will use the African Charter in advocacy, public education, policy review and litigation.<sup>70</sup> However, it is important to note that in most cases, the first point of reference is the 2010 Constitution. Other international and regional instruments are used to augment their constitution-based arguments. It is only in instances where the Constitution is deficient that direct reference is made to the African Charter and other international instruments. However, taking cognisance of article 2(5) of the 2010 Constitution, it is clear that the African Charter now forms part of Kenyan law. It is, therefore, important to ensure that there is increased awareness of the new status of the African Charter as part of Kenyan law and the need to refer to it in the same manner as one would refer to any domestic legislation. It is noteworthy that human rights institutions such as Equality Now have endeavoured over the years to continuously engage the bar and the bench on use of the Maputo Protocol and have aggressively led a coalition known as Solidarity for African Women's Rights (SOAWR) that has tasked African governments not only to ratify but also to implement the Protocol. Through such sensitisation, more civil society organisations have

become increasingly aware of the Protocol as a litigation tool.<sup>71</sup>

Currently, there are 20 NGOs that have observer status with the African Commission in Kenya alone.<sup>72</sup>

## **9 Incorporation in law school education and use by lawyers<sup>73</sup>**

There are about 13 law schools in Kenya.<sup>74</sup> Human rights law is taught in law schools at different levels. At the undergraduate level, human rights law is taught as part of the Constitutional Law Module with a specific focus on the Bill of Rights. In the upper years of undergraduate study, specifically the third and fourth years of study, human rights law is taught as an elective unit for one semester. It is also taught as part of Public International Law but not in considerable depth. In Jomo Kenyatta University of Agriculture and Technology, international human rights law is still taught together with international humanitarian law. In Moi University, international human rights law is taught in the gender studies module offered in the third year. This course serves as an introduction to the basic concepts of international human rights. At this stage, the main areas of focus are the

71 SOAWR 'Protocol watch' <http://www.soawr.org/content/protocol-watch> (accessed 28 September 2015).

72 African Commission on Human and Peoples' Rights 'NGOs with observer status' <http://www.achpr.org/network/ngo/> (accessed 16 November 2015).

73 Interviews with Lecturers at Catholic University, Moi University, University of Nairobi, Riara Law School, Kabarak University Law School.

74 These include three campuses in Nairobi, Kisumu and Mombasa for the University of Nairobi, Kenyatta University, Strathmore University, Riara University, Kisii University College, Jomo Kenyatta University of Agriculture and Technology, Mount Kenya University, Catholic University of East Africa, African Nazarene University, Egerton University and Kabarak University.

70 Interview with Davis Malombe, Deputy executive Director, Kenya Human Rights Commission (KHRC), 12 September 2011.

UN and the African human rights systems. Other regional systems such as the Inter-American and European systems are not delved into in detail.<sup>75</sup> However, students at this level are well able to appreciate the concept of human rights and the available structures and mechanisms for the protection and promotion of human rights at the domestic, regional and international levels. It is probably at the post-graduate level that human rights law is most extensively taught and in more detail.

At the University of Nairobi, a centre for human rights and peace studies was established in September 2012 to, amongst other things, teach a multi-disciplinary course in human rights particularly at the postgraduate level.

Public interest lawyers are generally aware of the African Charter provisions and use it to advance their human rights arguments. However, even lawyers who do engage in human rights legal practice rarely interact with the African Charter and would thus not use it in their legal arguments.<sup>76</sup> However, in the *Satrose Ayuma*,<sup>77</sup> the petitioners' advocates relied on the African Charter and the *Ogoni land* case to argue against the eviction of squatters living in land belonging to the former Kenya Railways without proper eviction guidelines and the provision of alternative areas of settlement.

75 From the consultations of different lecturers and author's own experience as a former student of law in Kenya, it appears that besides what is provided for under the syllabus, there is a wide discretion for them to define the scope of their teaching in this area. In this regard, some teachers will focus on Maputo Protocol specifically and others may mention it in passing.

76 See interview with John Chigiti, Advocate and Public Interest Lawyer, 26 August 2011.

77 *Satrose Ayuma and 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Scheme and 2 Others* Constitutional Petition 65 of 2010

## 10 National human rights institutions (NHRIs)

KNCHR is an independent and autonomous institution created under article 59 of the Constitution and the Kenya National Commission on Human Rights Act, 2011 to promote and protect human rights in Kenya. KNCHR takes the view that human rights are universal and indivisible and hence seeks to advocate human rights principles in line with international and regional standards in all aspects of its work on transitional justice, political accountability, public education on human rights, compliance with international obligations, minorities and marginalised groups, culture and human rights, business and human rights and legal services.

Under its compliance and international obligation work, and in line with its functions as provided for under article 8(f) of the KNCHR Act, 2011, KNCHR specifically: works in partnership with government to ensure timely reporting and dissemination of concluding observations by the various committee bodies; builds the capacity of Kenyan civil society to conduct their own monitoring and prepare shadow reports; and prepares and submits alternative reports to guide the work of treaty body committees. Also, KNCHR's Strategic Plan for the years 2015-2018 integrates both international and regional human rights law throughout the work of the KNCHR.<sup>78</sup> In this regard, the African Charter and to some extent,

78 See the KNCHR 'Strategic Plan 2015-2018' [http://www.knchr.org/Portals/0/Strategic Reports/Strategic%20Plan%202015-2018.pdf](http://www.knchr.org/Portals/0/Strategic%20Reports/Strategic%20Plan%202015-2018.pdf) (accessed 14 September 2015).



the Maputo Protocol<sup>79</sup> are useful reference points in the activities of the KNCHR.<sup>80</sup>

KNCHR also plays a leading role collaborating with regional human rights institutions including the African Commission and the African Court. KNCHR applied for and was granted affiliate status in 2004. In June 2013, it accepted an invitation from the African Commission to serve as a focal point to the Working Group on Indigenous Populations/Communities in Africa. Similarly, in July 2013, it hosted a delegation from the African Court at its premises.

Equally important in this category is NGEC, which is established pursuant to article 59 of the Constitution and the National Gender and Equality Commission Act, 2011.<sup>81</sup> It derives its mandate under articles 59, 27, 43 and Chapter 15 of the Constitution of Kenya as well as section 8 of the NGEC Act. Article 8(c) provides that the NGEC shall act

as the principal organ of the state in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalised persons, women, persons with disabilities and children.

79 The main reason could be that issues relating to women are dealt with primarily at the National Gender and Equality Commission (NGEC) from mainly an equality and freedom from discrimination perspective.

80 Interview with KNCHR Officers, 17 August 2011. See also the KNCHR website [www.knchr.org](http://www.knchr.org) (accessed 14 September 2015).

81 Cap 15 Laws of Kenya.

## 11 Academic writing on the African Charter and Maputo Protocol

A survey of writing by Kenyan academics leads to the conclusion that there is not much reference to the African Charter or the Maputo Protocol. This may be attributed to the relatively limited academic writing compared to say a country like South Africa which has many well-respected legal journals. Kenya lacks long-standing legal academic journals even from the more established faculties of law such as the University of Nairobi. Nevertheless, a few academics have discussed continental human rights instruments in depth, but those have presented a positive perception of its usefulness in alleviating the human rights problems faced by Kenya.

Muthoni Wanyeki, writing in the East African newspaper, expresses disappointment that Kenya withdrew its offer to host the 50th ordinary session of the African Commission celebrating 30 years of the African Charter in October 2011.<sup>82</sup> She describes the African Charter as 'a seminal instrument for Africa as a whole' that has dispelled the notion that human rights are culturally relative not universal, that human rights are divisible, and that human rights can only be claimed by individuals rather than collectives. She lauds the use of the African Charter by the African Commission for amongst other things ensuring that the AU does not block the referral of the Darfur situation by the UN Security Council to the International Crimi-

82 'Kenya won't host human rights summit – What a pity' *The East African* 14 August 2011 <http://www.theeastafrican.co.ke/OpEd/comment/Kenya+wont+host+human+rights+summit+what+a+pity/-/434750/1218724/-/12aw2hs/-/> (accessed 15 August 2011).

nal Court. She also considers it a positive aspect being the African Commission's numerous responses to individual complaints, the fact that states have generally not implemented the recommendations notwithstanding. On the whole, she expresses positive views about the African Charter and the Maputo Protocol, although states' compliance record with the instruments has been wanting.

The African Charter has been invoked as a source of inspiration for African leadership as leaders seek to find a solution to the prevailing drought in the Horn of Africa region.<sup>83</sup> In light of the post-election violence experienced in Kenya in 2007-2008, the right to participate in the government of one's country provided in the African Charter has been examined.<sup>84</sup> Mbondenyi's analysis of this right in the African Charter highlights a gap in the scope of the provision as enshrined in this Charter in that the right is recognised in a superficial way that does not expressly guarantee the holding of periodic and genuine elections, a striking omission given the plague of poor governance that afflicts many states on the continent.<sup>85</sup> The survey of the African Commission's jurisprudence on the right illustrates that simply holding elections is not enough, the right to participation in governance involves the conduct of elections without exclusionary bars often intended to prevent political opponents from exercising their right

to contest for office, and safeguarding other rights that support the exercise of democracy, rule of law and good governance.<sup>86</sup> The failure in protecting this right has been suggested as a factor which led to the violence experienced in Kenya in the aftermath of the 2007 elections.

In recent publications, more views are being proffered with regards to the African Charter and the Maputo Protocol. Orago, for instance, argues that in order for Kenya to be accountable for its human rights obligations under international law, domestic laws should be subordinate to international law.<sup>87</sup> The international law in this part also includes the African Charter.

The right to housing under the African Charter was also revisited in a recent publication by Juma. According to the publication, the articulation of the right to housing, which is not expressly in the Charter, in *SERAC v Nigeria*, was only possible as a result of the notion of the interdependence of human rights.<sup>88</sup> For him, the express provision in the Maputo Protocol of the right to housing means that it is more critical for the protection of vulnerable groups including women.<sup>89</sup> What is not clear however is whether the implied right under the African Charter and the express provisions under the Maputo Protocol means different obligations for the state, with vulnerable groups being expressly favoured.

83 'East Africa's drought response – Union members must arise' *Pambazuka News* 4 August 2011 <http://www.pambazuka.org/en/category/comment/75413> (accessed 15 August 2011).

84 MK Mbondenyi 'The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in light of Kenya's 2007 political crisis' (2009) 9 *African Human Rights Law Journal* 183.

85 Mbondenyi (n 84 above) 187.

86 Mbondenyi (n 84 above) 190.

87 NS Orago 'The 2010 Kenyan Constitution and the hierarchical place of international law in Kenyan domestic legal system: A comparative perspective' (2013) 13 *African Human Rights Law Journal* 415 440.

88 L Juma 'Nothing but a mass of debris: Urban evictions and the right of access to adequate housing in Kenya' (2012) 12 *African Human Rights Law Journal* 470 480.

89 Juma (n 88 above) 483.

On the issue of derogation, Ambani and Mbondenyi have observed that the Kenyan Constitution may be incompatible with international law and specifically the African Charter, which do not recognise derogation in any situation including emergency cases.<sup>90</sup> In the opinion of the two authors, this may pose a challenge in terms of the review process by treaty bodies and during litigation under the Bill of Rights.<sup>91</sup> These views are particularly important taking into account that international law now forms part of the Kenyan law pursuant to article 2(6) of the Constitution.

On political participation, Ogendi observes that the standard set under article 13(1) of the African Charter did not impose upon its members the requirement of a free and fair election and as such, it was necessary to remedy this situation by the adoption of the Charter on Democracy, Elections and Good Governance.<sup>92</sup>

Lastly, Aura, while giving several examples about the situation of women in Kenya, is of the view that ratification by Kenya of CEDAW in 1984 and the Maputo Protocol in 2010 has not 'fully' benefited Kenyan women as it should have.<sup>93</sup>

## 12 State reporting

The Treaty Making and Ratification Act<sup>94</sup> provides in section 16:

Where a treaty provides for the submission of periodic reports as part of its monitoring mechanisms the Cabinet Secretary shall, in conjunction with the Attorney General and the relevant State Department facilitate the preparation and submission of such report within the prescribed period.

The Cabinet Secretary referred to in this provision is the one responsible for foreign affairs.<sup>95</sup> The relevant State Department presumably refers to the department responsible for the subject matter of the treaty.

Currently, the Office of the Attorney General is charged with the leadership role in the preparation of state reports on human rights treaties. Whereas KNCHR is constitutionally mandated to ensure compliance with obligations under treaties and conventions, this mandate is however restricted to a watch-dog role of developing alternative reports. The Department of Justice under the AG's office is thus responsible for reporting to the African Commission as well as other UN treaty Monitoring bodies.<sup>96</sup> Section 5(1)(d) of the Office of the Attorney General Act<sup>97</sup> provides that in addition to the functions of the Office of the Attorney General under article 156 of the Constitution, the Office is also responsible for amongst others: 'coordinating reporting obligations to international human rights treaty bodies to which Kenya is a

90 JO Ambani & MK Mbondenyi 'A new era in human rights protection in Kenya? An analysis of the salient features of the 2010 Constitution's Bill of Rights' in MK Mbondenyi et al *Human rights and democratic governance in Kenya: A post-2007 appraisal* (2015) 29.

91 Ambani & Mbondenyi (n 90 above) 30.

92 P Ogendi 'Political parties and "free and fair" nominations in Kenya' in MK Mbondenyi et al (n 90 above) 161.

93 R Aura 'Judicial responses to women's rights violations in Kenya in the post-2007 context' in MK Mbondenyi et al *Human rights and democratic governance in Kenya: A post-2007 appraisal* (2015) 364.

94 Act 45 of 2012.

95 Sec 2(1) of the Treaty Making and Ratifications Act.

96 These Reports are generated in collaboration with NGEK, KNCHR and select civil society organisations working on human rights issues.

97 Act 49 of 2012.

member or on any matter which member states are required to report.'

The process of preparing the report includes obtaining input from government ministries as well as state bodies such as independent national human rights institutions and civil society organisations. Nevertheless, this process has been faulted for not including the wider Kenyan public, and also for not measuring progress as against benchmarks or even with reference to concluding observations previously issued.<sup>98</sup> With regards to the latter criticism, Kenya recently submitted its Combined 8th to 11th periodic report to the African Commission with a section containing information on the 2007 concluding observations of the African Commission.<sup>99</sup>

The 2010 Constitution provides that every year the President of the Republic shall submit a report for debate to the National Assembly on how the government is meeting its obligations with regard to international treaties.<sup>100</sup> This provision holds the promise of accountability in terms of what the government is doing to give effect to concluding observations. Unlike before, the KNCHR is currently working in partnership with government to ensure timely reporting and dissemination of concluding observations by the various committee bodies.

98 OHCHR 'Taking these rights seriously: Civil society organisations' parallel report to the initial state report of the Republic of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights' (2008) 8 [http://www2.ohchr.org/english/bodies/cescr/docs/ngos/K-HURI\\_NET\\_Kenya\\_CESCR41\\_report.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/ngos/K-HURI_NET_Kenya_CESCR41_report.pdf) (accessed 15 August 2011).

99 n 51 above, 67-72.

100 Art 132(1)(c)(iii).

### 13 Communications

Several communications have been lodged before the African Commission against Kenya. The latest, the *Endorois* case, was decided in November 2009.<sup>101</sup> Kenya was found to be in violation of the Endorois peoples' rights to freedom of religion, property, cultural life, wealth and natural resources and development. The African Commission recommended that the state should recognise rights of ownership to the Endorois and restore Endorois' ancestral land. It also found that the state must ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle. The African Commission further recommended that Kenya pays adequate compensation to the community for all the loss suffered, pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve. Furthermore, it was recommended that the state should grant registration to the Endorois Welfare Committee and engage in dialogue with the complainants for the effective implementation of these recommendations. Finally, as a follow-up mechanism, the African Commission recommended that Kenya should report on the implementation of these recommendations within three months from the date of notification.

On 18 January 2011, and in response to a question in Parliament on the status of implementation of the above recommendations, the Minister of Lands indicated that he had requested and was still waiting for a certified copy of the decision from Kenya's Mission to

101 (2009) AHRLR 75 (ACHPR 2009) (27th Activity Report) (*Endorois* case).

the AU in Addis Ababa.<sup>102</sup> He nevertheless indicated that there were already steps that the government had undertaken, even though not specifically in response to the communication, that would resolve some of these issues. He noted that the 2010 Constitution protected community land,<sup>103</sup> directed the state to take measures, including the enactment of legislation, to revise, consolidate, rationalise existing land laws and revise sectoral land use laws in accordance with principles of equitable access to land and security of land rights amongst other principles.<sup>104</sup> In relation to the environment and natural resources, the 2010 Constitution provides that the state shall ensure the sustainable exploitation, utilisation, management and conservation of the environment, public participation in these goals and utilisation of the environment and natural resources for the benefit of the people of Kenya, to name a few obligations.<sup>105</sup> Other provisions relate to the enforcement of environmental rights and the regulation of agreements relating to the exploitation of natural resources.<sup>106</sup>

The Minister further pointed out that the Ministry of Lands had drafted a National Lands Policy and was involved in the drafting of a National Land Commission Bill and a Lands Bill. The Policy had received input from pastoral and minority groups. He said that the emphasis of the Ministry was on developing a framework on equitable access to land for use rather than ownership.

On its part, KNCHR is not able to profile all communications due to limited resources and other competing needs. Consequently, it gives exposure only in specific matters that are of broad public interest, for example, the *Endorois* case ruling and its significance to the rights of indigenous communities and land rights in Kenya. In such cases, KNCHR engages with relevant stakeholders to ensure that the findings are widely disseminated.

In the *Endorois case*, KNCHR convened CSO stakeholders to mobilise the public through television and print media and through grassroots workshops with the Endorois community on the recommendations' significance to their rights as indigenous people. Steps have also been taken to engage with Parliament and with the Minister responsible for land affairs to pursue the implementation of the decision as part of the wider realisation of the community land framework under the current Constitution. As a follow up, CSOs and KNCHR will undertake a strategic planning process to identify key resources and formulate means of mainstreaming the Endorois decision implementation within their core programme areas. The convening role of KNCHR remains important.<sup>107</sup> Indeed, today, KNCHR has in place minorities and marginalised groups programmes focusing on, amongst others, indigenous groups.

Also, recent decisions against Kenya from the African Commission have not gone beyond the preliminary stages. In February 2013, Communication 407/11 *Artur Margaryan and Artur Sargasyan v Kenya* was struck out for lack of diligent prosecution. Similarly,

102 National Assembly Official Report (18 January 2011), Questions by private notice 'Property rights for pastoralists/marginalised groups' 17-22.

103 Art 63.

104 Art 68.

105 Art 69.

106 Arts 70-71.

107 Interview with Senior KNCHR Staff in charge of Minorities in the ECOSOC Department, 17 August 2011.

Communication 464/14 *Uhuru Kenyatta and William Ruto (represented by Innocence Project Africa) v Kenya* was also rejected at seizure stage during the 15th extraordinary session of the African Commission in Banjul, The Gambia.

#### 14 Special mechanisms and promotional visits by the African Commission

In 2003, then member of the African Commission responsible for Kenya, Commissioner Vera Chirwa, decried the apathy towards requests for promotional visits which went unanswered and unacknowledged, and the then dismal state reporting status on the African Charter.<sup>108</sup> Notwithstanding this general concern, in 1998, Kenya hosted one promotional mission by the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa.<sup>109</sup> The Working Group on indigenous populations/communities in Africa conducted a research and information visit to the Republic of Kenya from 1-19 March 2010.<sup>110</sup> Lastly, at the invitation of the KNCHR, working together with a group of civil society organisations, the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission conducted a five day advocacy visit in Kenya, which

took place from 24 to 28 August 2015.<sup>111</sup>

#### 15 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission

The 2010 Constitution has provided a much needed breath of fresh air in the articulation and advocacy of human rights principles in Kenya. In particular, article 2(5) thereof provides that all treaties ratified by Kenya shall form part of the laws of Kenya. The import of this is that all human rights treaties that Kenya has ratified (including the African Charter), now constitute part of Kenyan law.

Moreover, the Bill of Rights contains a raft of provisions that are modelled on international and regional standards for the promotion and protection of human rights. It is anticipated that this, together with a vibrant civil society, fairly independent media and effective watchdog agencies such as the KNCHR, will enhance the human rights discourse in Kenya and thus the impact of the African Charter and the Maputo Protocol

In terms of government led processes, the reform process in Kenya has seen matters of human rights come to the fore and be included in every discussion on law and policy. Furthermore, adoption of the proposed National Action Plan and Policy on Human Rights and the Performance Contracting Process in government with human rights indica-

108 East African Human Rights Report - Kenya (2003) 1 *The East African Journal of Human Rights and Democracy* 1 26.

109 Adopted during the 24th ordinary session held from 22-31 October 1998 in Banjul, The Gambia, <http://www.achpr.org/states/kenya/missions/promo-1998/> (accessed 5 December 2015).

110 Adopted during the 50th ordinary session held from 24 November 2010 in Banjul, The Gambia, <http://www.achpr.org/states/kenya/missions/indigenous-2010-kenya/> (accessed 5 December 2015).

111 See the press statement here: <http://knchr.org/Portals/0/PressStatements/Press%20Statement-Advocacy%20Visit%20by%20Special%20Rapporteur%20and%20Freedom%20of%20Expression.pdf> (accessed 21 September 2015).

tors will ultimately result in the mainstreaming of human rights in all aspects of service delivery by government.

Kenya was, under the previous Constitution, a dualist state. This meant that international instruments had force of law only when domesticated, and undomesticated treaties were only persuasive in terms of human rights advocacy and litigation. Coupled with a lack of judicial activism, this effectively hampered the impact of the African Charter, notwithstanding that the Charter was adopted in Nairobi. Myriad governance challenges and a hostile political environment for human rights defenders suffocated the human rights discourse in general including the African Charter and the Maputo Protocol. The enhanced democratic space and a more vibrant human rights discourse after 2003 has generally improved prospects for positive impact of the Charter and the Protocol in Kenya.

A significant challenge, however, is the lack of awareness and use of the African Charter and the Maputo Protocol by CSOs, legal practitioners and government bodies. In most cases, lawyers and activists rely on the provisions of international treaties such as the ICCPR, and other UN instruments. Recourse is only had to the African Charter in cases before the East African Court of Justice whose constitutive instrument makes explicit reference to the Charter as a source of law.<sup>112</sup> Kenyans are quick to engage with the UN mechanisms to the detriment of the regional framework. There is thus the need for enhanced awareness on the African Charter, and its relation to our

laws and its impact on human rights in Kenya.

In addition, there is the perception that UN Mechanisms are more effective, and they thus enjoy more publicity than the African mechanisms. For instance, the former UN Special Rapporteur on Extra-Judicial Executions, Professor Philip Alston took government to task over alleged extra judicial killings by the Kenyan police and military in 2008 whereas little was heard from the AU and African Commission on this. Furthermore, the AU's political stand in matters relating to the International Criminal Court process in Kenya and other African states has served to cast all AU affiliated mechanisms, including those established by the African Charter, in a negative light within the domestic realm. For this reason, it is suggested that the African Commission undertakes a promotional visit to Kenya to engage with CSOs and other human rights actors and the general populace in an effort to create new partnerships and strengthen existing ones.

Additionally, the main challenge today for human rights in Kenya is the fight against terrorism particularly in the wake of the WestGate Mall and Garissa University attacks. The Kenyan government has responded by applying measures that sometimes violate human rights norms. There should be a clear response by the African Commission to ensure that human rights are not ignored during the implementation of counter-terrorism measures. This is because as discussed above, and in line with the African Commission's jurisprudence, the African Charter does not recognise derogation of human rights even in emergency situations.

<sup>112</sup> For instance *IMLU v Attorney General of Kenya and 4 others* EACJ Ref No 3 of 2010.

With specific focus on the Maputo Protocol, it is evident that there are still a number of negative cultural practices that continue to subjugate women and impede the full realisation of their rights. Practices such as early marriages, wife inheritance, female genital mutilation and preference for the boy-child still need to be addressed in order to enhance the impact of the Maputo Protocol.

State parties to the Maputo Protocol have also not fully embraced its spirit. There is, therefore, a dire need for more sensitisation on the gains that the Maputo Protocol offers to the African people – both men and women, in terms of accelerated development due to the great untapped potential of African women in all spheres of life.

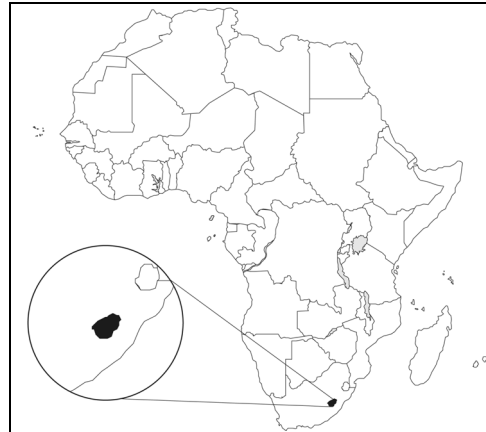
Kenyan national Lawrence Mute has been a member of the African Commission since 2013. This is a unique opportunity for Kenya to ensure better realisation of human rights in the country.

Additionally, Kenya hosted the 18th extraordinary session of the African Commission in Nairobi from 29 July to 7 August 2015, signalling an improving relationship in human rights cooperation.



# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN LESOTHO

*Sizakele Hlatshwayo\**



## 1 Introduction

Lesotho gained independence in 1966 from the British government and inherited a Westminster type constitution which provided for a Constitutional Monarch as the head of state and a prime minister, who was the leader of the majority party, and exercised executive power as the head of government. A new Constitution was drafted and came into effect on 2 April 1993. Ironically, the new Constitution was a replica of the Independence Constitution.<sup>1</sup> Section 45 of the 1993 Constitution of Lesotho provides that the King is designated by the College of Chiefs in accordance with the Customary Law of Lesotho if his predecessor dies or if there is a vacancy in the Office of the King. Lesotho has a dual legal system, Roman Dutch Law (Common Law) and Basotho customs (Customary Law).<sup>2</sup> These two systems of law have equal validity with the *proviso* that in cases of inconsistency, statutory law prevails. However, the two

systems cannot be applied simultaneously in a given situation.<sup>3</sup>

The 1993 Constitution of Lesotho provides a framework for the promotion and protection of human and peoples' rights. Section 18(4)(c) of the Constitution entrenches freedom from discrimination and stipulates that no law may make a provision that is discriminatory and that public officials, whilst performing their duties in terms of any law, may not treat any person in a discriminatory manner.<sup>4</sup> The Constitution defines discrimination as affording different treatment to different persons on the basis of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>5</sup> Nevertheless, it is important to note that the principle of non-discrimination does not apply to certain aspects of life which fall within the ambit of customary law and personal law.<sup>6</sup> Institutions of protection, such as the courts and the Ombudsman, have

\* LL.M. HRDA (Pretoria).

1 I Shale 'The law and legal research in Lesotho' (update) (2014) *Globalex* <http://www.nyulawglobal.org/globalex/Lesotho.htm> (accessed 24 August 2015).

2 Lesotho State Report on CEDAW, submitted to the UN CEDAW Committee on July 2010 (CEDAW /C/LSO/1-4).

3 As above.

4 Shale (n 1 above).

5 M Pholo 'Lesotho: Justice sector and the rule of law' (2013) *Afrimap*.

6 The areas include adoption, marriage, divorce, burial, devolution of property, death or other matters which fall within the provisions of personal law. See section 18(4)(c) Constitution of Lesotho.

been established to give practical effect to these rights. However, there are several social, cultural and economic rights (contained in Chapter III of the Constitution) which cannot be contested or enforced through the courts, but are promoted through the policies of the state.<sup>7</sup>

As Lesotho is a patriarchal society, gender roles and stereotypes and socio-cultural norms are prejudiced by patriarchy, a system which is embedded on an ideology which supports and justifies the subordination of women by men, regulates relations between them and allows men to control women in all spheres of life, including in private and public life. The negative stereotypes about women are unfortunately perpetrated by the honour of the Basotho culture which has deep-seated harmful norms, practices and traditions (patriarchal attitudes) regarding the roles, responsibilities and identities of women and men. For instance, polygamy and bride price (Bohali) are key customs and practices that perpetuate discrimination and unequal status against women and girls in the fields of education, public life, decision-making and exacerbate the persistence of violence against women.<sup>8</sup> Although women and men enjoy equal rights in civil and criminal courts, inheritance rights are an exception. Civil law does not address the issue, and customary law discriminates against women and girls as it pertains to inheritance. Customary law limits inheritance to male heirs only; it does not permit women or girls to inherit property.

Be that as it may, Lesotho has over the years made great strides to circumvent the situation of women's minority status in many ways, including through the enactment of laws aimed at protecting the rights of women. For instance, married women in Lesotho gained equality to men in 2006 under the Legal Capacity of Married Persons Act. Legally, any woman can now own land, receive inheritance, and make her own decisions. In 2003, women's rights were protected through passage of the Sexual Offences Act which officially defines all forms of unwanted sexual penetration as rape, not just vaginal penetration as was the case prior to this Act. The law also gives legal rights and validity to men who are raped.<sup>9</sup> Other key pieces of legislation include the Labour Code Order 1992, which defines discrimination in the work place as any exclusion or preference made on the basis of sex, marital status or religion; the Labour Code Wages (Amendment) Act 2009, which provides for paid maternity leave for workers in clothing, textile and leather manufacturing sectors;<sup>10</sup> the Education Act (2010) which provides for free and compulsory education; the Anti-Trafficking in Persons Act (2011) which criminalises all forms of slavery and provides for harsh penalties for perpetrators; and the Children's Protection and Welfare Act (2011). A Law Reform Commission was also established on 16 December 1993 with the mandate of reviewing discriminatory laws.<sup>11</sup> In 2003, Lesotho adopted a Gender and Development Policy (2003) which commits the state to ensuring that all sectors of development address gender inequalities that permeate all sectors of society. The Policy further

<sup>7</sup> As above.

<sup>8</sup> C Balch 'Discovering the mountain kingdom: Women in Lesotho – Gender inequality' <http://pcbalch.blogspot.co.za/2008/07/women-in-lesotho-gender-inequality.html> (accessed 22 June 2015).

<sup>9</sup> As above

<sup>10</sup> See n 2 above.

<sup>11</sup> Law Reform Commission Act 5 of 1993.

addresses inequalities cutting across social, racial, legal, cultural, economic and political spheres.<sup>12</sup>

However, the country has continued to hold on to cultural principles in some aspects which members of the public are not comfortable to abandon. Although the Constitution prohibits discrimination of any kind and unfair treatment, it contains exceptions to the principle of non-discrimination (as stated above) in matters relating to adoption, marriage, divorce, burial, devolution of property, death or other matters that fall within provisions of personal law, or where customary law is applicable. This is in contravention of the Maputo Protocol.<sup>13</sup> The Kingdom has been called by treaty bodies including the CEDAW Committee,<sup>14</sup> to amend provisions of the Constitution which are discriminatory as they constitute claw-back clauses which give rights on one hand and take away the rights on the other. Worse still, Lesotho has continued to protect the issue of succession to the throne and chieftainship, despite a world-wide, widely publicised litigation strategy by women's rights and gender activists in the *Senate Masupha* chieftaincy case.<sup>15</sup>

## 2 Ratification of African Charter and the Maputo Protocol

One of the legal traditions that Lesotho imported from the British Common Law is in the realm of international treat-

ties. In Britain, at the time, the power to ratify international treaties resided with the executive rather than the legislature.<sup>16</sup> According to one author, commenting on the position in Botswana, which is almost identical to the Lesotho position, the legislature plays no role in the treaty ratification process.<sup>17</sup> It is arguable that this is also the position in Lesotho given a similar historical context. Lesotho ratified the African Charter on 10 February 1992 and the Maputo Protocol on 26 October 2004.<sup>18</sup> True to the tradition of executive-led ratification, the process in both instances seems to have been led by the executive to the exclusion of parliament.<sup>19</sup>

The Ministry of Justice is responsible for coordinating implementation of Lesotho's obligations under the African Charter, while the Ministry of Gender and Women's Affairs is responsible for obligations in respect of the Maputo Protocol. In 2002, the government shuffled ministries, and as a result, the Ministry of Gender and Youth, Sports and Recreation (MGYSR), amongst others, was established. Its functions are to drive and direct the country's initiatives to promote and protect the rights of women. Several initiatives have been implemented as a result of the establishment of this coordinating Ministry.<sup>20</sup> They are therefore responsible for liaising and communicating with the African Commission on the Maputo

12 As above.

13 See n 11 above.

14 CEDAW Committee Concluding Recommendations to the Lesotho State Report October, 2011.

15 *Senate Masupha v Senior Resident Magistrate of the Subordinate Court of Berea District and Others* 2014 LSCA CofA Civ. All the courts including the upper court of the land, upheld the discriminatory provision. This was a blow not only to the Basotho women, but to all women in the African region.

16 BT Onkemetse 'Giving effect to treaties in the domestic law of Botswana' (1997) 10 *Lesotho Law Journal* 205, 209 cited in T Thabane & I Shale *Impact of the African Charter and Maputo Protocol* (2012).

17 As above.

18 See 'Chart of ratifications: AU human rights treaties' in C Heyns (ed) *Compendium of key human rights documents of the African Union* (2005) 261-264.

19 T Thabane & I Shale *Impact of the African Charter and Maputo Protocol* (2012).

20 CEDAW Report (n 2 above).

Protocol. The Ministry of Justice, Human Rights and Correctional Services is charged with the dispensation and administration of justice, protection and promotion of human rights and the rehabilitation of offenders. In fulfilling its mandate, the Ministry pursues the efficient delivery of Justice through improved and more effective use of correctional resources and the provision of skills; ensuring a culture of zero tolerance to corruption, and committing Lesotho to the promotion and protection of human rights of disadvantaged people such as children, the vulnerable, people with disabilities and those infected and affected by HIV and AIDS.<sup>21</sup>

### 3 Domestication or incorporation

Lesotho, just like a number of countries in the African region, practices the dualist approach to domestication and enforceability of international instruments. This means that international instruments are not enforceable in national courts of law, unless they have been incorporated into national laws by an Act of Parliament. The monist approach, on the other hand is such that once a country has ratified an instrument, it becomes an integral part of national laws and is enforceable.

Notwithstanding ratification of the African Charter and the Maputo Protocol, there has not been any deliberate move to domesticate either of the two instruments, thus limiting enjoyment of human rights for the people of Lesotho as envisaged in the instruments. Worse still, Lesotho has continued to enact laws that contravene its obligations under both the African Charter and the Maputo protocol.

21 Lesotho government portal <http://www.gov.ls> (accessed 25 August 2015).

Although the Constitution is, for the most part, consistent with the norms laid down by international agreements to which Lesotho is a party, such consistency is limited by adherence to customary law. Whilst the Constitution is progressive in some areas, its guarantee of non-discrimination does not apply to the customary law pertaining to persons who are subject to such law.<sup>22</sup> Pholo<sup>23</sup> in analysing the situation noted that 'this claw-back provision has the effect of perpetuating the application of customary law, including those of its aspects which legitimise gender-based discrimination'.<sup>24</sup> She argues that there is no constitutional provision which obliges the government to domesticate all human rights instruments or that provides for a systematic process for domesticating international human rights treaties once they are ratified or acceded to. In order to enable the people of Lesotho to benefit fully from the protection of human rights, the Constitution must be amended to include provisions that make domestication of ratified treaties obligatory for the state.<sup>25</sup>

There has been an attempt to domesticate some provisions of the Maputo Protocol, through the Legal Capacity of Married Persons Act 2006.<sup>26</sup> The rights enshrined in the African Charter, albeit not all, are explicitly provided for in the Bill of Rights.<sup>27</sup> In particular, the following rights are provided for: the right to life,<sup>28</sup> the right to personal liberty,<sup>29</sup> freedom of movement,<sup>30</sup> freedom from inhumane treat-

22 Sec 14(c) of the Constitution.

23 Pholo (n 5 above).

24 As above.

25 As above.

26 Legal Capacity of Married Persons Act 9 of 2006.

27 See Chap 2 of the Constitution.

28 Sec 5 of the Constitution.

29 Sec 6 of the Constitution.

30 Sec 7 of the Constitution.

ment,<sup>31</sup> freedom from slavery and forced labour,<sup>32</sup> freedom from arbitrary search or entry,<sup>33</sup> the right to respect for private and family life,<sup>34</sup> the right to a fair trial,<sup>35</sup> freedom of conscience,<sup>36</sup> freedom of expression,<sup>37</sup> freedom of peaceful assembly,<sup>38</sup> freedom of association,<sup>39</sup> freedom from arbitrary seizure of property,<sup>40</sup> freedom from discrimination,<sup>41</sup> the right to equality before the law and the equal protection of the law,<sup>42</sup> and the right to participate in government.<sup>43</sup> Interestingly, the Lesotho Constitution has an equality provision which enjoins the state to take affirmative action measures to promote the rights of disadvantaged groups, but this is under principles of state policy and thus not justiciable.<sup>44</sup>

Shale and Thabane<sup>45</sup> observe that some of the rights in the African Charter have not found their way into the 1993 Constitution, at least explicitly. They, however, noted that the 1993 Constitution proscribes undignified practices like slavery and inhumane treatment, but does not, like the African Charter, explicitly provide for the right to human dignity as an independent right.<sup>46</sup> It also lacks the right to receive information.<sup>47</sup>

Socio-economic rights are provided for in a separate chapter of the 1993 Constitution from the traditional civil

and political rights.<sup>48</sup> They are regarded as principles of state policy and as such are not enforceable in any court. These rights are also subject to the limits of the economic capacity and development of Lesotho. They are meant to guide the authorities and agencies in the performance of their duties with a view to progressively realising them.<sup>49</sup> They include the protection of health,<sup>50</sup> provision for education,<sup>51</sup> and the opportunity to work.<sup>52</sup>

#### **4 Legislative and policy reforms**

Notwithstanding the lack of direct domestication of human rights treaties, Lesotho has made great strides in legislative reform, as noted in several government documents.<sup>53</sup> There exist a plethora of legislation and policies which incorporate rights provided for in the African Charter and the Maputo Protocol. These include: the Legal Capacity of Married Persons Act (2006), the Sexual Offences Act (2003), the Labour Code Order 1992), the Labour Code Wages (2009), the Anti-Trafficking in Persons Act (2011), the Children's Protection and Welfare Act (2011), and the Gender and Development Policy (2003).

Some important government policies implicitly give effect to both the African Charter and the Maputo Protocol. For example, the Gender and Development Policy strives to address gender inequality and the vulnerability

31 Sec 8 of the Constitution.

32 Sec 9 of the Constitution.

33 Sec 10 of the Constitution.

34 Sec 11 of the Constitution.

35 Sec 12 of the Constitution.

36 Sec 13 of the Constitution.

37 Sec 14 of the Constitution.

38 Sec 15 of the Constitution.

39 Sec 16 of the Constitution.

40 Sec 17 of the Constitution.

41 Sec 18 of the Constitution.

42 Sec 19 of the Constitution.

43 Sec 20 of the Constitution.

44 Sec 26 of the Constitution.

45 Thabane & Shale (n 19 above).

46 Art 5 of the African Charter.

47 Art 9 of the African Charter.

48 See Chap 3 of the Constitution.

49 See sec 25 of the Constitution on application of the principles of state policy.

50 Sec 27 of the Constitution.

51 Sec 28 of the Constitution.

52 Sec 29 of the Constitution.

53 For example, Lesotho Poverty Reduction Strategy (2004/2005-2006/2007); National Gender Policy, Lesotho Report to the CEDAW (2010); Lesotho SADC Protocol Gender Barometer 2014.

of women to HIV/AIDS.<sup>54</sup> It calls for non-discrimination towards women, men, girls and boys in the following ten priority areas: gender and poverty and economic empowerment; gender and education and training; gender and youth; gender and power, gender and politics and decision making; gender and health; gender-based violence; gender and civil society organisations; gender and the media; gender and the environment; and gender and science and technology. The above rights are also encapsulated in the Maputo Protocol. The policy serves as a guiding tool to the government of Lesotho in its effort to achieve gender equality and protect the interests of vulnerable groups such as women. It is also used as a guide in gender mainstreaming processes for all government ministries, which could serve to address gender concerns in a wide spectrum of developmental issues.<sup>55</sup> Subsequent to the formulation of the Gender and Development Policy, an Implementation Plan 2008/10 was developed for mainstreaming gender concerns in policies and programmes of different sectors. Concurrently, institutional strengthening was undertaken for effective implementation of the plan, by establishing Gender Focal Points (GFPs), the Gender Technical Committee (GTC) and an Expanded Thematic Group on Gender and Reproductive Health (later renamed the Gender Forum) to effectively implement the plan.

Other policies that have favourably considered the African Charter and Maputo Protocol include the Lesotho Correctional Service HIV and AIDS policy and the National HIV/AIDS

strategic plan.<sup>56</sup> The National HIV and AIDS Strategic Plan 2007/2011, which was launched in 2007, identifies domestic violence as one of the factors fuelling HIV and AIDS in Lesotho and commits the state to addressing it in collaboration with partners through implementing the Behaviour Change Strategy. The country also developed a National Action Plan on Gender-based Violence in 2007, set up a One Stop Centre to support survivors of abuse as anticipated by the Maputo Protocol and established a dedicated Unit for Children (Child and Gender Protection Unit (CGPU)), recognising that children, although by extension are provided for under women's rights issues have specific needs that need special attention.

The Lesotho Law Reform Commission (LLRC) is mandated to review laws of Lesotho and consider proposals with a view to ensuring that the laws and proposals are consistent with the protection of fundamental human rights and freedoms specified in Chapter II of the Constitution.

## 5 Court judgments

According to Thabane and Shale,<sup>57</sup> the African Charter and the Maputo Protocol are seldom used in judgments. However it would seem that the Lesotho courts are in fact ready and willing to rely on these international instruments when these are relevant and persuasive in any given circumstances – for example those that deal with issues such as the independence and impartial-

54 Thabane & Shale (n 19 above).

55 Lesotho Report on CEDAW (n 2 above).

56 Thabane & Shale (n 19 above). These are available on the National AIDS Commission website at <http://www.nas.org.ls/documents/default.php> (accessed 12 September 2011).

57 As above.

ity of the courts, free and fair elections, human rights and freedoms.<sup>58</sup>

The courts began, in *Joe Molefi v government of Lesotho*, with a strict approach to dualism where they demanded that ratified international instruments be incorporated into the domestic law before they can regard their provisions enforceable.<sup>59</sup> In *Basotho National Party and Another v government of Lesotho and Others*,<sup>60</sup> the applicants, inter alia, sought an order directing the government of Lesotho to take necessary steps, in accordance with its constitutional processes, to adopt such legislative and other measures necessary to give effect to the rights recognised in international conventions such as the African Charter. The Court explicitly stated that 'these Conventions cannot form part of our law until and unless they are incorporated into municipal law by legislative enactment.' The Court stressed that:

the court cannot usurp the functions assigned the executive and the legislature under the Constitution and it cannot even indirectly require the executive to indirectly introduce a particular legislation or the legislature to pass it or assume itself a supervisory function over the law-making

activities of the executive and the legislature.<sup>61</sup>

However, in interpreting the right to legal representation in *DPP v Sole and another*,<sup>62</sup> the Court made reference to several international human rights instruments including article 7(1) of the African Charter.<sup>63</sup> Later, in the celebrated case of *Molefi Ts'epe v The Independent Electoral Commission and Others*, the highest court in the land confirmed the emerging acceptance and reliance on international human rights instruments by referring to several ratified, but undomesticated instruments including the African Charter, CEDAW, the SADC Declaration on Gender and Equality, and the International Covenant on Civil and Political Rights (ICCPR).<sup>64</sup> The appellant had challenged the constitutionality of a law that reserved one third of local government seats for women. He contended that the law was discriminatory on the basis of sex. Interestingly, he also argued that the international obligations that the respondent sought to bring to the fore were actually in conflict with the domestic laws of Lesotho. The court dismissed his arguments and found that Lesotho was bound by its international obligations. It specifically referred to article 18(4) of the African Charter despite the fact that this Charter is not domesticated. In an unprecedented move, the Court also referred to, but did not apply, the Maputo Protocol, which Lesotho had already

58 SN Peete 'Influential constitutional justice – Its influence of society and on developing a global human rights jurisprudence: A Lesotho perspective' [http://www.venice.coe.int/WCCJ/Papers/LES\\_Justice\\_Peete\\_E.pdf](http://www.venice.coe.int/WCCJ/Papers/LES_Justice_Peete_E.pdf) (accessed 25 August 2015).

59 *Joe Molefi v government of Lesotho* 1967-70 LLR 237. See also K Mohau 'Protection and redress for victims of crime and human rights violations: Adequacy and efficacy of institutions and laws' in Lesotho Justice Sector Conference Report (26-30 July 2004) 96 where the author makes reference to this decision.

60 *Basotho National Party and Another v government of Lesotho and Others* (Constitutional Case No 5/2002) [2003] LSHC 6 (1 January 2003) (unreported) and *Moosa and others v Magistrate - His Worship Mr Ntlhakana and others* [2007] LSHC.

61 The Court quoted Bhagwati J in *State of Haryana v State of Punjab* (1982) LRC 208 (Supreme Court of India).

62 [2001] LSHC 101 (unreported).

63 See also *Judicial Officers Association of Lesotho v The Prime Minister* [2006] LSHC in which the Court referred to arts 7 and 26 of the African Charter and stated that Lesotho is a state party to the African Charter which imposes on it, the duty to guarantee independence of the courts.

64 Lesotho ratified the ICCPR in 1992 and CEDAW in 1995.

ratified at that stage, but which had not yet come into force due to the fact that there were inadequate ratifications.<sup>65</sup>

Regarding the utility of the African Charter and the Maputo Protocol, in an interview with Shale and Habana,<sup>66</sup> four of the 11 Judges of the High Court of Lesotho indicated that minimal use of these instruments is attributed to amongst other things: lack of awareness by the courts as to the existence of the two instruments and whether Lesotho is party thereto; lack of awareness and access to the decisions of the African Commission; failure of legal practitioners to refer to the two instruments and the lack of enabling legislation that domesticates the African Charter and the Maputo Protocol. Pholo in her analysis in 2013<sup>67</sup> went a step further and asserted that the absence of enabling legislation for the domestication of the international human rights instruments is the key reason for their minimal use. It would seem that the courts in Lesotho have not allowed themselves to be proactive enough in their judgments so as to play an advocacy role. In instances where instruments have not been domesticated, the Courts play a major role in enforcing provisions of those instruments through judicial activism. However, it is critical that law practitioners, in their submissions, persuade the bench in that direction as well.

Recently, there has been an attempt for cases to cite the African Charter and

Maputo Protocol. In the case of *Security Lesotho v Moepa*,<sup>68</sup> the court cited international human rights instruments, including article 26 of the African Charter. Also in *Rex v Malefetsane Mohlomi and Others*,<sup>69</sup> the court referred to the African Charter on the Rights and Welfare of the Child. It should be noted however that the list of cases mentioned above is not exhaustive as access to the recent cases by the researcher had limitations.

However, the case of *Senate Masupha v the Kingdom of Lesotho*<sup>70</sup> was found to have gone an extra mile in relying on the two instruments as a basis for their arguments:

On May 16, the Constitutional Court dismissed the gender discrimination case of *Senate Masupha*, who challenged the constitutionality of the Chieftainship Act, which denies women the right to succeed to chieftainship based on the tradition of male primogeniture. Masupha sought to succeed her late father as principal chief of Ha Mamathe in Berea District and to inherit his estate. The court ruled no discrimination had taken place and noted that even if the law discriminated based on gender, such discrimination would be justifiable because the constitution enshrines patriarchal customary law. Masupha appealed the decision; the Court of Appeal in March 2014, also upheld the decision of the subordinate court.

Subsequent to exhausting local remedies, on 9 September 2014, Senate Masupha, the Federation of Women Lawyers (FIDA-Lesotho) and the Southern Africa Litigation Centre (SALC) submitted a complaint to the

65 For a comprehensive discussion of the case, see F Viljoen & M Nsibirwa 'Political participation of women in Lesotho: The case of *Molefi Ts'epe v The Independent Electoral Commission and Others*, Judgment of 30 June 2005' (2006) 39 *Comparative and International Law Journal of Southern Africa* 351.

66 Thabane & Shale (n 19 above)

67 n 2 above.

68 Constitutional Case No 12 of 2014.

69 Review case No 06/2013 CR. NO.10/2013/ Review Order No 1/20.

70 *Senate Gabashane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea District and Others* (2013) LSHC 9 CC; *Senate Gabashane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea District and Others* (2014) LSCA CofA Civ.



African Commission challenging Lesotho's law that provides for male-only succession to chieftainship. The prayer of the complainants was that the African Commission declare (i) section 10 of the Chieftaincy Act 22 of 1968 invalid to the extent that it excludes all first born daughters from succeeding their fathers as chiefs and (ii) the Constitution of Lesotho invalid as far as it permits discrimination in violation of articles 1, 2, 3, 5, 13, 14, 16, 17, and 18(3) of the African Charter; and articles 2, 3, 5, 8(f), 9, 13, 14, 17 and 21(3) of the Maputo Protocol.<sup>71</sup>

## **6 Awareness and use by civil society**

There is a reasonable presence of civil society organisations and NGOs operating at the national level in Lesotho. The work that each organisation is engaged in indicates awareness and a level of incorporation of the two instruments into their everyday work. They include: Women and Law in Southern Africa (WLSA), Federation of Women Lawyers (FIDA), the Lesotho Council of NGOs (LCN), Lesotho Planned Parenthood Association (LPPA), PHELA Health and Development Communications, as well as Gender and the Media in Southern Africa (GEMSA). WLSA runs a free legal advice centre for women, empowerment programmes for women in leadership positions, and awareness campaigns on property and inheritance rights.<sup>72</sup> FIDA trains paralegals in communities across Lesotho to give legal advice and infor-

mation on the use of these instruments before national courts and to encourage lobbying of the government to enact enabling legislation.<sup>73</sup> They also provide legal services for women and occasionally take on pro-bono cases for orphaned children, particularly girls, in cases of property grabbing and dispossession. GEMSA monitors the media for equal and positive representation of women.<sup>74</sup> The Lesotho Christian Council (LCC) educates the community on their rights contained in all international treaties.

The Transformation Resource Centre (TRC) has a human rights unit which in many instances uses the African Charter in its human rights campaigns, in its moot court competitions which it holds for law students and also in lobbying for domestication of the African Charter, so as to give effect to the rights provided therein, including in particular socio-economic rights which are still not justiciable in the country.<sup>75</sup> Civil society in Lesotho plays a major role in raising awareness on human rights issues including through being involved in strategic litigation on pertinent issues. The Federation of Women Lawyers for instance collaborated with the Southern Africa Litigation Centre (SALC) to bring the Chieftaincy case before the African Commission. TRC is the only NGO in Lesotho that has observer status before the African Commission, though it has collaborated with other local NGOs to send human rights cases to the African Commission. However, Lesotho civil society has not submitted any shadow reports to the African Commission on the two instruments under review.

71 Sec 10 of the Chieftaincy Act violates arts 1, 2, 3, 5, 13, 14, 16, 17 and 18 of the African Charter; sec 10 of the Chieftaincy Act violates arts 2, 3, 5, 8, 9, 13, 14, 17 and 21 of the Maputo Protocol.

72 'Women and Law in Southern Africa – Lesotho' <http://www.womenandlaw.org.ls> (accessed 22 June 2014).

73 As above.

74 Lesotho Report on CEDAW (n 3 above).

75 Thabane & Shale (n 19 above).

## 7 Awareness and use by lawyers and judicial officers

In general, there is some level of awareness and recognition of the African Charter and the Maputo Protocol in Lesotho, particularly with government officials and civil society. The two instruments have been used as a basis for development of key national documents like the Poverty Reduction Strategy; cited in judgments of the High Court of Lesotho and also used as a basis for advocacy work by civil society, calling upon government to adhere to its obligations and commitments under the two instruments.

The level of awareness however does not translate to practical usage of either the African Charter or the Maputo Protocol. It is in very few cases that lawyers in Lesotho have resorted to the African Charter in their arguments. Most lawyers are of the opinion that since the African Charter and the Maputo Protocol have not been domesticated into national law, they cannot be used for either interpretation purposes or to persuade the courts.<sup>76</sup>

For those who make reference to regional human rights instruments, resort is made mostly to the European Court of Human Rights' judgments and the Canadian Charter on Human Rights. Exact reasons for this pattern could not be ascertained although one may conclude that the influence may be from some of the Court of Appeal judgments in which cases from the European Court of Human Rights were quoted with approval.<sup>77</sup> There have been a number of trainings organised by the Law Society on human rights law in

general, though without necessarily singling out the Charter and the Maputo Protocol.

## 8 Higher education and academic writing

The Faculty of Law at the National University of Lesotho has included two courses relating to the African Charter and the Maputo Protocol: Human Rights and Humanitarian Law as well as Gender and the Law. Human Rights and Humanitarian Law has been one of the law courses at the university since its inception, and topics relating to the African Charter have been taught as far back as 1981. Developments in terms of resolutions and decisions of the African Commission on communications submitted to it are also included in this course. Specific topics dealing with the provisions of the African Charter and its implementation mechanisms are also part of the course. It also discusses the African Commission and the procedures for bringing communications before it, as well as establishment of the African Court of Justice. In Gender and the Law, which was recently reintroduced and made part of the curriculum within the faculty of law, students are exposed to the rights of women as enunciated in the Maputo Protocol and other instruments.<sup>78</sup>

The African Charter and the Maputo Protocol have been referred to and at times critiqued in various articles in the Lesotho Law Journal which is produced and edited by the Faculty of Law at the National University of Lesotho. These articles focus on a range of issues, from the rights of women in the African

<sup>76</sup> As above.

<sup>77</sup> As above.

<sup>78</sup> As above.

Charter,<sup>79</sup> human rights, democracy and development aid in Africa,<sup>80</sup> the right to legal representation in Africa,<sup>81</sup> independence of the judiciary,<sup>82</sup> the concept of peoples' rights,<sup>83</sup> freedom of

expression under the African Charter,<sup>84</sup> racial discrimination,<sup>85</sup> human rights and democracy in Africa,<sup>86</sup> the content of civil and political rights in the African Charter,<sup>87</sup> and culture and human rights.<sup>88</sup>

It is evident from the foregoing that academics in Lesotho have engaged

- 79 K Acheampong 'The African Charter and equalisation of human rights' (1991) 7 *Lesotho Law Journal* 21; O Tshosa 'Judicial protection of the rights of women under the constitutions of southern African countries with particular reference to non-discrimination' (2008-2009) 18 *Lesotho Law Journal* 99. In this article, the Charter and Protocol are quoted with approval as some of the international human rights instruments that prohibit discrimination on the basis of sex; N Aniekwu 'Customary law impacts on women's rights issues: Reconciling the tensions in Nigeria' (2008-2009) 18 *Lesotho Law Journal* 85 where the Charter and the Protocol are quoted as other sources or legal basis for women's rights in Nigeria. The author notes with concern that although the Charter has become part of Nigerian Law, it has however not been a basis for vindication of women's rights in Nigeria. She makes an example of *Mojekwu v Mojekwu* in which a certain Nigerian custom was declared discriminatory but without reference to the Charter or Protocol as the basis for such a holding.
- 80 K Acheampong 'Human rights, democracy and development aid to Africa' (1992) 8 *Lesotho Law Journal* 17. Here the author while discussing the link between human rights, democracy and developmental aid, refers to art 22(1) of the Charter which imposes upon state parties, the primary duty of facilitating the exercise of the right to development. He argues that though this article, unlike art 1(1) of the UN Declaration on Development does not include the word 'political', and that is no sign that the Charter has revisited the ideological battlefield of the issue of prioritisation of human rights. He bases this assertion on the fact that although the Charter has not in the past, paid particular attention to the right to development, it does make some reference to it in its preamble.
- 81 J Hatchard 'The right to legal representation in Africa: The Zimbabwean experience' (1988) 4 *Lesotho Law Journal* 135.
- 82 PKA Amoah 'Independence of the judiciary in Lesotho: A tribute to Justice Mofokeng' (1987) 3 *Lesotho Law Journal*. In discussing independence of the judiciary in Lesotho, the author comments that although the Charter and other instruments seem to be in agreement that judicial independence is a *sine qua non* for protection of basic human rights, they do not, however, provide comprehensive definition of the concept.
- 83 M Fanana 'The peoples' rights under the African charter on human and peoples' rights' (1997) 10 *Lesotho Law Journal* 37.
- 84 K Acheampong 'Freedom of expression including freedom of the press under the African Charter' (1997) 10 *Lesotho Law Journal* 57. This article determines the extent and the nature of the right to freedom of expression including that of the press under the Charter. It argues that arts 27 and 28 stipulate the parameters within which the right may be interfered with or limited by governments in accordance with the words 'within the law' in art 9. The author, however, notes that such limitations must be reasonably justifiable or necessary in a democratic society in which alone this right and other rights thrive.
- 85 ZS Gondwe 'Prohibition against all forms of racial discrimination: Policy, law and reality' (1996) *Lesotho Law Journal* 13. In discussing international and regional instruments that prohibit discrimination, this article refers to arts 2 and 28 of the Charter. The author criticises these provisions on the ground that the Charter is concerned more with the promotion by way of superimposition of human rights than with the identification and elimination of the root causes of racism.
- 86 K Acheampong 'Africa and the vicissitudes of the human rights principle of the will of the people as the basis of the authority of government' (1998) 11 *Lesotho Law Journal* 87. The author refers to art 13(1) of the Charter and argues that it is a standard upon which all national constitutions should be based and which if adhered to would lead to democracy.
- 87 M Mbondenyi 'Improving the substance and the content of civil and political rights under the African Human Rights System' (2007) 17 *Lesotho Law Journal* 37. This article commends the Charter for having all human rights provided in one instrument without there being generalisation of rights. It also identifies some shortcomings of the Charter that deal with civil and political rights and suggests how such may be improved.
- 88 P Letete 'The notion of culture and equality in international law: Conflict of laws in Lesotho' (1998) 11 *Lesotho Law Journal* 159. The author makes a point that art 18(3) of the Charter protects culture whilst at the same time safeguards the equality of all human beings. The author laments that despite being a party to the Charter, Lesotho has 'ignored' incorporating its provisions in municipal law and thereby making protective principles enunciated in the Charter and the Protocol useless.

with the African Charter in their writing from as early as the 1980s. It is, however, worrying that the lawyers they train do not seem to see the value in using the African Charter and other African instruments when they begin legal practise.<sup>89</sup>

## 9 State reporting and communications

State reporting is the domain of an Inter-sectoral Committee for Human Rights (ICHR) comprised of representatives of different government ministries and civil society. The composition of this body makes it ideal to deliver on state reporting as different government ministries and civil society organisations are represented in it. It has been faced with a huge backlog of overdue reports to different treaty bodies. It admitted to the promotional mission of the African Commission in 2006 that it prioritised reporting to United Nations treaty bodies.<sup>90</sup> It also acknowledged that it has capacity challenges. The government, therefore, ought to ensure that it is resourced and able to deliver on its mandate.<sup>91</sup>

Lesotho submitted an initial report on the African Charter in August 2000 which covered the period from 1991 to 2000. It provided information on legislative, judicial and administrative procedures, actions and interventions intended to give effect to the African Charter. The first part of the report provides general information about the country and its legal and institutional

structure. The second part contains a description of the implementation of the obligations under the Charter, listed article by article. It concludes with a list of the statutes and legal instruments referred to in the report.<sup>92</sup> However, Lesotho has not been able to meet the requirement of submitting periodic reports to the Commission; according to the 2012 Promotion Mission to Lesotho, five reports are now outstanding. Lesotho has similarly not yet submitted any reports on the Maputo Protocol.

There has been a slow increase in the number of communications submitted to the African Commission against Lesotho, following the first communication in 1989. Ironically, this was submitted before Lesotho became a party to the African Charter and as such it was declared inadmissible.<sup>93</sup> It had emerged during the African Commission's promotional mission to Lesotho in 2006 that a prisoner tried to access the African Commission through a letter complaining about torture in Lesotho prisons, but his letter was short of a formal communication.<sup>94</sup>

Recently, three cases have been submitted to the African Commission against Lesotho. The Commission is yet to make its decision on the case of

89 Thabane & Shale (n 19 above).

90 See ACHPR 'Report of the promotional mission to the Kingdom of Lesotho' (2006) paras 129-136 [http://www.achpr.org/files/sessions/40th/mission-reports/promo-lesotho-2006/misrep\\_promo\\_lesotho\\_2006\\_eng.pdf](http://www.achpr.org/files/sessions/40th/mission-reports/promo-lesotho-2006/misrep_promo_lesotho_2006_eng.pdf) (accessed 9 September 2011).

91 Thabane & Shale (n 19 above).

92 Lesotho: 1st Periodic Report 1991-2000, available at <http://www.achpr.org/states/lesotho/reports/1st-1991-2000/> (accessed 10 September 2015).

93 See *Simon B Nkata v Lesotho* 33/89 <http://www1.umn.edu/humanrts/africa/comcases/33-89.html> (accessed 9 September 2011). Lesotho became a party to the African Charter on 10 February 1992 and this matter was declared inadmissible at the Commission's 4th Ordinary Session held from 17-26 October 1988. A prisoner also tried to access the commission recently through a letter complaining about torture in prisons but this was short of a formal communication.

94 See Report of the promotional mission to the Kingdom of Lesotho (n 90 above) para 166.

Senate Masupha Chieftaincy. The Commission declared *Asemie v Lesotho*<sup>95</sup> inadmissible. And lastly, in *Munyandu and Freeth v Angola and Others*,<sup>96</sup> a case dealing with the suspension of the SADC Tribunal submitted against all SADC member states, the Commission found that there was no violation of the Charter.

## 10 Special mechanisms and promotional visits of the African Commission

The African Commission undertook a promotional mission to Lesotho from 3-7 April 2006.<sup>97</sup> The mission was led by Commissioner Mmasenono Mogaeng and her terms of reference were, inter alia, to raise awareness and visibility of the African Commission; to encourage Lesotho to establish a national human rights institution; and to submit its first periodic report in accordance with article 62 of the African Charter.<sup>98</sup> After consultations with various stakeholders, the mission made two important observations, namely that civil society was weak and law reform was very slow.<sup>99</sup> It also made recommendations ranging from the speedy establishment of a national human rights institution; abolition of the death penalty; and measures to ensure the integrity and preservation of judicial independence.<sup>100</sup>

Commissioner Mumba Malila addressed a symposium on strengthening the independence of the judiciary in 2010.<sup>101</sup> This engagement with the country's judiciary was a step in the right direction, given the 2006 recommendations made by the African Commission's promotional mandate on issues of judicial independence in the country.

A second promotion mission was undertaken from 3 to 7 September 2012. The mission was premised on the general situation in Lesotho, thematic issues related to freedom of expression and access to information, as well as prisons and conditions of detentions.<sup>102</sup>

The terms of reference for the mission included amongst other objectives; to promote the Charter, and deliberate on how to improve the enjoyment of human rights in the country; to raise awareness on the importance of the right to freedom of expression and access to information; hold discussions with prison administrative officials and other stakeholders on detention issues, assess conditions of prisons, follow up on recommendations arising from the concluding observations adopted by the Commission following its examination of Lesotho's initial report in 2000; and to encourage Lesotho to be up to date

95 Communication 435/12 – *Eyob B Asemie v the Kingdom of Lesotho*.

96 Communication 409/12 – *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others*.

97 See Report of the promotional mission to the Kingdom of Lesotho (n 90 above) paras 129-136.

98 As above.

99 As above, paras 184 and 185.

100 See recommendations to various stakeholders from paras 186-217 of the Report (n 90 above).

101 The Commissioner delivered a paper at the symposium on 'Strengthening the independence, impartiality and accountability of the judiciary in the context of Lesotho' organised by the International Commission of Jurists in conjunction with the Judiciary of Lesotho 4-5 March 2010, Maseru, Lesotho titled 'The independence of the judiciary through the eyes of the African Commission on Human and Peoples' Rights' <http://www.icj.org/dwn/database/Malila-SC-JudicialIndependencethroughtheeyesoftheACHPR.pdf> (accessed 12 September 2011).

102 See ACHPR 'Report of the promotional mission to the Kingdom of Lesotho' (2012) paras 7-8 [www.achpr.org/states/lesotho/mis-sions/promo-2012](http://www.achpr.org/states/lesotho/mis-sions/promo-2012) (accessed 13 November 2015).

with its periodic reports in accordance with article 62 of the African Charter.<sup>103</sup> The mission comprised of Commissioner Pansy Tlakula, Commissioner Med SK Kaggwa, and Ms Irene Desiree Mbengue Eleke, Legal Officer at the Secretariat of the Commission, who assisted the Commissioners. The mission met with various stakeholders at the high level in government, civil society organisations and other actors who are involved in the protection and promotion of human rights in Lesotho. The mission also visited the Central Prison of Maseru and the Correctional Centre of Maseru.<sup>104</sup>

Following the visit, the Commissioners made a number of observations including commending peaceful elections, drafting of a media policy, ratification of African human rights instruments on children's rights, women's rights, democracy, elections and governance, and the African Court. It noted with concern, amongst other issues, Lesotho's non-compliance with her reporting obligation under article 62 of the African Charter, and called on the government to submit its reports in the nearest future. The delegation also encouraged the government to involve civil society in the compilation of the periodic reports and thereafter made recommendations.<sup>105</sup> The research was not able to ascertain how far the government has gone in implementing the recommendations made by the mission.

103 As above.

104 As above.

105 As above.

## **11 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission**

Lesotho witnessed its first peaceful transfer of power in June 2012 when Prime Minister Motsoahae Thomas Thabane took office.<sup>106</sup> Domestic and international observers described the election as peaceful, credible and transparent. Also, for the first time, political party leaders signed a declaration accepting election results.<sup>107</sup> However, just when the country was being celebrated for being democratic, 2014 saw the country plunge into political unrest yet again. The current political situation is therefore uncertain and may impede the impact of the African Charter and the Maputo Protocol.

Civil society and the media are major players in exposing human rights violations and holding states and non-state actors accountable. The African Commission's promotional mission of 2006 observed that these two players are very weak in Lesotho. This may therefore explain the limited impact the African Charter has in the country.<sup>108</sup>

Most countries have established dedicated human rights institutions to promote the culture of human rights. Lesotho, despite support from donor agencies, and clear recommendation from the African Commission, has still not established a human rights institution. This vacuum in the promotion of human rights indirectly impedes the

106 Amnesty International 2014 Human Rights Report on Lesotho.

107 US Department Human Rights Report on Lesotho 2013.

108 Thabane & Shale (n 19 above).

impact of human rights instruments in the country.<sup>109</sup>

Although civil society is generally weak, women's rights groups like FIDA and the Lesotho Women and Law in Southern Africa (WILSA) have been vocal on issues of women's rights. They have participated in debates that led to the elaboration of the Maputo Protocol and the SADC Gender Protocol and have used their experiences to shape the agenda of women's rights in the country. They have also been instrumental in the law reform process, thus ensuring that provisions of the African Charter and Maputo Protocol find their way into Lesotho's domestic law. Having led the law reform process, they have also undertaken country-wide campaigns to expose women to the new laws meant to ameliorate their condition.<sup>110</sup>

It is arguable that the famous *Molefi Ts'epe* case paved the way for the direct impact of the African Charter, the Maputo Protocol and other international instruments in Lesotho. It is up to lawyers and judges to embrace it. Commissioner Mumba Malila's engagement with the judiciary and members of the legal profession where he, amongst others, exposed them to extensive jurisprudence of the African Commission on judicial independence and talked about the value of the African Commission's jurisprudence in the municipal jurisdiction is indeed a step in the right direction. It is hoped that the judiciary and the legal profession will tap into the information and knowledge shared by the Commissioner.<sup>111</sup>

109 As above.

110 As above.

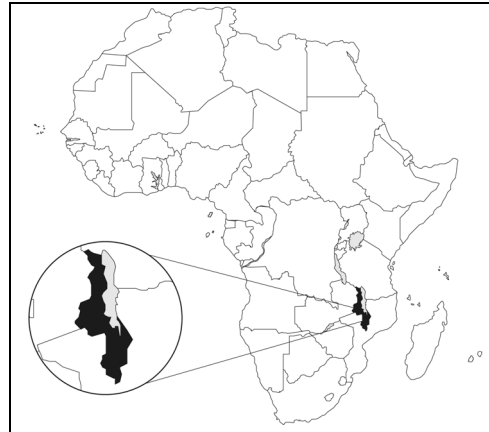
111 As above.





# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN MALAWI

Sarai Chisala-Tempelhoff\*  
Seun Solomon Bakare\*\*



## 1 Introduction

Malawi is a country that is burdened by widespread poverty, food insecurity, corruption, HIV/AIDS and pervasive gender inequality. It is also a country that still bears the traces of its convoluted political history. Malawi attained self-government in 1963 and full independence in 1964 with Dr Hastings Kamuzu Banda (HKB) as its first President. The 1964 Constitution contained a Bill of Rights. However, at the attainment of republican status in 1966, the Bill of Rights was expunged from the Constitution. The 1966 Constitution formally made Malawi a one party state, with the then ruling party, the Malawi Congress Party (MCP), as the sole legally recognisable political party.

HKB manipulated cultural concepts to validate and consolidate his control, often speaking of the 'good village'

where the young listen to the old and the chiefs are obeyed. This of course built up his own unassailability as the paramount chief of chiefs. This control extended to the sphere of morality. HKB wanted to preserve traditional values, attitudes and ways of thought. In his role as the protector of culture, he declared himself the 'Number 1 *Nkhoswe*' of all Malawian women.<sup>1</sup> In this manner, he used the concept of *mbumba* to appropriate culture and create a mass-based political organisation. Matrilineal groups in Malawi use the concept of the *mbumba* and the *nkhoswe* to explain the special guardianship that an older brother or maternal uncle (the *nkhoswe*) has over the women in the family (the *mbumba*). As the Number 1 *Nkhoswe* of Malawian women, HKB expressed his deep concern for ensuring their modesty and moral integrity through legislative measures such as the dress code. Culture was redefined to suit his political ends.<sup>2</sup>

\* LLM HRDA 2005; Senior Legal Researcher and the founder of EmGENDER: the Malawi Gender Justice Network.

\*\* LLM HRDA (Pretoria); Legal Assistant at the African Commission on Human and Peoples' Rights, Banjul, The Gambia; and Visiting Professional at the International Criminal Court (ICC) in The Hague, The Netherlands.

1 P Forster 'Culture, nationalism and the invention of tradition in Malawi' (1994) 32 *The Journal of Modern African studies* 477; J Power *Political culture and nationalism in Malawi: Building kwacha* (2010); L Semu 'Kamuzu's Mbumba: Malawi women's embeddedness to culture in the face of international political pressure and internal legal change' (2002) 49 *Africa Today* 77.

2 Semu (n 1 above).

HKB soon set about regulating personal behaviour and he did so through a comprehensive code of censorship and dress provisions. The proffered rationale for the strict censorship was 'protecting the national culture from pollution by immorality'.<sup>3</sup> Some provisions never came into fruition, such as a Wills and Inheritance Bill, better known as the 'Kamuzu's Mbumba's Protection Bill', that declared illegal certain injustices done to women in matters of inheritance, illegitimate pregnancy, marriage, and divorce.<sup>4</sup>

Others, such as the Decency in Dress Act of 1973 and the Censorship and Control of Entertainments Act of 1968, became a formal part of the legal system. These were laws that were harshly enforced at the time, perhaps no more so than by the citizens themselves. The women of Malawi continuously carve out their freedoms from the enduring rock of patriarchy. The *Mbumba* of the HKB years lives on, and whilst new legislation is largely gender-responsive and follows the international human rights norms, the enduring 'cultural' conceptualisation of Malawian women as the *Mbumba* with the state taking the place of the Number 1 *Nkhoswe* prevails. Malawian women are constantly negotiating their lives at the intersections of poverty, health, [dis]ability, culture, ethnicity, class, race, law and [hidden] sexuality.

Malawi returned to multi-party democracy in 1994. HKB was old, out of touch and unaware of his limited popularity. He succumbed to widespread pressure for change. A referendum to decide upon reintroducing multiparty democracy was held on

14 June 1993. A staggering two-thirds majority voted in favour of introducing a multiparty system of government. Presidential and parliamentary elections were held under a provisional constitution that came into full effect the following year. The transition to democracy was negotiated peacefully; with the introduction of a pluralistic constitution, democratic elections and a change of government in May 1994, the formal process of democratisation was completed.<sup>5</sup>

A provisional constitution, drafted by the Constitutional Subcommittee of the National Consultative Council (NCC) between January and May 1994, was adopted by Parliament on 16 May 1994.<sup>6</sup> This Provisional Constitution provided for a year of operation, pending review by a Constitutional Committee. Thereafter, the revised Constitution was adopted and came into force on 18 May 1995. The Bill of Rights drafted by the NCC has remained largely untouched by subsequent constitutional revision. The rights and freedoms enshrined in the Bill of Rights are *all* fully justiciable, no distinction is made between the different generations of rights in this aspect. Alongside recognising almost all the traditional civil and political rights, it also protects a number of economic, social and cultural rights such as the right to education, cultural and language rights, the right to property, the right to work or to pursue a livelihood, and rights concerning family and marriage. Section 24 protects the rights of women, in a comprehensive set of provisions that touch upon some of the protections under the Maputo Protocol

3 D Jones *Censorship: A world encyclopedia* (2001).

4 Semu (n 1 above) 82.

5 H Meinhardt & N Patel *Malawi's process of democratic transition: An analysis of political developments between 1990 and 2003* (2003).

6 See the Constitution of the Republic of Malawi (1994). See also DM Chirwa *Human Rights under the Malawian Constitution* (2011).

– for example relating to fair disposition of property upon dissolution of marriage and by granting additional protections for gender based discrimination in particular harmful cultural practices.

In 2015, Malawi was lauded for its progressive stance on child marriage when the Marriage Act was passed into law. The Act purports to bring child marriage to an end by setting the minimum age for marriage at 18. However, under section 22 of the 1994 Constitution, girls and boys ages 15 to 18 may be married with parental consent. The Constitution also does not specifically prohibit the marriage of children under 15, but merely directs the government to ‘discourage’ such marriages. The new marriage law also takes a very specific stance on LGBTi relationships by decreeing that marriage is limited to persons of the opposite sex, where sex is further defined as the sex of the person at birth. The Act also retains the status quo in terms of polygamy, with polygamy only being prohibited with respect to civil marriages. The laws criminalise harmful traditional practices – but it is almost impossible to find instances where these laws have been enforced. The laws prohibit harmful gender related practices but women who dare to bare their legs in a mini-skirt still face the wrath of street vendors and risk being stripped and publicly humiliated. There is a strong disparity and definite disconnect between the package of gender justice laws that have been promulgated (particularly in an effort to nationalise instruments such as the African Charter and the Maputo Protocol) and the law as lived by the people of Malawi.

## **2 Ratification of African Charter and the Maputo Protocol**

Malawi ratified the African Charter on 17 November 1989. The 1994 Constitution was the first in the constitutional history of Malawi to include a fully justiciable bill of rights.<sup>7</sup> The 1994 Constitution also paved the way for the ratification and domestication of several international instruments, including the Maputo Protocol which was ratified on 20 May 2005. The Constitution spells out the process of ratification and domestication of international treaties and agreements. It provides that while the President negotiates, signs, enters into and accedes to international agreements, he may delegate such power to ministers, ambassadors and high commissioners.<sup>8</sup> Members of the Cabinet often assist the President in identifying and determining international agreements to be so concluded and ratified, and they hold a further duty to inform the Parliament. Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.<sup>9</sup>

The main government focal points responsible for the implementation of all international agreements, including the African Charter, are: the Office of the President and Cabinet (OPC); the Ministry of Justice and Constitutional Affairs; acting with the support of the Malawi Human Rights Commission and the particular line Ministries work-

7 Chirwa (n 6 above) 6.

8 See generally art 89(f) of the Constitution of the Republic of Malawi, 1994. See also GH Flanz *Constitutions of the countries of the world* (2000) [http://scholar.harvard.edu/files/bsimmons/files/APP\\_3.2\\_Ratification\\_rules.pdf](http://scholar.harvard.edu/files/bsimmons/files/APP_3.2_Ratification_rules.pdf) (accessed 5 September 2015).

9 As above.

ing within that field. In the implementation of the Maputo Protocol, the focal points are: the Ministry of Gender, Children and Social Welfare; the Malawi Human Rights Commission (MHRC) as the enforcement agency of the Gender Equality Act 49 of 2012, and the Malawi Law Commission which is responsible for the review of all gender insensitive laws.<sup>10</sup>

### 3 Domestication

In Malawi, international law is both an indirect and a direct source of law. It is considered an indirect source of law in that it aids the courts in constitutional interpretation. This role is prescribed under various provisions of the Constitution. Accordingly, the guiding principles of interpretation under section 11 require the court to have regard to 'current norms of public international law' where applicable. Section 13(k) calls upon the state to govern in accordance with the law of nations. Section 45 allows derogation from the rights only during a state of emergency, and only so far as such derogation is consistent with Malawi's obligations under international law. Most notably, the Constitution stipulates that no restrictions or limitations may be placed on the exercise of any rights and freedoms other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.

International law is also a direct source of law. The Constitution stipulates that any international agreement ratified by an Act of Parliament forms

part of the law. In addition, binding international agreements entered into before 1994 and customary international law continue to form part of Malawian law unless Parliament specifies otherwise.<sup>11</sup>

In respect to domestication of the African Charter and the Maputo Protocol, the 1994 Constitution gave certain provisions of the Charter constitutional status when it incorporated a justiciable Bill of Rights.<sup>12</sup> Nkhata has explained the current legal position as follows:

All international agreements entered into prior to the Constitution or after the Constitution are binding on Malawi only if they are not in conflict with any domestic legislation. Thus international agreements, irrespective of when Malawi became a party to them, will be binding on Malawi as long as there is no domestic statute providing the contrary. As for customary international law, this is binding on Malawi as long as it does not contradict either the Constitution or any domestic statutes. In applying international law in Malawi, courts will strive to ensure an interpretation that does not contradict the Constitution or any domestic statutes, but where this is not possible, domestic law will always prevail.<sup>13</sup>

Justice Redson Kapindu reiterated this interpretation, stipulating that:

The position in Malawi is that where Malawi is a party to a treaty containing provisions that are relevant to the facts of a case at hand, it is preemptory that if a court is interpreting the Constitution, it must demonstrate that it paid due regard to that treaty. The courts, as an organ of the state, will be bound not to act in a manner that defeats the object and purpose of such a treaty in interpreting the Constitution. In cases where the treaty has been

10 Malawi's initial and combined periodic state report to the African Commission 71 [http://www.achpr.org/files/sessions/56th/state-reports/1-1995-2013/malawi\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/56th/state-reports/1-1995-2013/malawi_state_report_eng.pdf) (accessed 5 September 2015).

11 Sec 211 of the Constitution.

12 Chirwa (n 6 above).

13 MJ Nkhata *Malawi Country Report* [http://www.icla.up.ac.za/images/country\\_reports/malawi\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/malawi_country_report.pdf) (accessed 8 September 2015).

domesticated, it will obviously easily be directly enforceable by the courts as part of domestic law.<sup>14</sup>

There is also the principle of interpretation that obliges courts to interpret laws in such a way as to avoid creating breaches with international law or international agreements.<sup>15</sup> What is clear is that the judiciary must make every effort to take judicial notice of all treaties that are binding on Malawi.

The Constitution further establishes three independent governance institutions to provide oversight functions and ensure domestication of the rights and the state's obligations under the African Charter. These include the Law Commission mandated to conduct law reform which includes systematic review of existing legislation and development of new legislation in accordance with applicable international and regional instruments. The African Charter is one of the instruments that are taken into account in law reform. Where there are inconsistencies between the African Charter and local legislation, it is addressed through a systematic legislative and policy review approach with the aim of gradually eliminating inconsistencies. Courts also provide avenues for domesticating elements of the African Charter. Examples of legislation developed through law reform that have embraced precepts of international legal instruments include the Gender Equality Act 2013 (GEA) and

the 2015 Marriage, Divorce and Family Relations Act.<sup>16</sup>

#### **4 Legislative and policy reform**

The Malawi Law Commission has been engaged in several law reform projects that have a direct impact on gender imbalance in the country. Within the past decade several law reform reports issued by the Commission have been developed into gender justice laws. Such legislation includes the Marriage, Divorce and Family Relations Act (2015), the Gender Equality Act (2013), the Prevention of Domestic Violence Act (2006), the Trafficking in Persons Act (2015), the Deceased Estates (Wills, Inheritance and Protection) Act (2011), the Child Care, Protection and Justice Act (2010), and the Disability Act (2012). The Malawi Law Commission has pointed out that Malawi has an obligation to meet international legal standards in the development of its municipal laws. This was stated in the report on the development of the Marriage, Divorce and Family Relations Act of 2015. The Commission's report specifically cited CEDAW, the Beijing Platform for Action, the SADC Declaration on Gender and Development, and the Maputo Protocol as foundational to the development of the Gender Equality Act (GEA) 2013.<sup>17</sup>

The terms of reference for the development of legislation to prevent and

14 Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Sunbird Nkopola Lodge, Mangochi, Malawi, 6 and 7 March 2014 <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/8.pdf> (accessed 6 December 2015).

15 S Gløppen & FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalisation, vulnerability and the law' (2007) 5 *International Journal of Constitutional Law* 258-259.

16 This information was sourced from Malawi delegation's oral presentation and response to the questions posed by the African Commission in respect of its periodic report at the presentation of its state report during the 56th ordinary session of the African Commission in Banjul, The Gambia.

17 Malawi Law Commission (2006) 'Report of the Law Commission on the review of laws on marriage and divorce' [http://www.law.com.mw/docs/Report\\_on\\_the\\_review\\_of\\_Marriage\\_and\\_Divorce\\_Act.pdf](http://www.law.com.mw/docs/Report_on_the_review_of_Marriage_and_Divorce_Act.pdf) (accessed 5 September 2015).

eliminate trafficking in persons included the Maputo Protocol as one of the international instruments to be consulted.<sup>18</sup> In the development of the GEA, the Maputo Protocol was relied upon as a key international instrument that has had an impact on the government's gender equality policy.<sup>19</sup> Specific sections of the GEA that reflect the protections under the Maputo Protocol include the prohibition of harmful cultural practices and the clearly elucidated sexual and reproductive health rights.<sup>20</sup> The GEA also imposes duties upon health service providers to respect the sexual and reproductive rights of service users without discrimination and to provide family planning services to any person demanding them – regardless of their marital status.<sup>21</sup> Those duties are backed up by penal sanctions – a fine and three-year prison sentence – for any health services officer who contravenes the provisions.<sup>22</sup>

Policies and programmes have been put into place to give effect to Malawi's international and constitutional obligations. Examples include the Malawi Growth and Development Strategy 2006-2011, followed by the Malawi Growth and Development Strategy 2011-2016; the National Gender Policy 2000-2005; and the National Gender

Programme 2004-2009.<sup>23</sup> In 2005, then Chairperson of the Industrial Relations Court, Rachel Zibelu-Banda, made a direct connection between the ratification of the African Charter and the formulation of the National Aids Policy.<sup>24</sup> However, the researchers could not find any evidence to show that government policies specifically reflected the provisions of any general comments of the African Commission concerning women's rights.

## 5 Court judgments

According to Gloppen and Kanyongolo, the Malawian judiciary, which was marginalised during HKB's thirty years of authoritarian rule, thereafter emerged as a surprisingly strong institution in an otherwise weak political system.<sup>25</sup> The two authors noted that the existing jurisprudence bears little trace of the progressive promises contained in the letter of the law,<sup>26</sup> pointing out the following:<sup>27</sup>

As in many African constitutions, a wide range of social rights is recognized in Malawi's Constitution as a series of principles of national policy concerning such issues as gender equality, nutrition, health, environmental rights, education, rights of the disabled, children, the elderly, and the family. The principles are directive in nature and not directly justiciable, but ... [an] activist judiciary could thus give the directive principles significant jurisprudential force.

In his paper on the relevance of international law in judicial decision-making,

18 Malawi Law Commission (2011) 'Law Commission Report No 22: Report of the Law Commission on the Development of Trafficking in Persons Legislation' [http://www.lawcom.mw/docs/Report\\_on\\_the\\_Development\\_of\\_Trafficking\\_in\\_Persons\\_Legislation.pdf](http://www.lawcom.mw/docs/Report_on_the_Development_of_Trafficking_in_Persons_Legislation.pdf) (accessed 6 September 2015).

19 Malawi's initial and combined periodic state report (n 10 above).

20 Sec 19 of the Gender Equality Act of 2013.

21 Sec 20 of the Gender Equality Act of 2013.

22 Sec 20(2) of the Gender Equality Act of 2013.

23 OHCHR 'Committee on Elimination of Discrimination against Women considers report of Malawi' <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9766&LangID=E#sthash.BLRm18ma.dpuf> (accessed 9 September 2015).

24 See *Banda v Lekha* [2005] MWIRC 44.

25 Gloppen & Kanyongolo (n 15 above).

26 Gloppen & Kanyongolo (n 15 above) 259.

27 As above.

Justice Redson Kapindu also points out that:<sup>28</sup>

Socio-economic rights litigation has thus far been generally confined to a narrow range of economic rights, namely, labour rights, the right to work, the right to economic activity and to pursue a livelihood and, to a very limited extent, the right to education. Many other key socio-economic rights, such as access to housing, access to water, access to food, and others, that could conceptually have been litigated almost 20 years after the adoption of the Constitution, have remained judicially unexplored.

While the courts have increasingly used international law for the purposes of interpreting constitutional rights, they have rarely directly used the provisions of international treaties for holding the state responsible.<sup>29</sup> In the earlier case of *R v Chihana*,<sup>30</sup> the Supreme Court referred to the African Charter as being distinguishable from the Universal Declaration of Human Rights (UDHR) per Banda CJ:

Whereas the latter is part of the law of Malawi, the African Charter is not. Malawi may well be a signatory to the Charter and as such is expected to respect the provisions of the Charter but until Malawi takes legislative measures to adopt it, the Charter is not part of the municipal law of Malawi and we doubt whether in the absence of any local statute incorporating its provision the Charter would be enforceable in our Courts.

Post 1994, Justice Banda called upon provisions of the African Charter in deciding the matter of *Chakuamba and Others v Attorney General and Others*,<sup>31</sup> declaring that the African Charter envis-

ages the right to vote as a process where the will of the people is given and a citizen freely participates in the government of his country through elections held by secret voting. In the matter of *Jumbe and Another v Attorney General*,<sup>32</sup> Justice Katsala cited provisions of the African Charter (and other international instruments) that uphold fair trial rights:

Suffice to say that the right to a fair trial and to be presumed innocent is recognized almost in all civilized societies. This is evidenced by its inclusion in major international human rights documents. For example ... The African Charter on Human and Peoples' Rights, adopted on June 27 1981, in Article 7(1)(b) provides: Every individual shall have the right to have his cause heard. This comprises: (b) the right to be presumed innocent until proved guilty by a competent court or tribunal.

The provisions of the African Charter were applied directly in *R v Cheuka & Others*.<sup>33</sup> In that case, Constable Joshua Cheuka and three other police officers were charged with manslaughter for their involvement in the fatal shooting of a lorry driver. The court applied the provisions of the African Charter when determining whether or not the use of force in this particular instance conformed to international human rights standards.

In *Malawi Telecommunications Limited v Makande & Omar*,<sup>34</sup> the Malawi Supreme Court of Appeal ruled that all international treaties required domestication first before they could be relied upon as law in local courts. The court opined that in addition to the provision of the Constitution regarding domestication, one has to consider also the language of the treaty and its provisions

28 RE Kapindu 'Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities' (2013) 1 *African Human Rights Law Journal* 125 128.

29 Chirwa (n 6 above) 30.

30 [1993] MWSC 1.

31 [2000] MWSC 1.

32 [2005] MWHC 15.

33 [2009] MWHC 49.

34 Civil Appeal 2 of 2006 (unreported).

to determine whether it requires domestication before it could be relied upon in a domestic court. It was further observed that in some cases, the provisions of treaties would not require domestication because they are self-executing.

In *Kishindo v Kishindo*,<sup>35</sup> Justice Dunstain Mwaungulu referred to article 4 of the Maputo Protocol when distributing marital property after the dissolution of the marriage. Mwaungulu interpreted the relevant sections of the Constitution in light of the Maputo Protocol and the UDHR.<sup>36</sup>

Local courts have been called upon to protect and promote the rights of women in innumerable other cases. An example is the 2009 matter of *Trustees, Women & Law (Malawi) Research & Education Trust v Attorney General*<sup>37</sup> where the Applicant approached the Constitutional Court on a matter of public interest alleging that the existing property law regime is inconsistent with the rights of equality and women's property rights as enshrined in the Constitution. The case was dismissed for lack of legal standing. Per Justice Anacleto Chipeta:

In the absence of its having suffered a violation of its rights by the Court's use or misuse of the legislation complained against or cried for, and in the absence of a woman who has suffered this type of disadvantage being in the driving seat of the intended public interest litigation, such interest as the Applicant has claimed it has for commencing this matter is all distant and remote. Suing on the basis that the Trust Deed's objectives coincide with women's rights in the Republican Constitution, and on the basis that women (not mentioned and not involved in the

case) have been complaining to the Trust, and on the basis that the Trust's research has led to the conclusion that there is a problem, is not *sufficient interest* in the manner the existing authorities construe that expression under Section 15(2) of the Constitution. We, therefore, find ourselves in agreement with the observation of the Attorney General to the effect that the Applicant's interest in the matter it has raised is hypothetical, moot, or academic, and that it indeed rather seeks the advisory opinion of the Court, than a judicial determination from it on an issue that is truly in dispute. In the circumstances, we have no option but to dismiss the Applicant's Originating Motion herein.

## 6 Awareness and use by civil society

In 2014 and 2015, two civil society organisations, the Centre for Human Rights and Rehabilitation (CHRR) and Centre for the Development of People (CEDEP), submitted shadow reports to the African Commission in response to Malawi's Initial and Combined Periodic Report. It is important to stress that these are two of the civil society organisations from Malawi with observer status before the African Commission. Two external organisations, the Centre for Reproductive Rights and The Advocates for Human Rights also submitted shadow reports to the African Commission in respect of Malawi's State Report. Despite the lack of significant representation amongst those CSOs with observer status, local organisations regularly demonstrate their awareness of and engagement with the African human rights system and these two instruments in particular. An illustration can be found in the 2011 Access to

35 [2014] MWHC 2.

36 As above.

37 [2014] MWHC 1.



Justice Report by Desmond Kaunda;<sup>38</sup> or even the 2012 UNDP supported HIV and AIDS legal environment assessment which outlined the framework of rights and obligations that the African Charter imposes in the context of the legal responses to the HIV/AIDS pandemic in Malawi.<sup>39</sup>

## **7 Awareness and use by lawyers and judges**

The cases outlined in the previous sections demonstrate that there is a significant level of awareness of the African Charter and the Maputo Protocol within the Malawian legal and judicial community. The cases also demonstrate the willingness to use courts to address inequalities between men and women. Whilst Malawian courts may be accused of not always taking full advantage of the African Charter and the Maputo Protocol, nevertheless the two instruments are intricately woven into the tapestry of Malawian jurisprudence. Even if specific provisions are not cited, the rights protected under those provisions are well within the local legal vocabulary. To cite a specific example, human rights trained lawyer, Mandala Mambulasa<sup>40</sup> sought to rely upon the African Charter and other human rights instruments when making a bail application on

behalf of a juvenile offender in the case of *Republic v Mphembedzu*.<sup>41</sup> In response, Justice Chirwa stated as follows:

Since we have the following constitutional provision in place, a provision which clearly requires the State to make adequate provision for its citizens coupled with the provisions of the Prisons Act (Cap 9:02) This Court thus finds Counsel's reference to the provisions from the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples' Rights (the African Charter) or (the Banjul Charter); the United Nations Standard Minimum Rules for the Treatment of Prisoners Principal 22(2) etc, for the purposes of this Application a futile exercise.

Currently, the Malawi Law Society (MLS) is about to embark on a year-long project to raise awareness about human rights and laws especially pertaining to addressing the needs of the most vulnerable groups such as children and women. The activities that members are requested to be involved in include participating in a radio programme to discuss legislation designed to address social justice issues; contributing to a weekly column on the various aspects of law that have impact on social justice; and participating in mobile legal clinics in several districts especially in Zomba, Thyolo, Lilongwe, Mzimba and Blantyre.<sup>42</sup>

38 Working paper by DM Kaunda 'Expanding access to justice for the poor: Malawi's search for solutions – A comparative analysis with other select informal justice systems' Research Partnership Programme, Danish Institute for Human Rights (December 2011) [http://www.humanrights.dk/files/media/bilieder/udgivelses/desmond\\_report\\_ok.pdf](http://www.humanrights.dk/files/media/bilieder/udgivelses/desmond_report_ok.pdf) (accessed 9 September 2015).

39 'UNDP Malawi Annual Report 2012' <http://www.mw.undp.org/content/malawi/en/home/library/annual-reports/undp-malawi-annual-report-2012/> (accessed 3 November 2015).

40 It should also be noted that Mandala Mambulasa also served as the president of the Malawi Law Society.

41 [2011] MWHC 12.

42 Malawi Law Society and Times Group have entered into a partnership to launch a project on human rights awareness and legal literacy. The project will entail popularising laws that impact on social justice issues, especially those that affect the vulnerable groups such as children, women and disabled persons. The project is being funded by the Open Society Initiative of Southern Africa (OSISA) and will be carried out by way of newspaper articles, radio programmes and mobile legal clinics. Tichezeza Malamulo Radio Program started on Wednesday 23 September 2015 on Matindi Radio

Participants will focus on the Constitution and various pieces of social justice legislation including the Gender Equality Act, the Prevention of Domestic Violence Act, the Marriage Act, the Deceased Estates Act and the Trafficking Act. The MLS is currently recruiting and training its members for this purpose.

## 8 Higher education and academic writing

There is only one certified law school in Malawi – the University of Malawi’s Faculty of Law. The faculty covers the African Charter and the Maputo Protocol in great detail in a number of courses that are offered. The Law of Human Rights was taught as a full and separate course for the first time during the first semester of the 2001-2002 academic year. Prior to this, human rights law was taught as an integral part of Public International Law. However, the Faculty adapted the subject into a separate (and compulsory) course: ‘[D]ue to the rising awareness of human rights in Malawi and elsewhere and the potential contribution of human rights law to development, peace, justice and the quality of life.’<sup>43</sup> The implementation of human rights under the African Union system is tackled as a core aspect of the course, and the course materials include both the African Charter and the Maputo Protocol.

Civic education about the protections under the African Charter and the

Maputo Protocol is also carried out by other state and non-state institutions such as the MHRC; the Malawi Law Commission; the National AIDS Commission; the Malawi Law Society; Women and Law (WLSA) Malawi; the Women Lawyers Association; the Malawi Human Rights Resource Centre (MHRRC); the Council of Non-Governmental Organisations in Malawi (CONGOMA); the Malawi Economic Justice Network (MEJN); the Civil Liberties Committee; the Center for the Development of People (CEDEP); the NGO Gender Coordination Network; the Center for Human Rights and Rehabilitation (CHRR); and the media to mention just a few.

Malawian academics regularly engage with the African human rights framework in their writing and teaching. One of the more significant works to emerge recently is Danwood Chirwa’s book *Human rights under the Malawian Constitution*, which takes stock of the human rights jurisprudence generated by the new Constitution and the new judiciary in Malawi.<sup>44</sup> In her paper on marriage and customary law, Lea Mwambene also grappled with the role that African human rights instruments play in the local legal framework.<sup>45</sup> Other authors and academics have published on specific aspects of the African human rights system – such as Thoko Kaime’s work which focuses on the socio-legal aspects of the African Charter on the Rights and Welfare of the Child. Other writings include books and papers by constitutional lawyer and lecturer Fidelis Edge Kanyongolo and the works of legal experts such as Msai-

Station from 19:00-19:30; Malawi News – Malawi Law Society News Column: ‘Legal literacy corner’ – English Column started on 3 October 2015; Chichewa Column also started on the same day ‘Dziwaniza Malamulo’. See [www.malawilawsociety.net](http://www.malawilawsociety.net) (accessed 4 October 2015).

43 From the 2015 Syllabus: Law 340 – The Law of Human Rights.

44 Chirwa (n 6 above).

45 L Mwambene ‘Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi’ (2010) 1 *African Human Rights Law Journal* 78.

wale Chigawa, Matembo Nzunda, Garton Kamchedzera, Ngeyi Kanyongolo, and so many others. Their publications are relied upon to conduct training in the Faculty of Law. Beyond academic writing, these and other legal experts are regularly invited to provide their expertise in development projects across the country; and, to provide commentary on constitutional affairs in the media. In this way, our key thinkers are participating in educating not just our legal students, but the broader public, on the relevance and content of Malawi's international obligations.

## **9 National human rights institutions**

The Malawi Human Rights Commission plays a key role in monitoring the implementation of Malawi's obligations under the African Charter and other human rights instruments. The Constitutional responsibilities of the MHRC include the following:

To promote the harmonization of national legislation and practices with international human rights instruments to which Malawi is a party and to promote and monitor their effective implementation; to contribute to the reports which Malawi is required to submit pursuant to treaty obligations and where necessary, express its opinions on the subject matter but always with due regard to its status as an independent national institution; to cooperate with agencies of the United Nations, the Organization of African Unity, the Commonwealth and other multilateral or regional institutions and national institutions of other countries which are competent in area of protection and promotion of human rights.<sup>46</sup>

<sup>46</sup> See secs 129 to 131 of the Malawi 1994 Constitution. See also Malawi Human Rights Commission 'About Us' <http://www.hrcmalawi.org/about.html> (accessed 3 November 2015).

The MHRC was influential in the preparation of the state reports on the ICCPR and the African Charter: participating in the two report compilation task forces that were set up by the Ministry of Justice and Constitutional Affairs; as well as contributing the background research for the reports; and sending representatives as part of the team that presented the report to the African Commission.<sup>47</sup> Malawi reported to the African Commission that officials from its National Human Rights Institutions were some of the members of the National Task Force which prepared its Periodic State Report. As at the time of this research though, the African Commission has not issued concluding observations on Malawi's state report, hence our inability to assess whether these institutions will follow up on the implementation of such concluding observations.

## **10 State reporting**

At the 56th ordinary session of the African Commission held in April and May 2015, Malawi presented its initial and periodic state report, in accordance with its obligation under article 62 of the African Charter. In submitting a separate Part B report specific to the Maputo Protocol, Malawi became the first and, to date, the only country to report separately, as required by article 26 of the Maputo Protocol, on progress towards meeting the obligations in the Maputo Protocol. The report covers the period from 1992 to 2013. The report did not state any reason for the delay in submitting a periodic report before 2013. Malawi's Minister of Justice and a host of

<sup>47</sup> Malawi Human Rights Commission '14th Annual Report of the Malawi Human Rights Commission' (2013) <http://www.hrcmalawi.org/2013ar.pdf> (accessed 5 September 2015).

other officials including women led the delegation that presented the report.

Part A of the report, which is on compliance with the African Charter, 'was prepared by a National Task Force chaired by the Ministry of Justice and Constitutional Affairs'.<sup>48</sup> Part B that reports on compliance with the Maputo Protocol was prepared while 'Malawi prepared her report under the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)'.<sup>49</sup> The composition of the National Task Force, which prepared the report, includes members from several government ministries and parastatals as well as representatives of civil society. The report states as follows:

The Report was prepared by a National Task Force chaired by the Ministry of Justice and Constitutional Affairs. Members of the Task Force included, Ministry of Foreign Affairs, Office of the President and Cabinet, Ministry of Finance, Ministry of Information, Ministry of Education, Ministry of Lands, Ministry of Internal Security, the National Assembly, the Judiciary, the Law Commission, the Human Rights Commission, the Ombudsman, Malawi Police Service, Malawi Prison Service, the Anti-Corruption Bureau and National Statistics Office. Civil Society organizations were also represented on the Task Force by the Human Rights Consultative Committee, and the Public Affairs Committee.<sup>50</sup>

## 11 Communications

Malawi is one of the state parties to the African Charter that has not had many complaints submitted against it by individuals and NGOs. This reflects the generally low level of awareness about the communication procedure of the

African Commission in Malawi. Malawians also face significant barriers in accessing justice – even locally. This could also account for the low level of engagement with the communication procedure of the African Commission.

However, in Communication 64/92-68/92-78/92\_8AR *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, the African Commission reached a decision on the merits and declared the State of Malawi in violation of articles 4, 5, 6 and 7 of the African Charter.<sup>51</sup> Vera Chirwa received compensation from the government. The government also amended its legislation to outlaw Traditional Courts such as the Southern Region Traditional Court that tried Vera and Orton Chirwa.<sup>52</sup> In Communication 64/92-68/92-78/92\_7AR *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, the African Commission not only found that there were violations of the provisions of the African Charter, it further referred the matter to the Assembly of Heads of states and governments, in line with its power under article 58 of the African Charter.<sup>53</sup>

48 Malawi's initial and combined periodic state report (n 10 above).

49 As above.

50 Malawi's initial and combined periodic state report (n 10 above) 2.

51 See generally 'Merits' [http://case.law.ihrda.org/doc/64.92-68.92-78.92\\_8ar/view/en/#merits](http://case.law.ihrda.org/doc/64.92-68.92-78.92_8ar/view/en/#merits) (accessed 7 September 2015).

52 L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LL.D thesis, University of Pretoria, 2009 26.

53 See generally 'Final decision' [http://case.law.ihrda.org/doc/64.92-68.92-78.92\\_7ar/view/en/#holding](http://case.law.ihrda.org/doc/64.92-68.92-78.92_7ar/view/en/#holding) (accessed 6 December 2015); [http://caselaw.ihrda.org/doc/64.92-68.92-78.92\\_7ar/](http://caselaw.ihrda.org/doc/64.92-68.92-78.92_7ar/) (accessed 7 September 2015).

Available records further show that a few other communications against Malawi were declared inadmissible.<sup>54</sup> These include Communication 42/90 *International PEN v Malawi* and Communication 19/88 *International PEN v Malawi and three Others*.<sup>55</sup>

## 12 Promotional visits

Dr Vera Mlangazuwa Chirwa, then the African Commission's Special Rapporteur on Prisons and Conditions of Detention in Africa, carried out a Mission on Prisons and Conditions of Detention in Malawi in 2001. Dr Chirwa and her team visited places of detention in Malawi from 17 to 28 June 2001.<sup>56</sup> The objective of the visit was to assess and document the conditions of detention in Malawi. This visit is a particularly poetic one since Dr Chirwa spent 12 years as a political prisoner under HKB. On Christmas Eve 1981, she and her husband were arrested and charged with attempting to overthrow the government. The Chirwas were sentenced to death in 1984 and she remained in prison until 24 January 1993 when the country was caught up in the political transition to multiparty democracy and HKB ordered her release on humanitarian grounds.

A promotional visit of the African Commission to Malawi was conducted on 7 April 2008. The purpose of the Mission was to

[P]romote the African Charter and to exchange views and information on the implementation of the African Charter by the Republic of Malawi. Furthermore, the Mission was intended to raise awareness and visibility of the African Commission and its functions among the relevant government departments and institutions and in the civil society, and generally to encourage a closer relationship between the African Commission and the government and between the African Commission and civil society in Malawi.<sup>57</sup>

The delegation met with members of key democratic institutions across the country including the dean of the only accredited law school at the University of Malawi in Zomba. The delegation noted that:

The efforts that Malawi is making in fighting corruption and all the steps in the direction of realising for its people, the rights enshrined in the African Charter on Human and Peoples' Rights. The democratic space created by the introduction of multiparty politics, the creation of institutions of good governance such as the Malawi Human Rights Commission, the Anti-Corruption Bureau, the Malawi Electoral Commission and a free and vibrant press are all pointers in the right direction and the government should be encouraged to strengthen these institutions.<sup>58</sup>

## 13 Factors that may impede or enhance the impact of the African Charter, Maputo Protocol and African Commission

As noted above, Dr Vera Chirwa was a member of the African Commission (November 1999-November 2005) and formerly Special Rapporteur on Prisons

54 See 'Malawi' <http://caselaw.ihlda.org/country/malawi/> (accessed on 7 September 2015).

55 As above.

56 African Commission on Human and Peoples' Rights 'Malawi: Missions on Prisons and Conditions of Detention, 2001: Prisons in Malawi' [http://www.achpr.org/files/sessions/30th/mission-reports/Malawi/achpr30\\_misrep\\_specmec\\_priso\\_malawi\\_2001\\_eng.pdf](http://www.achpr.org/files/sessions/30th/mission-reports/Malawi/achpr30_misrep_specmec_priso_malawi_2001_eng.pdf) (accessed 9 September 2015).

57 African Commission on Human and Peoples' Rights 'Press Release on the Promotional Mission to Malawi' <http://www.achpr.org/press/2008/04/d59/> (accessed 3 November 2015).

58 As above.

and Conditions of Detention in Africa. She occupies a powerful space in Malawi's history, particularly as a woman – she is the first female lawyer in Malawi. She was instrumental in Malawi's independence story; and she was imprisoned for fighting for democracy. She established one of the oldest gender justice organisations in the country – Malawi Centre for Advice, Research and Education on Rights (Malawi CARER) and she wrote a book about her incredible life. Dr Chirwa continues to be celebrated as a freedom fighter and an ardent advocate of gender equality. It is almost impossible to quantify the role that Dr Chirwa's presence on the African Commission has played on the impact of the African Charter in Malawi. That being said, she is very present in the memory and imagination of the country. She fought the tyrannies of colonialism and dictatorship – political systems that tread upon the freedoms embodied in the African Charter and the Maputo Protocol.

The authors conducted an anonymous self-administered survey with a cross-section of Malawians to gauge their awareness and impressions of the African Charter and the Maputo Protocol. The electronic survey was widely disseminated online through a web link posted on social media and targeted individual emails sent to networks. The Facebook metrics show that the survey reached 19 231 people in Malawi and that 128 people followed the link.<sup>59</sup> After three weeks, only 15 people completed the survey. Personal communications from people who were inter-

ested and wanted to help was that whilst they were aware of both instruments, they simply did not know enough about the African Charter or the Maputo Protocol to feel comfortable about answering the questions.<sup>60</sup>

All but one of the respondents was college educated; 11 identified as female, and four as male. Four of the respondents had never seen any information about either the African Charter or the Maputo Protocol. Most notably, the majority of the respondents felt that the African Charter and the Maputo Protocol have had little to no impact in Malawi. Several respondents cited the prevailing context of gender inequalities as an obstacle to the implementation of both the African Charter and the Maputo Protocol. Respondents also pointed out that there was a general and widespread lack of awareness amongst Malawians:

[T]he conventions are impeded by a lack of publicity and general public awareness. More awareness would enable people to know their rights and demand them. The impact of the conventions are enhanced by a willingness on the part of judges and law makers to accept and apply the provisions of the charter. It is also enhanced by the emergence of prominent women in organizations such as the AU, whose presence generally bring issues of equality to the fore of conversations on rights.<sup>61</sup>

The results of the survey, even the general unwillingness of people to engage with the questions, lend support to a position that the authors hold: that the existence and impact of these instruments is predominantly evident to those who work on social justice issues. Whilst most provisions have been given legal effect through the Constitution, legislation and policies, their effect on

59 The surveymonkey.com link was publicised through targeted Facebook advertising. The parameters were that the audience may: be of any sex; be in Malawi; be aged over 18; and that they are interested in the African Union, human rights and a long list of directly related topics.

60 The survey had ten questions.

61 Respondent #10 (2 September 2015).

people's lived realities is still mythical. The barriers and challenges that the majority of Malawians face in accessing justice keep the promises of the African Charter and the Maputo Protocol beyond reach.

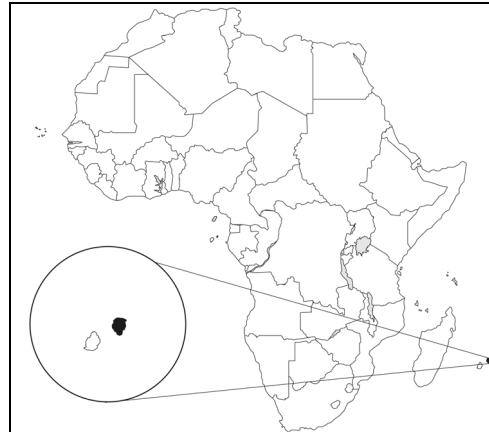
The authors believe that there is hope though. The enduring human rights challenges across Malawi exist within a very particular context: a country that is generally free and a populace that jealously guards its political freedom; the shifting demographics of Malawi; the borderless 'digiverse' where information that matters must be 140 characters or less; and the widespread connectivity of all Malawians – rural and urban – via mobile phones and particularly social media applications such as Facebook, WhatsApp and Twitter. The authors suggest that the coincidence of these social realities can radically shift the way that the region is connected and regional agreements like the African Charter and the Maputo Protocol are consumed. Perhaps one day soon the #AfricanCharter and #MaputoProtocol will be trending.





# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN MAURITIUS

*Meskerem Geset Techane\**  
*Roopanand Mahadew\*\**



## 1 Introduction

After a long period of French and British colonial rule respectively, Mauritius attained its independence in 1968 while the British Monarchical regime under the Queen of England was maintained. A Republic was established in 1992. The Republic of Mauritius is a parliamentary multi-party democracy with the President as the head of the state and the Prime Minister as the Head of Government.<sup>1</sup> The National Assembly is a unicameral legislative body encompassing members democratically elected every five years.<sup>2</sup>

The supreme law of the land,<sup>3</sup> the first written and comprehensive Constitution based on the Westminster

model,<sup>4</sup> was adopted upon independence. Despite a number of amendments, the 1968 Constitution has subsisted over the years and the fundamentals have remained unchanged since independence, with the exception of a 1992 major amendment establishing the Republic, which revoked the British monarchical regime. Having evolved under both colonial systems, the legal system of Mauritius manifests a cross-breed of laws with French and British origin.<sup>5</sup> Substantial laws concerning society were of French inspiration while the procedure and court systems that applied those laws are based on the English legal system, thus illuminating the hybrid nature of Mauritian law.<sup>6</sup>

Mauritius has entrenched a justiciable Bill of Rights under Chapter II of the Constitution in terms of which all the fundamental rights and freedoms of individuals, which derive substantial inspiration from the European Convention of Human Rights (ECHR), have

\* LLM HRDA (Pretoria); doctoral candidate, Human Rights Center, University of Padova; and formerly Deputy Executive Director of the Institute for Human Rights and Development in Africa (IHRDA).

\*\* LLM HRDA (Pretoria); doctoral candidate, Faculty of Law, University of Western Cape; full time academic at the Department of Law, University of Mauritius; and former legal researcher with the African Committee of Experts on the Rights and Welfare of the Child.

1 See secs 28, 59 & 61 of the Constitution of the Republic of Mauritius (the Constitution).

2 Sec 31 of the Constitution.

3 Sec 2 of the Constitution.

4 PR Domingue 'Legal method and Mauritian legal systems' unpublished paper, University of Mauritius, 2011 34.

5 Domingue (n 4 above).

6 V Glover 'Legislative drafting in Mauritius: A developing discipline' (2011) 21 [http://www.opc.gov.au/calc/docs/Loophole\\_papers/Glover\\_Aug2011.pdf](http://www.opc.gov.au/calc/docs/Loophole_papers/Glover_Aug2011.pdf) (accessed 8 August 2015).

been inscribed.<sup>7</sup> Courts are bestowed with the mandate to interpret and enforce provisions of the Constitution and constitutional questions of a substantial nature are to be settled by the Supreme Court, the highest judicial authority in the country,<sup>8</sup> save for the constitutional right of appeal to the Privy Council of the United Kingdom.<sup>9</sup> The broader legal system in Mauritius also embodies an array of other laws for the protection and enforcement of fundamental rights and freedoms. Mauritius is a party to notable international human rights instruments and reports to and cooperates with treaty bodies.<sup>10</sup> Encompassing other reporting obligations under international treaties, Mauritius has successfully fulfilled its submission for both the African Peer Review Mechanism (APRM) and the Universal Periodic Review (UPR).<sup>11</sup> It was highlighted by the APRM Panel that Mauritius has made laudable efforts in the areas of health, education, corporate and social governance.<sup>12</sup> Mauritius

is also acclaimed for its democratic institutions and independent judiciary.<sup>13</sup> Elections are generally free and fair,<sup>14</sup> and security forces are under the command of the authority rendering the country politically stable and peaceful.<sup>15</sup>

Nevertheless, such a noteworthy record is not without flaws. Arbitrary arrests and detention, abuse of suspects and detainees by the police force and breach of fair trial safeguards are amongst prevalent cases in Mauritius. It is reported that police have been detaining people on mere suspicion and that many high profile cases have been submitted for prosecution based on erratic confessions.<sup>16</sup> Those confessions have, in some cases, been attained by way of violence and duress resulting, for instance, in the unfortunate deaths of some detainees.<sup>17</sup> Despite relatively improved conditions of detention, the problem of drug abuse in Mauritius' prisons still loiters as a crucial cause for concern. Recent visits by local stakeholders such as the press, the Mauritian National Human Rights Commission (NHRC) as well as the United Nations Office of Drugs and Crime have generally ruled out prison conditions as being

7 Sec 17 of the Constitution provides remedy by the Supreme Court where any individual alleges infringement of her/his rights enshrined in the Bill of Rights.

8 Sec 84 of the Constitution.

9 Sec 81 of the Constitution.

10 Mauritius ratified the ICCPR, ICESCR, CERD, CEDAW, CAT, CRC, ACRWC (1992), ACHPR (1998) and the African Court's Protocol (2003). See Ministry of Foreign Affairs 'List of treaties and conventions' <http://foreign.govmu.org/English/conventions/Pages/List-of-Conventions-and-Treaties.aspx> (accessed 3 September 2015).

11 See African Peer Review Mechanism *Country Review Report No 13* (2010) [http://www.aprm-au.org/admin/pdfFiles/CRR\\_No13-Mauritius\\_EN.pdf](http://www.aprm-au.org/admin/pdfFiles/CRR_No13-Mauritius_EN.pdf) (accessed 23 August 2015); see UPR Info <http://www.upr-info.org> (accessed 20 September 2011).

12 See 'African Union Peer Review Report lauds Mauritius for best practices' *Africa Money* <http://africamoney.info/african-union-peer-review-report-lauds-mauritius-for-best-practices/> (accessed 18 August 2015).

13 See R Kasenally 'Chapter 8: Mauritius' in D Kadima & S Booysen (eds) *Compendium of Elections in Southern Africa 1989-2009* (2009).

14 M Singh 'Election and democracy: Lessons to be learnt from Mauritius' (2012) 1 [https://www.academia.edu/7792959/Election\\_and\\_Democracy\\_Lessons\\_to\\_be\\_learnt\\_from\\_Mauritius\\_A\\_report\\_on\\_the\\_backdrop\\_of\\_vexatious\\_election\\_of\\_Manipur\\_India\\_](https://www.academia.edu/7792959/Election_and_Democracy_Lessons_to_be_learnt_from_Mauritius_A_report_on_the_backdrop_of_vexatious_election_of_Manipur_India_) (accessed 8 August 2015).

15 As above.

16 US Department of State 'Country report on human practices for 2014' (2014) 6 [http://photos.state.gov/libraries/mauritius/882940/hrr\\_2015/mauritius\\_2014\\_human\\_rights\\_report.pdf](http://photos.state.gov/libraries/mauritius/882940/hrr_2015/mauritius_2014_human_rights_report.pdf) (accessed 8 August 2015).

17 'The very controversial Mr Raddhooa' *lexpress* 24 January 2006 8.

decent.<sup>18</sup> Freedom of the press is also not fully implemented or respected, especially by political leaders.<sup>19</sup> The country has also recently been struck by some corruption cases, such as the British American Insurance Scandal and the corruption cases involving the former Prime Minister.<sup>20</sup> There are rampant cases of violence and discrimination against women, sexual abuse of children and discrimination against people living with HIV/AIDS.<sup>21</sup> The Ministry of Gender, Child Development and Family Planning (Ministry of Gender) in Mauritius reported that women and children in the country continue to be vulnerable to violations and underlined, in particular, that the frequency of domestic violence is disquieting.<sup>22</sup> The African Commission has also echoed concern over the pervasiveness of violence against, and discrimination of,

children.<sup>23</sup> The issue of rape has become another subject of serious concern. Despite criminal laws which criminalise rape with stiff sentences,<sup>24</sup> it is contended that rape is rampant but not always reported to the police for fear of social stigmatisation.<sup>25</sup> It must be noted however that spousal rape is yet to be criminalised. The Protection from Domestic Violence Act of 1997 provides for various protective measures, despite alleged ineffective implementation of them.<sup>26</sup> On the progressive side, Mauritius has recently legalised abortion in specific circumstances (such as rape, incest, and danger to the life of the baby or the mother).<sup>27</sup>

There is no defined structure or government institution or office responsible for coordinating Mauritius' responses and reporting obligations to international human rights bodies. The Attorney General's office, the National Human Rights Commission (NHRC) and relevant ministries will normally contribute. For instance, the Attorney General's office has a division called International Affairs and Mutual Legal Assistance Division which provides legal advice to the government and its agencies on all aspects relating to international law. There is also the Multilat-

18 United Nations Office of Drugs and Crimes 'Counter piracy programme: Support to the trial and related treatment of piracy suspects' (2013) 6 [https://www.unodc.org/documents/easternafrika/piracy/UNODC\\_Brochure\\_Issue\\_11\\_wv.pdf](https://www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_Issue_11_wv.pdf) (accessed 8 August 2015).

19 For example, the popular case of Nitin Chinien, a journalist from the Mauritius Broadcasting Corporation was arrested and accused of violating the Information and Technologies Authority Act and threatening the former Prime Minister Navin Ramgoolam until the Director of Public Prosecutions dropped all the charges against him due to a lack of evidence. See 'Nitin Chinien appears in court: His lawyer "not informed"' *Business Mega* (2013) <http://business.mega.mu/2013/11/21/nitin-chinien-appear-court-his-lawyer-not-informed/> (accessed 8 August 2015).

20 'Changing fortunes of Mauritius' ousted leaders' *Aljazeera* 17 March 2015 <http://www.aljazeera.com/indepth/features/2015/03/changing-fortunes-mauritius-ousted-leaders-150309095143234.html> (accessed 8 August 2015).

21 US Department of State (n 16 above) 4.

22 See 'A study of the extent, nature and costs of domestic violence in Mauritian economy' (2010) & 'A situational analysis of women and children in the Republic of Mauritius' (2003) in MG Techane 'Where is the African Charter? Assessing the impact of the African Charter on Human and Peoples' Rights in Mauritius' unpublished LLM dissertation, University of Pretoria, 2011 20.

23 African Commission's Concluding Observations and Recommendations on the 2nd, 3rd, 4th and 5th periodic reports of the Republic of Mauritius (Concluding Observations) (2009), para 43 & 46 <http://www.achpr.org> (assessed 15 August 2011).

24 A term of imprisonment up to 20 years and a fine not exceeding MUR 200,000 (Criminal Code, art 249).

25 K Kinnear *Women in developing countries: A reference handbook* (2011) 210.

26 Such as the Protection Order, the Occupation Order and the Tenancy Order. Section 8 of the Act also provides for a fine which is double upon a second conviction under the Act.

27 RA Mahadew 'Mauritius decriminalizes abortion in certain circumstances - Lessons from the *travaux préparatoires*' (2015) 36 *Statute Law Review* 160.

eral Political Directorate of the Ministry of Foreign Affairs which is responsible for bilateral and multilateral discussions and negotiations with international governmental organisations on a range of issues including human rights. Finally, the Human Rights Unit under the Prime Minister's Office is charged by Cabinet with inter-ministerial monitoring and coordination of human rights related activities, which by default include preparation of periodic reports under international treaties.<sup>28</sup>

## 2 Ratification of the African Charter and the Maputo Protocol

The African Charter was signed by Mauritius on 27 February 1992 and ratified on 19 June 1992. Mauritius signed the Maputo Protocol on 29 January 2005. However, more than ten years after becoming a signatory, Mauritius has still not ratified the Protocol.

Ratification of international instruments in Mauritius is the responsibility of the executive and Parliament. This study found no specific laws or regulations in place that clearly define the roles and responsibilities of these two organs of government in the ratification process. International instruments can only have significance in Mauritius if they are endorsed by Parliament upon the request of relevant ministries.<sup>29</sup> Accordingly, initial considerations are made by the concerned ministry in

consultation with the Attorney General's Office and other stakeholders. The Attorney General's Office then carries out a compatibility review whereby the implications of the specific treaty will be assessed in the light of domestic policies, laws, and Mauritius' international obligations.<sup>30</sup> The Cabinet will thoroughly deliberate upon the request and may pass it to Parliament for approval.<sup>31</sup> Once the request for ratification is endorsed by Parliament, the Ministry of Foreign Affairs will deposit the instrument of ratification with the relevant international body.<sup>32</sup>

A study conducted in 2011 attempted to explore the ratification history of the African Charter but had little success in accessing primary sources.<sup>33</sup> In spite of such impediments, government officials share a firm opinion that ratification of the African Charter was galvanised by the sentiment to reinforce the state's commitment to human rights, bearing in mind that Mauritius already had in place a democratic Constitution that fully recognises several fundamental rights and freedoms.<sup>34</sup>

Reports show that ratification of the Maputo Protocol is underway,<sup>35</sup> though it is difficult to note any tangible progress on ratification over the

28 A Cabinet decision adopted in 2008. See interview with BR Cader, Acting Principal Assistant, Prime Minister's Office, 5 September 2011, cited in Techane (n 22 above) 45.

29 Multilateral Political Directorate of the Ministry of Foreign Affairs [http://foreign.govmu.org/English/AboutUs/foreign/Pages/Multilateral-Political-Directorate-\(Multilateral-Organisations\).aspx](http://foreign.govmu.org/English/AboutUs/foreign/Pages/Multilateral-Political-Directorate-(Multilateral-Organisations).aspx) (accessed 18 August 2015).

30 Interview with G Chitto, Principal State Counsel, Attorney General's Office, 18 August 2015.

31 See interview with Cader (n 28 above).

32 Interviews with NP Ponnisamy, Second Secretary, Ministry of Foreign Affairs, 18 August 2015.

33 MG Techane 'The impact of the African Charter and the Women's Protocol in Mauritius' in *The Impact of the African Charter and the Women's Protocol in selected African states* (2012) 92.

34 Interviews (n 30 & 32 above).

35 See Mauritius Country Report on the AU Solemn Declaration on Gender Equality in Africa, Comment 9: Implementation of the Solemn Declaration on Gender Equality In

years. Notwithstanding assertions from government authorities as to the absence of any obstacles to ratification,<sup>36</sup> the long delay begs critical questions. The African Commission has also highlighted its concern that Mauritius has still not ratified the Maputo Protocol.<sup>37</sup> Yet, the question of ratification has not been tabled before cabinet.

Mauritius could presumably be playing the card of 'compliance without ratification rather than ratification without compliance'.<sup>38</sup> As a state party to CEDAW, Mauritius arguably does provide for a decent and internationally acceptable set of legal rights and protection to women, thus breeding a tendency of reluctance towards ratifying the Maputo Protocol. No doubt, such a stand is against empirical evidence showing that ratification of legal instruments breeds more positive effects on human rights.<sup>39</sup>

### 3 Domestication of the African Charter and the Maputo Protocol

The Constitution is silent on the status of international treaties signed and ratified by the government, except by providing for the supremacy of the Constitution, with the effect that any inconsistent law shall be null and void.<sup>40</sup> It logically follows that the provisions of the African Charter and the Maputo Protocol are applicable only to the extent that they are consistent with the Constitution.<sup>41</sup>

The African Charter has not been incorporated into the domestic laws of Mauritius either by explicit embodiment in the Constitution or by an Act of Parliament. As is the norm in any dualist state,<sup>42</sup> international human rights treaties are not enforceable by national courts in Mauritius unless incorporated into domestic law.<sup>43</sup>

The civil and political rights enshrined in the Constitution to a large extent tally with the African Charter provisions notwithstanding a few omissions or deviations. On the contrary, the particular norms of the Maputo Proto-

Africa: First report by all AU member states for consideration at the January 2007 summit to be held in Addis Ababa, Ethiopia <http://www.africaunion.org/root/au/conferences/past/2006/October/WG/doc.htm> (accessed 4 September 2011). See also NHRC Report (2006) para 189 in Techane (n 33 above) 93.

36 Interviews with senior officials of the Ministry of Gender, in Techane (n 33 above) 93. It was also reported that the Attorney General's Office advised the absence of any impeding legal considerations to ratify the Maputo Protocol (See Mauritius Country Report n 35 above).

37 African Commission's Concluding Observations (n 23 above) para 47.

38 Resonates the position of the United States when it comes to the ratification of the CEDAW; see W Schulz *The future of human rights: The US Policy for a new era* (2008) 109.

39 OHCHR 'International Human Rights Laws' <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 8 August 2015).

40 Sec 2 of the Constitution.

41 M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: An Introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 14.

42 The dualist theory provides that international law and domestic law are separate legal systems; thus, international norms require a process of incorporation to form part of domestic law and have a force of law municipally. See G Gaja 'Dualism - A review' in J Nijman & A Nollkaemper *New perspectives on the divide between national & international law* (2007) 52 cited in Killander (n 41 above) 11; see also F Viljoen *International human rights law in Africa* (2007) 535-536 & J Dugard *International law: A South African perspective* (2005) 61.

43 R Lallah 'The domestic application of international human rights norms' (1988) 2 *Mauritius Law Review* 216.

col are generally absent in the Constitution. Though the relevance of the existing positive ordinary laws cannot be dismissed,<sup>44</sup> Mauritius' commitment under the African Charter to ensure the elimination of all forms of discrimination against women and to confer special protection to women and children is not constitutionally rooted. This may be inconsistent with the African Charter.<sup>45</sup>

Despite the entrenchment of the principles of equality and non-discrimination in sections 3 and 16 of the Constitution, the grounds for discrimination are provided exhaustively and Mauritian courts have also attached strict adherence to these grounds.<sup>46</sup> However, the Equal Opportunities Act (2008) has expanded the grounds of non-discrimination, by adding two new grounds, namely sexual orientation and impairment. Further, section 16 of the Constitution, which deals with the right to non-discrimination, does not cover laws concerning foreigners and personal status which may license personal status laws that discriminate women and children in contradiction to the Maputo Protocol.<sup>47</sup> This limitation to section 16 may also justify the lack of adequate protection for migrant workers as well as the absence of law on granting asylum or refugee status.<sup>48</sup>

While guaranteeing the rights to life and liberty under sections 4 and 5

respectively, the Bill of Rights falls short of expressly recognising the right to integrity and security of the person as an autonomous right. Most critical is that judicially sanctioned punishments for criminal offence constitute justified exceptions to the protection of the right to life.<sup>49</sup> The African Commission recommended amendment of the provisions of the Constitution that license the death penalty;<sup>50</sup> though this recommendation has not been complied with so far. Despite outlawing torture, inhumane and degrading punishment and treatment, the Bill of Rights provides dangerous exceptions in cases of punishment authorised by law, contrary to the absolute protection under the African Charter. Except for the implicit element of dignity in relation to the prohibition of degrading treatment and punishment, the right to dignity is also blatantly absent from the Constitution as a self-standing right.

The right to the recognition of one's legal status, a very important right expressly provided for both in the African Charter and the Maputo Protocol, is not protected under the Constitution of Mauritius.<sup>51</sup> The Bill of Rights also has no provisions conforming with article 13 of the African Charter on the right to participate in government, and the right of equal access to public property and service. It is noted that the sections of the Constitution dealing with the election of members of the National Assembly provide for the rights to be elected and to vote,<sup>52</sup> confining political participation to the National Assembly which is a rather restrictive scope of political participation.

44 For example, the Equal Opportunities Act 42 of 2008.

45 Techane (n 22 above) 20.

46 See for example *Jeekahrajee v Registrar Cooperatives* (1978) MR 215 and *Société United Docks v government of Mauritius* (1976) MR 81.

47 This is contrary to arts 6, 7 and 21 of the Maputo Protocol which provides states' duty to ensure the equality and non-discrimination of women in marriage, separation, divorce and annulment of marriage and inheritance.

48 See Concluding Observations (n 23 above) para 40-41.

49 See sec 4(1) of the Constitution.

50 See Concluding Observations (n 23 above) para 59.

51 See arts 5 and 3 of the African Charter and the Maputo Protocol respectively.

52 See sec 33 and 44 of the Constitution.

The economic, social and cultural rights guaranteed in the African Charter have not been enshrined under the Constitution of Mauritius. A range of fundamental rights, such as the rights to work, health, education, family and culture, amongst others, do not enjoy any constitutional protection. In addition to the exclusion of the rights of women and children, the aged and the disabled are not given special constitutional protection. Such critical omission is attributable to the Bill of Rights' background of direct inspiration by the ECHR which does not have comparable provisions dealing with socio-economic and cultural rights. This fact notwithstanding, ratification of the African Charter should have stimulated constitutional amendments towards incorporation of justiciable socio-economic rights.

It is worth mentioning that there is existing domestic legislation that provides legal protection for socio-economic rights.<sup>53</sup> This legislation, coupled with Mauritius' welfare state system, may simply imply that there is ample protection of socio-economic and cultural rights and in effect, explain the lack of enthusiasm towards entrenching them as constitutional guarantees.<sup>54</sup>

During the examination of periodic reports to the United Nations Committee on Economic, Social and Cultural Rights (CESCR), however, Mauritius was questioned as to when it intends to enshrine socio-economic rights in its Constitution.<sup>55</sup> Irrespective of such a legislative framework, socio-economic rights should be guaranteed as justiciable constitutional rights, rather than legislative prerogatives, as required by the African Charter.

The distinct and intrinsic component of the African Charter, 'peoples' rights',<sup>56</sup> are not recognised in the Mauritian Bill of Rights. Without over-emphasising the significance of the principle of 'equality of all peoples' to the multi-cultural society of Mauritius, the African Charter also emphasises the essentiality of the right to development; the right to economic, social and cultural development and the right to a satisfactory environment, amongst others. These rights are very important to the Mauritian population and should be incorporated into the Constitution.

#### **4 Legislative and policy reforms**

A number of new laws and legal reforms, including several constitutional

53 For example, (a) on the right to work: Employment Rights Act 33 of 2008, the Equal Opportunities Act 42 of 2008, Occupational Health and Safety Act 28 of 2005, Training and Employment of Disabled Persons Act 9 of 1996, National Pensions Act 44 of 1976; (b) on the right to health: Public Health Act Cap 277 of 1925, Public Health Amendment Bill 30 of 2006, the HIV and AIDS Act 31 of 2006; National Council for the Rehabilitation of Disabled Act 37 of 1986; (c) on the right to education: The Education Act (RL2/6031957) & The Education (Amendment) Act 33 of 1977; (d) on social welfare: Social Aid Act 2 of 1983.

54 It should be noted that the Law Reform Commission (LRC) and National Human Rights Commission (NHRC) eventually submitted recommendations for the

incorporation of socio-economic rights in the Bill of Rights; yet to be considered by the government. See Techane (n 33 above) 93.

55 See CESCR 'Examination of the second, third and fourth periodic reports' (2010) 44th Session of the CESCR (7 May 2010) [http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MUS/INT\\_CESCR\\_ST\\_A\\_MUS\\_44\\_11146E.pdf](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MUS/INT_CESCR_ST_A_MUS_44_11146E.pdf) (accessed 23 August 2015).

56 Arts 19-24 cover a range of peoples' rights including the right to development, the right to existence, to self-determination, to freely dispose of their wealth and natural resources, the right to national and international peace and security, and the right to a general satisfactory environment.

amendments,<sup>57</sup> have come into effect in Mauritius since ratification of the African Charter. A few examples include the Protection from Domestic Violence Act (amendments) (2004, 2007, 2011), Equal Opportunities Act (2012), Combating of Trafficking in Persons Act (2009), Revision of the Civil Code (2011), and the Criminal Code Amendment (2012). Notwithstanding that the adoption or revision of these laws derived inspiration from relevant international human rights instruments, none has shown a clear influence of the African Charter or the Maputo Protocol.<sup>58</sup>

Compatibility reviews are commonly conducted by the Attorney General's Office when a new bill is proposed, with the view to verify a bill's conformity with the Constitution, international treaties, domestic laws and Concluding Observations of treaty bodies.<sup>59</sup> The African Charter and the Concluding Observations of the African Commission, amongst others, reportedly constitute imperative considerations in such reviews.

The Law Reform Commission (LRC) is seen to only make use of legal instruments from the United Nations or the European regional system and none from the African system.<sup>60</sup> For example, constitutional amendments seeking to include socio-economic rights in the Bill of Rights proposed by the LRC were not inspired by the African Charter but by international treaties from other

jurisdictions.<sup>61</sup> Similarly, LRC's proposed reforms on criminal law as well as property rights have not integrated relevant provisions of the African Charter or instruments of the African Commission.<sup>62</sup>

Notwithstanding the African Commission's resolution<sup>63</sup> that urges states to take steps for the integration of provisions of the African Charter in their national laws, there is not much deliberate effort shown by Mauritius to accomplish this.

There is hardly any evidence showing that the African Charter and the Maputo Protocol have influenced the formulation or reform of specific policies in Mauritius. The Gender Policy (2008) refers to the Maputo Protocol as one of the guiding principles of the policy framework, though CEDAW is given a position of primacy as the main instrument that inspired the policy.<sup>64</sup> This may be plausible considering the fact that the Maputo Protocol is not yet ratified. The National Human Rights Action Plan (NHRAP 2008) makes no reference to the African Charter or the Maputo Protocol. None of the programmes in the NHRAP, including its recent revision, incorporated specific components for the promotion and implementation of the African Charter

57 For example, secs 5(3), 8,10 & 16 of the Constitution.

58 Techane (n 22 above) 28.

59 Interview with Chitto (n 30 above).

60 LRC of Activity Reports (1997-2011); Issue Papers & Newsletters (2007-2011) reviewed in Techane (n 22 above) 29.

61 The LRC proposal derived major inspiration from the Constitution of South Africa, and the Draft 2006 Constitution of Trinidad and Tobago. See LRC *Issue Paper* (2010)4-5; Techane (n 22 above) 29.

62 See LRC 'Issue Paper – Droit des biens' <http://lrc.govmu.org/English/Documents/Reports%20and%20Papers/34%20reform-codes.pdf> (accessed 3 September 2015).

63 African Commission Resolution on the Integration of the Provisions of the African Charter on Human and Peoples' Rights into National laws (1989).

64 See National Gender Policy Framework (2008). It is noted that the Maputo Protocol is merely listed amongst other several relevant documents.



or the Maputo Protocol. The same can be asserted concerning the National Action Plan to End Gender-Based Violence (2012-2015), that is currently being implemented, and the National Action Plan on Family, that was implemented in 2015, and the National Action Plan to Combat Domestic Violence, as inspired by CEDAW, which also resulted in the creation of the Victim Empowerment and Abuser Rehabilitation Policy.<sup>65</sup>

## 5 Court judgments

International law may enjoy judicial application in domestic courts either by way of direct enforcement or reference as an interpretive guide.<sup>66</sup> The question of direct application will not have much relevance to the dualist legal system of Mauritius.<sup>67</sup> There is no express provision in the Constitution empowering national courts to use international human rights instruments as interpretive guides. Likewise, the Mauritian rule of interpretations does not provide for any canon to use international law as an aid to interpretation of national law.<sup>68</sup> In the absence of any constitutional or legislative imperative, courts are left to their own discretion to apply the African Charter and/or Maputo Protocol as an aid to interpretation.

Previous studies based on a systematic review of judgments delivered after ratification of the African Charter, corroborated with personal statements from judges, counsel as well as court officers<sup>69</sup> suggest that interpretive guidance is taken mainly from French legal doctrines and English case-law. The ECHR and case law of the European Court stands as the most frequently referenced human rights treaty and human rights case law. In the same vein, it is common to come across cases that make similar reference either directly or by reference to the Privy Council's decisions which are also highly influenced by the European Court's jurisprudence.<sup>70</sup> Some decisions have also made reference to the International Covenant on Civil and Political Rights in interpreting constitutional provisions.<sup>71</sup> However, none were found that referred to the African Charter, case law of the African Commission or any instruments from the African human rights system. Resulting from the close relationship between the Constitution and the European Convention, a large body of case-law from the European Court is incorporated into domestic jurisprudence. Thus, judges are simply

65 'Government Programme' (2005-2010) in Techane (n 22 above) 30; See 'Family Welfare and Protection Unit' Ministry of Gender, Child Development and Family Welfare <http://gender.govmu.org/English/Pages/Units/Family-Welfare-and-Protection-Unit.aspx> (accessed 15 August 2015).

66 Viljoen (n 42 above) 540.

67 In the Interlocutory Judgment in *Ex Parte Devendranath Hurnam, a Barrister-at-Law* (2007) SCJ 289, the Supreme Court asserted that unratified and unincorporated treaties are of no direct effect in Mauritian courts. See also Techane (n 22 above) 14.

68 Interpretations and General Clauses Act RL 3/267 of 1982.

69 See Techane (n 22 above) 22 & Techane (n 33 above) 97. The review was done through the use of an interactive online database made available by the Supreme Court of Mauritius. See <http://supremecourt.govmu.org/scourt/home/welcome.do> (accessed 6 December 2015).

70 Few examples include: *Dookhitsu S v The District Magistrate of Pamplémousses* (2011) SCJ 101; *Parayag RK v The Independent Commission against Corruption* (2011) SCJ 309; *Bundhun VP v State* (2010) SCJ 206; *Moodoosoodum v State* (2009) SCJ 413; *Oozeer S.A.S & Others v The State* (2007) SCJ 307; *State v Assame HD & Another* (2001) SCJ 177.

71 For example, *Bajan Mythe State* (2010) SCJ 348; *Devendranath Hurnam, Toolskykamalv HH The District Magistrate of Pamplémousses* (2007) SCJ 289; *Fakeemeeah Mohamed v Commissioner of Police and Others* (2001) SCJ252.

prone to refer to those.<sup>72</sup> By contrast, judges confirm that they have not been using the African Charter or case law of the African Commission in their judgments and equally have not encountered any domestic court decisions or submissions from litigants that refer to the same.<sup>73</sup> This explains the position that the case law of the African Commission is not well known to Mauritian judges. Such a glaring absence of judicial application of the African Charter shows that Mauritian judges fall short of the significant role highlighted by the African Commission towards incorporating the African Charter and the jurisprudence of the African Commission in court decisions.<sup>74</sup>

It may be far-fetched to expect courts to make reference to the Maputo Protocol as an instrument given that it has not been ratified. However, one may stagger at the lack of any reference to the African Charter and the case-law of the African Commission throughout two decades, particularly given the Mauritian judiciary's rich tradition of reference to international and foreign case law and legal instruments. The authors argue that the non-domestication of the African Charter has contributed to its neglect by the judiciary and litigants. This scenario would have been quite different if the African Charter was an integral part of domestic law. Needless to mention, the lack of ratification of the Maputo Protocol precludes any significant judicial attention to it.

72 Interviews with judges cited in Techane (n 22 above) 24 & Techane (n 33 above) 97; Interview with Justice SB Domah 17 August 2015.

73 As above.

74 African Commission Resolution on the Role of Lawyers and Judges in the Integration of the African Charter (1996).

## 6 Awareness and use by civil society

The interaction between civil society in Mauritius and the African Commission does not tally with the regional trend of NGOs' active participation in the work of the African Commission through submission of communications and other promotional activities. This study did not find any NGO in Mauritius which enjoys observer status or meaningfully engages with the African Commission. In addition to the very limited number of NGOs engaged in human rights advocacy in Mauritius, awareness of the African Charter and the Maputo Protocol is very low among civil society.

Despite the human rights advocacy done by the Mauritius branch of Amnesty International, before its closure in 2012, its publications and training and awareness raising materials showed no reference to the African Charter, the Maputo Protocol or any of the documents of the African Commission.<sup>75</sup> Trainings and advocacy activities were highly reliant on the United Nations human rights treaties and former staff have admitted that the African human rights system has not been used properly in the work of the organisation.<sup>76</sup> In fact, it was only in 2011 that Amnesty International's newspaper published an article on the African Charter and that trainings on the African Charter were delivered.<sup>77</sup>

75 See Techane (n 22 above) 36.

76 Interviews with former Amnesty Mauritius staff cited in Techane (n 22 above) 36.

77 See Techane (n 22 above) 36; 'Les instruments Africains des droits de l'homme' *DIME Maurice* 4 October 2011 34. Also, one of the authors, MG Techane, had joined the Amnesty training team and covered training sessions on the African Charter in the training programmes between 12 September-4 October 2011.

## 7 Awareness and use by lawyers

A close study of the practice of both state and private lawyers shows no significant distinction in so far as far as application of the African Charter and the Maputo Protocol is concerned. The African Charter is not particularly popular amongst lawyers in either group and awareness in respect of the Maputo Protocol is almost non-existent.<sup>78</sup> Only a few state lawyers who work on state reporting can allege notable exposure to the African Charter instruments.<sup>79</sup>

The majority of litigation lawyers tend to rely, in addition to the Constitution and other relevant domestic laws, on the ECHR and the case law of the European Court, most likely due to the regard attached to the ECHR as the source of the Bill of Rights.<sup>80</sup> There is also a relatively growing practice of referring to sources from the United Nations human rights system.<sup>81</sup> Nevertheless, Mauritian lawyers confirmed that the practice of citing provisions of the African Charter or case law and other authoritative documents of the African Commission in their submissions is almost non-existent. This can be ascribed to their unfamiliarity with the relevant instruments and jurisprudence.<sup>82</sup>

The Mauritius Bar Association and its members do not stand as human

rights driven groups, and have not been seen visibly engaging in local human rights initiatives.<sup>83</sup> This may also contribute to their invisible role in the African human rights system.

## 8 Higher education and academic writing

The University of Mauritius provides human rights courses as part of the undergraduate law curriculum,<sup>84</sup> which mainly focuses on the Constitution and international human rights instruments. The cursory coverage of the African Charter in the curriculum leaves its occasional inclusion in lectures to the interests of a particular lecturer.<sup>85</sup> However, in recent years, facilitated by collaborations with the University of Pretoria, the African human rights system is gaining better attention in the University's law programmes on a regular basis.<sup>86</sup>

The gradually increasing number of dissertations on topics related to the African Charter and the Maputo Protocol is also promising.<sup>87</sup> The restricted interest of students to write their dissertations on related topics may be explained by the lack of proper cover-

78 Interviews with barristers S Calliapien and Arvin Ramsahok (15 August 2015); see also interviews with prominent barristers: P Patten & JC Bibi, September 2011, cited in Techane (n 22 above) 26.

79 Interviews with state lawyers from Attorney General's Office & Office of the Director of Public Prosecutions cited in Techane (n 33 above) 99.

80 Interviews with barristers and prosecutors (n 79 & 80 above).

81 Interviews (n 80 above).

82 Interviews with barristers cited of the African Court in Techane (n 33 above) 99.

83 Previous assessment done in 2011 did not find any notable human rights activities carried out or supported by the Bar Association. See Techane (n 22 above) 27. The situation remained the same to date. See n 82 above.

84 The Department of Law at the University of Mauritius is the one and the only with a compulsory human rights course; though the University of Central Lancashire and University of Middlesex, two private universities, also provide LLB degree courses.

85 Interviews with lecturers D Michel & V Jugoo, University of Mauritius (14 August 2015).

86 Interview with P Bissessur, Lecturer of Law, University of Mauritius (5 August 2015).

87 For example, women's rights in Africa, sexual minorities' rights in Africa, state reporting mechanism in Africa, etc.

age of the African system in their courses, coupled with the dominance of European system in the education system. The consistent participation of the University in the African Human Rights Moot Court Competition is another encouraging aspect that is facilitating improved visibility of the African human rights system in Mauritius' legal education.<sup>88</sup> Nevertheless, the library still offers negligible reference materials relevant to the topic of the African Charter and the Maputo Protocol.

Preceding studies that reviewed academic journals, publications and research did not find any pieces of academic work from the domestic academic community relevant to the African Charter or the Maputo Protocol.<sup>89</sup> There is however encouraging progress in recent years with the increased participation of lecturers in academic conferences during which papers are presented on topics related to the African human rights system.<sup>90</sup>

## 9 National human rights institutions

In spite of the NHRC's affiliate status with the African Commission,<sup>91</sup> neither the African Commission's documents nor the African Charter or the Maputo Protocol are represented in the work

of the NHRC.<sup>92</sup> The human rights education and advocacy activities of the NHRC usually focus on human rights issues under the Constitution, and may cover international instruments. However most commonly they do not include the African Charter except by occasional cursory mention in a few trainings and workshops.<sup>93</sup> Women's rights advocacy is highly influenced by United Nations instruments, but not by the Maputo Protocol. Further, it was also observed that relevant officers at the NHRC not only give higher regard to the UN human rights system, but also lack proper exposure to the African system.

The NHRC is normally expected to participate in state reporting, and to submit its own report to the African Commission.<sup>94</sup> It is also expected to assist, advise and monitor implementation of Concluding Observations in accordance with the Paris Principles.<sup>95</sup> However, the NHRC has not been actively involved in the preparation of state reports under the African Charter,<sup>96</sup> and neither has the African Commission fulfilled its reporting obligation as required of NHRIs that enjoy affiliate status with the African Commission.

88 Centre for Human Rights 'Moot 2014: Top results' <http://www.chr.up.ac.za/index.php/moot-archives/moot-2014/moot-2014-top-results.html> (accessed 08 August 2015).

89 Techane (n 22 above) 37 & Techane (n 33 above) 100-101.

90 R Mahadew 'Best loser system in Mauritius' in J de Visser (ed) *Constitution-Building in Africa* (2015) 135; R Mahadew 'The right to health in Mauritius: Is the state doing enough or is the constitutional protection of the right to health still required?' in E Durojaye (ed) *Litigating the right to health in Africa* (2015).

91 Granted in May 2002 at the 31st ordinary session of the African Commission.

92 The NHRC annual reports since 2004 have been closely reviewed. These reports are available on NHRC's website.

93 Discussions with NHRC staff cited in Techane (n 22 above) 34.

94 The Resolution on Granting Observer Status to NHRIs in Africa (1998) imposes obligation on NHRIs with observer status to submit reports to the African Commission every two years.

95 United Nations Principles relating to the Status of National Institutions (the Paris Principles) (1993) A, para 3 (a-g).

96 This was also duly faulted by the African Commission. See Concluding Observations (n 23 above) para 36.

## 10 State reporting

Only two periodic reports have been submitted to the African Commission by Mauritius so far. The first is the initial report submitted in 1996 and the second is a combined report of the 2nd, 3rd, 4th and 5th periodic reports, submitted in 2008. Although three reports became due as of 2015, there are no indications that any report is underway for submission.<sup>97</sup> Relevant authorities have suggested that the delays in reporting happen with respect to all treaties and are attributed to challenges in timely information gathering from various stakeholders under multiple reporting obligations to several international bodies.

Presently, the Human Rights Unit of the Prime Minister's Office is the apex body and has a leadership role in the preparation of state reports under human rights treaties. Previously, the same task was accomplished by the Minister of Justice and Human Rights (the current Attorney General's Office). The process of preparing reports involves gathering inputs from relevant government ministries and state departments and hosting thorough consultations with the Attorney General's Office. Still, the process is faulted for the low level of engagement and lack of consultation with all relevant stakeholders. For instance, interdepartmental dialogue is infrequent and the participation of the NHRC, civil society and the wider public is absent in the reporting process.<sup>98</sup> Important stakeholders still remain unaware of the reporting process and the reports submitted to the African Commis-

sion generally remain unpublished. Where published, the reports are not disseminated to the public.

Finally, the Human Rights Unit has responsibility to ensure that Concluding Observations are disseminated to relevant government bodies and this should be followed by necessary monitoring on implementation of the recommendations.<sup>99</sup> The Attorney General's Office, being the principal advisory body to the government, advises on the essential measures to be taken as per the Concluding Observations. A previous study has noted that an analysis of the Concluding Observations has formerly been prepared and distributed to relevant government departments, directing them to take necessary measures within their mandates and report back to the Human Rights Unit on their efforts.<sup>100</sup> There is, however, no standard practice of disseminating Concluding Observations to NGOs or the public.

## 11 Communications involving the state

Since becoming a state party to the African Charter, only one communication has been brought against Mauritius (in conjunction with thirteen other Southern African countries) in 2013 followed by a decision in 2014.<sup>101</sup> The case involved an alleged violation of articles 7 and 26 of the African Charter for denial of access to justice after 14 countries accepted the suspension of the SADC Tribunal. Nonetheless, the African Commission found no violation of the

97 See Techane (n 33 above) 101.

98 See Techane (n 22 above) 32. See also Concluding Observations (n 23 above) para 36.

99 Interview with Cader (n 28 above).

100 Techane (n 22 above) 33 indicated that the document was reviewed.

101 *Tem bani & Freeth v Angola and Thirteen Others* (2014) AHRLR 54 (ACHPR 2014).

alleged articles of the African Charter by the respondent states.<sup>102</sup>

The low level of awareness regarding the African Charter and the communication procedure of the African Commission most probably explains why Mauritians do not resort to the African Commission in the pursuit for justice.

## 12 Special mechanisms and promotional visits by the African Commission

So far, there has been only one visit by the African Commission to Mauritius which was held in August 2006 and covered a comprehensive review of human rights issues in the country.<sup>103</sup> Accordingly the African Commission made relevant recommendations which, amongst others, included, urging the government to consider the abolition of death penalty, encouraging equal gender representation in politics, undertaking affirmative action in favour of marginalised groups, expediting judicial processes, ensuring the protection of people living with HIV/AIDS from discrimination, submitting overdue reports, popularising the African Charter and making the declaration under article 34(6) of the African Court Protocol to allow direct access of NGOs and individuals to the African Court.<sup>104</sup> Nevertheless, it remains disquieting that even if the mission report brought about diverse recommendations, no specific follow-up measures were underlined. As a matter

of fact, many relevant actors and officers are unaware of the visit and the report.

## 13 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission

It is to be noted that factors that hinder or heighten the impact of the said instruments in Mauritius remain more or less the same those found during the initial assessment under this study which were carried out in 2011.<sup>105</sup>

The central mandate of the Human Rights Unit of the Prime Minister's Office, which is to coordinate all government activities pertaining to human rights, offers a great advantage for institutionalising all responsibilities of the state in relation to the African Charter. As a matter of fact, such a mandate, combined with the existence of important institutions such as the NHRC and the LRC can contribute immensely to enhancing the impact of the African Charter.

The ongoing discourse on constitutional amendments, particularly on the incorporation of socio-economic rights in the Bill of Rights, remains a unique opportunity for the integration or incorporation of the norms of the African Charter and the Maputo Protocol. Likewise, the opportunity can also be seized to incorporate a constitutional imperative for judicial interpretation guided by the African Charter and international human rights instruments. Equally, the importance of domestication should also not be disregarded.

102 See *Tem bani & Freeth v Angola and Thirteen Others* (n 102 above) para 146.

103 See African Commission on Human and Peoples' Rights 'Mission report of the promotional visit to Mauritius' (August 2006) [http://www.achpr.org/files/sessions/40th/mission-reports/mauritius/misrep\\_promo\\_mauritius\\_2006\\_eng.pdf](http://www.achpr.org/files/sessions/40th/mission-reports/mauritius/misrep_promo_mauritius_2006_eng.pdf) (accessed 4 June 2011).

104 See Mission Report (n 104 above) 33-35.

105 See Techane (n 33 above) 103-104 & Techane (n 22 above) 39-49.

LRC's research can contribute considerably to enlightening all stakeholders about appropriate legislative amendment or adoption to guarantee harmonisation with the African Charter, Maputo Protocol and the Concluding Observations, general comments, resolutions and case law of the African Commission. The LRC is well positioned to commission a compatibility study that could spark the influence of the African Charter on legislative action and boost compliance by the state with its obligation to take legislative measures to give effect to the rights in the African Charter.

A statutory human rights institution, the NHRC with affiliate status with the African Commission, offers an opportunity to enrich visibility of the African Charter, the Maputo Protocol and the work of the African Commission in the domestic human rights system. The NHRC should proactively integrate the African Charter, Maputo Protocol and resolutions, general comments and Concluding Observations of the African Commission in its works. The NHRC should also organise targeted promotional activities such as awareness raising workshops, trainings, publications and media campaigns to promote the same.

The fact that state reporting and Concluding Observations of the African Commission are given rational consideration is an important asset to heighten the impact of the African Charter even though much remains to be done in this respect. The reporting process should be regarded as an opportunity to surge the impact of the African Charter by enhancing the participation of all stakeholders. Publication and wider dissemination of periodic reports and Concluding Observations is encouraged.

The justiciable Bill of Rights, which currently only embodies civil and political rights, is an important opportunity for the enforcement of rights in the African Charter that could be complemented by the extensive jurisprudence of the African Commission. Furthermore, without disregard to the constitutional lacunae on socio-economic rights and some aspects of civil and political rights, the progressive legislation on a range of human rights positively contributes to the promotion and protection of rights under the African Charter and the Maputo Protocol.

The tradition of the judiciary and lawyers referring to international instruments can provide a fertile ground for application of the African Charter in domestic litigation and judicial practice. However, the lack of awareness and limited importance attached to the African Charter and the jurisprudence of the African Commission continues to limit such influence. Sensitisation seminars and training programmes for judges and practicing lawyers are of paramount importance. The roles of the Judicial and Legal Studies Institute and the Bar Association cannot be overemphasised in this regard.

The presence of lecturers trained on the African human rights system at the University of Mauritius,<sup>106</sup> and its regular participation in the African Human Rights Moot Court Competition is an opportunity that enhances the influence of the African Charter and the jurisprudence of the African Commission in law school education and academic writing. The inadequate coverage of the African human rights

106 Including one of the authors, R Mahadew, being a lecturer at the University of Mauritius.

system in law school curricula and the scarcity of reference materials on the subject still constrain the influence of the African Charter, Maputo Protocol and the African Commission's jurisprudence. This inadequacy needs to be addressed. In addition, academics in Mauritius need to engage in active human rights practice as 'constitutional interpreters',<sup>107</sup> and as change agents.

The lack of domestication is a critical factor encumbering the impact of the African Charter in the domestic system of Mauritius. While Mauritius has been a party to the African Charter for more than two decades, the African Charter remains invisible in the domestic human rights practice mainly because it still is not declared as a fundamental part of the domestic law. In a dualist legal system like Mauritius, incorporation into domestic law will have greater utility in litigation practices as well as judicial enforcement.

The non-ratification of the Maputo Protocol has contributed significantly to the lack of attention given to the instrument. The government must earnestly consider ratification of this Protocol and the Ministry of Gender should actively promote the Maputo Protocol and urge its ratification.

The absence of a clear government programme in the National Human Rights Action Plan (NHRAP) and other important policies that draw attention to the African Charter and the Maputo Protocol is a point of concern. Adoption of clear commitments to promote the African Charter and to

ensure the integration of its provisions and also other instruments of the African Commission in the domestic legal system proves to be highly relevant. The NHRAP should provide concrete steps in relation to human rights activities, legal and policy reform, judicial training, higher education and other areas.

An empirical observation evidences the dearth of awareness about the African Charter and the Maputo Protocol in Mauritius. Many who work in relevant government departments are oblivious to the instruments and the work of the African Commission.

The domestic influence of the African Charter in Mauritius is to a large extent shrunk by the lack of vibrant local or international human rights NGOs. This is aggravated by the closure of Amnesty International and its Human Rights Training Center which promoted the African Charter. The deficiency of human rights lawyers and lawyers associations that 'engage leading institutions of the state'<sup>108</sup> through dynamic efforts and catalyse change poses undesirable bearings.

It is also important to observe geographic, social and political contexts. The detached physical location of Mauritius from Africa mainland, its large population of Asian descents with dominant Asian culture and the stable culture and the stable peace, security and economic situation of the country might have created societal

107 Du Plessis illuminates the role of academics and academic institutions as 'constitutional interpreters'. See L Du Plessis 'Legal academics and the open community of constitutional interpreters' (1996) 12 *South Africa Journal on Human Rights* 214.

108 A Aturu 'The legal profession and protection of human rights' unpublished paper presented for the Nigerian Institute of Advanced Legal Studies, 2010 referred to in Meskerem, Geset Techane 'Where is the African Charter: Assessing the Impact of the African Charter on Human and Peoples' Rights in Mauritius' [http://repository.up.ac.za/bitstream/handle/2263/18643/Techane\\_Where\(2011\).pdf?sequence=1](http://repository.up.ac.za/bitstream/handle/2263/18643/Techane_Where(2011).pdf?sequence=1) p 27.



perceptions of not associating with 'Africa's problems'.<sup>109</sup> In addition, having its major foreign relations as well as trade and economic partnerships tied to Britain, France and India,<sup>110</sup> Mauritius has minimal interaction with most African states. This arguably contributes to a general outlook amongst relevant actors that African instruments are more relevant to an 'African context' than Mauritius. This is compounded by the dominant influence of the European human rights system and the attitude towards the UN human rights system as a more relevant supranational human rights system.

The lack of media coverage on the work of the African Commission and Mauritius' interactions with the African human rights system has its own contribution to impairment of public awareness. Major media coverage on Africa alerts the public mainly about crises on the continent.<sup>111</sup> The role of the media should be boosted to give coverage of the African human rights system, thus increasing public awareness.

## 14 Conclusion

The foregoing discussions establish that the influence of the African Charter and the Maputo Protocol on the domestic system of Mauritius is weak. There are undeniably positive dynamics that can be used to improve the status quo.

Despite a decent standard of human rights prevailing in the country, Mauritius needs to come to terms with the fact

that the African Charter and the Maputo Protocol confer additional and essential protections of human rights. It is imperative that the state show genuine political will to enshrine provisions from the African human rights instruments into the domestic legal frameworks. In parallel, education of students, lawyers and judges on the African human rights systems is mandatory. Judges particularly shoulder the responsibility to incorporate provisions from African instruments into their judgments although lawyers are also expected to engage in proactive litigation integrating the same into their submissions.

Ratification and domestication of the concerned instruments and the reporting obligations therein, as well as necessary legislative and policy reform, awareness and capacity building programmes should be given due attention. The roles of NHRIs, judicial and legal training institutes, lawyers associations, government bodies, civil society and academic institutions should be enhanced.

109 Techane (n 22 above) 40-41.

110 H Metz (ed) *Mauritius: A country study* (1994), Washington GPO for the Library of Congress <http://countrystudies.us/mauritius/> (accessed 21 August 2011).

111 Techane (n 22 above) 42.



# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN NIGERIA

*Victor Oluwasina Ayeni\**



## 1 Introduction

Nigeria is one of the founding state parties to the African Charter as well as the Maputo Protocol, having ratified the Charter on 22 June 1983 and the Maputo Protocol on 16 December 2004.<sup>1</sup> Nigeria gained its political independence from British colonial rule on 1 October 1960. Its first constitution upon attaining independence was the 1960 Independence Constitution.<sup>2</sup> This Constitution contains Nigeria's first constitutional guarantees of human rights.<sup>3</sup> After a series of constitutional dispensations each of which embodied a

Bill of Rights, Nigeria is currently operating under its 1999 Constitution.<sup>4</sup> The 1999 Constitution guarantees basic civil and political rights.<sup>5</sup> In addition to the constitutional guarantees, some progress has been achieved in the areas of access to information,<sup>6</sup> domestication of international instruments on children,<sup>7</sup> prohibition of violence against women and girls,<sup>8</sup> prohibition against trafficking in persons including women and girls,<sup>9</sup> and strengthening of laws against discrimination and sexual harassment in the workplace.<sup>10</sup> The incumbent President of Nigeria, Muhammadu Buhari, has also initiated government-backed programmes for the clean-up of Ogoniland, one of the landmark recommenda-

\* LLB (Akungba-Nigeria), LLM HRDA (Pretoria) and doctoral candidate, Centre for Human Rights, University of Pretoria, South Africa.

1 African Union 'List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples' Rights' <http://www.au.int/en/treaties> (accessed 16 September 2015).

2 Prior to the 1960 Independence Constitution, the colonial administrations in Nigeria operated at least five 'constitutional instruments'. These instruments also referred to as 'constitutions' were made through orders-in-council of the British monarch in 1914, 1922, 1946, 1951 and 1954.

3 See Chapter III, sections 17-27, Independence Constitution, 1960.

4 It should be noted that between 1960 and 1999, Nigeria operated at least two different constitutions, namely the 1963 (Republican) Constitution and the 1979 Constitution.

5 See Chapter IV, Constitution of the Federal Republic of Nigeria, 1999 (Constitution).

6 See the Freedom of Information Act of 2011.

7 See the Child's Rights Act of 2003.

8 See Violence against Persons (Prohibition) Act of 2015.

9 See Trafficking in Persons (Prohibition) Enforcement and Administration Act of 2015.

10 See Constitution of the Federal Republic of Nigeria (Third Alteration) Act of 2011. See also section 254(c)(2)(g) of the 1999 Constitution (as amended).

tions of the African Commission in the case of *SERAC v Nigeria*.<sup>11</sup>

In spite of these advances, however, the Nigerian government has failed to curtail human rights abuses in a number of areas. Some of the human rights abuses dominating Nigeria's human rights landscape include the indiscriminate killing of civilians and abduction of women and girls by the Boko Haram sect, and the failure of government to protect the lives and property of people in North East Nigeria where Boko Haram insurgency is currently taking place.<sup>12</sup> Government security forces handling the country's counter-insurgency operations have also been accused of high-handedness and massive human rights abuses including torture, arbitrary detention and extrajudicial killing of suspects.<sup>13</sup> Sectarian and political violence has continued to plague some states, especially in the Northern part of Nigeria, and the government has not been decisive in ensuring accountability. Large-scale corruption in public and private institutions continues to impede the enjoyment of socio-economic rights. Consensual homosexual conduct remains criminalised across Nigeria and same-sex marriage is prohibited and criminalised under a new law adopted in 2015.<sup>14</sup> Human rights defenders, especially those working on sexual orientation and gender identity issues,

have been subjected to state-sponsored attacks, restrictions and profiling.

## 2 Ratification of the African Charter and the Maputo Protocol

The President of the Federal Republic of Nigeria is vested with power to conduct all external relations, including negotiation and ratification of international treaties, on Nigeria's behalf.<sup>15</sup> This power like other executive powers of the President may be exercised by the President personally or through the Vice-President, ministers or any duly designated officer in the public service of the Federation.<sup>16</sup> The National Assembly on the other hand is empowered to implement or in a technical term 'domesticate' international treaties duly entered into by the President.<sup>17</sup> As the law currently stands, the National Assembly has no competence to ratify treaties between Nigeria and other countries.<sup>18</sup> The procedure for treaty making, including signature and ratification of treaties in Nigeria, is contained in the Treaties (Making Procedure) Act Cap T20 LFN 2004. Although the President may notify the National Assembly of his

- 11 *Social Economic Right Action Centre (SERAC) and Another v Nigeria* (Ogoniland case) (2001) AHRLR 60 (ACHPR 2001). See 'UNEP Report: Buhari orders fast-track of Ogoni clean-up' *Premium Times* 5 August 2015 <http://www.premiumtimesng.com/news/top-news/187884-unesp-report-buhari-orders-fast-track-of-ogoni-clean-up.html> (accessed 24 September 2015).
- 12 Human Rights Watch 'World Report 2015: Nigeria' <https://www.hrw.org/world-report/2015/country-chapters/nigeria> (accessed 24 September 2015).
- 13 As above.
- 14 See the Same Sex Marriage (Prohibition) Act of 2013.

- 15 See Items 26 & 31 of Part I of the Second Schedule to the Constitution. See also E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51 *Journal of African Law* 249-250. See also Items 26 & 31 of Part I of the Second Schedule to the Constitution; VO Ayeni 'Domestic impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: A case study of Nigeria' unpublished LLM Dissertation, University of Pretoria, 2011.
- 16 See sec 5(a) of the Constitution.
- 17 Sec 12 of the Constitution.
- 18 See *AG Federation v AG Abia State and 35 others* [2002] 16 1 *Weekly Report of Nigeria* 175; A Oyebo 'Treaty making power in Nigeria' in A Oyebo (ed) *International law and politics: An African perspective* (2003) 118. AA Akinbuwa 'The concept of women's rights in Nigeria' (2009) 15 *East African Journal of Peace and Human Rights* 465-474.

or her intention to ratify a treaty, there is no obligation to do so.<sup>19</sup> It is the prerogative of the President acting through their vice, a minister of the Federal Republic or any other duly designated officer to sign and ratify international treaties. In accordance with these processes, Nigeria signed and ratified the African Charter on 31 August 1982 and 22 June 1983 respectively, and deposited the instrument of ratification on 22 July 1983.<sup>20</sup> Nigeria signed and ratified the Maputo Protocol on 16 December 2003 and 16 December 2004 respectively.<sup>21</sup> The instrument of ratification of the Maputo Protocol was deposited on 18 February 2005.<sup>22</sup>

The Federal Ministry of Justice has been designated as the 'focal point' responsible for coordinating Nigeria's response and responsibilities on the African Charter.<sup>23</sup> The actual department in charge of the ministry's activities in respect of the African Charter is the Department of Comparative and

International Law (DCIL) of the Federal Ministry of Justice.<sup>24</sup> The Department also coordinates the meetings of the Inter-Ministerial Committee on the African Charter, a committee set up to ensure Nigeria complies with her obligations under the African Charter.<sup>25</sup> A government focal point has also been designated for the Maputo Protocol: the Federal Ministry of Women Affairs.<sup>26</sup> Based specifically on the African Commission's recommendation, a National Working Group on Human Rights Treaty Reporting has also been established.<sup>27</sup> The working group is mandated amongst other things to ensure effective coordination and regular consultation amongst stakeholders in line ministries, departments and agencies; and also to ensure follow up action on concluding observations and recommendations of the African Commission and other treaty monitoring bodies.<sup>28</sup>

### 3 Domestication or incorporation

Domestication of treaties may take place at two levels: directly through incorporation or indirectly through transformation.<sup>29</sup> According to Viljoen, incorporation is the wholesale enactment of the provisions of a treaty, usually with specific reference to the treaty being incorporated.<sup>30</sup> Transformation

19 Akinbuwa (n 18 above). Note however that an amendment to the Treaties (Making Procedure) Act is currently before the National Assembly. The Amendment seeks amongst other things to make consultations with the National Assembly mandatory before the executive arm of government can sign or ratify a treaty. See <http://nass.gov.ng/document/bills> (accessed 1 October 2015).

20 African Union (n 1 above).

21 African Union (n 1 above).

22 As above.

23 Nigeria's Third Periodic Country Report: 2005-2008 on the implementation of the African Charter on Human and Peoples' Rights in Nigeria to the African Commission (2008) 15; Nigeria's Fourth Periodic Country Report: 2008-2010 on the implementation of the African Charter on Human and Peoples' Rights in Nigeria (2011) 5; Nigeria's Fifth Periodic Country Report: 2011-2014 on the implementation of the African Charter on Human and Peoples' Rights in Nigeria (2014) ii & 2.

24 Nigeria's Fourth Periodic Country Report (n 23 above) ii & 5; Nigeria's Fifth Periodic Country Report (n 23 above) ii & 2; AA Yola 'Overview of all departments in the Federal Ministry of Justice' (2012) 4 *Justice Journal* 9.

25 Yola (n 24 above) 11; Nigeria's Fourth Periodic Country Report.

26 Nigeria: Initial Country Report on implementation of AU Solemn Declaration on Gender Equality in Africa (2004-2006).

27 Nigeria's Fourth Periodic Country Peoples' Rights (n 23 above) 18.

28 As above.

29 J James-Eluyode 'Enforcement of international humanitarian law in Nigeria' (2003) 3 *African Human Rights Law Journal* 266.

30 F Viljoen *International human rights law in Africa* (2012) 522.

on the other hand occurs where treaty norms influences a legislative enactment or amendment without explicit reference to the treaty.<sup>31</sup> Nigeria has adopted the dualist approach; this implies that duly ratified treaties do not have force of law in Nigeria unless and until they have been domesticated.<sup>32</sup> Section 12 of the 1999 Constitution provides:<sup>33</sup> 'No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.'<sup>34</sup> This means for a treaty to have the force of law in Nigeria, the treaty must first be domesticated.

The process of domesticating treaties to which Nigeria is a party depends largely on the subject matter of the treaty. Where a treaty relates to any of the items under the Exclusive Legislative List, such treaty is deemed duly to have been domesticated upon a law passed to that effect by the National Assembly.<sup>35</sup> However, where the subject matter of a treaty falls outside the Exclusive Legislative List, a law to domesticate such treaty must first be passed by the National Assembly and further ratified by a majority of the 36 state houses of assembly.<sup>36</sup>

On 17 March 1983, Nigeria's National Assembly passed the African

#### Charter on Human and Peoples' Rights (Ratification and Enforcement) Act<sup>37</sup>

to enable effect to be given in the Federal Republic of Nigeria to the African Charter on Human and Peoples' Rights made in Banjul on the 19th day of January, 1981 and for purposes connected therewith.<sup>38</sup>

The Act provides:

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.<sup>39</sup>

No official reasons were found during this study for the prompt domestication of the African Charter in Nigeria, which interestingly took place before ratification. One hint may be in the preamble of the implementing legislation, which states that 'Nigeria is desirous of adhering to the said Charter'.<sup>40</sup> Since Nigeria in 1983 was not a model in terms of adherence to human rights, the actual reason for domestication of the Charter must be located outside the preambular provision. It has been argued that many dictatorial regimes in Africa ratified or domesticated the African Charter and other international human rights instruments as a result of international pressure demanding domestic reform.<sup>41</sup> Up to the time of this study, Nigeria is the only Anglophone country in Africa to

31 As above.

32 *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228 SC; *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Part 498) 124 150; *African Reinsurance Corporation v Abata Fantaye* [1986] 3 NWLR (part 32) 811.

33 See also sec 12(1) of the 1979 Nigerian Constitution, sec 13 of the 1989 Nigerian Constitution, sec 74 of the 1963 Nigerian Constitution and sec 69 of the 1960 Nigerian Constitution.

34 The status of international treaties in Nigeria thus depends on whether or not the treaty has been domesticated.

35 Sec 12(1) & (2) of the Constitution.

36 Sec 12(1)-(3) of the Constitution.

37 Cap A9, LFN 2004.

38 Preamble, African Charter (Ratification and Enforcement) Act.

39 Sec 1 of the African Charter (Ratification and Enforcement) Act.

40 Preamble, African Charter (Ratification and Enforcement).

41 See KO Kufuor *The African human rights system: Origins and evolution* (2010).

have directly domesticated the African Charter.<sup>42</sup>

The status of the African Charter, domesticated as the African Charter (Ratification and Enforcement) Act, in relation to other national legislations received significant attention in the case of *Abacha v Fawehinmi*.<sup>43</sup> In that case, Fawehinmi was arrested without a warrant and detained by members of the State Security Service (SSS). He alleged that his arrest and detention violated the Nigerian Constitution of 1979 and provisions of the African Charter (Ratification and Enforcement) Act. During the hearing, legal counsel for Abacha raised a preliminary objection contending that the Court was not competent to hear the case since its jurisdiction has been ousted by various decrees. The Supreme Court unanimously held that the African Charter (Ratification and Enforcement) Act was superior to all military decrees and domestic legislation in Nigeria with the exception of the Constitution.<sup>44</sup> The Judges further stated that in the case of conflict between the African Charter (Ratification and Enforcement) Act and other domestic legislation, the African Charter (Ratification and Enforcement) Act shall prevail and the conflicting domestic legislation shall to the extent of its inconsistency be void.<sup>45</sup>

Unlike the African Charter, the Maputo Protocol has not enjoyed direct incorporation into the domestic legal system in Nigeria. Provisions of the Maputo Protocol have however been domesticated indirectly through a process of legislative 'transformation'.

Some old laws have been amended and new laws adopted to give effect to obligations arising from the Protocol's provisions. Due to the Federal structure of Nigeria and the nature of issues covered by the Maputo Protocol,<sup>46</sup> domestication takes place at two different levels: national and sub-national. At the national level, consolidated legislation titled the Violence against Persons (Prohibition) Act was signed into law on 25 May 2015.<sup>47</sup> The law prohibits and criminalises amongst other things female genital mutilation, harmful widowhood practices, spousal battery, emotional or verbal abuse, forceful ejection from the matrimonial home, forced financial dependence, and forced isolation or separation from family and friends.<sup>48</sup> Another consolidated piece of legislation, the Gender and Equal Opportunities Bill seeks to domesticate articles 1-24 of the Maputo Protocol and currently before the National Assembly.<sup>49</sup>

At the sub-national level, specific provisions of the Maputo Protocol, such as the prohibition of female genital mutilation and domestic violence, the promotion of gender equality and affirmative action, women's land rights and widowhood practices have been absorbed into laws of the various states in Nigeria.<sup>50</sup>

Although as a general rule no treaty may have force of law in Nigeria unless enacted into law by parliament, there are at least two ways to enforce an undomesticated treaty in Nigeria. First, by virtue of the Constitution (Third

42 Viljoen (n 30 above) 529.

43 [2000] 6 NWLR (Part 660) 228. For a more detailed analysis of the case, see Egede (n 15 above) 249-284.

44 *Abacha* (n 32 above) 289-343.

45 Sec 4(5) of the Constitution.

46 See sec 12(2)-(3) of the Constitution.

47 See Violence against Persons (Prohibition) Act of 2015.

48 As above.

49 Nigeria's Fifth Periodic Country Report (n 23 above).

50 As above.

Alteration) Act of 2011, international human rights instruments governing any aspect of labour, employment, workplace and industrial relations may be enforced directly before an industrial court in Nigeria.<sup>51</sup> Thus, the provisions of the Maputo Protocol relating to gender equality and the prohibition of sexual harassment at the work place may be applied in Nigeria with or without domestication.<sup>52</sup>

Moreover, by virtue of article 18(3) of the African Charter which has been domesticated as article 18(3) of the African Charter (Ratification and Enforcement) Act, Nigeria has an obligation to ensure the elimination of discrimination and protection of women as 'stipulated in international declarations and conventions'.<sup>53</sup> Viljoen and some human rights experts are of the view that article 18(3) makes CEDAW for instance applicable to all state parties to the African Charter irrespective of their ratification status under CEDAW.<sup>54</sup> It is further submitted that even the Maputo Protocol could be considered part of the African Charter under this provision.<sup>55</sup> The implication of such indirect incorporation for a state such as Nigeria which has domesticated the African Charter word for word is to empower domestic courts to invoke the provisions of the Maputo Protocol through article

18(3) of the African Charter (Ratification and Enforcement) Act. This creative interpretation may be resorted to where a litigant in Nigeria intends to rely on an undomesticated provision of the Maputo Protocol.

#### 4 Legislative reform or adoption

The African Charter has influenced legislative outcomes in Nigeria in at least two ways. There are cases of direct causality and also instances of correspondence in norms. In 1987, the then military government of Nigeria promulgated a decree – the Civil Disturbances (Special Tribunal) Decree. This Decree set up a special tribunal to try persons accused of causing civil disturbances. Membership of the tribunal as stipulated by the Decree included a superior court judge and four other members, one of which must be a serving member of the Armed Forces. Right of appeal was not allowed against the decisions of the tribunal. The jurisdiction of ordinary courts was also ousted. This Decree was challenged in a number of communications submitted to the African Commission, which found the Decree to be a violation of the African Charter. The African Commission's decisions were used widely by activist organisations to mount pressure on the government and on 5 June 1996, the Decree was amended. The amendment specifically granted a right of appeal and removed the Armed Forces member of the tribunal.<sup>56</sup>

On another occasion, activist organisations in Nigeria used the African Commission's decisions to press for the repeal of the State Security (Detention

51 See sec 254(C)(1)(g)-(h) and 254(c)(2) of the 1999 Constitution as amended by sec 6 of the Constitution (Third Alteration) Act 2011.

52 As above.

53 Viljoen (n 30 above) 270.

54 Viljoen (n 30 above); Women in Law and Development in Africa (WiLDAF) 'Nigeria's advocacy for better implementation of women's rights in Nigeria' (2002) 5 www.wildaf-ao.org (accessed 4 September 2004).

55 See similar argument in F Viljoen 'The African Commission on Human and Peoples' Rights: Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2004) 497-498.

56 For a more detailed account of the process leading up to the repeal of the Decree, see OC Okafor *The Africa human rights system: Activist forces and international institutions* (2007) 128-130.



of Persons) (Amendment) Decree 2 of 1994. This Decree which was promulgated by the then military government of Nigeria empowered the government to detain persons for acts prejudicial to state security for up to six months. Section 2A of the Decree prohibited the courts from issuing a writ of *habeas corpus* for the release or production in court of the detainees. In a number of communications as in the earlier case, the African Commission condemned this Decree as a flagrant violation of the right to liberty and fair trial under the African Charter. As a result of massive condemnations by NGOs and civil society organisations – using the African Commission’s decisions as a reference point – the Decree was repealed in June 1996.<sup>57</sup>

Upon transition to democracy, the following decrees which were the subject of litigation in various communications before the African Commission were also repealed:<sup>58</sup> Constitution (Suspension and Modification) Decree 1984, State Security (Detention of Persons) Decree 1984, Military Courts (Special Powers) Decree 1984, Treason and Other Offences (Special Military Tribunals) Decree 1986, Civil Disturbances (Special Tribunals) Decree 1987, Academic Staff Union of Universities (Proscription and Prohibition from Participation in Trade Union) Decree 1992, Treason and Treasonable Offences Decree 1993, Political Parties (Regis-

tration and Activities) Decree 1998. Although it is difficult to establish conclusively all the factors that inspired these wide-ranging legislative reforms, African Charter norms and the African Commission’s repeated condemnations were arguably amongst the foremost considerations.

The African Charter played no significant role during the drafting process of the 1999 Constitution.<sup>59</sup> This is because the 1999 Constitution is a near-verbatim adaptation of Nigeria’s 1979 Constitution which predated the African Charter.<sup>60</sup> The Bills of Rights in the two constitutions are not only similar, but identical except for slight variations in numbering. As a result, there is no explicit reference to the African Charter in the 318 sections of the 1999 Nigerian Constitution. While it cannot be said that the African Charter formed the basis of the 1999 Constitution, most of the human rights provisions in the Constitution coincide with the African Charter’s provisions. The African Charter has also been referenced in some legislation enacted after the transition to civil rule in 1999.<sup>61</sup> An analysis of the impact of the Maputo Protocol on the Constitution is unnecessary because the Constitution was adopted long before the Maputo Protocol came into force.

No evidence was found in Nigeria of a compatibility study undertaken prior to the ratification of either the African Charter or the Maputo Proto-

57 See State Security (Detention of Persons) (Amendment) (Repeal) Decree 18 of 1996. Other military decrees such as the Political Parties Dissolution Decree 114 of 1999 and the Newspapers Registration Decree 43 of 1993 were reportedly repealed following intense criticism from international and domestic activist groups, usually relying on the decisions of the Commission. See Okafor (n 56 above) 132-134.

58 See Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree 63 of 1999.

59 See Speech Delivered by the Chairman of the Constitution Debate Coordinating Committee (CDCC), Justice Niki Tobi, while presenting the Committee’s report to the Head of State, General Abdulsalami Abubakar (on file with the author).

60 As above.

61 See for instance, art 3(2)(f) and 4(1)(d) of the Treaty to establish the African Union (Ratification and Enforcement) Act of 2003; sec 6 of the National Human Rights Commission (Amendment) Act of 2010.

col. Thus, real conflict still exists between the African Charter and the Maputo Protocol on the one hand and Nigerian domestic laws on the other hand.<sup>62</sup> Under the African Charter, both civil and political rights as well as socio-economic rights are justiciable. By contrast, only civil and political rights are justiciable under the Nigerian Constitution;<sup>63</sup> socio-economic rights are non-justiciable.<sup>64</sup> The Nigerian Constitution also does not recognise the rights of peoples to existence, free disposal of their wealth and natural resources, development, peace and security as well as to a generally satisfactory environment.<sup>65</sup> Notwithstanding the provision of section 42 of the Nigerian Constitution which generally prohibits discrimination on a number of grounds including sex, several laws in Nigeria still conflict with the Maputo Protocol. Section 26(2) of the Constitution for instance limits women's rights to transmit their nationality to their foreign spouses. Sections 228-230, 297, 309 and 328 of the Criminal Code and sections 232-236 of the Penal Code criminalise medical abortion in all circumstances except where the abortion is required to save the life of the woman or to preserve her physical or mental health. Contrary to article 14(2)(c) of the Maputo Protocol, Nigerian law does not allow medical abortion in cases of sexual assault, rape or incest. Section 357 of the Criminal Code justifies marital rape, and 'wife beating' is permitted in Northern Nige-

ria under section 55 of the Penal Code. While the Violence against Persons (Prohibition) Act of 2015 has addressed some of these issues, the law operates only in the Federal Capital Territory.

## 5 Policy reform or formulation

The African Charter and the Maputo Protocol have inspired the development of a number of national policies in Nigeria. These policies seek to protect either human rights in general or the rights of a particular group of people. The National Action Plan (NAP) for the Promotion and Protection of Human Rights in Nigeria was first developed in 2006 and later updated in 2009.<sup>66</sup> Although the NAP document claims that the rights it contains are drawn from domestic, regional and international human rights instruments,<sup>67</sup> a close look at the document shows significant influence of the African Charter. For instance, the NAP document contains references to rights to development, peace and protected environments and the African Charter is specifically mentioned as one of the primary sources of these rights.<sup>68</sup> In addition, the document contains over 50 references to the African Charter and at least five references to the Maputo Protocol.<sup>69</sup>

62 See Egede (n 15 above) 255.

63 Chap IV, Constitution. See also sec 6(6)(c) of the Constitution.

64 Sec 6(6)(c) of the Constitution. See *Archbishop Okogie v Attorney General of Lagos State* (1981) 2 NCLR 337 350.

65 Although some provisions in the Directive Principles in Chap II of the Constitution speak to peoples' rights, these Directive Principles are not enforceable in court. See secs 14-17 as well as sec 6(6)(c) of the Constitution.

66 See National Action Plan for the Promotion and Protection of Human Rights in Nigeria (2006). The 2006 document was updated in 2009. See the National Action Plan for the Promotion and Protection of Human Rights in Nigeria (2009-2013). The 2009 document is currently being viewed by the National Human Rights Commission. See 'NHRC reviews National Action Plan for promotion, protection of human rights' *News Agency Nigeria* 10 March 2015 <http://www.nannewsnigeria.com/node/40092> (accessed 22 September 2015).

67 NAP (2009-2013) 8-10.

68 See NAP (2006) 58-64; NAP (2009-2013) 78-91.

69 As above.

The National Gender Policy (NGP) was adopted in 2006.<sup>70</sup> It replaced the erstwhile National Policy on Women of 2000. The NGP is aligned with the provisions of major international instruments on women's rights, including the Maputo Protocol. Although the Maputo Protocol was not the only inspiration for the new Gender Policy, there are a number of reasons to believe that the entering into force of the Maputo Protocol played a crucial role in mobilising support for the new gender policy. The process that culminated in the adoption of the new National Gender Policy started in August 2006,<sup>71</sup> less than a year after the Maputo Protocol came into force and within one month after Nigeria submitted its initial report on the AU Solemn Declaration on Gender Equality in Africa. The NGP contains at least four references to the Maputo Protocol. The Policy also reinforces article 2(d) of the Maputo Protocol by adopting a 35 per cent affirmative action policy for women. The affirmative action clause of the Policy was used by various women's rights groups in Nigeria to push for and realise 33 per cent representation by women in the Federal cabinet as at 2011.<sup>72</sup> It is unfortunate to note that women's representation in Cabinet under the current administration of President Buhari has dropped significantly.

In addition to the two principal policies discussed above, a number of national policies have been adopted to

promote specific provisions of the African Charter and the Maputo Protocol.<sup>73</sup>

## 6 Court judgments

The African Charter, and to some extent the Maputo Protocol, have influenced judicial decisions in at least four important ways. These include the development of the African Charter supremacy jurisprudence, and the use of the African Charter or the Maputo Protocol as a basis of remedy, interpretative guidance and as a source of legitimacy. As early as 1990, the Nigerian Court of Appeal in the case of *Oshevire v British Caledonian Airways Ltd*<sup>74</sup> had laid down the principle that a treaty which has been ratified and domesticated in Nigeria is superior to other domestic laws with the exception of the Constitution. This decision has been followed in subsequent cases.<sup>75</sup>

The main contribution of the 'African Charter supremacy argument' is that it empowered domestic courts to entertain human rights cases even in situations where their jurisdiction has been ousted explicitly by national legislation. In a number of cases, provisions of the African Charter have been used as basis for seeking remedies before domestic courts in Nigeria. Only a few examples of these cases are referred to in this

70 See also the National Gender Policy Strategic Framework (Implementation Plan) Federal Republic of Nigeria (2008-2013).

71 National Gender Policy (2006).

72 See 'Nigerian women take key cabinet posts' *afronline* <http://www.afronline.org/?p=17786> (accessed 18 October 2011).

73 See for instance the National Policy and Plan of Action on Elimination of Female Genital Mutilation in Nigeria 2002; National Gender Policy on Education 2008; National Health Policy 2004; National Strategic Health Development Plan (2010-2015); National Policy on Environment 1999, National Child Policy of 2007; and the National Policy on Education 2004 amongst others.

74 (1990) 7 NWLR 507.

75 See *UAC v Global Transporte Oceanic SA* (1996) 5 NWLR 291; *CRP v Babangida* Suit M/102/92; *Comptroller of Nigerian Prisons v Dr Femi Adekanye (No 2)* (2002) 15 NWLR 332 SC; *Fawehinmi v Abacha* (1996) 9 NWLR (pt 475) 710 CA; *Ubani v Director of SSS* (1999) 11 NWLR (pt 265) 129 CA; *Abacha* (n 32 above) 228, and *Odeunmi v Oladimeji* (2012) LPELR 15419 (CA).

report. In *Comptroller Nigerian Prisons v Dr Femi Adekanye and Others*,<sup>76</sup> 27 people were arrested and detained for close to 30 months under the Failed Bank (Recovery of Debts) and Financial Malpractices in Banks Decree 18 of 1994. Meanwhile, the decree under which they were detained and tried ousted the court's jurisdiction. The trial court dismissed the suspension of its jurisdiction. On appeal, the Court of Appeal stated that the offending decree 'totally destroys the presumption of innocence in favour of the accused under article 7 of the African Charter'.<sup>77</sup>

In *Garuba and Nine Others v Attorney General of Lagos State*,<sup>78</sup> 10 applicants mostly juveniles were tried, convicted and sentenced to death. They appealed against the sentence. While their appeal was pending, the government made moves to execute them. An application was filed to enforce their right under the Constitution and the African Charter. Even though the fundamental rights provisions of the Nigerian Constitution as well as the African Charter Act were at the time suspended, the Court held that the international aspects of these instruments could not unilaterally be abrogated.

The Nigerian judiciary further demonstrated its creativity in deploying the African Charter in the case of *Akinola v Babangida*.<sup>79</sup> In this case, the Court was invited to invalidate the Newspaper Decree 43 of 1993. Even though this decree expressly ousted the jurisdiction of courts, the Court held that:<sup>80</sup>

Since the courts have held that the African Charter (Act) is like an enactment of the Federal Government per decree, it follows that if there is a conflict between an enactment ousting the jurisdiction of the Court and another which does not, the Court should lean more on the one (referring to the African Charter) that preserves its jurisdiction.

In all the cases discussed above, the African Charter was relied upon as a basis for seeking remedy before a domestic court in Nigeria. The African Charter is usually relied upon in addition to other relevant constitutional provisions. However, in *Agbakoba v Director of State Security Service*,<sup>81</sup> the provisions of article 12(2) of the African Charter were clearly resorted to as an interpretive guide. In that case, the applicant had been invited to a human rights conference in The Netherlands. On the day he was scheduled to depart, he was intercepted by officers of the State Security Service. His passport was impounded, without any explanation offered to him. In short, he missed the conference. In its judgment, the Supreme Court sought guidance from the freedom of movement provision under article 12(2) of the African Charter which explicitly provides that 'every individual shall have the right to leave any country including his own'. The applicant was successful.

In some domestic decisions in Nigeria, local courts have deployed the African Charter to legitimise claims of rights that were considered very sensitive. In order to invalidate a customary law which prevented female children of a deceased man from inheriting his property, the Nigerian Court of Appeal in *Moujekwu v Ejikeme* stated as follows:<sup>82</sup>

76 (1999) 10 NWLR 400.

77 *Comptroller Nigerian Prisons* (n 76 above) 423.

78 Suit ID/599M/91 (31 October 1991).

79 Reprinted in (1994) *Journal of Human Rights Law and Practice* 250.

80 As above.

81 (1994) 6 NWLR 475.

82 (2000) 5 NWLR (part 567) 402, 409.

And what is more, such a custom has clearly discriminated against Virginia, the daughter of Reuben and is therefore unconstitutional in light of the provisions of section 42 of the Constitution of the Federal Republic of Nigeria, 1999 ... Article 18 of the African Charter on Human and Peoples' Rights specifically provides for the elimination of discrimination against women.

A similar decision was reached more recently in the case of *Nwosu v Nwosu*<sup>83</sup> where the Court of Appeal affirmed a woman's right to custody of her children pending divorce, by resorting to section 18(3) of the African Charter. In 2014, the Supreme Court issued two landmark decisions, *Ukeje v Ukeje*<sup>84</sup> and *Anekwe v Nwekwe*<sup>85</sup> where the court nullified the customary law that prevented female children and wives from inheriting from their fathers and husbands respectively. Even though socio-economic rights are not justiciable under the Nigerian Constitution, the Nigerian Court in *Odafe v Attorney General of the Federation*<sup>86</sup> has enforced the socio-economic rights of prisoners to medical care on the basis of the African Charter. The court has also relaxed the rules of *locus standi* on the basis of article 13(2) of the African Charter.<sup>87</sup>

Another aspect where the African Charter has significantly influenced the judiciary is in the deployment of the Fundamental Rights Enforcement Procedure (FREP) Rules. As a result of the delay and prohibitive cost usually associated with court process in Nigeria, the FREP Rules were designed in 1979 to provide a special fast-track and more

cost-effective procedure for the enforcement of fundamental rights in Nigeria.<sup>88</sup> Because the Rules predated the adoption of the African Charter, no reference was made to the African Charter in the Rules; and no Rules were made subsequently for the enforcement of the rights in the African Charter.

Confronted with this tricky situation, the Supreme Court of Nigeria in what appeared to be a very liberal construction of the applicable laws held in *Ogugu v The State*<sup>89</sup> that although the 1979 FREP Rules did not prescribe rules for the enforcement of rights in the African Charter, the provisions of the Charter are nonetheless enforceable under the 1979 FREP Rules. This reasoning was adopted in subsequent cases such as *Nemi v The State*,<sup>90</sup> *Bamidele v Alele Williams*<sup>91</sup> and *Ohakosin v Commissioner of Police, Imo State*.<sup>92</sup>

In 2009, the 1979 FREP Rules were abrogated and replaced with the 2009 FREP Rules. Under the new Rules, the African Charter is referred to in a number of occasions. The Rules provide for the following overriding objectives:<sup>93</sup>

The Constitution especially Chapter IV as well as the African Charter shall be *expansively and purposively interpreted and applied*, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.

Referring specifically to the African Charter and the Universal Declaration of Human Rights, the 2009 Rules mandate courts to respect municipal,

83 (2012) 8 NWLR (Part 1303) 27.

84 Suit No: SC.224/2004; (2014) LPELR 22724 (SC).

85 Suit No: SC.129/2013; (2014) LPELR 22697 (SC).

86 (2004) AHRLR 205 211.

87 See *Nwankwo v Onomeze-Madu* (2009) 1 NWLR (part 1123) 671, 715-716.

88 See sec 42 of the 1979 Constitution and sec 46 of the 1999 Constitution.

89 (1994) 9 NWLR 1 26-27.

90 (1994) 1 LRC 376.

91 Suit B/6M89 Benin High Court.

92 (2009) 15 NWLR (part 1164) 229.

93 Preamble, 2009 FREP Rules (emphasis mine).

regional and international bills of rights cited to it, brought to its attention or which the court is has knowledge of. The Rules also contain a number of other progressive provisions but these are not within the purview of this study.

## **7 Awareness and use by civil society**

There is a huge NGO presence in Nigeria and their level of awareness in respect of the two instruments is generally high. In the 5th periodic report of the Federal Republic of Nigeria to the African Commission, over 300 human rights related civil society organisations were listed.<sup>94</sup> Due to this huge number coupled with the relative shortness of the study period, a systematic assessment of all NGOs and civil society organisations (CSOs) in Nigeria was not undertaken. However, most of the organisations approached during the course of this study are aware of both the African Charter and the Maputo Protocol.

The African Charter and the Maputo Protocol have made substantial impact on the activities of these CSOs. They attend sessions of the African Commission regularly and participate actively in the activities of the Commission. Nigeria has more NGOs having observers' status with the Commission than any other country in Africa or outside Africa.<sup>95</sup> There are 28 NGOs from Nigeria that have observer status with the African Commission. This figure is closely followed by South Africa that has 24, Kenya and Senegal that

have 20 each and the United Kingdom that has 19 NGOs having observer status with the Commission. Nigerian CSOs have been more engaged with the African Commission's individual complaints procedure than their counterparts in other countries of Africa. Out of the 31 communications submitted to the African Commission in respect of Nigeria as at 2014, at least 25 were filed by CSOs. As stated by Okafor, the African Charter and the jurisprudence of the African Commission have served as key resource in the hands of Nigerian NGO activists, activist lawyers, minority rights advocates, activist politicians and activist journalists.<sup>96</sup> More importantly, the key CSOs working in the field of socio-economic rights in Nigeria, according to Nigeria's Fourth Periodic Country Report to the African Commission, have relied chiefly on the African Charter, perhaps because there are no justiciable socio-economic provisions in the Nigerian Constitution.<sup>97</sup> The same is true of CSOs working on the rights of women, which have included the Maputo Protocol in their programmes. The African Charter and the Maputo Protocol feature prominently in the promotional activities of CSOs in Nigeria.

## **8 Awareness and use by practicing lawyers**

The African Charter is generally more popular amongst lawyers than the Maputo Protocol. One of the interviewees, a staff member in the Federal Ministry of Justice, stated that the African Charter's provisions are less frequently used by government lawyers. According to him, the African Charter is more often used in human rights cases

94 See Nigeria's Fifth Periodic Country Report (n 23 above) 139-145. See also Nigeria's Fourth Periodic Country Report (n 23 above) 91-98.

95 See ACHPR 'NGOs with observer status' <http://www.achpr.org/network/ngo/> (accessed 24 September 2015).

96 Okafor (n 56 above).

97 See Nigeria's Fourth Periodic Country Report (n 23 above) 91-98.

by lawyers for complainants or applicants. In a review of Nigeria's leading law report, the Nigerian Weekly Law Report (1985-2014), this study found no less than 70 cases in which the African Charter or the African Charter (Ratification and Enforcement) Act was referred.<sup>98</sup> More recently, less reference has been made directly to the African Charter as a treaty because the African Charter Act is more often invoked. Some lawyers believe it is the Act and not the African Charter itself that is part of Nigerian law.

It should be recalled that one of the most visible marks of military dictatorship in Nigeria was the repression of the media, arbitrary closure of media houses, arrest and detention of journalists, amongst others. Some of these abuses were challenged before the African Commission and the Commission's decisions in most of these communications were widely publicised in the media although the visibility of the Commission's findings have reduced in recent years.

## **9 Academic writing and law school education**

In 56 out of the 104 faculties of law in Nigeria, the African human rights system and especially the African Charter is being taught at the undergraduate level.<sup>99</sup> In some faculties, it is taught as a fully-fledged module, which may be compulsory or elective. In other faculties, it is taught as part of public international law. Most first and second generations universities encourage research and thesis writing on the African human rights system at both under-

graduate and postgraduate level. Procedure for the enforcement of human rights is also part of the curriculum of the Nigerian Law School, although emphasis on the African Charter and the Maputo Protocol is minimal.

What can be inferred from responses received from specific Nigerians interviewed in the course of this study is that emphasis on the African human rights system is minimal or non-existent in primary and secondary schools as well as vocational institutions. Nevertheless, a number of lecture series at all levels help to promote the African Charter and in some cases the Maputo Protocol amongst academics, lawyers, judges and public officers.<sup>100</sup>

The African Charter and to some extent the Maputo Protocol are widely referred to in academic publications such as books and journals. During the course of this study, a significant number of academic publications were found which contained information on the African Charter and which were authored by Nigerians. Much less were found on the Maputo Protocol. Conclusive figures are however unavailable because country-wide searches were not carried out. From the limited searches carried out, most of the learned papers which were written on the African

<sup>98</sup> A list of these cases is on file with the author.

<sup>99</sup> See Nigeria's Fourth Periodic Country Report (n 23 above) 6.

<sup>100</sup> Nigerian Institute of Advanced Legal Studies, Lagos 2005-2010 annual Human Rights training workshop sessions; National Judicial Institute Abuja, human rights workshop sessions for judges of Federal and State High Courts, Sharia Courts and lower court judges nationwide (2002 to date); Nigerian Bar Association (NBA) Human Rights and Environment Committee Annual Continuing Legal Education Training Programmes for legal practitioners at all levels nationwide; National Human Rights Commission (NHRC) Abuja/Civil Society Organisations training workshop and seminar series on Human Rights. Papers presented during these series of lectures are usually published. See also Nigeria's Fourth Periodic Country Report (n 23 above) 6-7.

Charter by Nigerians were published in foreign journals, and few in local journals. The impact of the African Charter will greatly improve if more academic writing on the African Charter and the Maputo Protocol are published locally.

## **10 National human rights institutions**

The Nigerian National Human Rights Commission (NHRC) was established in 1995. The law establishing the Commission was amended in 2010 by the National Human Rights Commission (Amendment) Act. It is specifically mandated, amongst other things, to deal with all matters relating to the promotion and protection of human rights guaranteed by the Nigerian Constitution, the African Charter and other international human rights treaties, including the Maputo Protocol.<sup>101</sup> The Governing Council of the NHRC comprises 16 members including a chair, three representatives of cognate ministries, three NGO representatives, two legal practitioners, three media representatives, one representative of organised labour, two women representatives as well as the Executive Secretary of the Commission.<sup>102</sup>

From evidence gathered during this study, the African Charter and the Maputo Protocol have influenced the NHRC's activities in the following ways. The NHRC has an affiliate status with the African Commission, regularly attends sessions of the Commission, and participates actively in the Commission's activities. The NHRC also raises awareness in Nigeria about the African Charter, Maputo Protocol and activities

of the African Commission. Since 1998, the NHRC in conjunction with relevant partners has been organising training workshops and a public lecture series on the African human rights system. One of the thematic focuses of the NHRC is 'women and gender matter'. To this end, the NHRC has an advocacy group on violence against women. The NHRC coordinates the preparation of Nigeria's periodic report in conjunction with the Ministry of Justice. The NHRC also coordinated the development of the National Action Plan on the Promotion and Protection of Human Rights in Nigeria which is substantially modeled on the African Charter and the Maputo Protocol. Currently, follow-up and implementation of concluding observations and decisions of the African Commission is not one of the thematic focus areas of the NHRC.

## **11 State reporting**

The reporting process is coordinated by the Federal Ministry of Justice. From a review of the second, third, fourth and fifth periodic reports of Nigeria under the African Charter, the reporting process commences with the appointment of a consultant. Then, there is a Core Drafting and Review Team comprising members drawn from the Federal Ministry of Justice and the National Human Rights Commission, which meets with the consultant to develop a framework and work plan for the report writing; places call for inputs in newspaper adverts in at least two national dailies; collates and analyses the inputs supplied as a result of the newspaper adverts; and produces the first drafts for peer review. Once this is done, a two-day peer review workshop is usually called where all stakeholders – from the relevant ministries, agencies,

101 Sec 5(a) of the National Human Rights Commission (Amendment) Act 2010.

102 Sec 2(2) of the National Human Rights Commission (Amendment) Act 2010.



human rights NGOs, legislators and the general public – meet to review the first draft and produce the second draft.

The second draft will then be validated by a one-day stakeholders' forum to be attended by the core drafting and review team, the peer reviewers, the media and members of the public. Inputs from the one-day stakeholders' forum are incorporated to produce the final draft. The final draft is then submitted to the Federal Executive Council through the Minister of Justice. After approval by the Federal Executive Council, the final report is then sent to the Secretariat of the African Commission.

There is no evidence of any occasion where concluding observations of the African Commission were disseminated to the public at large by the state. The Observations are also not translated into the three major languages. Civil society groups however use concluding observations in their advocacy activities. Nigeria has thus far complied with its reporting obligation under the African Charter, having submitted up to date five periodic reports to the African Commission.<sup>103</sup> The first report was submitted in 1990; the second in 2003; the third in 2008; the fourth in 2011 and the fifth in 2014. Nigeria has yet to submit a specific report on efforts aimed at promoting and protecting the rights contained in the Maputo Protocol.

The Commission's practice with regard to concluding observations was not fully developed until 2001,<sup>104</sup> there-

by limiting this study to the second, third and fourth reports. The concluding observations in respect of the second periodic report could not be accessed by the author. There is also no information in the third periodic report on steps taken by the government to implement the Commission's observations on the second periodic report. However, the fourth periodic report outlined specific steps taken by the government to implement observations made by the Commission in the third periodic report. A closer look at the responses however reveals that five out of the seven recommendations are yet to be fully implemented.<sup>105</sup> One of the pertinent concluding observations following review of Nigeria's Fourth Periodic report was that Nigeria should take steps to ratify the Charter on Democracy, Elections and Good Governance. This treaty was ratified on 1 December 2011. The Commission also recommended that government should enact at the federal level, legislation prohibiting FGM, violence and other discriminatory practices against women. Pursuant to this recommendation, the Violence against Persons (Prohibition) Act was passed into law in 2015. Concluding observations in respect of the Fifth Periodic Country Report submitted to the African Commission in July 2014 and considered at its 56th ordinary session is yet to be available on the Commission's website. It is hoped that when these concluding observations are available, the government will do the needful to implement them before the next reporting cycle.

103 One of the reasons that prompted Nigeria to submit its Fourth Periodic Report on time was the need to respond to the concerns raised by the Commission in the concluding observations issued after examination of the Third Periodic Report. See Nigeria's Fourth Periodic Country Report (n 23 above) 1.

104 Viljoen (n 30 above) 387.

105 See recommendations 35, 36, 37, 41 & 42 of the Concluding Observations and Recommendations on the Third Periodic Report of the Federal Republic of Nigeria.

## 12 Communications involving Nigeria

Between 1987 and 2014, a total of 34 communications were submitted against Nigeria.<sup>106</sup> Out of these communications, nine were declared inadmissible; three were withdrawn; one was resolved via friendly settlement; 21 were declared admissible.<sup>107</sup> Violations were found in 19 cases out of the 21 communications that were found to be admissible.<sup>108</sup> Out of the 19 cases in which the African Commission found violations against Nigeria, full compliance was recorded only in two; partial compliance in 14,<sup>109</sup> and total noncompliance in three.<sup>110</sup>

At least in two cases, the Nigerian government fully complied with the recommendations of the African Commission. In *Constitutional Rights*

*Project v Nigeria*,<sup>111</sup> five Nigerians were arrested and detained by the Nigerian military government without trial for about two years. On behalf of the detainees, the Constitutional Rights Project (CRP) submitted a communication to the African Commission. In its findings, the Commission found Nigeria in violation of articles 6 and 7 of the African Charter and urged Nigeria to charge or release the complainants. Soon after the African Commission's decision, the Nigerian government complied by charging the detainees.<sup>112</sup> In another case, *Centre for Free Speech v Nigeria*,<sup>113</sup> four Nigerian journalists were tried and convicted secretly by a military tribunal. During the trial, they were not allowed access to counsel of their choice. The military decree setting up the tribunal also ousted the court's jurisdiction. The complainants thus were without a right of appeal. In a communication submitted on their behalf by the Centre for Free Press, the African Commission found Nigeria in violation of articles 6, 7 and 26 of the African Charter. The African Commission urged the Nigerian government to release the journalists. They were eventually released.<sup>114</sup>

Partial compliance was recorded in four cases.<sup>115</sup> In *Constitutional Rights Project (in respect of Akamu, Adegan and Others) v Nigeria*,<sup>116</sup> CRP filed a communication before the African Commission

106 This information is based on facts available on the Commission's website at <http://www.achpr.org/states/nigeria/> (accessed 6 November 2015). It should be noted that officially there are 33 communications listed against Nigeria on the Commission's website. This is because communication 270/03 *Access to Justice v Nigeria* which was decided at the 13th extraordinary session of the Commission on 25 February 2013 is yet to be published. However, information in the 34th Activity Report of the Commission reveals that the case is a merit decision.

107 These figures are based on the author's analysis of all the 34 communications submitted to the Commission in respect of Nigeria as at 2014.

108 Communication 425/12 *Legal Defence and Assistance Project v Nigeria* which was declared admissible at the Commission's 16th extraordinary session on 20-29 July 2014 is yet to be decided on the Merit. Also, as earlier discussed, the decision of the Commission on the merit in communication 270/03 *Access to Justice v Nigeria* is yet to be published. As a result, it was not possible to ascertain whether violation was found or not.

109 See L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LL.D. thesis, University of Pretoria, 2005 56.

110 As above.

111 *Constitutional Rights Project v Nigeria* (2000) AHRLR 248 (ACHPR 1999) (Nigerian Detention case).

112 See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1 10.

113 *Centre for Free Speech v Nigeria* (2000) AHRLR 250 (ACHPR 1999) (Nigerian Journalists case).

114 Viljoen & Louw (n 112 above) 10.

115 Louw (n 109 above).

116 (2000) AHRLR 180 (ACHPR 1995).

on behalf of Akamu, Adegba and others who were convicted and sentenced to death by a military tribunal. After consideration of the communication, the African Commission recommended that the complainants should be released. Although the complainants were not released, the death sentence imposed upon them was commuted to terms of imprisonment.<sup>117</sup> In a similar case, *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v Nigeria*,<sup>118</sup> the African Commission recommended the release of the complainants who had been sentenced to death by a special military tribunal. Following the African Commission's recommendation, the complainants' death sentence was commuted to five years' imprisonment, and they were later released.<sup>119</sup> Following the African Commission's recommendation in *Constitutional Right Project v Nigeria*,<sup>120</sup> 11 soldiers who had been detained unjustly for a long period were released. They were however not paid any compensation as recommended by the African Commission.

Out of the 13 cases in which the then military government of Nigeria clearly failed to comply with the recommendations of the African Commission, at least ten cases were to some extent implemented upon transition to democracy.<sup>121</sup> A number of military decrees earlier declared by the African Commission to violate the African Charter were repealed or amended. Some of the detainees that have been vindicated by the African Commission were also released.

Following the African Commission's recommendations in *SERAC v Nigeria*, the recommendations were widely disseminated by SERAC.<sup>122</sup> The Nigerian government subsequently established the Ministry of Niger Delta with a special mandate on the development of the Niger Delta area. This was followed by a Development Master Plan specifically designed for the Niger Delta. The Niger Delta Development Commission (NDDC) has also taken some measures to address health and development concerns of the Ogoni.<sup>123</sup> However, critical issues such as impact assessment, prosecution of erring officials, and comprehensive clean-up of the Ogoniland are yet to be adequately addressed.<sup>124</sup> It is noteworthy that the incumbent President, Muhammadu Buhari has initiated programmes for the clean-up of Ogoniland.<sup>125</sup>

Due to the failure of the Nigerian government to fully implement the decision of the African Commission in *SERAC v Nigeria*, the Registered Trustees of the Socio-Economic Rights Action Project (SERAP) on 23 July 2009 filed a complaint against Nigeria at the ECOWAS Community Court of Justice (ECCJ). The plaintiff, in the case titled *SERAP v Nigeria* (Environment),<sup>126</sup> complained that the Nigerian government through its agencies, agents and some multinational corporations violated the rights to health, adequate standards of living and rights to economic and social development of the

117 Louw (n 109 above) 26.  
118 (2000) AHRLR 183 (ACHPR 1995).  
119 See also Louw (n 109 above) 27.  
120 (2000) AHRLR 241 (ACHPR 1999).  
121 Louw (n 109 above) 56.

122 M van der Linde & L Louw 'Considering the interpretation and implementation of art 24 of the African Charter on Human and Peoples' Rights in light of SERAC communication' (2003) 3 *African Human Rights Law Journal* 167 184.  
123 As above.  
124 Louw (n 109 above) 48.  
125 See Premium Times (n 11 above).  
126 *SERAP v Nigeria* ECW/CJ/JUD/18/12, Judgment of 14 December 2012.

Niger Delta people. In a groundbreaking judgment delivered by the ECCJ in December 2012, the Court found the government of Nigeria in violation of the African Charter and ordered it to: take all measures as soon as possible ensure restoration of the environment of the Niger Delta; prevent occurrence of damage to the environment; and hold perpetrators of the environmental damage accountable. It remains to be seen whether the government of Nigeria will comply with this decision.

In addition to the decision discussed above, the ECCJ has also found Nigeria in violation of various provisions of the African Charter amongst other international human rights instruments in at least three cases, namely *Ugokwe v Nigeria*,<sup>127</sup> *Djot Bayi v Nigeria*,<sup>128</sup> and *SERAP v Nigeria* (Education).<sup>129</sup> In a study carried out in 2013 which analysed the three cases cited above, it was found that full compliance was recorded in two.<sup>130</sup>

### 13 Promotional visits by the African Commission

The first mission of the African Commission to Nigeria was undertaken from 7 to 14 March 1997. The mission was approved by the African Commission at its 2nd extraordinary session in Kampala, Uganda, in 1995. The aims of the mission included gathering information about a number of communications which were pending before the African Commission, visiting Ogoniland and

strengthening co-operation with NGOs. The mission consisted of Commissioner Dankwa and Amega. The mission recommended amongst others that: the programme for transition of power from the military to civilians should be followed through and that Nigerians should be allowed to freely decide on those to govern them; members of Niger Delta communities should be compensated for the damage done to their environment through government oil exploration activities; the 'Ogoni 19' should be tried speedily and the conditions under which they lived should be improved; and that the military government should release the acclaimed winner of the 1993 Presidential election, Chief MKO Abiola, from prison. Most of these recommendations have been implemented on way or the other.

The Special Rapporteur on the Rights of Women in Africa conducted a promotional mission on the rights of women in Nigeria in 2001. In her report, the Rapporteur recommended that the government of Nigeria should: take measures to protect women against all forms of violence, as well as traditional beliefs and practices; ensure that the application of 'Sharia' does not constitute an impediment to the promotion and protection of women's rights; and ensure that laws of subnational governments respect international human rights norms that the Nigeria has willfully accepted. Today, almost all the issues raised in the recommendations of the Special Rapporteur remain part of the lingering problems with regards to women's rights in Nigeria.

Another promotional mission was undertaken to Nigeria by the African Commission in 2009. The mission recommended amongst others that government should: ensure passage of

127 ECW/CCJ/JUD/03/05.

128 ECW/CCJ/JUD/01/09.

129 ECW/CCJ/JUD/07/10

130 HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: compliance and influence' unpublished LLD Thesis, University of Pretoria 2013 389.

laws aimed at addressing domestic violence and discrimination against women; review the powers, functions and funding of the NHRC, make the article 34(6) declaration under the Protocol to the African Charter on the Establishment of the African Court; reform and restructure the Independent National Electoral Commission; reduce overcrowding in prisons and establish an independent oversight body to investigate allegations of police malpractices, including unlawful killings. At least two of these recommendations have been satisfactorily implemented based on the researcher's observations during this study. In 2010, a new electoral law was adopted strengthening the independence of the electoral body and providing for prosecution of electoral offenders, amongst others.<sup>131</sup> The enabling law of the NHRC was also reviewed with the new law providing for operational, structural and financial independence of the NHRC.<sup>132</sup> The NHRC currently enjoys 'A' status according to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).<sup>133</sup>

Between 23 August and 2 September 2011, Commissioner Atoki as the Special Rapporteur for Prisons and Conditions of Detention in Africa undertook a prisons' promotional mission to Nigeria. The full report of this mission is yet to be made public. It is very difficult to state conclusively the impact of the African Commission's

promotional missions in Nigeria. What is however clear is that missions give more visibility to the work of the Commission. They also increase public awareness about the African Charter and the Maputo Protocol. As to holding of African Commission's sessions in member states, two sessions of the African Commission were held in Nigeria, namely, the 9th ordinary session, 18-25 March 1991, and the 44th ordinary session, 10-24 November 2008. This greatly impacted on the level of awareness about the African Charter. It also increased the visibility of the African Commission in Nigeria.

#### **14 Factors that may impede or enhance the impact of the African Charter and the Maputo Protocol**

The factors which are found in this study to have enhanced the impact of the African Charter and the Maputo Protocol include the following:

- (a) *Strong civil society*: This includes NGO activists, activist lawyers, minority rights advocates, activist politicians and activist journalists. The NGOs especially Constitutional Rights Project, Civil Liberties Organisations and Media Rights Agenda are well established and well resourced. Civil society was incredibly creative in deploying the African Charter.
- (b) *Domestication*: Perhaps the most important enhancing factor is the domestication of the African Charter in 1983. The fact that the African Charter was already part of Nigerian law greatly eased the work of CSOs in convincing local judges to apply the African Charter. This also helped the judges to develop the far reaching 'African Charter superiority propositions'.
- (c) *Number of communications against Nigeria*: The impact of the African Charter in Nigeria has been enhanced by the volume of citable jurisprudence set out

131 See the Electoral Act 2010.

132 See the National Human Rights Commission (Amendment) Act 2010.

133 See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights 'Chart of the status of national institutions' (2014) [www.ohchr.org/Documents/Countries/NHRI/Chart\\_Status\\_NIs.pdf](http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf) (accessed 20 November 2015).

by the Commission in communications submitted against Nigeria.

- (d) *Judicial activism*: In partnership with activist CSOs, progressive judges have demonstrated exceptional courage and creativity in giving effect to the African Charter.
- (e) *Academic writings*: Academic writings of commentators like Odinkalu, Udombana, Umozurike, Falana and Osita Eze amongst others have greatly enhanced the level of awareness about the African Charter in Nigeria.
- (f) *Support by the Commission*: Another factor that has enhanced the impact of the African Charter and the Maputo Protocol in Nigeria is the direct support and encouragement given to CSOs in Nigeria by the African Commission.
- (g) *The overall international and domestic contexts*: One factor that is often excluded from consideration is the overall international and domestic context which was favourable or even supportive of the activities of the CSOs and that of the African Commission. Such context includes the repression and human rights abuses by the military despots in Nigeria, the suspension of Nigeria from the Commonwealth of Nations in 1995 and the general relegation of Nigeria to the status of a pariah nation by foreign nations and donors during the long years of military dictatorship.
- (h) *Membership of the Commission*: Up to the time of compiling this report of Nigeria, two Nigerians have served on the African Commission. These include Professor Oji Umozurike (1989-1997) and Ms Catherine Modupe Atoki (2007-2013). Most importantly, their appointments have contributed to the development of the NHRC. After his retirement from the African Commission, Professor Umozurike was appointed on the Board of the NHRC in 2000. Ms Atoki was until her appointment a Special Rapporteur of the NHRC on Women and Gender related matters. Ms Atoki was also a member of the Governing Council of the NHRC until 2007 when she was appointed to the African Commission. After serving her term at the African Commission, she was appointed Direc-

tor-General of Nigeria's Consumer Protection Council, which office she still hold as at the time of compiling this report.

It is noteworthy that much has changed since Nigeria returned to civil rule in 1999. Creative use of the African Charter by domestic courts has dropped significantly. The same is true of the number of communications filed against Nigeria before the African Commission. However, civil society advocacy and the general level of awareness about the African Charter and the Maputo Protocol have improved. The Maputo Protocol has also continued to exert steady influence on the executive arm of government as well as civil society organisations. However, the impact of the Protocol on legislative and judicial activities has been less than satisfactory. While laws and judicial decisions have progressively been aligned with provisions of the Maputo Protocol, explicit reference to the Protocol in legislation and judicial decisions has been the exception rather than the norm. It is assumed that the absence of one or more of the conditions which earlier enhanced the impact of the Charter is responsible for the limited impact of the African Charter and the Maputo Protocol in Nigeria during the study period.

# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN SIERRA LEONE

*Augustine Sorie Marrah\**



## 1 Introduction

Sierra Leone is one of the world's least developed countries, with a population of about six million people and high levels of entrenched poverty, illiteracy and youth unemployment.<sup>1</sup> Sierra Leone is a multi-party democracy with a fusion of presidential and parliamentary systems of government. While women make up the highest percentage of the national population, they constitute just 13,2 per cent of the current parliament.<sup>2</sup>

Sierra Leone is a state party to most international treaties or conventions including the African Charter, and has recently ratified the Maputo Protocol.<sup>3</sup> While Sierra Leone continues to face enormous challenges in upholding human rights within its borders, it continues to record progress in the areas of legislative and other policy frame-

works and general awareness of human rights.<sup>4</sup>

Although there has been an increase in legislation in favour of women, traditional practices and societal attitudes to women and their livelihoods remain largely unchanged. A recent study by Plan International, Save the Children and World Vision International concluded that teenage pregnancy and gender-based violence are on the rise across the country mainly due to the Ebola Virus Disease (EVD).<sup>5</sup> The most recent incident of sexual violence was in the case of a girl who was gang-raped along the main beach in Freetown.<sup>6</sup>

Sierra Leone's Constitution guarantees fundamental human rights and free-

\* LLM HRDA (Pretoria); Secretary, General Legal Council in Sierra Leone.

1 UNDP 'About Sierra Leone' <http://www.sl.undp.org/content/sierraleone/en/home/countryinfo.html>; Sierra Leone Demographics Profile 2014 [http://www.indexmundi.com/sierra\\_leone/demographics\\_profile.html](http://www.indexmundi.com/sierra_leone/demographics_profile.html) (accessed 10 November 2015).

2 As above.

3 Ratified on 2 July 2015.

4 'The state of human rights in Sierra Leone 2013' <http://www.hrsl.org/> (accessed 10 November 2015).

5 Save the Children 'Children Report increased exploitation, teenage pregnancies in Ebola-affected Sierra Leone' <http://www.savethechildren.org/site/apps/nlnet/content2.aspx?c=8rKLIXMGIpI4E&b=9241341&ct=14736265&notoc=1> (accessed 20 September 2015). Also see Awoko 'Sierra Leone News: Sexual penetration on the increase in Kenema District' <http://awoko.org/2015/08/21/sierra-leone-news-sexual-penetration-on-the-increase-in-kenema-district/> (accessed 10 November 2015).

6 UN in Sierra Leone 'Statement from the United Nations Country Team in Sierra Leone over the rape and murder of a young woman at Lumley Beach, Freetown'

doms to all. Section 15 of the Constitution<sup>7</sup> guarantees fundamental human rights and freedoms of the individual notwithstanding their 'race, tribe, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest'. These rights include the right to life and liberty, security of the person, freedom of movement, freedom of expression, conscience and assembly, and protection from deprivation of property.

The Constitution of Sierra Leone does not guarantee socio-economic rights as they only constitute part of the 'fundamental principles of state policy'.<sup>8</sup> Although the Constitution broadly enshrines most civil and political rights, enjoyment of these rights is however limited by claw-back clauses. For instance, even though the Constitution guarantees the right to life, capital punishment is still legal and can be used in some circumstances, namely murder and treason.<sup>9</sup>

In addition to the limited rights contained in the Constitution of Sierra Leone, section 27(4)(d) which has been termed the notorious constitutional provision in relation to women's rights further allows discriminatory laws to be applicable to women.<sup>10</sup> Section 27(4)(d) states that the non-discrimination clause

does not apply to any law regarding adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. Women in Sierra Leone face discrimination in customary laws relating to marriage, property distribution, adoption and constitutional recognition.

The Constitution of Sierra Leone is evidently out of touch with modern principles of good governance and the overall realities of democratic processes. There is currently a Constitutional Review Committee<sup>11</sup> that is charged with the mandate of formulating a new national constitution reflecting the aspirations of the peoples of Sierra Leone in the current political and social-economic era both nationally and globally. A representative of the Sierra Leone Bar Association on the committee stated that the African Charter has become the primary source of consultation in the area of human rights and 'is very useful in putting together the new bill of rights for Sierra Leone'. She remarked that she was not aware of the African Charter until her appointment to the committee.

## 2 Ratification and domestication

Sierra Leone has a dualist system of incorporating international laws. This means that Sierra Leone must domesticate a treaty or international convention in order for that treaty or international convention to constitute part of its body of laws. Because of this, international instruments do not automatically form part of the legal regime of Sierra Leone until they are domesticated.

Although the African Charter and the Maputo protocol have been ratified

20 August 2015 <http://sl.one.un.org/2015/08/20/statement-from-the-united-nations-country-team-in-sierra-leone-over-the-rape-and-murder-of-a-young-woman-at-lumley-beach-freetown/> (accessed 10 November 2015).

7 Act 6 of 1991.

8 Chap II of the Constitution.

9 Sec 16 of the Constitution.

10 Constitutional Review Committee, Republic of Sierra Leone "'Expunge the infamous Sec 27(4) (d) and (e) now" Women demand' available at [http://constitutionalreview.gov.sl/site/MediaCenter/NewsPressReleases/expunge\\_infamous\\_sec27\(4\)\(d\)\\_e\\_women\\_demand.aspx](http://constitutionalreview.gov.sl/site/MediaCenter/NewsPressReleases/expunge_infamous_sec27(4)(d)_e_women_demand.aspx) (accessed 10 March 2016).

11 Constitutional Review Committee website <http://constitutionalreview.gov.sl/site/Home.aspx> (accessed 20 September 2015).



by Sierra Leone, they have not been incorporated into the municipal laws of Sierra Leone. The African Charter was ratified on 21 September 1983 while the Maputo Protocol was ratified in July 2015 some twelve years after Sierra Leone signed the Protocol. The instrument was placed before parliament by the Minister of Social Welfare, Gender and Children's Affairs supported by numerous civil society groups. A senior official in the Foreign Affairs Ministry noted that 'Sierra Leone did not enter any reservations while ratifying the African Charter and the Maputo Protocol'.<sup>12</sup>

Broadly speaking, international law can become part of domestic law by either the act of incorporation or through judicial use. However, provisions from the African Charter and Maputo Protocol have not been relied upon by Sierra Leonean courts. The African Charter and the Maputo Protocol have been rarely (if at all ever) used in binding judicial precedents which would have incorporated provisions of these instruments into the laws of Sierra Leone.

The Ministry of Justice and Ministry of Foreign Affairs and International Co-operation are the principal ministries concerned with treaties and other international instruments signed by Sierra Leone. There is specifically a human rights division within the Ministry of Foreign Affairs charged with the responsibility of handling, compiling and advising the government mainly in respect of ratification of human rights treaties signed by Sierra Leonean plenipotentiaries. In respect of ratification and incorporation, the Ministry of Foreign Affairs liaises with the Office of

Attorney General in the Ministry of Justice. The latter is the principal legal advisor to the government of Sierra Leone and has an international division that handles treaties or other instruments to which Sierra Leone is a state party.

The Ministry of Social Welfare, Gender and Children's Affairs is the main focal point for the Maputo Protocol. Although it collaborates with the two other ministries mentioned above, the gender ministry has been involved with the Maputo Protocol more than any other governmental entity in Sierra Leone.

### **3 Legislative reform or adoption**

Sierra Leone has not undertaken any significant legislative reforms in the light of the African Charter and the Maputo Protocol. The enactment of what have been dubbed 'the three gender laws' the Domestic Violence Act 2007, the Registration of Customary Marriage and Divorce Act 2008 and the Devolution of Estates Act 2007 – were prompted, in the opinion of civil society, by the growing awareness and use of the African Charter amongst other international treaties.

The Domestic Violence Act 2007 addresses issues of widespread violence against women especially in domestic settings in Sierra Leone in line with article 4 of the Maputo Protocol, which deals with the rights of women to life, integrity and security.

The Registration of Customary Marriage and Divorce Act was passed to give recognition to customary marriages, which are the most contracted in the country. This law makes it mandatory for customary marriages to

<sup>12</sup> Interview granted on 3 August 2015.

be registered and this is in line with article 6(d) of the Maputo Protocol. This Act also extends recognition of customary divorce which women can now obtain unlike before. This aspect relates to article 7 of the Maputo Protocol.

The Devolution of Estate Act was enacted to address issues of inheritance of property by women upon the demise of their spouses. Before the passage of this law, women whose husbands died intestate could not inherit if their tribal customary laws did not provide as such. The content of this legislation is in line with article 21 of the Maputo Protocol, which deals with a widow's right to inheritance.

In 2012, the Sexual Offences Act was passed in order to address the rising tide of sexual violence across the country. This could very well be interpreted as fulfilment of Sierra Leone's obligation under article 4(2)(a) of the Maputo Protocol.<sup>13</sup> The sexual offences law for the first time also makes provision for free medical treatment for sexual violence victims.<sup>14</sup> The Executive Director of Advocaid<sup>15</sup> noted that the enactment of the Sexual Offences Act was prompted by advocacy from civil society consortiums in partnership with international actors and that the Maputo Protocol was frequently cited during the process of enactment. A senior official in the Attorney-General's office maintained that the Disability Act of 2011 and the Legal Aid Act of 2012 were all in compliance with the state's international obligations arising from the rele-

vant provisions of the African Charter and the Maputo Protocol.

#### 4 Policy reform or adoption

The government's national policies have not been directly geared towards implementation of the African Charter or the Maputo Protocol but some inevitably address crucial human rights issues contained in the African Charter and the Maputo Protocol.

The Minister of Social Welfare, Gender and Children's Affairs noted that 'government has taken both legislative and policy measures to address harmful practices to women'.<sup>16</sup> He stated that the President has, *inter alia*, endorsed the national campaign for the minimum 30 per cent quota of women in political decision-making positions. He maintained that Sierra Leone is the first country in the sub-region to declare International Women's day – 8 March – as a national public holiday. The Agenda for Prosperity<sup>17</sup> which is the government's roadmap for governance and development in Sierra Leone has gender equality and women's empowerment as one of its eight pillars. The government states in the said document that 'it is committed to addressing Gender Equality and Women's Empowerment in the area of legal and policy reforms'.<sup>18</sup>

There is a national healthcare policy for free medical services to pregnant women, nursing mothers and children across the country which has been in force since April 2010. This has helped

13 Art 4(2)(a) provides that state parties shall take appropriate and effective measures to: (a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.

14 Section 39 of the Sexual Offences Act 2012.

15 Advocaid is a leading women's right organisation in Sierra Leone.

16 Interview with Hon Emmanuel M Kaikai on 7 August 2015.

17 'Agenda for Prosperity' [http://www.undp.org/content/dam/sierraleone/docs/projectdocuments/povreduction/undp\\_sle\\_The%20Agenda%20for%20Prosperity%20.pdf](http://www.undp.org/content/dam/sierraleone/docs/projectdocuments/povreduction/undp_sle_The%20Agenda%20for%20Prosperity%20.pdf) (accessed 10 November 2015).

18 As above.

in some way to reduce the maternal and infant mortality rates in the country.<sup>19</sup> There is also a National HIV Prevention Strategy 2011-2015 addressing prevention of infections and the treatment, care and support of those infected.<sup>20</sup>

## 5 Court judgments

The African Charter and the Maputo Protocol are rarely cited in court decisions in Sierra Leone. This is partly because they have both not been incorporated into the laws of Sierra Leone. It could also be attributed to the fact that lawyers very seldom reference or cite them in their pleadings or submissions in court. The current president of the Sierra Leone Bar Association remarked that 'the African Charter and the Maputo Protocol have not been very popular amongst lawyers in Sierra Leone'.<sup>21</sup> Also, human rights related public interest litigation is few and far between in Sierra Leone, another reason for the low levels of awareness of the African Charter in the courtrooms of Sierra Leone.

In recent times, a group of female lawyers formed an organisation called Legal Access through Women Yearning for Equality Rights and Social Justice (LAWYERS). This group of female legal practitioners use both the African

Charter and the Maputo Protocol, especially in their advocacy activities. Through this entity, the African Charter and Maputo Protocol are thus becoming familiar instruments within civil society activism although their usage in the courtrooms still has a long way to go.

Currently the Society for Democratic Initiatives (SDI-SL) has filed two applications in the Supreme Court challenging certain public order provisions on the grounds of the African Charter including other international treaties.<sup>22</sup> Panels are yet to be constituted for these actions.

The Human Rights Commission of Sierra Leone employs the African Charter and the Maputo Protocol in arriving at some of its quasi-judicial decisions.<sup>23</sup>

## 6 Awareness and use by civil society organisations

Ibrahim Tommy, the Executive Director of the Centre for Accountability and Rule of Law, a leading human rights organisation in Sierra Leone, held the view that the African Charter and the Maputo Protocol are no longer unfamiliar instruments to civil society groups but expressed doubt as to the appreciation of the contents of those instruments by human right activists. A few organisations – such as Prison Watch SL, Human Right Defenders, and Amnesty International – have applied for observer status<sup>24</sup> with the African Commission but none has been granted so far. Alpha

19 Sierra Leone previously had one of the worst statistics on maternal and infant mortalities. See <http://www.sl.undp.org/content/sierra-leone/en/home/mdgoverview/overview/m dg4.html> check link and provide description; Sierra Leone infant mortality rate [http://www.indexmundi.com/sierra\\_leone/infant\\_mortality\\_rate.html](http://www.indexmundi.com/sierra_leone/infant_mortality_rate.html) (accessed 10 November 2015).

20 National HIV/AIDS Secretariat, Sierra Leone 'Sierra Leone National HIV Prevention Strategy 2011-2015' <http://www.nas.gov.sl/publication/124-sierra-leone-national-hiv-prevention-strategy-2011-2015> (accessed 16 November 2015).

21 Interview with Ibrahim Sorie, President Sierra Leone Bar Association, 3 August 2015.

22 Interview with Emmanuel Saffa Abdulai, Executive Director, Society for Democratic Initiatives, 4 August 2015.

23 Interview with Doris Sonsiama, Senior Human Right Officer, Human Right Commission, 4 August 2015.

24 Email interview with Alpha Sesay, legal officer – Open Society Foundation, 16 November 2015.

Sesay, a legal officer at the Open Society Foundations at the Hague observed that there is a growing interest in the African Charter and the Maputo Protocol by local NGOs in Sierra Leone and this, he said, was evidenced by their presence at the African Commission's 57th ordinary session notwithstanding their non-observer status.<sup>25</sup>

A senior member<sup>26</sup> of LAWYERS hinted that the Maputo Protocol became an every day read during their advocacy for the ratification of the said protocol. She noted she was a participant in some training on the Maputo Protocol in Tanzania and that most of the provisions of the Maputo Protocol have formed the aims and objectives of their organisation.

The Executive Director of Advocaid noted that the African Charter and the Maputo Protocol are the tools they mainly use in their trainings of prison officers in regards their handling of female inmates. In her opinion, awareness of these instruments is increasing but adherence to the provisions of those instruments is far from satisfactory.

Ms Yasmin Jusu-Sheriff, a senior human rights lawyer and civil society activist maintained that while awareness and use of both the African Charter and Maputo Protocol are of appreciable levels within the civil society sector, she lamented that such is not the same with magistrates and judges. She noted that civil society would often use these instruments in advocacy activities prior to their ratification but would usually abandon them after ratification.

<sup>25</sup> As above.

<sup>26</sup> Christiana Davies-Cole is the Project Manager of LAWYERS. Interview granted on 5 August 2015.

The Executive Director of the Society for Democratic Initiatives remarked that awareness of both instruments is rising within civil society as they are used oftentimes as advocacy tools but noted that the same could not be said for the implementation of the rights contained in the said instruments.

The UN Country Team referred to the Maputo Protocol in their statement<sup>27</sup> on a recent rape incident in Sierra Leone:

The UN recalls that sexual assault against women, especially gang rape, was rampant during the 1991-2002 civil war in Sierra Leone. The UNCT is also cognizant of the fact that the government of Sierra Leone passed legislation in 2007 making the sexual abuse of women a criminal act. In addition, it reminds the authorities that Sierra Leone ratified the African Charter on Human and People's Rights on the Right of Women in Africa, a Charter that requests the state parties to protect women from all forms of violence, particularly sexual and verbal violence:

'States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.' (Article 3/4, Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa).

## **7 Incorporation in law school education and academic writings**

The Department of Law at the University of Sierra Leone has for the first time introduced a human rights module in the law programme. This appears to be inspired by the growing recognition of the African Charter and the Maputo

<sup>27</sup> UN in Sierra Leone (n 6 above).

Protocol. The African regional system is one of the components of the course.

It is hoped that this course marks the beginning of a profound interest within the legal profession for human rights treaties both regionally and internationally. That inevitably would expedite the incorporation of the African Charter and the Maputo Protocol amongst other treaties awaiting domestication.

There is a noticeable dearth of academic resources in Sierra Leone and this unattractive reality extends to academic materials in relation to human rights. Before now, very few human rights activists and organisations referred to the African Charter in their brochures and handbooks on human rights. This situation is fast changing since most organisations now utilise the African Charter and more new women's organisations are using the Maputo Protocol in their advocacy drives. While academic material referencing the African Charter may still be limited, these instruments do come in handy in civil society advocacy activities.

## **8 National human rights institutions**

There is a human right commission, and an office of the ombudsman in Sierra Leone. The Human Right Commission of Sierra Leone (HRCSL) was established in 2004<sup>28</sup> in accordance with the Paris Principles. The Commission is charged with the mandate of promoting and protecting human rights across the country. The Commission was accredited 'A Status' in 2011 by the UN International Coordinating Committee of

National Institutions for the Promotion and Protection of Human Rights (ICC). This accreditation played a huge role in Sierra Leone's election to the membership of the UN Human Right Council in 2012.<sup>29</sup>

Ms Jamesina King, a commissioner of the HRCSL who was appointed in June 2015 as a commissioner of the ACHPR, noted that the African Charter and the Maputo Protocol are part of the key tools being used in the discharge of the Commission's mandate.<sup>30</sup> She maintained that the Commission employs these instruments both in its quasi-judicial functions and in their public education and trainings, which are offered to diverse entities and groups across the country. She noted further that the HRCSL does make reference to certain provisions of the African Charter and the Maputo Protocol in its annual reports on the state of human rights in the country. Ms King maintained that the Commission collaborated with many other human rights organisations in advocating for the ratification of the Maputo Protocol.

'[A] [f]ew years ago, the relationship between the African Commission and the HRCSL was tenuous', she said. But that has changed since they were trained by a representative of the African Commission on how to compile a state report. Ms King's recent appointment to the African Commission<sup>31</sup> as a member will hopefully also strengthen the ties

28 Established pursuant to the Human Right Commission of Sierra Leone Act 9 of 2004.

29 United Nations Human Rights Council 'Current Membership of the Human Rights Council, 1 January-31 December 2016' <http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx> (accessed 20 September 2015).

30 Interview granted on 4 August 2015. Report available at <http://www.achpr.org/sessions/57th/> (accessed 16 November 2015).

31 African Union '25th Assembly of the African Union commits to mainstreaming women as the Continent begins to implement Agenda

between HRCSL and the African Commission.

The Office of the Ombudsman is very much overshadowed in recent times by the prominence stemming from the activities of the HRCSL. The awareness and usage of the African Charter and Maputo Protocol by the Office of Ombudsman in Sierra Leone is not noticeable to say the least. Currently, the Ombudsman heads the Constitutional Review Committee. Therefore, it is hoped that by the time that assignment expires, his knowledge and usage of these instruments would have increased, courtesy of the numerous citations and references by human right advocates.

## 9 State reporting

Sierra Leone submitted its first state report under the African Charter in 2014.<sup>32</sup> Ms King noted that the Human Right Commission of Sierra Leone worked in collaboration with the Attorney General's Office in putting together the said report. Sierra Leone could not send a delegation to present the report because of the outbreak of the EVD until November 2015.<sup>33</sup> The state report was developed by the Attorney-General's Office in collaboration with the HRCSL and in consultation with civil society groups in the country.<sup>34</sup> The report was presented by the Attorney

General of Sierra Leone who was accompanied by the Sierra Leone Ambassador to The Gambia, the head of the Justice Sector Coordination programme, a state counsel and a few others.<sup>35</sup>

The report is a 28 page document detailing the human-rights situation, legal frameworks and general practice in regard to both civil and political rights and socio-economic rights in Sierra Leone. The Report seems to group both categories of rights as if both are justiciable in Sierra Leone. It does not disclose what steps the state of Sierra Leone is taking to ensure that socio-economic rights are enforceable in Sierra Leone. Whilst the report attracted several questions from the commissioners regarding the human rights situation in Sierra Leone, the country was applauded for establishing the Independent Police Complaints Commission.<sup>36</sup> A shadow report is said to have been presented by one local NGO.<sup>37</sup>

It is hoped that Sierra Leone, going forward, will be compliant with her state reporting obligations under the African Charter and also under the Maputo Protocol.

## 10 Communications and promotional visits

To date, only one communication has been submitted against Sierra Leone to the African Commission for, inter alia, contravention of the right to life.<sup>38</sup> The government of Sierra Leone executed 24 soldiers after being tried and sentenced

2063' <http://summits.au.int/en/25thsummit/events/25th-assembly-african-union-commits-mainstreaming-women> (accessed 10 November 2015).

32 See African Commission on Human and Peoples' Rights 'Sierra Leone: Initial and Combined Reports, 1983-2013' <http://www.achpr.org/states/sierra-leone/reports/1st-1983-2013/> (accessed 16 November 2015).

33 At the 57th ordinary session 4-18 November 2015.

34 Khadija Z Bangura, state counsel, Attorney General's office. Interview granted on 16 November 2015.

35 As above.

36 As above.

37 n 24 above.

38 223/98 *Forum of Conscience v Sierra Leone* <http://caselaw.ihlda.org/doc/223.98/> (accessed 16 November 2015).

to death by a Court Martial for their alleged roles in a coup that unseated a democratically elected government headed by President Ahmed Tejan Kabah. The communication alleged procedural improprieties in the trial and the execution before appeal, a violation of the African Charter. The African Commission, which was only seized of the matter after Sierra Leone had executed the twenty-four soldiers, decided that the execution was in breach of the right to life under the African Charter.

Sierra Leone still has death penalty provisions although a moratorium has been in place for a long time and prisoners on death row are occasionally granted presidential clemency.<sup>39</sup>

The African Commission has not undertaken any promotional or fact-finding missions to Sierra Leone. A promotional visit was scheduled sometime in 2014 but was cancelled due to the outbreak of the EVD, according to Ms King.<sup>40</sup>

In 2010, the Special Rapporteur on Prison and Places of Detention in Africa was invited to a workshop in Sierra Leone. This invitation afforded the Special Rapporteur the opportunity to engage with the stakeholders in the prison sector of Sierra Leone.<sup>41</sup>

<sup>39</sup> Sierra Leone State Report (n 32 above) 9.

<sup>40</sup> Jamesina King, Commissioner, Human Right Commission SL, interview granted on 5 August 2015 in Freetown.

<sup>41</sup> African Commission on Human and Peoples' Rights 'Report of the Special Rapporteur on prisons and conditions of detention in africa' Presented by Hon Commissioner Med SK Kaggwa at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights Yamoussoukro, Côte d'Ivoire, 9 - 22 October 2012 <http://www.achpr.org/sessions/52nd/inter-session-activity-reports/prisons-and-conditions-of-detention/> (accessed 16 November 2015).

## **11 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission**

A few years ago, the African Charter and the Maputo Protocol were largely unknown both in terms of awareness of their existence and impact in human rights related issues. This cannot hold true any more for these two instruments. Firstly, the Maputo Protocol has been ratified by Sierra Leone's Parliament and this would not have happened but for the nationwide advocacy efforts of many women's groups. Therefore, recognition of these instruments has heightened in recent times. Also, many human rights organisations are now beginning to use some of the provisions of these instruments in bringing pressure to bear on the government in human rights related issues. The appointment of Ms King to the African Commission has also substantially brought the African Charter and the Maputo Protocol to the media spotlight. This is no doubt an opportunity for the HRCSL to build a stronger connection with the African Commission. Sierra Leone's presentation of its state report to the African Commission was witnessed by only a few of its local NGOs and did not attract media attention in Sierra Leone.

While awareness levels of the existence of the African Charter and the Maputo Protocol have certainly soared, the same cannot be said of the overall impact of these instruments. This is partly due to the absence of political will in upholding, promoting, fulfilling and respecting the human right of all persons in Sierra Leone.

Secondly, the non-domestication of the African Charter and the Maputo Protocol has considerably crippled the impact these instruments would have had in enriching the inadequate constitutional rights in Sierra Leone. Domestication is the first step in implementation, which consequently would engender the impact of these instruments in all spheres of the Sierra Leonean society.

Thirdly, within legal circles, the African Charter and the Maputo Protocol are not as popular as they are within the civil society sector. Lawyers and benchers have either been too conservative or not very *au fait* on how to employ the provisions of these regional human right instruments. This in part may be due to the unincorporated status of these instruments. However, the judicial reluctance to utilise these instruments in court and judgments has largely affected the growth and impact of these regional human rights instruments in Sierra Leone. Active litigious usage of the African Charter and the Maputo Protocol could broaden the recognition and stimulate substantial protection and fulfilment of human and peoples' rights. Also, judicial activism by means of using the provisions of the African Charter and the Maputo Protocol could enhance the impact of these instruments. In order to promote and protect human rights in Sierra Leone, lawyers and academics must move beyond traditional legal and academic contours by engaging the said regional instruments in lawsuits and judicial discourse even when they remain undomesticated.

Fourthly, even though civil society groups and media entities often refer to the African Charter and the Maputo Protocol, they arguably still do not fully comprehend their provisions. In effect,

while there is increasing recognition, education is pretty low on the extent of these rights and the reciprocal government obligations to promote, respect and fulfil them. The shallow knowledge of these instruments has affected their impact which is limited depending on the threshold of knowledge. Many civil society activists still regard international human rights instruments as nonbinding obligations and therefore only useful to persuade government to honour its human rights obligations. Such attitudes pose difficulties in impactful implementation of the African Charter and the Maputo Protocol.

Thirty years after the adoption of the African Charter and over twelve years after the adoption of the Maputo Protocol, harmful cultural practices continue to torment and oppress women. Customary laws, which are mostly unpleasant to women in Sierra Leone, are still constitutionally recognised as part of the laws of Sierra Leone.<sup>42</sup> This means therefore that customary practices recognised by law may continue to hamper the impact of both the African Charter and the Maputo Protocol especially in the lives of women and children.

In the case of the Maputo Protocol, the limitations outlined in the Agenda for Prosperity are exact and extensive.<sup>43</sup> There is a dearth of resources to fully implement the policies, plans and legislation relating to the Maputo Protocol. The Ministry of Social Welfare, Gender and Children's Affairs continues to face institutional and technical constraints due to insufficiency of staff. Domestication of international and regional

42 Sec 170 of the Constitution.

43 Agenda for Prosperity (n 17 above) 142 & 143.



women's rights instruments remains undone.<sup>44</sup>

While progress made in terms of the awareness levels of both the African Charter and Maputo Protocol and the ratification of the latter instrument must not be overlooked, there is certainly much yet to be achieved. Since both instruments have been ratified by Sierra Leone, it behoves Sierra Leone to start implementing them by first taking steps to incorporate them into the laws of Sierra Leone so that they can become enforceable domestically. Incorporation of these instruments would no doubt foster progress in the political, economic and social spheres of Sierra Leone. Human rights are not meant to deteriorate society but to improve the livelihoods of all persons irrespective of status, age, sex and religious and political convictions.

44 As above.



# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN SOUTH AFRICA

*Ofentse Motlhasedi\**  
*Linette du Toit\*\**



## 1 Introduction

In 1994, South Africa made a remarkable transition from an oppressive regime characterised by racial segregation, inequality and authoritarianism to constitutional democracy. The 1996 Constitution has a transformative purpose and seeks to create a free, equal and democratic South Africa.<sup>1</sup> As the point of reference for the fostering of a culture of human rights, the Constitution includes an enforceable and extensive Bill of Rights<sup>2</sup> and recognises 'the advancement of human rights and freedoms' as a founding value of the Republic.<sup>3</sup>

As part of this democratic transition, South Africa has drastically

changed its attitude toward international law.<sup>4</sup> While the country viewed international law as a threat to the state during apartheid; it made deliberate efforts to align itself with international standards by signing multiple human rights treaties shortly after the Interim Constitution came into force.<sup>5</sup>

The 1996 Constitution's transformative vision includes the creation of a society where all are equal.<sup>6</sup> While the main focus of this transformative project has been on equality of races, special attention has also been paid to the status and position of women in the country.<sup>7</sup> On 9 August 2015, which is Women's Day in South Africa, the recurring sentiment was expressed that the country has made significant progress as far as

\* LL.M. HRDA (Pretoria).

\*\* LL.M. HRDA (Pretoria).

1 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146-150.

2 See Chap 2 of the Constitution of the Republic of South Africa, 1996 (the Constitution). South Africa's Constitution has often been praised for its progressive nature. It is the first Constitution in Africa to include enforceable socio-economic rights.

3 See sec 1(a) of the Constitution.

4 J Dugard 'Kaleidoscope: International law and the South African Constitution' (1997) 1 *European Journal of International Law* 77.

5 Dugard (n 4 above) 82. South Africa signed the Convention on the Rights of the Child and the Convention on the Elimination of All forms of Discrimination against Women in 1993 and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1994.

6 Sec 1(a) of the Constitution.

7 The Constitution has an extensive equality provision (sec 9) and also mandated the creation of a Commission for Gender Equality (sec 187).

women's rights are concerned, but that much more needs to be done.<sup>8</sup>

It is within this context that we will consider the impact of the African Charter and Maputo Protocol in South Africa.

## 2 Ratification of the African Charter and Maputo Protocol

South Africa ratified the African Charter on 9 July 1996 and the Maputo Protocol on 17 December 2004.<sup>9</sup>

During the Maputo Summit, South Africa and other nations expressed reservations to the Protocol.<sup>10</sup> At the time of ratification, South Africa made three reservations and two interpretative declarations to the Maputo Protocol.<sup>11</sup> The first reservation was made to article 4(2)(j) which deals with the imposition

of the death penalty on pregnant and nursing women. South Africa's position was that the section does not find application in South Africa because the death penalty has been abolished and the existence of article 4(2)(j) may be construed as an inadvertent sanctioning of the death penalty in other state parties.<sup>12</sup> The second reservation, to article 6(d), was entered into on the basis that in accordance with national laws, the recording of a marriage in writing is not necessary for it to be legally recognised; particularly in light of the fact that the failure to register a customary marriage does not render that marriage invalid.<sup>13</sup> The final reservation made, in relation to article 6(h), is founded on the basis that this article may remove inherent rights of citizenship and nationality from children which South Africa seeks to protect.<sup>14</sup>

Interpretive declarations were also entered by South Africa. The first of these was to article 1(f) where South Africa states that the definition of 'discrimination against women' in the Maputo Protocol has the same meaning and scope as provided for by the Constitution of the Republic of South Africa.<sup>15</sup> The second interpretive declaration made, in respect of article 31, provides that the South African Bill of Rights should not be interpreted to offer less favourable protection of human rights than the Maputo Protocol, since the Maputo Protocol does not expressly

8 South African government website 'President Jacob Zuma: Celebration of National Women's Day' 9 August 2015 <http://www.gov.za/speeches/president-jacob-zuma-celebration-national-women%E2%80%99s-day-9-aug-2015-0000> (accessed 1 September 2015). Positive strides include the fact that in 2014, 59% of university graduates and 43% of the cabinet were women. Yet, women are far from equal to men on many bases and those living in rural areas remain particularly vulnerable to the violation of their rights. Gender-based violence remains grossly widespread and underreported. Women still make out a disproportionate section of the unemployed and remain more likely to be employed in low-skilled occupations. Dominant social norms place unpaid work such as childcare and home-making in the domain of 'a woman's responsibility' which means that women have less time and opportunity to participate in the labour market. Department of Women 'The status of women in the South African economy' (2015) 9 [http://www.gov.za/sites/www.gov.za/files/Status\\_of\\_women\\_in\\_SA\\_economy.pdf](http://www.gov.za/sites/www.gov.za/files/Status_of_women_in_SA_economy.pdf) (accessed 1 September 2015).

9 <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> (accessed 21 August 2015).

10 See [http://www.chr.up.ac.za/hr\\_docs/themes/theme39.html](http://www.chr.up.ac.za/hr_docs/themes/theme39.html) (accessed 21 August 2015).

11 JD Mujuzi 'The Protocol to the African Charter on Human and People's Rights on

the Rights of Women in South Africa: South Africa's reservations and interpretative declarations' (2008) 41 *Law Democracy and Development* 52.

12 Mujuzi (n 11 above) 52-53.

13 Mujuzi (n 11 above) 53-56.

14 Mujuzi (n 11 above) 56.

15 Mujuzi (n 11 above) 56-58.

provide for limitations in the way the Bill of Rights does.<sup>16</sup>

In respect of the African Charter, South Africa entered a declaration calling for improved consultation on enforcement mechanisms, limitations to the rights in the African Charter and congruency between the African Charter and the United Nations resolutions characterising Zionism. This is generally not considered to qualify as a reservation.<sup>17</sup>

Prior to the enactment of the final Constitution in 1996, the executive exercised exclusive treaty making power.<sup>18</sup> With the advent of democracy and the abolishment of parliamentary sovereignty in favour of constitutional supremacy, the process of signing, ratification and accession to international treaties was significantly altered.<sup>19</sup>

Section 231 of the 1996 Constitution and the Department of International Relations', 'Practical Guide and Procedure for the Conclusion of International Agreements' (Guideline for Conclusion of Agreements)<sup>20</sup> provides that treaty-making power in South Africa is shared between the executive and the legislature. The executive plays the initial role by negotiating and signing international

treaties. A signature of a treaty does not by itself establish South Africa's consent to be bound by the treaty;<sup>21</sup> a resolution of ratification must be passed by the National Assembly and the National Council of Provinces.

The ordinary procedures for concluding international agreements have been provided in the Guideline for Conclusion of Agreements and involve the following:

- (a) obtaining opinions on the agreement's consistency with both domestic law and international law from the Office of the Chief State Law Advisers (OCSLA) in the Department of Justice and Constitutional Development and the State Law Advisers in the Department of International Relations and Cooperation respectively;
- (b) preparation of a President's Minute by the responsible government department for signature by both the responsible line function Cabinet Minister and the President; and
- (c) forwarding of the two legal opinions, President's Minute, a short Explanatory Memorandum and a copy of the agreement to the Office of the Chief State Law Adviser for certification<sup>22</sup> before it can be presented to the Presidency for approval.<sup>23</sup>

Section 231 of the Constitution establishes a framework for two avenues in which a treaty may be ratified. The procedure to be adopted is dependent on whether the agreement falls within the ambit of section 231(2) or section 231(3). Section 231(2) agreements

16 Mujuzi (n 11 above) 58.

17 African Commission on Human and Peoples' Rights 'African Charter on Human and Peoples' Rights' <http://www.achpr.org/instruments/achpr/> (accessed 21 August 2015).

18 Dugard (n 4 above) 81.

19 AG Assefa 'The impact of the African Charter and Women's Protocol in South Africa' in *Impact of the African Charter and Women's Protocol in selected African States* (2012) 161.

20 Department of International Relations and Cooperation, Office of the Chief State Law Adviser (International Law) 'Practical Guide and Procedures for the Conclusion of Agreements' [http://www.dfa.gov.za/foreign/bilateral/conclusion\\_agreement0316.pdf](http://www.dfa.gov.za/foreign/bilateral/conclusion_agreement0316.pdf) (accessed 15 September 2015).

21 Except in cases provided in section 231(3), for instance where the treaty states that it is intended to be binding upon signature.

22 The instrument is considered to be certified when the OCSLA affix the official stamp on the final text indicating that the agreement is acceptable to be submitted for the President's approval [http://www.dfa.gov.za/foreign/bilateral/conclusion\\_agreement1014.pdf](http://www.dfa.gov.za/foreign/bilateral/conclusion_agreement1014.pdf) (accessed 21 August 2015).

23 Guideline for Conclusion of Agreements (n 20 above) 21.

require that parliamentary approval be sought along with the ordinary procedures for concluding international agreements as described above. Section 231(3) agreements, on the other hand, are adopted by the ordinary procedure and must be tabled in Parliament for information purposes only.<sup>24</sup>

In the case of section 231(2) agreements, parties shall notify each other in writing when their respective constitutional requirements necessitating entry into force for a treaty are fulfilled whereas section 231(3) applies to international agreements that merely require the signature of a duly authorised representative of a state party to come into effect. Agreements that fall under section 231(2) are those that require ratification or accession (usually multilateral agreements), and have financial implications that require an additional budgetary allocation from Parliament or have legislative or domestic implications (such as treaties that require new legislation or legislative amendment).<sup>25</sup> However, a treaty which falls under the scope of section 231(3) is one that does not require parliamentary approval for ratification or accession; that has no extra-budgetary financial implications or one which does not have legislative implications.

Both the African Charter and the Maputo Protocol fall under section 231(2).

### 3 Government focal point

The focal point of South Africa's response and responsibilities on the African Charter is the International Legal Relations Chief Directorate within the Department of Justice and Constitutional Development. The focal point in respect of the Maputo Protocol is the Ministry of Women which is located within the office of the Presidency.

The Chief Directorate: International Legal Relations deals with bilateral and multilateral issues and interacts with international bodies, such as the African Union. The Directorate also liaises with the Department of International Relations and Cooperation and other government departments (as well as South African Foreign Missions on international legal matters). The North and Multilateral Directorate also deals with the handling of human rights and humanitarian law matters at bilateral and multilateral (international) levels, including the negotiation of human rights treaties, declarations and resolutions, as well as writing country reports on these instruments. Most treaties have stipulated within them a requirement that states parties submit regular reports to a treaty monitoring body on the legislative, judicial, administrative, policy or other measures which they have adopted, and which give effect to the provisions of the treaty. One of treaties which fall under this mandate is the African Charter.<sup>26</sup>

The Ministry of Women describes its mandate as championing the advancement of women's socio-economic empowerment and the promotion of gender equality. It aims to drive imple-

24 Guideline for Conclusion of Agreements (n 20 above) 8.

25 Guideline for Conclusion of Agreements (n 20 above) 8-9. Approval for accession is required when South Africa has not signed an agreement but can become a party thereto through accession.

26 The Department of Justice & Constitutional Development 'International Legal Relations' <http://www.justice.gov.za/ilr/ilr.html> (accessed 26 August 2015).

mentation through developing appropriate standards for implementation of both national and International law. It describes the Maputo Protocol as one of South Africa's several regional and international commitments on women's empowerment and gender equality and describes it as falling under its 'other mandate'. The Ministry endeavours to work towards the full and effective implementation of the Protocol at the national level.<sup>27</sup>

Although the responsibility for women's empowerment and gender equality is vested with the Minister of Women in the Presidency, gender mainstreaming is being implemented as a strategy for realising gender equality across government and in all members of Cabinet, government entities, the private sector and civil society. National Gender Machinery (NGM) refers to 'an integrated package' of structures located at various levels of state, civil society and within the statutory bodies. Within government, this is evidenced through Cabinet, the National Office on the Status of Women (OSW) in the Presidency, Provincial OSWs in Premiers' Offices, Gender Units and Gender Focal Points (GFP) in line departments (at best in the Offices of the Directors-General).<sup>28</sup>

#### 4 Domestication

The African Charter and Maputo Protocol, as international agreements, have a status lower than that of the Constitution and domestic legislation in South Africa. The Constitution, which is the supreme law of the Republic,<sup>29</sup> provides that international agreements only become enforceable in South Africa once they have been enacted into law by national legislation.<sup>30</sup> A self-executing provision of a ratified treaty becomes law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.

Many of the African Charter rights are contained in the Bill of Rights, including the right to equality and non-discrimination, to dignity, life, freedom and security of person, religion, freedom of expression, association and assembly and to participate in government.<sup>31</sup> There are also corresponding provisions on rights to property, a fair trial and a healthy environment.<sup>32</sup> Significantly, the South African Bill of Rights also includes justiciable socio-economic rights such as the right to health and education.<sup>33</sup>

In a previous edition of this chapter, Assefa has argued that even though the Bill of Rights does not protect 'the right to equality of peoples' as the African Charter does, it does provide for the establishment of a Commission for the Promotion and Protection of Cultural,

27 Republic of South Africa 'Department of Women Strategic Plan 2015-2020' 8.

28 South Africa's National Policy Framework for Women's Empowerment and Gender Equality; Republic of South Africa 'Beijing +20 Report: Progress made on the Implementation of the Beijing Declaration and Platform for Action and the Outcomes of the 23rd Special Session of the General Assembly in 2000' 57 [http://www.women.gov.za/attachments/article/52/Final%20Draft%20\(2\)%20National%20Beijing%20+20%20Report%20%2026022015%20\(3\).pdf](http://www.women.gov.za/attachments/article/52/Final%20Draft%20(2)%20National%20Beijing%20+20%20Report%20%2026022015%20(3).pdf) (accessed 15 September 2015).

29 Sec 2.

30 Sec 231(4).

31 See sec 9-19 of the Constitution, which form part of the Bill of Rights.

32 See secs 24, 25 and 35 of the Constitution.

33 Secs 26 & 27. On the enforcement of socio-economic rights in South Africa, see C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and restorative justice* (2009).

Religious and Linguistic Communities.<sup>34</sup>

Similarly, many Maputo Protocol rights are entrenched in the South African Constitution, though not specifically in respect of women, but applying to anyone present in the Republic. These rights include the right to dignity, life, integrity and security of person, access to justice and equal protection before the law, education, housing, social security and political participation. The Constitution explicitly guarantees the right to *reproductive* health care<sup>35</sup> in line with article 14 of the Maputo Protocol. There are also areas where the Constitution can be seen to advance the aims of the Maputo Protocol. The principle of non-discrimination underlies the Maputo Protocol; similarly non-sexism and the achievement of equality are foundational values of the South African Constitution.<sup>36</sup> Where article 2 requires that the principle of equality between men and women is included in national constitutions and legislative instruments of member states, the equality clause in the South African Constitution explicitly prohibits discrimination on the basis of sex, gender and sexual orientation, amongst other grounds.<sup>37</sup> The equality clause also provides that legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken to promote the achievement of equality.<sup>38</sup> The 1996

Constitution provides for the creation of a Commission for Gender Equality.<sup>39</sup>

Though 17 Constitution Amendment Acts have been adopted since the 1996 Constitution came into force, none have altered the provisions of the Bill of Rights. Thus it can be argued that the African Charter and Maputo Protocol have not inspired constitutional amendment.

The African Charter has not yet been enacted into law by national legislation in terms of section 231(4) of the Constitution.<sup>40</sup> The process of domesticating the Maputo Protocol is also still underway. On 29 January 2014, the Centre for Applied Legal Studies (CALS) and the Centre for the Study of Violence and Reconciliation (CSVr) made joint submissions to the Portfolio Committee on Women, Children and People with Disabilities on the Women Empowerment and Gender Equality Bill of 2013. The organisations urged that compliance with the Maputo Protocol ought to be added to the objectives of the Bill and that this would contribute to its domestication process.<sup>41</sup> The Bill has, however, since been withdrawn for further consultation.

the workplace, where women have historically suffered discrimination and in fact continue to suffer discrimination.

39 Sec 187.

40 *DE v RH* [2015] ZACC 18 para 46.

41 Oral submission to the Portfolio Committee on Women, Children and People with Disabilities on the Women Empowerment & Gender Equality Bill, 29 January 2014 by the Center for Applied Studies (CALS) and the Centre for the Study of Violence and Reconciliation (CSVr), delivered by Executive Director CSVr: Delphine Serumaga <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/140129cals.pdf> (accessed 13 September 2015).

34 Assefa (n 19 above) 163.

35 Sec 27(1)(a).

36 Sec 1.

37 Sec 9(3).

38 Subsequently, women have been identified as a 'designated group' in terms of the Employment Equity Act 55 of 1998 which means that they are entitled to advancement in the employment arena for the purposes of achieving equality. Corrective and positive measures are thus undertaken in the area of



## 5 Legislative reform

The Portfolio Committee on Justice and Constitutional Development, having considered the request for approval by Parliament of the Maputo Protocol, held deliberations in October 2004. The Portfolio Committee compiled a brief report which notes reservations, areas of concern and points of clarification.<sup>42</sup> It can be inferred from these deliberations and the publicised report that a compatibility study was undertaken prior to ratification.<sup>43</sup>

Generally, after 1994, the South African legal system experienced drastic changes as a result of the promulgation of the Constitution and commitment to South Africa's international law obligations. A considerable number of laws have been enacted and amended in line with international and regional instruments, including the African Charter and the Maputo Protocol. South Africa is required to regularly review its legislation in order to ensure that it is in line with the norms reflected in these instruments.

The implicit influence of the African Charter and the Maputo Protocol can be traced in three different ways.<sup>44</sup> Firstly,

according to the Department of Justice and Constitutional Development, a number of legislative initiatives have been undertaken by departments with a view to enhance the application of the African Charter.<sup>45</sup> Examples of legislation which have been enacted or amended with the implicit purpose of giving effect to the Maputo Protocol include: the Choice on Termination of Pregnancy Amendment Act 8 of 2004; the Sexual Offences and Related Matters Amendment Act 32 of 2007; the Civil Union Act 17 of 2006; and the Reform of Customary Law of Succession and Regulation of Related Matters 11 of 2009.

Secondly, the Protocol is referenced in discussion documents around the development of national legislation. According to the Report of the Portfolio Committee on Women, Children and People with Disabilities, public hearings on the Women Empowerment and Gender Equality Bill took place during March 2014. During these discussions, civil society organisations requested that the Maputo Protocol be included in the Bill's objectives, which the Department had undertaken to do although this Bill has since been withdrawn.<sup>46</sup> During public hearings on the Traditional Courts Bill in September 2012, equality provisions of the Maputo Protocol were

42 Report of the Portfolio Committee on Justice and Constitutional Development on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (27 October 2004) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/041027report.htm> (accessed 31 August 2015).

43 Parliamentary Monitoring Group – Justice and Correctional Services 'Protocol to African Charter on Human and People's Rights on Rights of Women in Africa: Deliberation' <https://pmg.org.za/committee-meeting/10181/> (accessed 31 August 2015). During earlier deliberations the Portfolio Committee considered the Maputo Protocol in the light of legal advice from the State Law Adviser on certain provisions that appeared contradictory or unnecessary in respect of South African domestic law.

44 Assefa (n 19 above) 165.

45 The enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is an example of this.

46 Parliamentary Monitoring Group 'ATC140324: Report of the Portfolio Committee on Women, Children and People with Disabilities Public Hearings on the Women Empowerment and Gender Equality Bill [50-2013], dated 5 March 2014' <https://pmg.org.za/taled-committee-report/2202/> (accessed 31 August 2015). The Centre for Applied Legal Studies (CALS) and the Centre for the Study of Violence and Reconciliation (CSVR) made joint submissions in which it stated that the Maputo Protocol specifically addresses patriarchal, traditional, cultural and institutional practices that hinder women's

raised in opposition to certain of the Bill's provisions.<sup>47</sup>

Finally, as Assefa has argued, certain legislative changes were inspired by South African court decisions in which the African Charter has been referred to.<sup>48</sup>

## 6 Policy reform and formulation

The African Charter and the Maputo Protocol have been used scantily in policy reform and formulation by the South African executive branch of government. National policies on gender, poverty reduction and education, while expressing the purport of the provisions of the African Charter and the Maputo

empowerment and that 'facilitation of compliance with the Maputo Protocol' should be added as an objective of the Act: Oral submission to the Portfolio Committee on Women, Children and People with Disabilities on the Women Empowerment & Gender Equality Bill [B50-2013] 29 January 2014 by the Centre for Applied Legal Studies (CALS) and The Centre for the Study of Violence and Reconciliation (CSVSR) delivered by Executive Director CSVSR; Delphine Serumaga <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/140129cals.pdf> (accessed 13 September 2015).

47 Report of the Select Committee on Security and Constitutional Development on the Traditional Courts Bill (2012) <https://pmg.org.za/taled-committee-report/286/> (accessed 31 August 2015).

48 The specific examples that Assefa notes (n 19 above) are that of the adoption of the Abolition of Corporal Punishment Act 33 of 1997, which is partly influenced by the decision of the Constitutional Court in *S v Williams* 1995 (3) SA 632 (CC). In this case, the Court declared sec 294 of the Criminal Procedure Act 51 of 1977 constitutionally invalid and relied on a number of international instruments to this end, including art 5 of the African Charter. The invalidation of sec 25(9)(b) of the Aliens Control Act 96 of 1991 lead to the adoption of the new Immigration Act 13 of 2002. This has been inspired by the decision of the Court in *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936(CC), where O'Regan J uses art 18 of the African Charter.

Protocol, tend to lack direct references to these instruments.<sup>49</sup>

There are a few instances, however, where these instruments have been used in a direct way to formulate policy. The Department of Correctional Services, in preparing its Draft White Paper on Remand Detention Management in South Africa seemingly took into account its obligations under the African Charter.<sup>50</sup> The Draft White Paper states that the African Charter is part of the broader legal framework governing the management and remand of detainees in the country. It makes specific reference to articles 4, 5, 6 and 7 of the African Charter which enshrine the rights to integrity and dignity of the person, freedom from torture, inhuman and degrading treatment, the prohibition of arbitrary arrest and detention as well as the presumption of innocence and fair trial rights.<sup>51</sup> It also indicates that international law includes guidelines or standards that are not necessarily promulgated into law but have normative significance in providing direction to stakeholders on how to deal with remand detainees.<sup>52</sup>

49 Some of these policies, of which the content overlap with that of the African Charter and Maputo Protocol to an extent but where there is no direct reference to these instruments, include the National Developmental Plan 2030 – Our Future, Make it Work 2012; South Africa National Policy Framework on Women's Empowerment and Gender Equality 2000; and the National Education Policy Act 27 of 1996.

50 Department of Correctional Services 'Draft White Paper on Remand Detention Management in South Africa' 2013 <http://www.dcs.gov.za/docs/landing/White%20paper%20on%20Remand%20Detention%20in%20SA%20Draft%20Final.pdf> (accessed 13 September 2015).

51 Department of Correctional Services (n 50 above) 30-31.

52 Department of Correctional Services (n 50 above) 30.

The Department of Women, Children and Persons with Disabilities has recently recognised regional instruments, which includes the African Charter, as part of the ‘enabling environment’ which is necessary for the government to develop policy and framework.<sup>53</sup> The African Charter is also referred to as a relevant document in the Policy and Strategic Framework on HIV and AIDS for Higher Education in South Africa. This is a policy document stemming from the 2012-2016 National Strategic Plan for HIV, STI’s and TB.<sup>54</sup>

The researchers were not able to obtain any relevant information concerning whether or not government policies reflect the general comments of the African Commission.

## 7 Court judgments

The African Charter and Maputo Protocol, if mentioned in South African judgments at all, are mostly only referred to in a cursory manner.<sup>55</sup> This trend of merely referring to an article of the African Charter, as one of the many instruments protecting a particular right in the domestic, regional and international framework, has continued as can be seen in the recent case of *National Commissioner of the South African Police Service v Southern African Litigation Centre and Others*.<sup>56</sup> In this matter, the Constitutional Court relied on the African

Charter and jurisprudence from the African Commission to support its finding that South Africa is obliged to investigate torture allegations in a neighbouring state. The Court referred to a myriad of international instruments, but also noted that article 5 of the African Charter prohibits torture and that torture has been interpreted by the African Commission in the matter of *Huri-laws v Nigeria*<sup>57</sup> to include the widest possible array of mental and physical abuse.<sup>58</sup>

The African Charter has been utilised by the courts on the rare occasion that rights which are not explicitly protected by the Constitution are at stake. Unlike the constitutions of most democratic states, the South African Constitution does not protect the rights of individuals to freely marry and to raise a family.<sup>59</sup> Consequently, the South African courts have placed much reliance on the provisions of the African Charter dealing with rights and duties in respect of the family.<sup>60</sup> The Constitutional Court in particular has made use of article 18 of the African Charter in *Dawood and Another v Minister of Home Affairs and Others*,<sup>61</sup> *Volks NO v Robinson and Others*<sup>62</sup> and most recently, in *DE v RH*.<sup>63</sup> All these matters touched upon

53 National Treasury ‘Mainstreaming in programmes and projects – Setting the policy landscape’ (2012).

54 Department of Higher Education and Training Policy Strategic Framework on HIV and AIDS for Higher Education (2012).

55 *S v Williams* 1995 (3) SA 632 (CC); *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); *Samuel Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC); *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC);

56 2015 (1) SA 315 (CC).

57 (2000) AHRLR 273 (ACHPR 2000).

58 *Huri-laws* para 39.

59 The absence of a provision protecting the family as the basic unit of society was challenged in the *First Certification* case. (*Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 96.) The Constitutional Court held that the absence of a right to family life is justified in the multi-cultural South African context and that other provisions on the Constitution do provide indirect protection to the family unit (paras 97-103).

60 These provisions are arts 18, 27(1) and 29(1).

61 Consolidated with *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 29.

62 2005 (5) BCLR 446 (CC) para 82.

63 [2015] ZACC 18 paras 45-46.

the right to marriage and family life.<sup>64</sup> The African Charter's explicit provisions for the protection of the family thus served to fill the gap left by the Constitution.

South Africa has taken an innovative step by including justiciable socio-economic rights in its Bill of Rights.<sup>65</sup> In giving content to these rights, reference to and reliance on the regional framework has been markedly absent from the Constitutional Court's jurisprudence. In the seminal *Grootboom* case,<sup>66</sup> the constitutional right to housing was considered in terms of international law, but regional instruments and jurisprudence were not taken into account. The same goes for *Minister of Health and Others v Treatment Action Campaign and Others*,<sup>67</sup> *Khosa v Minister of Social Development*<sup>68</sup> and *Mazibuko v City of Johannesburg*.<sup>69</sup>

The Constitution of South Africa compels courts to consider international law when interpreting the Bill of Rights.<sup>70</sup> Regrettably, even where international law has been alluded to or used it seems that the African Charter and Maputo Protocol have not truly been used as interpretative sources or as the basis of a remedy.

## 8 Awareness and use by civil society

South Africa boasts a vibrant civil society. From interviews conducted with members of different organisations, it is clear that though most organisations are aware of both the African Charter and the Maputo Protocol, they play only a marginal role in the activities of the CSOs with a domestic focus. For human rights organisations that are based in South Africa but which have a regional focus, the instruments have much greater significance.<sup>71</sup>

Michael Power, an attorney at the Legal Resources Centre (LRC),<sup>72</sup> states that in his view, civil society is well-aware of these instruments, but the extent to which they are used would depend on the specific focus area of the particular organisation. He states that the LRC rely on the African Charter for the purposes of advocacy, litigation and law reform. Thabang Poee, researcher at Section 27 says that due to the domestic focus of their organisation, they would rarely invoke regional instruments beyond referencing them in advocacy and litigation.<sup>73</sup> Similar views were expressed by Irene de Vos, senior researcher and general counsel at the Socio-Economic Rights Institute of South Africa (SERI).<sup>74</sup> She states that although CSOs are aware of the African Charter, the fact that local remedies are effective means that it is usually not necessary to rely on the regional framework.

64 These matters were respectively about the circumstances in which foreign spouses of South African residents are permitted to reside temporarily in the country; maintenance claims of life partners; and whether the delictual claim based on adultery should continue to exist in South African law.

65 C Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' (1998) 2 *Law, Democracy and Development* 153.

66 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

67 2002 (5) SA 721 (CC).

68 2004 (6) SA 505 (CC).

69 2010 (4) SA 55 (CC).

70 Sec 39(1).

71 Organisations based in South Africa with a regional focus include the Southern African Litigation Centre (SALC); the University of Pretoria's Centre for Human Rights and Sonke Gender Justice Network.

72 Email from Michael Power, 30 August 2015.

73 Email from Thabang Poee, 13 September 2015.

74 Email from Irene de Vos, 23 September 2015.

According to Keegan Lakay,<sup>75</sup> the Community Education and Mobilisation manager at Sonke Gender Justice Network, the organisation engages in impact litigation, in partnership with other organisations in the region and places much reliance on the Maputo Protocol in this regard. He says that the Protocol is useful to the organisation in that it provides a guideline according to which government compliance with the realisation of the rights of women can be monitored.

### 9 Awareness and use by lawyers and judicial officers

Out of the ten practising attorneys surveyed, four were not aware of the existence of these instruments. Lawyers in private practice mostly do not see the relevance of these instruments to their work.<sup>76</sup> It seems that lawyers whose practices are focused on human rights work would list provisions of the African Charter and Maputo Protocol in support of their arguments on a fairly regular basis. However, due to the expansive nature of the South African Constitution, it would rarely happen that lawyers would base their arguments on the provisions of these instruments only or directly.

A notable reliance on the African Charter took place in 2009. A group of investors instituted a claim against South Africa in the International Centre for Settlement of Investment Disputes (ICSID).<sup>77</sup> Two South African civil

society organisations, along with two international organisations, applied to intervene as non-disputing parties (NDPs) in this arbitration.<sup>78</sup> The NDPs relied on international instruments, provisions of the South African Constitution as well as article 9(1) of the African Charter in requesting the disclosure of 'discreet categories of documents' to which they needed access in order to take part in the arbitration in a meaningful way.<sup>79</sup>

### 10 Higher education and academic writing

Information provided by the law faculties of four different South African universities indicate that, at most, the African Charter and the Maputo Protocol are touched upon at an undergraduate level.<sup>80</sup> Modules such as International Law or Human Rights Law tend to make reference to these instruments as part of the regional human rights framework, but they are not studied in-depth.

There are a large number of South African and South Africa-based scholars whose main field of research is human rights law in Africa.<sup>81</sup> These scholars are responsible for lively academic deliberation on these instruments, their

75 Telephone communication with Keegan Lakay, 4 September 2015.

76 Three different lawyers at corporate law firms, who were aware of the existence of the African Charter and Maputo Protocol, referred to the pro bono departments of their firms.

77 *Pietro Foresti, Laura De Carli v Republic of South Africa* ICSID Case No: ARB (AF) 07/01.

78 The Legal Resources Centre (LRC) and the Centre for Applied Legal Studies (CALS), two South African organisations, formed a coalition with the International Centre for the Protection of Human Rights (INTERIGHTS) and the Centre for International Environmental Law (CIEL).

79 J Brickhill & M Du Plessis 'Two's company, three's a crowd: Public interest intervention in investor-state arbitration (*Pietro Foresti v South Africa*)' (2011) 27 *South African Journal on Human Rights* 152-160.

80 The universities surveyed are: Nelson Mandela Metropolitan University, North West University, the University of Pretoria and the University of the Witwatersrand.

81 Three of these scholars are Professors Christof Heyns, Magnus Killander and Frans Viljoen.

implementation, potential and shortcomings.<sup>82</sup> South Africa also houses two research centres which have a strong focus on the regional human rights system: the Centre for Human Rights based at the University of Pretoria<sup>83</sup> and the Dullah Omar Institute at the University of the Western Cape.<sup>84</sup> Many publications emanating from these institutions focus on the African Charter and Maputo Protocol and their implementation. Assefa has noted that the *African Human Rights Law Journal* published by the Centre for Human Rights is a major contributor to scholarship on the African Charter and Maputo Protocol.<sup>85</sup> *Law, Democracy and Development*, a journal of the Faculty of Law at the University of the Western Cape, also makes a significant contribution in this regard.<sup>86</sup>

A positive move can be seen in that scholars writing about human rights law in the context of South Africa and publishing in South African law journals also include these instruments in their work. For example, Gustav Muller published an article in a South African law journal in which he discusses the eviction of vulnerable unlawful occupants in light of women's rights in terms of the Maputo Protocol.<sup>87</sup> An increase in scholarship of this kind may encourage courts to make use of regional instruments in the development of socio-economic rights jurisprudence.

## 11 National human rights institutions

The African Charter and the Maputo Protocol are utilised by the South African Human Rights Commission (SAHRC) in a variety of ways, including research publications, programmes, education and training, public dialogues and workshops. In what follows, the scope of the SAHRC's involvement in the African human rights system is discussed.

In broad terms, the SAHRC understands its mandate as monitoring government obligations, including those made in terms of international and

82 See for example: M Killander & CH Heyns 'The African regional human rights system' in C Heyns & K Steffszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 195; M Killander & H Adjohouhoun 'International law and domestic human rights litigation in Africa' (2010); F Viljoen 'An introduction to the Protocol of African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11; F Viljoen *International human rights law in Africa* (2012); F Viljoen 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 313; F Ougergouz *The African Charter on Humans and Peoples' Rights* (2003).

83 See CHR website <http://www.chr.up.ac.za/index.php/about/overview.html> (accessed 14 September 2015).

84 The Institute was previously named 'Community Law Centre' <http://communitylawcentre.org.za/> (accessed 14 September 2015).

85 Assefa (n 19 above) 171.

86 See for example: ST Ebobrah 'Application of the African Charter by African sub-regional organisation: pains, gains and the future' (2012) 16 *Law, Democracy and Development* 49; JD Mujuzi 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservations and interpretative declarations' (2008) 12 *Law, Democracy & Development* 4; P de Vos 'A new beginning? The

enforcement of social, economic and cultural rights under the African Charter of Human and Peoples' Rights' (2004) 8 *Law, Democracy & Development* 1.

87 'On considering alternative accommodation and the rights and needs of vulnerable people' (2014) 30 *South African Journal on Human Rights* 4; Muller also makes mention of the African Charter. The South African law journal also contain articles on the African regional human rights system, see for example: TS Bulto 'Patching the legal black hole: Extra-territorial reach of states' human rights duties in the African Human Rights system' (2011) 27 *South African Journal on Human Rights* 249; S Gumede 'The NEPAD and human rights: Current developments' (2006) 22 *South African Journal on Human Rights* 144.

regional treaties. In its programmes on the Right to Food in South Africa, the African Charter and Maputo Protocol are cited as establishing the legal framework for the recognition of this right.<sup>88</sup> The SAHRC has held workshops, dialogues and discussions with residents across South Africa in order to obtain contributions from ordinary people on this aspect. The SAHRC also monitors South Africa's progress in realising the right to food in terms of these treaties.

The SAHRC regularly participates in the sessions of the African Commission. It was the only national human rights institution that made a statement on the human rights situation in South Africa and across the continent at the 43rd Ordinary Session of the African Commission.<sup>89</sup> In October 2012, the SAHRC received the African Commission award for its commitment to the promotion and protection of human rights, its attendance at the sessions and direct contribution to the work of the Commission.<sup>90</sup>

In respect of monitoring compliance and following up on South Africa's international and regional obligations, SAHRC interacts with Parliament and stakeholders. This interaction promotes

compliance and ensures the implementation of action plans based on international and regional activities.<sup>91</sup> In order to foster outcome achievement and impact realisation, the SAHRC incorporates resolutions from international and regional engagements undertaken in the previous financial year into its planning process. In this regard, approximately 40 resolutions, ranging across varied human rights areas were considered and addressed during 2013/2014.<sup>92</sup>

Finally the SAHRC is the custodial and monitoring body of the Promotion of Access to Information Act in South Africa. It cites the African Charter along with the Universal Declaration of Rights as providing the broader legislative framework for its work in this regard.<sup>93</sup>

## 12 State reporting

The Ministry of Women located in the Presidency is tasked with state reporting under the Maputo Protocol whereas reporting under the African Charter vests within the Department of Justice and Constitutional Development – International Legal Relations Chief Directorate. The coordinating government department is tasked with overseeing the entire process. The process ideally requires the coordinating department to prepare a baseline report, request contributions on relevant thematic areas and developments from various government departments and oversee interactions with civil society. All contributions received from all the

88 Right to Food <http://www.sahrc.org.za/home/index.php?ipkArticleID=270> (accessed 10 September 2015).

89 43rd Ordinary Session Report <http://www.communitylawcentre.org.za/achpr/report/Report%2043rdSess%20ACHPR%2010Jul08.pdf> (accessed 10 September 2015). See Assefa (n 19 above) 170.

90 South African Human Rights Commission 'SAHRC receives African Commission Award for its commitment to the realisation of human rights' 10 October 2012 <http://www.sahrc.org.za/home/index.php?ipkArticleID=139> (accessed 8 September 2015).

91 Further details contained in South African Human Rights Commission 2013/2014 International and Regional Activities Action Plan.

92 South African Human Rights Commission Annual Report 2013/2014.

93 South African Human Rights Commission Human Rights Development Report 2008.

different stakeholders should be consolidated by the coordinating department.

South Africa's initial report on the African Charter was submitted timeously in October 1998. The second, third and fourth reports were due in October of 2000, 2002 and 2004, respectively. These reports were submitted late as a consolidated report in May 2005. One shadow report was also submitted. According to the website of the African Commission, South Africa is behind on more than five country reports and is yet to submit a specific and separate report on progress towards realising the rights enshrined in the Maputo Protocol.

The pertinent concluding observations were that in some sections of the reports, South Africa simply provides a general description of the provisions of the Charter and the legislation and/or policy put in place, without indicating how these measures have contributed to enhancing the rights of the persons. The 2005 report lacked detail of the measures taken by South Africa to eradicate the phenomenon of xenophobia directed at African migrants. It was noted that despite efforts to implement legislation, policies and programmes to prevent and combat the sexual exploitation of children and violence against women; the African Commission remains concerned at the high incidence of sexual violence against women and children.

In November 2006, at its 40th ordinary session, the African Commission passed the Resolution on the importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by state parties. This resolution highlights the necessity of submitting country reports timeously and to follow up and implement recommendations.

South Africa has, over the years, implemented programmes and reforms addressing the above issues. Although they do not specifically cite the recommendations of the African Commission, they reference the African Charter as establishing the necessary legal framework for the development of government policy. To this end, government has instituted policies on social cohesion aimed at combating xenophobia, the development of the Victims Charter and the prevention of *ukuthwala* which work towards fighting the scourge of gender-based violence.

### 13 Communications

To date, there have been three communications submitted to the African Commission which involved South Africa.<sup>94</sup> However, no finding has yet been made against the state.

Civil society organisations which were interviewed pursuant to this study expressed a willingness to take cases to the African Commission, should domestic remedies become exhausted and if it would be in the best interest of their clients. However, at this stage, they tend to rely on the independence and 'transformation-mindedness' of the domestic courts for the purposes of undertaking human rights litigation relevant to South Africa. It would only be on the rare

<sup>94</sup> In *Gareth Anver Prince v South Africa* (2007) AHRLR 40 (HRC 2007), the African Commission decided the matter on the merits and held that there was no violation of the complainant's rights. Communication 409/12 *Luke Munyandu Tembani and Another v Angola and Thirteen Others* was filed against South Africa along with thirteen other states for their decisions and actions in their capacity as SADC member states. Here too, the Commission found no violation of the African Charter. Communication 335/06 *Dabalorivhuwa Patriotic Front v the Republic of South Africa* was also dismissed <http://www.achpr.org/states/south-africa/> (accessed 28 August 2015).



occasion that a party would wish to appeal from the Constitutional Court that instituting a claim in a regional forum would be considered.<sup>95</sup>

#### **14 Special mechanisms – Promotional visits of the African Commission**

The Commissioner responsible for promotional activities in South Africa visited the country from 25 to 29 September 2001 for the purposes of promoting the African Charter and raising awareness of the African Commission.<sup>96</sup> It was recommended that the South African government initiate extensive awareness programmes on human rights for members of the South African Police Service, immigration officials, prison officers and border police. In particular, it was recommended that the government advocate for the elimination of xenophobic attitudes towards foreigners and immigration. It was suggested that specialised training should be provided to the police on the handling of immigrants, asylum seekers and refugees. The mission recommended that the government put in place appropriate mechanisms that would minimise the ill-treatment of alleged illegal immigrants at the time of apprehension, while in detention and during deportation.<sup>97</sup> It was also suggested that efforts be taken to eliminate overcrowding in prisons. The African Commission was encouraged to develop jurispru-

dence, ensure proper publishing, translation and distribution of its work. Finally the Commission was urged to ensure knowledge exchange and training between itself and other human rights institutions.<sup>98</sup>

The Special Rapporteur on Prisons and Conditions of Detention visited the country from 14 to 30 June 2004 and made specific recommendations for the improved protection of the rights of prisoners.<sup>99</sup> The Special Rapporteur made numerous recommendations to all stakeholders. It was suggested that prison officials should be more involved in monitoring the welfare of prisoners and desist from inciting one gang against the other. Heads of prison should develop strategies to combat corruption by prison officials. To this end, confidential complaint boxes should be used to allow prisoners to submit confidential complaints. Members of civil society, especially NGOs, were encouraged to constantly visit prisons and other places of detention to ensure that the government is meeting its domestic as well as international human rights obligations in respect of persons deprived of their liberty; encourage and organise retreats and workshops for prison officials and inform them of best practices in other penal systems in Africa and around the world; and to support the efforts of government by assisting in promoting the welfare of prisoners. The donor and international community were urged to

95 This sentiment was expressed by Sonke Gender Justice Network (n 71 above).

96 African Commission on Human and Peoples' Rights 'South Africa: Promotion Mission, 2001' <http://www.achpr.org/states/south-africa/missions/promo-2001/> (accessed 16 September 2015).

97 In further detail, it was suggested that government should ensure that alleged illegal immigrants are allowed to gather their belongings or hand over to a third party of their choice, to be allowed to make telephone

calls to inform a person of their choice of their situation, to be allowed to fetch their documents and permits, and, in cases of asylum seekers, to be adequately provided with information on the procedure applicable to them.

98 African Commission on Human and Peoples' Rights (n 96 above).

99 African Commission on Human and Peoples' Rights 'South Africa: Prisons and detention conditions, 2004' <http://www.achpr.org/states/south-africa/missions/prisons-2004/> (accessed 16 September 2015).

continue their support to the prison sector in South Africa specifically with regard to training and rehabilitation. Lastly, it was recommended that the Commission of the African Union should collaborate with members of the Southern African Development Community to explore the possibility of prisoner exchange. To this end, the African Union should organise a meeting of SADC Ministers of Corrections and should make prisons and conditions of detention an important indicator in the peer review process of the NEPAD.<sup>100</sup>

The researchers were unable to establish whether effect was given to the recommendations in the report of the Special Rapporteur.

### **15 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission**

The impact of the African Charter and the Maputo Protocol is enhanced in South Africa by the fact that there exists a culture of human rights. Courts are bound to consider international law when interpreting the Bill of Rights. South Africa has academic centres and NGOs which make use of the regional system and thereby enhance its role.

A positive factor, which has the effect of impeding the impact of regional instruments, is the effectiveness of domestic remedies. South Africans generally have faith in the country's judiciary and are afforded fair hearings where their rights are taken into account. There is a long way to go in order to exhaust all local remedies and litigants would not often leave the

Constitutional Court with the notion that their rights have not been vindicated. Also, since South Africans have both the international and domestic framework to consider, reliance on regional instruments can easily be neglected.

Negative factors which impede the impact of the African Charter and Maputo Protocol include lack of awareness on the part of both government officials and legal practitioners. Since not much focus is placed on these instruments in the curricula of undergraduate legal studies, few practitioners appreciate the regional human rights system. One of the interviewees, who is attached to an NGO,<sup>101</sup> commented that the main problem with implementation lies in the lack of knowledge and support of the African Charter and the Maputo Protocol on the side of government. He laments the government's failure to submit numerous periodic reports over the past decade and believes that there is a fatal disconnect between the provisions of regional instruments and the awareness of the instruments on the part of the government.

South Africa hosted the 31st ordinary session of the African Commission from 2 to 16 May 2002.<sup>102</sup> Ms Pansy Tlakula, a South African, is currently the Chairperson of the Commission. She is also the Special Rapporteur on Freedom of Expression and Access to Information, Chairperson of the Working Group on Specific Issues Related to the work of the African Commission and member of the Working Group on Rights of Older Persons and People

<sup>101</sup> Keegan Lakay (n 75 above).

<sup>102</sup> Department of International Relations and Cooperation 'African Commission on Human and Peoples' Rights' <http://www.dfa.gov.za/foreign/Multilateral/africa/afirh.htm> (accessed 16 September 2015).

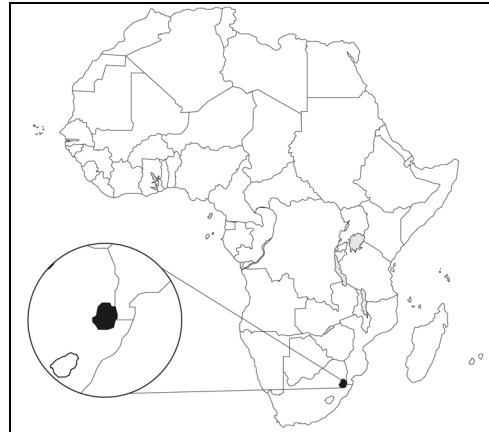
<sup>100</sup> As above.

with Disabilities. Dr Barney Pitso Rabe was a Commissioner from 1997 to 2003 and released reports on, amongst others, the Zimbabwe Fact Finding Mission of 2002, the Botswana Promotion Mission of 2001 and the Mozambique Promotion Mission of 2000. The fact that South African nationals serve on the African Commission and the country's openness to host sessions of the Commission point to a vested interest on the part of the state and, when properly covered by the media, these facts enhance public awareness of the regional system.



# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN SWAZILAND

*Dumsani Dlamini\**  
*Sizakele Hlatshwayo\*\**



## 1 Introduction

One prominent feature of the system of governance in Swaziland is the interaction between the traditional system and the Westminster model of governance.<sup>1</sup> In furtherance of this unique system of governance, the Constitution of the Kingdom of Swaziland of 2005 (the Constitution) states that the Swazi nation has found it necessary to blend the good institutions of traditional law and custom with those of an open democratic society.<sup>2</sup>

The Kingdom of Swaziland is a state party to various human rights instruments some of whose provisions are reflected in the Constitution. However, in spite of ratification by the state of key human rights instruments and the recognition of fundamental rights and freedoms of the individual in the justiciable Bill of Rights in the Constitution, the human rights situation

in the country falls short of international standards. The African Commission has expressed its alarm at the failure of the government of Swaziland to implement its decision in a communication that it decided against the state and has called on the government to implement the recommendations and submit a report on the status of implementation.<sup>3</sup> In a similar vein, the African Commission is concerned that the government of Swaziland has failed to implement the recommendations in the report of the African Commission's promotional mission to the Kingdom despite calling on the government to implement the recommendations.<sup>4</sup> The Universal Periodic Review, in its 19th session, commended Swaziland for having made positive strides in a number of areas, such as the right to education, but made several recommendations with regard to other rights. A mid-term review of implementation of the recommenda-

\* LLM HRDA (Pretoria), Lecturer, University of Swaziland.

\*\* LLM HRDA (Pretoria).

1 UNDP 'About UNDP in Swaziland' [http://www.sz.undp.org/content/swaziland/en/home/operations/about\\_undp.html](http://www.sz.undp.org/content/swaziland/en/home/operations/about_undp.html) (accessed 4 September 2015).

2 Para 4 of the Preamble to the Constitution.

3 African Commission on Human and Peoples' Rights (ACHPR) '216: Resolution on the Human Rights Situation in the Kingdom of Swaziland' <http://www.achpr.org/sessions/51st/resolutions/216> (accessed 4 September 2015).

4 ACHPR (n 3 above); see also ACHPR 'Report of the promotional mission to the Kingdom of Swaziland' [http://www.achpr.org/files/sessions/41st/mission-reports/swaziland/misrep\\_promo\\_swaziland-2006\\_eng.pdf](http://www.achpr.org/files/sessions/41st/mission-reports/swaziland/misrep_promo_swaziland-2006_eng.pdf) (accessed 13 August 2013).

tions revealed that 38 of the recommendations have not been implemented, 11 have been partially implemented and only two have been fully implemented.<sup>5</sup>

Swaziland is a patriarchal society that is heavily steeped in tradition, which permeates all forms of social, political, legal and economic interaction. This has serious implications for gender relations and consequently for the status of women in the country. Women in Swaziland are discriminated against in social, economic, legal and cultural spheres. In spite of the adoption of the Constitution, which provides for equality of all before and under the law, some laws still discriminate against women.<sup>6</sup> The Constitution states in unequivocal terms that the traditional government of Swaziland is administered in accordance with Swazi law and custom and that the traditional institutions are the pillars of the monarchy.<sup>7</sup>

## 2 Ratification of African Charter and the Maputo Protocol

Swaziland ratified the African Charter on 15 September 1995 and the Maputo Protocol on 5 October 2012.<sup>8</sup> The state did not enter any reservations to either of the treaties. Swaziland has a reputa-

tion for not entering any reservations to the treaties to which she accedes or ratifies. Her major challenge, however, lies in giving effect to the provisions of the treaties. The Constitution provides that 'the government may execute or cause to be executed an international agreement in the name of the Crown'.<sup>9</sup> The term 'government' as used in this context should be construed as referring to the executive branch of government. It is the prerogative of the executive organ of state to negotiate and sign international agreements on behalf of Swaziland.

The procedure for ratifying treaties is beyond the compass of international law.<sup>10</sup> This matter falls exclusively within the domain of municipal or internal law.<sup>11</sup> In this connection, the Constitution provides that:

[A]n international agreement executed by or under the authority of the government shall be subject to ratification and become binding on the government by an Act of parliament or a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament.<sup>12</sup>

The import of this provision is that before the state expresses its consent to be bound at the international level by an agreement that it has executed, that agreement shall be subject to 'internal ratification'. 'Internal ratification' refers to a national process of 'ratification' or approval, which is a precursor of 'external ratification'.<sup>13</sup> In other words, before Swaziland deposits her instru-

5 'Midterm assessment, Swaziland, July 2014' <http://www.upr-info.org/followup/assessments/session25/swaziland/MIA-Swaziland.pdf> (accessed 26 May 2015).

6 For an exposition of how the courts of Swaziland have enforced women's rights see T Masuku 'Women and justice in Swaziland: Has the promise of the Constitution been fulfilled?' in Heinrich-Boll-Stiftung *Perspectives political analyses and commentary Africa, women custom and access to justice* (2013); see also CM Fombad 'The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?' (2007) 23 *South African Human Rights Law Journal* 100.

7 Sec 227(1) of the Constitution.

8 ACHPR 'Swaziland' <http://www.achpr.org/states/swaziland/ratifications/> (accessed 5 August 2015).

9 Sec 238(1) of the Constitution.

10 KA Acheampong 'The ramifications of Lesotho's ratification of the Convention on the Elimination of all Forms of Discrimination Against Women' (1993) 9 *Lesotho Law Journal* 79-89-90.

11 Acheampong (n 10 above) 90.

12 Sec 238(2)(a) & (b) of the Constitution.

13 F Viljoen *International human rights law in Africa* (2007) 21.

ment of ratification, which is an expression of consent to be bound by an international agreement, with the relevant body or depository, the Parliament of Swaziland must have approved of the treaty in question. Parliament shall manifest its approval by enacting an Act of parliament or a resolution supported by at least two-thirds of the members at a joint sitting of the two chambers of parliament. The act of depositing an instrument of ratification with the appropriate depository shall bind Swaziland only at the international level. Carefully construed, section 238(2) of the Constitution suggests that 'external ratification', which is not preceded by parliament's approval, shall not bind Swaziland. This proposition resonates with the postulation that acceptance of the binding effect of a treaty has both external and internal phases.<sup>14</sup> The external aspect will manifest itself on the international plane whereas the internal facet depends on national processes.<sup>15</sup> It is important that both dimensions be satisfied. The Constitution further provides that the provisions of section 238(2) shall not be applicable if the international agreement is of 'a technical, administrative or executive nature or is an agreement which does not require ratification or accession'.<sup>16</sup>

Swaziland does not have a clear policy or legislation that states in whom power to sign or ratify international agreements on behalf of the state resides.<sup>17</sup> Either the King or a minister

signs international agreements.<sup>18</sup> If it is not the King (as head of state and head of government) or the Minister of Foreign Affairs and International Cooperation who signs or ratifies a treaty, any other minister or person who performs these functions should comply with article 7 of the Vienna Convention on the Law of Treaties of 1969. It is the ministry of Foreign Affairs and International Cooperation that is mostly responsible for depositing instruments of ratification with the appropriate bodies.<sup>19</sup> Furthermore, the Constitution stipulates that the Attorney General, who is the principal legal advisor to the government,<sup>20</sup> an *ex officio* member of the Cabinet<sup>21</sup> and an *ex officio* member of the House of Assembly,<sup>22</sup> shall peruse treaties and conventions to which the government is a party or in respect of which it has an interest.<sup>23</sup> The state shall not conclude an agreement, treaty or convention without the advice of the Attorney General.<sup>24</sup>

### 3 Government focal point

The Ministry of Justice and Constitutional Affairs is responsible for the state's response and responsibilities under the African Charter. The Ministry has appointed a crown counsel from the Attorney General's chambers as a focal person in furtherance of this role. In discharging the state's responsibilities, the officer communicates with the African Commission from time to time and attends specific meetings pertaining to the African Charter.

14 As above.

15 As above.

16 Sec 238(3) of the Constitution.

17 'Workshop on the Protocol to the African Charter on the rights of women: Women and law in Southern Africa Research Educational Trust' Paper prepared and presented by SJK Matsebula, Principal Parliamentary Counsel, Attorney General's Chambers at a workshop held at La Casserole on 26-27 June 2001.

18 Matsebula (n 17 above) 19.

19 As above.

20 Sec 77(3)(a) of the Constitution.

21 Sec 77(3)(b) of the Constitution.

22 Sec 95(1)(d) of the Constitution.

23 Sec 77(5)(b) of the Constitution.

24 Sec 77(7) of the Constitution.

The Gender and Family Issues Department under the Deputy Prime Minister's office is the focal point of the state's response and responsibilities on the Maputo Protocol. The mandate of the department is to coordinate all programmes on gender and family issues, prepare the state's initial and periodic reports on gender issues, raise awareness and build the capacity of government institutions and the people of Swaziland on gender issues.

The focal person at the Ministry of Justice and Constitutional Affairs liaises with the African Commission through the Swazi Embassy in Ethiopia. This trail of communication is protracted and as a result, focal points have in some instances missed deadlines because of delayed communication.

#### 4 Domestication or incorporation

The Constitution is the supreme law of Swaziland.<sup>25</sup> Unless it is self-executing, a treaty does not form part of the municipal law of Swaziland until parliament enacts it into the domestic legal system.<sup>26</sup> In the case of *Ray Gwebu v R*,<sup>27</sup> the Court of Appeal of Swaziland (now the Supreme Court) determined that unincorporated international agreements may be used as aids to interpretation but may not be treated as part of municipal law for purposes of adjudication in a domestic court. It is worth mentioning that the Court decided this case before the Constitution came into force. It appears that the Constitution affirmed the legal position that prevailed before it came into force in respect of the domestication or incorporation of

treaties in Swaziland. After the commencement of the Constitution, a plethora of case law authority has emerged supporting the proposition that unincorporated treaties may be used as interpretative sources, but do not form part of domestic law until parliament enacts them into municipal law.<sup>28</sup>

The domestic Bill of Rights guarantees some of the rights and freedoms enshrined in the African Charter. These are the right to life,<sup>29</sup> the right to liberty,<sup>30</sup> the right to a fair hearing,<sup>31</sup> the right to freedom from slavery and forced labour,<sup>32</sup> the right to freedom from inhuman or degrading treatment,<sup>33</sup> the right to own property,<sup>34</sup> the right to equality before the law,<sup>35</sup> the right to freedom from arbitrary search and entry,<sup>36</sup> the right to freedom of conscience or religion,<sup>37</sup> the right to freedom of expression and opinion,<sup>38</sup> the right to freedom of assembly and association,<sup>39</sup> and the right to freedom of movement.<sup>40</sup> In fact, it may be contended that the framers of the Constitution were, to an extent, guided by the African Charter when they were

25 Sec 2(1) of the Constitution.  
 26 Sec 238(4) of the Constitution.  
 27 [http://www.swazilii.org/files/sz/judgment/supreme-court/2002/21/ray\\_gwebu\\_pdf\\_21134.pdf](http://www.swazilii.org/files/sz/judgment/supreme-court/2002/21/ray_gwebu_pdf_21134.pdf) (accessed 5 August 2015).

28 *Masinga v Director of Public Prosecutions & Others* (21/07) [2011] SZHC; *Southern Trading Company v Minister of Agriculture & Cooperatives & 4 Others* (50/2011) [2011] SZSC 17; *Swaziland National Ex-Miners Workers Association & Another v The Minister of Education & Others* (335/09) [2009] SZHC 104; *Fakudze & Others v Director of Public Prosecutions & Another* (237/08) [2008] SZHC 16; *Stapley v Dobson* (2240/07)[2008] SZHC 11; *Sithole NO and Others v Prime Minister of the Kingdom of Swaziland & Others* (2792/2006) [2007] SZHC 1 <http://www.swazilii.org> (accessed 5 August 2015).  
 29 Secs 14(a) & (15) of the Constitution.  
 30 Sec 16 of the Constitution.  
 31 Sec 21 of the Constitution.  
 32 Sec 17 of the Constitution.  
 33 Sec 18 of the Constitution.  
 34 Sec 19 of the Constitution.  
 35 Sec 20 of the Constitution.  
 36 Sec 22 of the Constitution.  
 37 Sec 23 of the Constitution.  
 38 Sec 24 of the Constitution.  
 39 Sec 25 of the Constitution.  
 40 Sec 26 of the Constitution.



drafting the provisions of the Constitution. Although the language in which the corresponding rights contained in both documents is couched may not be identical, the import of these provisions is substantially similar. It is worth noting that the Bill of Rights, which appears in sections 14 to 39 of Chapter III of the Constitution and captioned 'Protection and Promotion of Fundamental Freedoms', is specially entrenched.<sup>41</sup> The Bill of Rights, however, does not recognise some of the socio-economic rights guaranteed in the African Charter. The non-inclusion of socio-economic rights in the Bill of Rights puts a damper on the Constitution. As noted by Fombad, although inserting socio-economic rights in the Bill of Rights will not necessarily render them legally enforceable, it is an indication that the state accords them pride of place.<sup>42</sup>

Section 27 of the Bill of Rights states that marriage shall be entered into only with the free and full consent of both parties.<sup>43</sup> This constitutional provision accords with article 6(a) of the Maputo Protocol. In keeping with article 2(2) of the Maputo Protocol, the Constitution provides that 'a woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed'.<sup>44</sup> In conformity with the equality principle of the Maputo Protocol, the Constitution provides that women have the right to equal treatment with men.<sup>45</sup>

The Bill of Rights, however, does not recognise the bulk of the rights enunciated in the Maputo Protocol.

These include, amongst others, reproductive rights, the right to food security, the right to adequate housing, and the right to sustainable development. Some commentators may argue that the conspicuous omission of these rights in the Bill of Rights can be excused on the ground that the Constitution came into force before Swaziland ratified the Maputo Protocol. It is submitted, however, that this contention can be faulted on several counts. First, when the state adopted the Constitution, it had already signed, although it was not then a state party to, the Maputo Protocol. Swaziland signed the Maputo Protocol on 7 December 2004.<sup>46</sup> The Constitution came into force on 26 July 2005. By virtue of being a signatory state, Swaziland had the obligation not to act in a manner that would undermine the object and purpose of the Maputo Protocol. The Maputo Protocol should have influenced the drafting of the provisions of the Constitution, especially those that relate to women's rights. This act of omission by the state undermined the object and purpose of the instrument. Second, a state that has signed a human rights treaty, and that is wholeheartedly committed to the promotion of and respect for human rights, ought to conduct a compatibility study on the basis of which it brings into conformity the treaty and any national law that offends against the treaty provisions.<sup>47</sup> This should be done prior to ratification. Swaziland ratified the Maputo Protocol in 2012. It was expected that, when the state ratified the Maputo Protocol, its Constitution would be in line with it. However, both

41 Sec 246(2)(c) of the Constitution.

42 Fombad (n 6 above) 101.

43 Sec 27(2) of the Constitution.

44 Sec 28(3) of the Constitution.

45 Sec 28(1) of the Constitution.

46 ACHPR 'Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' <http://www.achpr.org/instruments/women-protocol/ratification> (accessed 11 September 2013).

47 Viljoen (n 13 above) 22.

the Constitution and ordinary legislation retain provisions that fly in the face of the Maputo Protocol.

Swaziland has not incorporated the African Charter and the Maputo Protocol into ordinary legislation, although certain provisions of both instruments have become part of domestic law by way of reception or transformation. This means that parliament has amended or repealed certain legislative provisions to conform to standards contained in these instruments, though without expressly stating that these standards have their origin in these instruments. For example, parliament amended section 16(3) of the Deeds Registry Act of 1968 (Deeds Registry Act) to give effect to the equality provisions of the African Charter and the Maputo Protocol. Furthermore, parliament has domesticated the Maputo Protocol by way of reception through enacting section 27(2) of the Constitution, which provides that marriage shall be entered into with the free and full consent of the intending spouses. This section resonates with article 6(a) of the Maputo Protocol.

In addition, there are pieces of legislation that refer to provisions of the African Charter and the Maputo Protocol. The Children's Protection and Welfare Act of 2012, for example, enshrines the right to freedom from discrimination;<sup>48</sup> the right to education;<sup>49</sup> the rights of children with disabilities;<sup>50</sup> the right to opinion;<sup>51</sup> the right to protection from exploitative labour;<sup>52</sup> the right to freedom from torture or other cruel, inhuman or degrading treatment or punishment;<sup>53</sup> and the right to parental

property.<sup>54</sup> All the rights listed above give effect to certain provisions of the African Charter. The resuscitated Sexual Offences and Domestic Violence Bill of 2015 states that its object is, amongst other things, to give effect to the several international instruments dealing with sexual and domestic violence, including the African Charter and the Maputo Protocol.

## 5 Legislative reforms or adoption

There is no evidence to indicate that Swaziland undertook a compatibility study before she ratified the African Charter or the Maputo Protocol. However, both instruments have had an impact on the domestic legal system as parliament has amended legislation and the High Court has invalidated certain aspects of the common law concept of marital power to give effect to the provisions of these instruments.

Parliament amended the Deeds Registry Act in order to give effect to the equality provisions of the African Charter and the Maputo Protocol, courtesy of a landmark decision of the Supreme Court, the final court of appeal in Swaziland, in the case of *Attorney-General v Aphané*.<sup>55</sup> The facts of the case were that the respondent, who was the applicant in the court *a quo*, approached the Court *a quo* for an order declaring that section 16(3) of the Deeds Registry Act was invalid because it was inconsistent with the provisions of sections 20 and 28 of the Constitution. Section 20 of the Constitution provides for equality before the law and equal protection of the law. Section 28 provides that women have the right to equal treatment with men.

48 Sec 4.

49 Sec 9.

50 Sec 11.

51 Sec 12.

52 Sec 13.

53 Sec 14.

54 Sec 17.

55 (12/09) [2010] SZSC 32 <http://www.Swazilii.org/sz/judgment/Supreme-Court/2010/32> (accessed 7 August 2013).

The respondent and her husband were married in community of property. They entered into an agreement to purchase immovable property and wished to have the property registered in their joint names. However, they failed to register the property in their joint names on the basis that because they were married in community of property, the property would be registered in the sole name of the husband as dictated by section (16)(3) of the Deeds Registry Act, thereby excluding the respondent's name. It is against this background that the respondent sought the invalidation of section 16(3). The Court *a quo* concurred with the respondent, ruling that section 16(3) of the Deeds Registry Act was unconstitutional. As a remedy, the court severed the offending words in the provision and replaced them with words that would make the provision constitutional. The Attorney General appealed against the remedies of severance and reading in and argued that the appropriate remedy was to be determined by parliament. The Supreme Court upheld the appeal but declared that section 16(3) of the Deeds Registry Act was inconsistent with sections 20 and 28 of the Constitution and was therefore invalid. The Supreme Court suspended the declaration of invalidity for a period of twelve months to afford Parliament an opportunity to enact legislation that would rectify the invalidity. Parliament has amended the offending provisions to bring them into conformity with the Constitution.

In another landmark decision,<sup>56</sup> a full bench of the High Court held that

56 *Nombuyiselo Sihlongonyane v Mholi Sihlongonyane* (470/2013) [2013] SZHC 144 <http://www.Swazilii.org/sz/judgment/High-Court/2013/144-0> (accessed 7 August 2013).

the Roman Dutch common law position that a woman who is married in community of property and who is under her husband's marital power has no *locus standi in judicio* to sue and be sued in her own name was inconsistent with the constitutional right of equality for all before the law. This common law position was therefore found to be invalid to the extent of the inconsistency.

Parliament has also adopted the Children's Welfare Act and the People Trafficking and People Smuggling (Prohibition) Act of 2009 to give effect to the provisions of the African Charter and the Maputo Protocol.

## 6 Policy reform or formulation

The government of Swaziland has adopted several policies to give effect to the African Charter and the Maputo Protocol. The National Gender Policy of 2010 provides a national framework and strategies for gender mainstreaming and women's empowerment in order to give effect to the Constitution and other relevant international and regional human rights instruments to which the country is a state party. The National Gender Policy highlights nine thematic areas that are considered critical in the advancement of gender equality in Swaziland. It also articulates that the African Charter and the Maputo Protocol guide it.<sup>57</sup> The Poverty Reduction Strategy and Action Plan 'puts emphasis on affording equal opportunity to all citizens regardless of sex or race to access social and economic services in order to enhance their development'. This is in line with the prohibition on discrimination recognised in the African

57 [http://www.undp.org/content/dam/swaziland/docs/publications/UNDP\\_SZ\\_Gender\\_SwazilandNationalGenderPolicy2010.pdf](http://www.undp.org/content/dam/swaziland/docs/publications/UNDP_SZ_Gender_SwazilandNationalGenderPolicy2010.pdf) (accessed 25 August 2105).

Charter and the Maputo Protocol. The National Development Strategy of 1997 accords high priority to gender equality and the eradication of gender imbalances and proposes strategies that seek to eliminate gender inequality and offer equal opportunities to all citizens irrespective of their sex. The Swaziland National Children's Policy of 2009 informed the drafting of the Children's Protection and Welfare Act of 2012. This Act is underpinned by the Convention on the Rights of the Child, The African Charter and the Maputo Protocol, all of which enjoin states parties to take measures to protect the rights of the child.

## 7 Court judgments

There are very few cases in which the courts have referred to provisions of the African Charter or Maputo Protocol or to the jurisprudence of the African Commission.

In *Fakudze v The Director of Public Prosecutions*,<sup>58</sup> the Director of Public Prosecutions had indicted the applicants on charges of fraud, corruption and theft. Since the state was taking too long to prosecute, the applicants applied to the High Court for an order permanently staying their prosecution. They argued, amongst other things, that the state had violated their right to a fair trial by delaying their prosecution. In determining the case, the Court referred to the principles and guidelines on the right to a fair trial adopted by the African Commission as an interpretative guide. In view of the circumstances of the case, the Court dismissed the application.

58 (237/08) [2008] SZHC 161 [http://www.swazilii.org/files/sz/judgment/high-court/2008/161/SZHC\\_237\\_2008.pdf](http://www.swazilii.org/files/sz/judgment/high-court/2008/161/SZHC_237_2008.pdf) (accessed 8 August 2008).

In similar fashion, the High Court has also referred to the Human Rights Committee General Comment 28 on the Equality of Rights between men and women (2000) in the *Nombuyiselo Sihlongonyane* case.<sup>59</sup> The Court observed that Swaziland was a state party to the International Covenant on Civil and Political Rights and that in enacting the equality provisions of the Constitution, the country was aware of its obligations to its people in this regard and of its international obligations under this human rights instrument.<sup>60</sup> Based on this reasoning, the Court held that the common law concept of marital power was, to the extent that it barred married women from suing and being sued without the assistance of their husbands, inconsistent with sections 20 and 28 of the Constitution

In *Mabila v The Director of Public Prosecutions*,<sup>61</sup> the applicants had been tried *in camera* before a specially constituted tribunal. They brought an application before the High Court to have the record of proceedings relating to their trial, in which they were convicted of high treason, released to them. In opposing the application, the respondents contended that since the proceedings before the tribunal were conducted *in camera*, the release of the record was precluded. The Court referred to various human rights instruments including the African Charter as aids to interpretation to buttress the principle that *in camera* trials are the exception and not the rule. The Court further stated that this principle is coupled with the requirement that

59 *Nombuyiselo Sihlongonyane* (n 56 above) para 27.

60 *Nombuyiselo Sihlongonyane* (n 56 above) para 29.

61 (3347/2003) [2009] SHZC 119 [http://www.swazilii.org/files/sz/high-court/2009/119/SZHC\\_334-2003.pdf](http://www.swazilii.org/files/sz/high-court/2009/119/SZHC_334-2003.pdf) (accessed 8 August 2015).

after an *in camera* hearing, the whole or part of the judgment has to be made public. The Court stated that trials behind closed doors with secret judgments tainted any judicial system in which the rule of law and fair trial rights have any meaning at all. The Court gave judgment for the applicants. The Court in this case cited the relevant provisions of the African Charter but unfortunately did not refer to the African Commission's interpretation of the provisions.

In as much as the courts occasionally refer to the African Charter and the Maputo Protocol, they have been shy to refer to the jurisprudence of the African Commission for interpretative guidance on the rights that have a bearing on highly contentious issues in the Kingdom. For example, the courts have not referred to the exposition of the African Commission on what it understands to be the scope and content of the right to freedom association in the context of political parties.

## **8 Awareness and use by civil society**

Civil society organisations (CSOs), especially those whose mandate involves the promotion and protection of human rights, are aware of the African Charter and the Maputo Protocol. In this respect, they have filed communications before the African Commission.<sup>62</sup> Some CSOs refer to provisions of these human rights instruments, especially those involved in legal education. CSOs also displayed their awareness of both instru-

ments at the 54th ordinary session of the African Commission, at which they took turns castigating the state for its violation of human rights and failure to implement previous recommendations of the African Commission.<sup>63</sup> Their use of Concluding Observations has been minimal. This may be attributed, among other things, to the fact that Swaziland has not been consistent in submitting her periodic reports to the African Commission and as such very few Observations have been made. Moreover, the state has not disseminated even the Concluding Observations of the only report that was submitted.

The Coordinating Assembly of Non-Governmental Organisations (CANGO), which is the umbrella body of non-governmental organisations in Swaziland, has made an effort to heighten CSO awareness of human rights in Swaziland.<sup>64</sup> CSOs comprise non-registered and registered non-governmental organisations, community-based and faith-based organisations, amongst others.<sup>65</sup> CANGO has established a Governance and Human Rights Consortia that will, amongst other things, facilitate the 'integration of human rights responsive programming and development'.<sup>66</sup> The establishment of the consortia is a reaction to the dearth of knowledge amongst some CSOs on the human rights-based approach to development.<sup>67</sup> CANGO is concerned that, in spite of the adoption of a national constitution which reflects numerous

62 Communication 444/13 *Justice Thomas Masuku (represented by Lawyers for Human Rights Swaziland) v Swaziland*; Communication 414/12 *Lawyers for Human Rights Swaziland (Swaziland) v The Kingdom of Swaziland; Lawyers for Human Rights Swaziland v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

63 R Lee 'Swaziland under fire at the African Commission' 29 October 2013 <http://www.osisa.org/hrdb/swaziland/swaziland-under-fire-african-commission> (accessed 11 August 2015).

64 'CANGO Governance and Human Rights Consortium Strategic Plan' *The Swazi News* 2 November 2013.

65 As above.

66 As above.

67 As above.

fundamental human rights and freedoms, lack of knowledge on the Constitution and Bill of Rights undermines the realisation and enjoyment of these rights.<sup>68</sup> The development of an advocacy strategic plan will, according to CANGO, assist CSOs with a frame of reference and enable them to address issues of governance and human rights.<sup>69</sup>

## 9 Awareness and use by lawyers

Human rights law became a fully-fledged course in the curriculum of the University of Swaziland when the university introduced the new Bachelor of Laws programme in 2001. Awareness of human rights increased after the introduction of this programme, especially amongst lawyers who graduated from it. This does not suggest that lawyers did not bring human rights related cases before courts before 2001. Lawyers did file human rights related cases in courts before this period but such cases were not as pronounced as they are today. The adoption of the Constitution with a justiciable Bill of Rights coupled with the increase in the number of lawyers with a background in human rights law has seen an increase in human rights related cases before domestic courts. There is heightened awareness of the African Charter and the Maputo Protocol, especially amongst lawyers who are interested in human rights litigation. There are court cases in which lawyers have referred to the African Charter in their arguments.<sup>70</sup> The law society of Swaziland has also tabled a communication before the African Commission in which it alleged violations of human rights by

68 As above.

69 As above.

70 *Ray Gwebu* (n 27 above); *Sithole NO* (n 28 above).

the state.<sup>71</sup> Lawyers have not referred to the Maputo Protocol as extensively in their arguments. This may be attributed to the fact that Swaziland only ratified the Maputo Protocol in 2012.

Judges have shown growing awareness of the African Charter and the Maputo Protocol in their judgments.<sup>72</sup> And, as noted above, one judge has referred to the jurisprudence of the African Commission as an interpretative source in deciding a case.<sup>73</sup>

## 10 Higher education and academic writing

The University of Swaziland introduced a course in human rights law in the 2001 academic year. A human rights law course outline for the 2015 academic year reflects that the African system of human rights protection is one of the topics covered in this course and the African Charter appears as one of the major legal instruments cited in this course. The Maputo Protocol features prominently in the discourse on such rights as the right to equality.

There is a dearth of literature by Swazi legal academics on the African Charter and the Maputo Protocol. There is, however, a journal article in which a legal academic laments the omission of economic, social and cultural rights in the Bill of Rights.<sup>74</sup> She contends that, by virtue of being a state

71 Communication 406/11 *Law Society of Swaziland v Swaziland* [http://www.achpr.org/files/activity-reports/37\\_2015\\_eng.pdf](http://www.achpr.org/files/activity-reports/37_2015_eng.pdf) (accessed 11 August 2015).

72 *Ndzimandze & Others v Ndzimandze & Others* (981/14) [2014] SZHC 234; *Masinga v Director of Public Prosecutions & Others* (21/07) [2011] SZHC 58; *Fakudze* (n 58 above); *Mabila* (n 61 above).

73 *Mabila* (n 61 above).

74 SM Langwenya 'Recent Legal Developments – Swaziland' (2005) *University of Botswana Law Journal* 170.

party to the African Charter, Swaziland was expected to recognise these rights in the Bill of Rights.

## **11 National human rights institutions**

The Constitution provides for the establishment of a Commission on Human Rights and Public Administration (CHRPA).<sup>75</sup> The Constitution outlines the functions<sup>76</sup> and powers<sup>77</sup> of the CHRPA. The CHRPA was constituted through Legal Notice 143 of 2009. By June 2013, the CHRPA had received 68 cases of alleged human rights violations.<sup>78</sup> The bulk of these cases allege violations of the right to a fair hearing, the right to administrative justice, the right to freedom from inhumane or degrading treatment and the rights of workers.<sup>79</sup> In 2009, the CHRPA presented to parliament the Human Rights and Public Administrative Bill that would fully operationalise the CHRPA. To date, however, parliament has not enacted the Bill into law. Since the CHRPA is not fully operational, it faces challenges which include processing the cases that it has received and otherwise discharging its mandate as required.

## **12 State reporting**

The Ministry of Justice and Constitutional Affairs and the Gender and Family Issues Department under the Deputy Prime Minister's Office are responsible

for state reporting under the African Charter and the Maputo Protocol respectively. The process of preparing a report is not clear as Swaziland has submitted only one report on the African Charter. There is no evidence that either the state or civil society disseminate Concluding Observations of the African Commission.

As has been noted in the antecedent paragraphs, Swaziland has not been consistent in submitting state reports to the African Commission. Swaziland submitted the first periodic report, which covered the period from 1995 to 2000 on 21 February 2000; four years after the first report became due.<sup>80</sup> This is the only report that the state has submitted to the African Commission.

In respect of the submission of periodic reports, the then Minister of Justice and Constitutional Affairs apologised to the promotional mission that visited Swaziland, on 21-26 August 2006, for the state's failure to submit reports.<sup>81</sup> He assured the mission that since Swaziland had adopted a constitution; the state intended to comply with its international obligations, including attending sessions of the African Commission.<sup>82</sup> However, Swaziland has not lived up to the Minister's promise. The study could not ascertain the composition of the government's delegation during the presentation of the state report on the African Charter. It was impossible for the researchers to find the report that Swaziland submitted to the African Commission and the website of the African Commission does not have the report, although it reflects that the state

75 Sec 163(1) of the Constitution.

76 Sec 164 of the Constitution.

77 Sec 165 of the Constitution.

78 'Swaziland Commission on Human Rights and Public Administration Strategic Plan 2013-2017' [http://www.undp.org/content/dam/swaziland/docs/publications/UNDP\\_SZ\\_Governance\\_Swaziland](http://www.undp.org/content/dam/swaziland/docs/publications/UNDP_SZ_Governance_Swaziland) (accessed 5 August 2015).

79 As above.

80 <http://www.achpr.org/states/swaziland/reports/1st-1995-2000/> (accessed 4 September 2015).

81 ACHPR (n 4 above).

82 ACHPR (n 4 above) 13.

submitted its report during that period. In the absence of the report, the researchers could not establish the pertinent concluding observation. Swaziland has not yet submitted her initial report on the Maputo Protocol. The report became due on October 2014.

### 13 Communications

The African Commission has decided against the state in one communication.<sup>83</sup> The state has not given any exposure to or disseminated the findings of the African Commission. A special mission of the African Commission visited Swaziland in 2006 and inquired from the then Minister of Justice and Constitutional Affairs as to what measures the state had taken to implement the recommendations of the African Commission on the communication against Swaziland.<sup>84</sup> The Minister's response was that the state had not received an official communication on the decision and that it learnt of the decision by chance.<sup>85</sup> The findings of the African Commission in the communication against Swaziland were that the state had, through certain legislation, violated articles 1, 7, 10, 11, 13, and 26 of the African Charter. The African Commission recommended that Swaziland align the offending legislation with provisions of the African Charter and that the state should involve stakeholders, including civil society, in the conception and drafting of the new Constitution.

The state has adopted legislative measures to implement the recommendations of the African Commission, although such measures promise more

than what the state offers in practice. Swaziland has adopted a constitution whose Bill of Rights recognises some of the civil and political rights guaranteed in the African Charter. To some extent, the state has complied with article 1 of the African Charter. In keeping with article 7 of the African Charter, the Constitution provides for the right to a fair hearing.<sup>86</sup> The extent to which this right is applicable in Swaziland is a matter of speculation as the Judicial Service Commission, whose chair is the Chief Justice, recommended the removal from office of a judge of the High Court after a hearing that made a mockery of the right to fair trial and all that it stands for. The Constitution recognises the right to freedom of assembly and association<sup>87</sup> as guaranteed in the African Charter. In the context of the operation of political parties in Swaziland, however, the enjoyment of this right remains a contentious issue. In spite of the recognition of freedom of association in the Constitution, there is no law that regulates the operation of political parties. The Attorney General has argued that section 79 of the Constitution, which provides that the system of government in Swaziland emphasises individual merit as the basis for election or appointment to public office, 'represents a fundamental choice by the people, a choice that individuals not groups may participate in the governance of the country'.<sup>88</sup> In similar fashion, he has argued that political parties are allowed to exist in Swaziland but cannot contest political power.<sup>89</sup> The primary aim of political parties is to contest for political power in order to govern or rule if voted into office. The

83 *Lawyers for Human Rights* (n 62 above).

84 ACHPR (n 4 above).

85 As above.

86 Sec 21 of the Constitution.

87 Sec 25 of the Constitution.

88 'AG tells judges to back off' *Times of Swaziland* 25 July 2008 4.

89 As above.



argument by the Attorney General is in stark contrast with the observation of the Constitutional Court of Uganda:<sup>90</sup>

The freedoms to assemble and associate do not only concern the right to form a political party but also guarantee the right of such a party once formed to carry out on its political activities freely.

Swaziland has enacted section 141 of the Constitution, which guarantees the independence of the judiciary, in order to implement the recommendation that the state should bring its offending legislation into conformity with article 26 of the African Charter. Although at the formal level independence of the judiciary is guaranteed, a judge of the High Court was removed from office because of a statement he had made in his judgment. The Judicial Service Commission framed disciplinary charges against him and recommended his removal from office, contrary to the constitutional stipulation that

a judge of a superior court or any person exercising judicial power shall not be liable to any action or suit for any act or omission by that judge or person in the exercise of the judicial power.<sup>91</sup>

The African Commission has expressed alarm at the failure of the government of Swaziland to implement its decision in this communication and has thus called on the government to implement the recommendations and submit a report on the status of implementation.<sup>92</sup>

There are concerns that the Constitution is not broadly representative of the Swazi society because some stakeholders and CSOs were excluded in its conception and drafting. The Supreme

Court, however, has dismissed such allegations.<sup>93</sup>

#### **14 Special mechanisms and promotional visits of the African Commission**

The African Commission undertook a promotional visit to the Kingdom of Swaziland from 21 to 25 August 2006.<sup>94</sup> The terms of reference of the promotional mission included discussions on the implementation of the African Commission's decision on the communication against Swaziland and the process of ratification of the Maputo Protocol, the Protocol to the African Charter on the Establishment of the African Court, the African Charter on the Rights and Welfare of the Child and the submission of Swaziland's state reports in accordance with article 62 of the African Charter. The promotional mission also sought to (i) promote the African Charter and deliberate on the interpretation and implementation of the African Charter; (ii) heighten awareness of the African Commission and its role among government departments and civil society; and (ii) promote closer relationships between the African Commission and Swaziland. The promotional mission held meetings with relevant ministers of the Crown, the law society of Swaziland, the Commissioner of Police and civil society.

In the context of the 28 recommendations determined by the promotional mission, the government was required to, amongst other things, abolish the death penalty, ratify the Maputo Protocol, establish a human rights commis-

90 *Dr Paul Ssemwogerere and Others v Attorney General Constitutional Petition No 5/2002* (CC) (Unreported).

91 Sec 141(4) of the Constitution.

92 ACHPR (n 3 above).

93 *Sithole & Others v The Prime Minister & Others* (35/2007) [2007] SZSC <http://www.Swazilii.org/sz/judgment/Supreme-Court/2013> (accessed 7 August 2013).

94 ACHPR (n 4 above).

sion that complies with the Paris principles, submit periodic reports to the African Commission and effectively implement the decision in the communication against Swaziland. The state has given effect to one of these recommendations, that is, it has ratified the Maputo Protocol. There is no evidence that a special mechanism of the African Commission has visited Swaziland or made recommendations to the country.

### **15 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission**

The factors presented below may impede the impact of the African Charter, the Maputo Protocol and the African Commission. First, the exclusion from the Bill of Rights of certain rights enunciated in the African Charter and the Maputo Protocol negate implementation and the possible impact of these treaties. This assertion finds a measure of support in the *Ray Gwebu*. The Supreme Court decided this case when the Constitution was in the process of formulation. The Court stated in its *obiter dictum* and in an advisory tone that the norms recognised in the African Charter to which Swaziland had pledged her adherence should be reflected in the Constitution. The Court observed that this was necessary in order for the state to fulfil its obligation 'to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the Charter'.

Second, parliament's tardiness in enacting legislation to give effect to the Constitution, some of whose provisions give effect to the rights recognised in the African Charter and the Maputo Proto-

col, vitiates the impact of these treaties. Since the adoption of the Constitution, the courts have expressed, in not less than three decisions, their concern about parliament's sluggishness in aligning ordinary law with the Constitution.<sup>95</sup>

Third, failure by the courts to refer to the jurisprudence of the African Commission as an interpretative source when interpreting rights enshrined in African Charter and the Maputo Protocol discount the impact of these instruments. It is indisputable on the one hand that the jurisprudence of the African Commission is not binding on the courts of Swaziland because the state has not incorporated these instruments. On the other hand, it is axiomatic that the general comments of this treaty body provide an authoritative interpretation of relevant treaty provisions and have persuasive authority. Referring to the jurisprudence of the African Commission can enrich the jurisprudence of the courts of Swaziland

Fourth, the absence of a Human Rights Commission that complies with the Paris Principles<sup>96</sup> is a drawback not only to the protection and promotion of human rights generally but also to the specific protections offered by the African Charter and the Maputo Protocol specifically.

95 *Ndzimandze* (n 80 above) para 8; *Attorney-General v Aphane* (n 63 above) para 61; *Aphane v Registrar of Deeds & Others* (383/09) [2010] SZHC 29 paras 16 & 34 <http://old.swazilii.org/sz/judgment/high-court/2010/29>

96 These are international standards that frame and guide the work of International Human Rights Institutions and were adopted by the General Assembly of the United Nations in 1993.

Fifth, the lack of awareness of human rights by individuals vitiates the impact of these human rights instruments. As noted by CANGO<sup>97</sup> and the CHRPA,<sup>98</sup> ignorance of human rights by the generality of the Swazi population poses a major challenge to the enjoyment of rights. Individuals cannot agitate for their rights and hold government accountable if they are not aware of their rights.

Sixth, litigation by its very nature is expensive. Awareness of rights serves no useful purpose if the rights-holder cannot vindicate those rights in court. The absence of a national legal aid system in Swaziland impedes enjoyment of the rights contained in the African Charter and the Maputo Protocol, especially by vulnerable groups such as women, children, the elderly and persons with disabilities.

Seventh, the inconsistency of the state in submitting its periodic reports to the African Commission negates the provisions of the African Charter and the Maputo Protocol. By submitting its reports, the state would benefit from the Concluding Observations of the African Commission, which highlight areas in which a state has to take further action.

Eighth, section 268(1) of the Constitution provides that '[the] existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into

conformity with this Constitution'. This constitutional stipulation suggests that laws that offend against the Constitution should be reformed. Law reform agencies play a critical role in bringing laws into conformity with the notion of human rights. Swaziland does not have a law reform commission that would, amongst other things, align the law with current circumstances, eliminate defects in the law or advise on or initiate proposals for the introduction of new methods for the administration of justice.<sup>99</sup>

Addressing the challenges discussed above may enhance the impact of the African Charter and the Maputo Protocol. There is also a need for judicial activism. As noted previously, the Bill of Rights does not recognise the bulk of the socio-economic rights guaranteed in the African Charter and the Maputo Protocol. In this respect, Swaziland is in dire need of an activist bench that would engage in an expansive reading of civil and political rights, to include aspects of socio-economic protection.

The African Commission held its 43rd ordinary session in Swaziland from 7 to 22 May 2008. The objective of the session was to enhance the promotion and protection of human rights on the continent. No national of Swaziland has ever been a member of the African Commission.

The media plays a significant role in exposing human rights violations perpetrated by the state and non-state actors. The media has exposed, amongst other things, police brutality against individu-

97 'CANGO Governance and Human Rights Consortium Strategic Plan' *The Swazi News* 2 November 2013.

98 'Swaziland Commission on Human Rights and Public Administration Strategic Plan 2013-2017' [http://www.undp.org/content.dam/swaziland/docs/publications/UNDP\\_SZ\\_Governance\\_Swaziland](http://www.undp.org/content/dam/swaziland/docs/publications/UNDP_SZ_Governance_Swaziland) (accessed 5 August 2015).

99 JE Ruhangisa 'Human rights and good governance: The role of law reform agencies' (2005) 11 *East African Journal of Peace and Human Rights* 108.

als, violence and discrimination against women and abuse of children.

# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN TANZANIA

*Grace Kamugisha Kazoba\**  
*Charles Mmbando\*\**



## 1 Introduction

The United Republic of Tanzania is a union of two former sovereign states, Tanganyika and the Peoples' Republic of Zanzibar. This came about as the result of ratification of the Articles of Union on 23 April 1964, which entered into force as the result of Tanganyika merging with Zanzibar to form one sovereign and independent state on 26 April 1964. Apart from forming the legal basis for the Union, the Articles of Union also made the declaration of the United Republic. The name 'United Republic of Tanganyika and Zanzibar' was later changed to United Republic of Tanzania by the United Republic (Declaration of Name) Act of 1964.<sup>1</sup>

Tanganyika attained its independence from British rule on 9 December 1961 whereas Zanzibar became independent as a result of a revolution which

occurred in 1964. Zanzibar still retains some distinct features of a sovereign state,<sup>2</sup> popularly regarded in Tanzania as features of an autonomous territory, such as having its own legislature over non-union matters,<sup>3</sup> and a judiciary up to the level of the high court distinct from the High Court of Tanzania, whereas the latter has jurisdiction over the mainland only. In addition Zanzibar has its own president known as the President of the Revolutionary Government of Zanzibar<sup>4</sup> and several non-union bodies such as the Electoral Commission of Zanzibar, amongst others. Laws enacted by the legislature of the United Republic of Tanzania over Union matters, usually sitting in Dodoma in the Tanganyika territory, must be ratified by the House of Representatives of Zanzibar to be operational in Zanzibar. Thus, between Tanganyika and Zanzibar, each party to the Union has its own history in relation to the introduction of human rights through the bill of rights operating in the constitutions of each state party to the Union.

\* LL.B (Hons, Dar), LL.M HRDA (Pretoria), PhD (Dar), lecturer and Head of the Department of General Studies (law, development studies and communications skills), Institute of Finance Management (IFM), Dar es Salam.

\*\* LL.B (Mzumbe), LL.M HRDA (Pretoria), Principal State Attorney, Ministry of Constitutional and Legal Affairs, Dar es Salam.

1 The Declaration of Name Act 61 of 1964.

2 Art 102(1) of the Constitution of the United Republic of Tanzania (the Constitution).

3 Art 106(1)-(3) of the Constitution.

4 Art 103(1) of the Constitution.

Tanzania mainland introduced the Bill of Rights into its Constitution of 1977 in 1984. Nevertheless, the implementation of the Bill of Rights in Tanzania mainland was delayed for two years for what was alleged by the government as allowing the government to put its house in order in preparation of compliance with the Bill of Rights. Yet, in the year 1986 when the Bill of Rights became operational in Tanzania, the legal framework was not ready to let Tanzanians enjoy civil, political, economic, social and cultural rights and freedoms contained in the instrument. Currently, cultural and economic rights are generally not justiciable in Tanzania.<sup>5</sup> The Bill of Rights runs from article 12 of the Constitution through to article 30. The rights which are guaranteed and justiciable under the Tanzanian Constitution are as follows: equality of human beings, equality before the law, the right to life, the right to personal freedom, the right to privacy and personal security, the right to freedom of movement, right to freedom of conscience, right to freedom of expression, right to freedom of religion, freedom of association, freedom to participate in public affairs, the right to work, right to just remuneration and the right to own property.

With respect to women's rights, the Constitution of Tanzania provides in its article 13 for the equality clause. Article 13(6) prohibits discrimination including on the ground of sex. Many other laws and court pronouncements protect the rights of women to equality. Such legislation includes the Land Act of 1999

and the Village Land Act of 1999. These land laws provide for the equal rights of women and men to access land without any kind of discrimination.

There are other laws that uphold women's rights in accordance with the African Charter and the Maputo Protocol such as the Employment and Labour Relations Act of 2004. This law prohibits discrimination on the basis of several grounds including sex, pregnancy, family responsibilities and marital status, amongst others. It also protects women against termination of employment on grounds related to pregnancy or taking maternity leave. The Law of Marriage Act of 1971 provides for the right of division of matrimonial properties upon divorce. The Penal Code and Sexual Offences Special Provisions (SOSPA) of 1998 prohibit Female Genital Mutilation and create offences that can generally be used by women who undergo physical violence by their spouses. In addition, the Constitution in article 13 provides for equality of all before the law.

Despite progressive provisions contained in the current Constitution of 1977, the National Land Policy of 1995 specifically provides that clan land shall continue to be governed by customary law. The Land Act does not directly deal with issues of inheritance. Consequently, the Customary Law Declaration Order of 1963 which discriminates against women in relation to inheritance is still operative in Tanzania, contrary to the provisions of the Constitution.

## 2 Ratification of African Charter and the Maputo Protocol

Tanzania ratified the African Charter on 18 February 1984. This was preceded by the signing of the Charter on 31 May

5 Only a few ones such as education and to certain extent, the right to health, which is enforced through the window of the right to life, are justiciable. See GK Kazoba *Consumer protection and a guard against counterfeit and substandard pharmaceuticals in Tanzania: Examining legal and institutional frameworks* (2013) 217.

1982. Tanzania signed and ratified the Maputo Protocol on 5 November 2003 and 3 March 2007, respectively. The Maputo Protocol was ratified without any reservations despite a heated debate in the parliament of the United Republic of Tanzania when the instruments of ratification were presented for ratification. The instruments of ratification were deposited on 7 May 2007.

There are no specific reasons that can be clearly pointed out as to why Tanzania decided to ratify the two instruments. There is no specific law in Tanzania that clarifies the procedure for ratification of international instruments. Article 63(3) of the Constitution simply provides as follows:

For the purposes of discharging its functions, the National Assembly may: enact law where implementation requires legislation; deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification.

Thus, ratification of international instruments falls within the ordinary powers and functions of the National Assembly. In that context, the instruments of ratification are presented by the minister responsible to the Parliament for discussion and possible ratification.<sup>6</sup>

### **3 Government focal points**

The Ministry for Constitutional and Legal Affairs is responsible for implementation of all international human rights obligations especially in mainland Tanzania, as human rights are not a Union matter. The Division of Constitutional Affairs and Human Rights in the Attorney General's Chambers is responsible for the state's response and respon-

sibilities under the African Charter and Maputo Protocol. However, there are always overlapping mandates across different ministries such as the Ministry for Gender, Community Development, and Children. The Ministry for Gender, Community Development and Children is responsible for matters concerning women as well as civil society organisations which are significant stakeholders in the protection of the rights of women. Thus, even though it is the Human Rights Department of the Ministry of Constitutional and Legal Affairs and the Attorney General's Chambers which has the overall mandate to oversee and report on human rights situations, including the rights of women in Tanzania, there are other bodies that deal with human rights monitoring, protection and promotion. Apart from the Ministry of Gender, Community Development and Children, there is also the Commission for Human Rights and Good Governance (CHRAGG) which is established under the Constitution of the United Republic of Tanzania.

Even though the Ministry of Constitutional and Legal Affairs has the overall responsibility concerning human rights matters in Tanzania, it cannot be ignored that combining human rights matters under one ministry regardless of their unique nature may compromise the attention given to certain specific issues. For instance, during the parliamentary debate that preceded ratification of the Maputo Protocol, there were several resentful statements to certain provisions of the Maputo Protocol such as those on reproductive health. This could be due to the fact that the Ministry introducing the instrument was not necessarily prepared to explain the rationale behind such provisions as it deals with law, constitutional and legal

<sup>6</sup> Interview with Deputy Minister for Foreign Affairs on 4 November 2015.

rights generally rather than the rights of women.

Indeed, the fact that human rights accountability mandates of Tanzania are spread between different government departments creates difficulties to those in need of following up human rights issues in Tanzania. However, it is the Division of Constitutional Affairs and Human Rights of the Attorney Generals' Chambers that has a mandate for Tanzania's responsibilities in relation to the African Charter and the Maputo Protocol.

#### 4 Domestication or incorporation

Tanzania is a dualist country. By virtue of article 63(3) of the Constitution, international law must be domesticated after ratification before it can be applied as a law by courts in Tanzania. Thus, the African Charter and the Maputo Protocol having been ratified by Tanzania are generally speaking only persuasive legal instruments until domesticated or incorporated into Tanzanian statutes. In terms of hierarchy of laws, the Constitution comes first, followed by national legislation. The African Charter and the Maputo Protocol are only persuasive sources of law in Tanzania.

However, one could argue that such an approach of interpretation of impact of article 63(3) of the Constitution is merely academic. It all depends on the presiding judge as to whether he or she will accept the legal persuasion to lead him to a conclusion which aligns itself to international law or not.

As Kazoba asserts:

The justice argued that even though politicians would like to argue that once a convention has not been domesticated it is not applicable in local courts, courts will

hold the opposite view. The justice explained that if Tanzania has signed a Convention, courts will apply it unless the country entered some reservation in accordance with international law procedures. That is only to the extent of the reservations that the courts will not apply the Convention in local courts.<sup>7</sup>

Such an approach can be found also in the case of *Bernado v Holaria Pastory*,<sup>8</sup> where the Court addressed a customary law rule which barred women from inheriting clan land. The High Court of Tanzania relied on the general equality provision of the Constitution<sup>9</sup> to annul the customary rule. In arriving at that conclusion, the Court used the 'equality before the law' provision of the Constitution to hold that the discriminatory rule had to accord with human rights norms of equality and non-discrimination enshrined in various international human rights instruments that Tanzania had signed and ratified such as CEDAW and the African Charter. The Court noted that: 'the principles enunciated in these documents [international conventions] are standards below which any civilized state will be ashamed to fall'.<sup>10</sup>

The Land Act contains a clause to the effect that in circumstances where land is in issue, the provisions of the Land Act 113 of 2002 shall prevail. The Village Land Act established institutions such as Village Land Committees with a minimum requirement of women in the

7 Kazoba (n 5 above) 133.

8 (1990) LRC 757.

9 Since the non-discrimination provision in the Constitution did not then prohibit discrimination on the basis of sex and gender.

10 See also *Transport Equipment & Reginald John Nolan v Devram Valambbia* Appeal Case No 19 of 1993 (Ramadhan JA) (unreported), where it was held that international agreements and conventions signed and ratified by the Tanzanian government are valid undertakings and that the government is bound by its commitments to others.



composition, failing which the Committee cannot operate.

The Constitution does not include socio-economic rights which are provided by the African Charter and the Maputo Protocol. The only socio-economic right that can be found under the Tanzanian Bill of Rights is the right to education. However, the proposed constitution contains some socio-economic rights in clear terms in particular the right to health.

Despite the fact that Tanzania introduced the Bill of Rights in 1984, it is not clear whether there is any relationship between the African Charter and the 1984 Bill of Rights. It cannot be ignored however that the signing of the African Charter might have contributed towards accelerating the introduction of the Bill of Rights into the Union Constitution given the level of awareness that was created in Tanzania when the African Charter was adopted. For instance, in *Ephraim v Holaria Pastory*,<sup>11</sup> Justice Mwalusanya referred to the African Charter. However, the provisions of the Maputo Protocol are still not incorporated into Tanzanian law.

In relation to civil and political rights, Tanzania complies with the African Charter and the Maputo Protocol by incorporating these rights in its Constitution and national legislation. The only difference would be the extent of protection. For instance, the Land Act of 1999 provides for equal rights of women as for men in acquiring property with the exception of clan land which usually changes title by way of inheritance. Women, though they can inherit cannot do so on a similar basis as men. The Employment and Labour Relations

Act of 2004 and the Law of Marriage Act of 2002 also have components of maintenance, the right to own property, and equality in relation to division of matrimonial property upon divorce. The employment law protects women against discrimination on various grounds such as pregnancy, marital status, and family responsibilities. Also, a woman is entitled to resume work on the same terms as she enjoyed before taking maternity leave, failure of which it will be regarded as unfair termination of employment. There are other protections relevant to reproductive health rights in the employment law such as the right to maternity leave; not working within six weeks of confinement; and not working at night during pregnancy, amongst others. Although the African Charter and the Maputo Protocol are not directly domesticated, there are some provisions of these instruments which have been incorporated into national laws and hence attained complete legal force. However, these national laws do not specifically refer to the African Charter or the Maputo Protocol.

## **5 Legislative and policy reform**

There is no report to the effect that a specifically targeted study was conducted in Tanzania to assess compatibility of domestic law with provisions of the African Charter or the Maputo Protocol before ratifying these instruments. Even if there was such a compatibility study, no serious action was taken to harmonise international law with domestic laws in Tanzania. However, in 1992, the Nyalali Commission identified 40 pieces of legislation that were not compatible with international human rights standards. The Commission was

11 (2001) AHRLR 236 (TzHC 1990).

originally set up to advise government on multi-partism.

The ratification of the Maputo Protocol in 2009 was not preceded by any specific study to assess the readiness of the Tanzanian legal framework to adhere to international human rights obligations that Tanzania had committed itself to. That is why laws such as the Customary Law Declaration order and provisions of the Law of Marriage Act on bride price still exist. Although no legislation has been enacted or amended in Tanzania to specifically give effect to the African Charter or the Maputo Protocol, some plans and policies reflect the rights and norms established by these instruments, as detailed below.

Several policies and strategies have been formulated explicitly to give effect to the African Charter, Maputo Protocol and other human rights instruments in Africa. Examples of such policies include the Child Justice Strategy (A Five year Strategy for Progressive Reform 2013-2017),<sup>12</sup> and the National Human Rights Action Plan.<sup>13</sup> Other policies adopted at national and institutional levels have not explicitly mentioned the African Charter or the

Maputo Protocol but their content implicitly advances the realisation of various rights enshrined in these documents such as: the Tanzania Development Vision 2025,<sup>14</sup> Tanzania Five Year Development Plan,<sup>15</sup> and the National Strategy for Growth and Reduction of Poverty II.<sup>16</sup> These documents have set out general goals to improve good governance, rule of law, human rights and the realisation of social and economic rights in the country. They also address issues of reduction of HIV and AIDS, improving health care services and the protection of PLHIV,<sup>17</sup> as a result giving life to the rights enshrined in the African Charter and the Maputo Protocol.

The adoption of the National Land Policy (NLP) in 1995 was the turning point for women's rights to own land in the country. The policy aims to promote the equitable distribution of land as well as provide all citizens with access to land.<sup>18</sup> The NLP specifically describes the conditions in which women find themselves regarding land ownership

- 12 Developed by the Ministry of Constitutional and Legal Affairs in 2013, it aims at providing a framework for reforms within which relevant MDSs and CSOs can shape their child justice related activities, to ensure that everyone is moving in the same direction to achieve a common vision of the child justice system. The reform process is framed by key principles enshrined in the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and other international Instruments.
- 13 The National Human Rights Action Plan 2013-2017 was adopted by the Ministry of Constitutional and Legal Affairs. The NHRAP recognises that the protection and promotion of human rights is not limited to a single topic, sector, government ministries, departments or agency. The plan identifies twenty three human rights issues, arranged

- in four thematic headings, as priorities for improving coordination and protection throughout Tanzania. The NHRAP strengthens a Human Rights Based Approach (HRBA) in existing national policies and strategies, including MKUKUTA, MKUZA, the MDGs, Vision 2025, Five Year Development Plan spanning from 2011/12 to 2015/2016, and existing action plans of other Ministerial Departments and Agencies (MDAs). The Plan establishes a comprehensive system for implementation, monitoring and evaluation.
- 14 Adopted by the Planning Commission of the President's Office.
- 15 2011/2012-2015/2018 adopted by the Planning Commission of President's Office in 2012.
- 16 2010/11-2014/2015 also famously known as MKUKUTA.
- 17 The Tanzania Five Year Development Plan includes a target to 'increase and strengthen services for care and treatment of people living with HIV/AIDS to reach 800,000 by 2015/16'.
- 18 The National Land Policy (1997) 5 & 12.

and aims to cure the situation.<sup>19</sup> The NLP influenced the process of land law reform which resulted in the Land Act of 1999 and the Village Land Act. In a combined way, these provisions provide a framework that is favourable to women, giving them access, ownership, and decision-making power, and thus giving life to the rights enshrined in the African Charter and the Maputo Protocol.

The government has also taken steps to advance issues of gender,<sup>20</sup> and to eradicate FGM and alleviate GBV by adopting policies, strategies and plans of action.<sup>21</sup> For more than three decades, Tanzania has made a concerted response to the HIV/AIDS epidemic, which nevertheless continues to claim the lives of thousands of people, and threatens national, social, and economic development.<sup>22</sup> The Tanzania Third National Multi-Sectorial Strategic Framework for HIV/AIDS was designed as a broad National Strategic

Plan to guide the country's multi-sectorial response to the epidemic.<sup>23</sup> The National HIV and AIDS Policy (2012) further emphasised the importance of respect for the human rights of PLHIV and Health Sector HIV and AIDS Strategic Plan (HSHSP 2013-2017), a subset of both the Health Sector Strategic Plan III and the National Multi-sector Strategic Plan III addresses issues of HIV/AIDS.

Although many policies do not explicitly mention the African Charter or the Maputo Protocol, they reflect not only the spirit of these documents but also the comments of the African Commission in respect of women's rights. These policies have laid a strong foundation for the promotion and protection of women's rights in the country, thus fulfilling Tanzania's obligations under the African Charter and the Maputo Protocol.

## 6 Court judgments

According to surveys conducted by the authors in the course of compiling this report, there are very few cases where the African Charter, the Maputo Protocol, case law, resolutions or general comments of the African Commission have been referred to as interpretive guidance in any court judgment in Tanzania. One of the very few cases is *Ephraim v Pastory*.<sup>24</sup> Additionally in the case of *Elizabeth v AG*,<sup>25</sup> the African

19 In order to enhance and guarantee women's access to land and security of tenure, women will be entitled to acquire land in their own right not only through purchase but also through allocation.

20 Adoption of the Gender Policy 2000 and Strategic Plan on Gender 2006 has acknowledged the status of women participation in economic and social issues to be low, and through the Policy, guidelines to minimize the gaps have been provided.

21 The National Management Guidelines for the Health Sector Prevention and Response to Gender Based Violence (2011), the National Strategy for Gender Development (2000), Multi Sector National Plan of Action to Prevent and Respond to Violence Against Children (July 2013-June 2016), National Plan of Action for the Prevention and Eradication of Violence Against Women and Children (2001-2015) and its Communication Strategy (2007-2015) and the National Plan of Action to Combat Female Genital Mutilation (2001-2015).

22 Tanzania 3rd National Multi-Sectorial Strategic Framework for HIV/AIDS 2013/14-2017/18 x.

23 The Framework calls for scaling up of the comprehensive, national response in prevention, care, treatment, and impact mitigation in a way that is responsive to issues of gender. It emphasises the prevention of new HIV infections, with a special focus on women, youth and key populations at higher risk of HIV. It also focuses on the necessary quality in the continuum of care for PLHIV and stewardship for the nation's most vulnerable children.

24 (2001) AHRLR 236 (TzHC 1990).

25 Misc Civil Cause 82 of 2005.

Charter and the Maputo Protocol were referred to by the civil society organisations that represented the applicant widows but given the path the court took which ignored not only international human rights instruments but also the Constitution of Tanzania, the instruments were not considered and hence did not positively influence the outcome of the cases.

### 7 Awareness and use by civil society

There is a wide range of awareness of the African Charter and the Maputo Protocol amongst civil society organisations in Tanzania. For instance, the position paper on mainstreaming gender in constitution-making in Tanzania that was prepared by the Gender Forum, a coalition of civil society organisations advocating positive gender provisions in the proposed constitution, used international human rights provisions as an advocacy tool in addition to constitutional provisions of other countries such as South Africa and Kenya to advocate for gender mainstreaming in constitution-making.<sup>26</sup>

Also, during the same exercise of constitutional review, a special committee on the Constitution that was coordinated by the Legal and Human Rights Centre (LHRC)<sup>27</sup> and composed of national and international experts of constitutional law and constitutional matters, members of civil society organisations, academics with a duty to monitor, assess, inform public opinion and engage politicians on the constitutional review processes and developments, the African Charter and the Maputo Proto-

col were referred to on a number of occasions by the committee.<sup>28</sup>

In addition to the above, Tanzanian civil society organisations supported the applicant in the *Independent Candidate* case,<sup>29</sup> which was decided by the African Court. During the hearing of the case, they made references to several provisions of the African Charter such as the right to participate in public affairs under article 13(1).<sup>30</sup>

According to the website of the African Commission, there are five Tanzania-based NGOs that have observer status with the African Commission.<sup>31</sup>

The African Charter and the Maputo Protocol are widely known amongst lawyers in Tanzania especially those who organise themselves through civil society organisations. For instance, in the constitutional review discussions referred to above, the forums were composed mainly of lawyers and they organised meetings as professionals. Also, in the *Elizabeth* case, civil society organisations referred to several provisions of the African Charter. However, the high court did not pay adequate attention to those provisions.

### 8 Higher Education and academic writing

Higher education curricula and academic writing in Tanzania refer to the African Charter. For instance, Mzumbe University, Tumaini University and Ruaha University College have human

26 One of the authors of this paper happened to be the consultant.

27 A national NGO dealing with protection and promotion of human rights in Tanzania.

28 One of the authors also happened to be a member of the Committee.

29 *Attorney General v Rev Christopher Mtikila* Civil Appeal 45 of 2009.

30 See *Mtikila v Tanzania* Applications 009/2011 and 011/2011, Judgment of 14 June 2013.

31 <http://www.achpr.org/network/ngo/> (accessed 16 November 2015).

rights courses at both undergraduate and postgraduate levels. Also, the University of Dar es Salaam established its Master of Laws (LLM) Programmes in 2013, of which one on procedure before international judicial bodies which refers to and discusses issues under the African Charter and the Maputo Protocol. Several academics write published papers which make references to the African Charter and the Maputo Protocol.<sup>32</sup> Some of these works advocate for the protection of socio-economic rights in the Constitution with particular reference to women's right to health, maternity issues and rights to work.

## **9 National human rights institutions**

The Commission for Human Rights and Good Governance (CHRAGG) was established under article 129(1) of the 1977 Constitution, and the Commission for Human Rights and Good Governance Act of 2001. It is an independent government department established to oversee the promotion and protection of human rights and good governance in the country.<sup>33</sup> It is one of the NHRIs in Africa established in accordance with the Paris Principles<sup>34</sup> and granted

affiliate status by the African Commission.<sup>35</sup> As a NHRI with an affiliate status, CHRAGG is required to assist the African Commission in the promotion and protection of human rights at national level and submit reports to the Commission every two years on its activities towards the promotion and protection of the rights enshrined in the African Charter.<sup>36</sup> In fulfilling its affiliate status obligation to the African Commission, CHRAGG makes direct reference to the African Charter and the Maputo Protocol in its programmes and when exercising its mandate to promote and protect human rights in the country.

At the national level, CHRAGG is involved in the preparation and submission of state reports to the African Commission in cooperation with other stakeholders.<sup>37</sup> It was involved in the preparation and submission of the combined 2nd-10th report. CHRAGG undertakes follow up of concluding observations and recommendations of the African Commission. For example, CHRAGG has made formal communication to the government by urging it to ratify the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), as a way of implementing the recommendations of the African Commission and other international bodies.

At various occasions, CHRAGG has urged the government to consider

32 See for instance, GK Kazoba 'Justiciability of the right to health in Tanzania and women's access to health care: Lessons from India, Kenya and South Africa' in GD Mjema & GE Kaganda (eds) *Socio-Economic Development in Tanzania: A Multidisciplinary Perspective* (2014); GK Kazoba 'Promoting a balance between economic development and protection of maternity rights at work places in Tanzania' in GD Mjema & GE Kaganda (eds) *Socio-Economic Dynamics in Tanzania: Lessons and experiences* (2015); CJ Mmbando 'The protocol on the rights of women in Africa: A tool to women rights protection in Tanzania' (2014) 3 *TUMA LAW Review* 16.

33 Art 130(1) of the Constitution.

34 Adopted by UNGA Resolution 48/134 of 20 December 1993.

35 ACHPR/Res.31(XXIV) 98 Resolution on granting of Observer Status to NHRI in Africa, 1998.

36 Art 4(b) & (c) of ACHPR/Res.31(XXIV) 98.

37 This is done in compliance of Principle 3(d) of the Paris Principles which requires NHRI to contribute to the reports which states are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence.

the abolition of the death penalty, corporal punishment and has conducted public sensitisation programmes on those issues. On the issue of indigenous people for instance, CHRAGG has continued to engage with the government and other stakeholders at various levels on the recognition and implementation of indigenous peoples' rights.<sup>38</sup> Despite the fact that on these two issues CHRAGG has not received positive action from the government, its follow up efforts have helped the government implement other recommendations of the African Commission.

## 10 State reporting

The obligation of the state to report to the African Commission as per article 62 of the African Charter is mandated to the Division of Constitutional Affairs and Human Rights in the Attorney General's Chambers. The Division is the focal point on issues of the obligation of the state in terms of the African Charter and other human rights treaties and bodies. It coordinates state and non-state actors from Tanzania Mainland and Zanzibar in the preparation of the state report. The division prepares consultation meetings, shares issues with stakeholders, collects inputs, compiles a report and conducts a validation meeting of the report. It also coor-

dinate stakeholders in the submission and presentation of the state report.<sup>39</sup>

A total of two reports under the African Charter have been submitted to the African Commission by Tanzania.<sup>40</sup> The first report was submitted on 1 January 1992 during the 11th ordinary session of the Commission.<sup>41</sup> A compilation of the 2nd to 10th consolidated periodic reports was due in 2006. With permission of the African Commission, the report was submitted, and considered at the 43rd ordinary session of the Commission in 2008.<sup>42</sup> It is important to note that the 2nd to 10th Consolidated Report could not be submitted on time due to a lack of specific institutional mechanisms for coordinating and preparing the report.<sup>43</sup> The preparation of these reports was participatory in nature; it involved stakeholders such as civil society organisations, government ministries, CHRAGG, NGOs, political parties and the United Nations Development Programme (UNDP).<sup>44</sup> The country's delegation at the 43rd ordinary session of the Commission was led by the Minister for Justice and Constitutional Affairs, accompanied by repre-

38 In September 2014, CHRAGG convened a national stakeholders meeting involving government representatives and civil society actors. In June 2015, CHRAGG held a sensitisation seminar for members of parliament. In July 2015, it convened Local Government Authorities from eight districts where indigenous people reside. This went hand in hand with a field visit to Yaeda Chini in Mbulu district to assess the situation of the Hadzabe community.

39 An interview with Nkasori Sarakikya, Assistant Director, Division of Constitutional Affairs and Human Rights at the Attorney Generals Chambers (21 August 2015).

40 There is an outstanding four reports. See <http://www.achpr.org/states/> (accessed 11 August 2015).

41 This covers the period 1984 to 1992. See <http://www.achpr.org/states/tanzania/reports/1st-1984-1992/> (accessed 10 August 2015).

42 This covers the period 1992 to 2006 <http://www.achpr.org/states/tanzania/reports/2to10-1992-2008/> (accessed 10 August 2015).

43 The 2nd-10th Consolidated Periodic Report submitted by the United Republic of Tanzania under the African Charter (2008) 2.

44 Concluding Observation and Recommendations on the Consolidated 2nd-10th Periodic Report of United Republic of Tanzania (2008) 2 <http://www.achpr.org/states/tanzania/reports/2to10-1992-2008/> (accessed 10 August 2015).

sentatives from government ministries, civil society organisations and CHRAGG.

The 43rd ordinary session resulted into a number of Concluding Observations which give account of the positive aspects, factors restricting enjoyment of rights guaranteed under the African Charter and areas of concern identified in the report.<sup>45</sup> Amongst the pertinent Concluding Observations is the call for the government to work closely with NGOs, civil society organisations and other human rights actors to ensure enjoyment of the rights and freedoms in the Charter;<sup>46</sup> provide CHRAGG with adequate financial, human and material resources;<sup>47</sup> domesticate the African Charter and other international human rights instruments ratified by the country;<sup>48</sup> formulate laws to penalise domestic violence;<sup>49</sup> enact legislation on HIV/AIDS and establish National AIDS Control Commission;<sup>50</sup> and authorise the African Commission to undertake missions in the country.<sup>51</sup>

45 Concluding Observations and Recommendations (n 44 above) 1&2.

46 The government has continued to engage with various NGOs especially those granted observer status by the Commission.

47 The Commission operates both in Zanzibar and Tanzania Mainland.

48 Evidenced by enactment of the Law of the Child Act 21 of 2009, the Persons with Disabilities Act 9 of 2010 and the Anti-Trafficking in Persons Act 6 of 2008.

49 Implemented through the Penal Code CAP 16.

50 The HIV/AIDS (Prevention and Control) Act 28 of 2008, establishment of Tanzania's Commission for AIDS through Act 22 of 2001.

51 In October 2008, a mission was undertaken to Tanzania by Commissioner Mumba Malila, member of the African Commission responsible for the promotion and protection of human rights in the United Republic of Tanzania, and the African Commission's Special Rapporteur on Prisons and Conditions of Detention in Africa. See <http://www.achpr.org/states/tanzania/missions/promo-2008/> (accessed 10 August 2015).

To ensure that these recommendations are owned by all stakeholders and ultimately implemented, the government through the Attorney General's Chambers has conducted dissemination workshops of the concluding observations to stakeholders and has at various occasions done the same with the public. Despite such efforts, this is an area that is faced with challenges in its implementation. Dissemination of the concluding observation to stakeholders and citizens invites budgetary aspects, getting enough budgetary allocation for this has posed a challenge for effective implementation.

## 11 Communications

To date, the African Commission has received seven communications against Tanzania filed by civil society organisations on behalf of individuals and by individuals themselves.<sup>52</sup> Out of these communications, three were declared inadmissible;<sup>53</sup> in two communications Tanzania was not found in violation;<sup>54</sup> in one communication Tanzania was found in violation of article 7(1)(a) of the Charter;<sup>55</sup> and one was closed.<sup>56</sup> These communications have not had much exposure in the country apart from paving a way for individuals and NGOs to use the jurisprudence of the

52 <http://www.achpr.org/states/tanzania/> (accessed 10 August 2015).

53 Communication 333/06 *Southern Africa Human Rights NGO Network and Others v Tanzania*; Communication 53/91 *8AR Alberto Capita v Tanzania*; Communication 53/90 *7AR Albert T Capita v Tanzania*.

54 See Communication 409/12 *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others*; Communication 157/96 *Association pour la sauvegarde de la paix au Burundi/Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC) and Zambia*.

55 See Communication 243/01 *Women Legal Aid Centre (On behalf of Sophia Moto) v Tanzania*.

56 See Communication 66/92 *Lawyers' Committee for Human Rights v Tanzania*.

African Commission in situation of violations.

With regard to cases before the African Court, the first judgment against Tanzania was in the case of *Mtikila v Tanzania* referred to elsewhere in this report, Tanzania was found in violation of the African Charter especially the article providing for freedom of association as its constitution prohibited a possibility of an independent candidate from vying for any elective position in Tanzania.<sup>57</sup> So far, Tanzania has not done anything to implement the decision of the African Court. The only attempt that has been so far made was to include the right of an independent candidate to stand for election in the proposed new constitution. However, since the constitutional review process has been suspended for the time being, realisation of the remedy ordered by the African Court is still illusive in Tanzania.

## 12 Special mechanisms and promotional visits of the African Commission

The Commission undertook its first promotional mission to Tanzania in 2000 through Commissioner Vera Mlanguzwa Chirwa. The report of the mission was presented at the 28th ordinary session of the Commission in 2000.<sup>58</sup> It has been difficult for the researchers to get details of this visit. This is because only the French version of the mission report is published on the Commission's website. The second promotional mission was undertaken by

Commissioner Mumba Malila in 2008.<sup>59</sup> This mission intended amongst others to promote the African Charter and the activities of the African Commission; engage the government on measures it is taking or has taken to implement its international human rights obligations and its obligations under the African Charter; exchange views with the government on the challenges it faces in fulfilling its international and regional human rights obligations and the extent to which the African Commission can assist; and exchange views with other human rights stakeholders on ways and means of promoting and protecting human rights in the country.<sup>60</sup>

The Commission gave out a number of recommendations to the government that range from ratifying outstanding human rights instruments,<sup>61</sup> improving prison conditions,<sup>62</sup> improving the

57 An independent candidate is a Tanzanian who is not a member of any political party, but aspires to contest for a political office in Tanzania.

58 <http://www.achpr.org/states/tanzania/missions/promo-2000/> (accessed 11 August 2015).

59 Member of the African Commission responsible for the promotion and protection of human rights in the United Republic of Tanzania and the African Commission's Special Rapporteur on Prisons and Conditions of Detention in Africa.

60 <http://www.achpr.org/states/tanzania/missions/promo-2008/> (accessed 27 November 2015).

61 Tanzania has ratified African Youth Charter in 2013.

62 Enactment of Community Service Act CAP 291, the National Parole Board Act CAP 400, National Prosecutions Service Act 8 of 2008 and the establishment of Criminal Justice Forum have been collectively used to reduce congestion in prisons. The government has bought 17 buses, the LSRF has bought 14 buses which all together have been distributed across the country to facilitate movement of inmates to attend court sessions and thus facilitate disposal of cases. The government has built 12 health centres in central prisons. Measures to rehabilitate latrines, improve ventilation, and access to information have also been taken to improve conditions of prisons.



working of the judiciary and appointment of judges;<sup>63</sup> equipping the Commission for Human Rights and Good Governance with adequate resources and collaboration with it in sensitisation programmes.

These promotional visits have helped to bring the Commission, the government and other stakeholders on the same page with regard to Tanzania's obligations under the African Charter. The recommendations have made the government put greater effort into improving human rights situations in the country in the areas recommended and other areas not touched on by the visits.

Between 21 January and 6 February 2013, the Working Group on Indigenous Population/Communities in Africa (WGIP) led by Dr Naomi Kipuri and Dr Abraham Sing'Oei Korir visited Tanzania. The aim of the visit by the WGIP was to undertake research, gather information and examine steps taken by the government towards the recognition, promotion and protection of the rights of indigenous peoples.<sup>64</sup> The WGIP met with various government officials, higher learning institutions, civil society organisations, indigenous communities in Manyara, Arusha and Morogoro and the media for the

purpose of raising awareness on the problems and challenges that indigenous people are facing in attaining their rights and freedoms.

It is well known that the concept of indigenous peoples remains a contentious issue in Tanzania. The official position of the government is that the term 'indigenous people' is not applicable, as all Tanzanians of African descent are indigenous to Tanzania. The government acknowledges that there are special groups which need special protection within the country and has taken various measures to provide political, social and cultural amenities to such groups.<sup>65</sup> What is clear is that the visit increased awareness about the African Charter, the Maputo Protocol and the work of the Commission and improved the Commission's engagement with the government and other stakeholders on human rights in the country.

### **13 Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission**

A strong Bar and Bench in the country provides an opportunity for advancing the African Charter, the Maputo Protocol and the work of the Commission. The Commission has so far generated jurisprudence in various areas that are left open to both the bench and bar to utilise by making reference to them. The spirit of the bench and bar to make reference to these norms will also be fuelled if law schools and law faculties include

63 The enactment of Judiciary Administration Act 4 of 2011 and the establishment of Judiciary Fund have brought significant changes in the working of the Judiciary. The number of justices of Appeal Court has increased from nine in 2005 to 16 in 2015. Judges of the High Court have increased from 35 in 2005 to 84 in 2015 and the number of magistrates has increased from 151 in 2005 to 670 in 2015 [http://www.judiciary.go.tz/index.php?option=com\\_content&view=article&id=217:mahakama-yam-uaga-rais-wa-jamhuri-ya-muungano-wa-tanzania&catid=1:latest&Itemid=124](http://www.judiciary.go.tz/index.php?option=com_content&view=article&id=217:mahakama-yam-uaga-rais-wa-jamhuri-ya-muungano-wa-tanzania&catid=1:latest&Itemid=124) (accessed 12 August 2015).

64 A Letter from Ministry of Foreign Affairs and International Cooperation Ref: No. CHD 87/738/01/90, 20 January 2013.

65 National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1 – United Republic of Tanzania A/HRC/WG.6/12/TZA/1 11.

modules on the African human rights system with specific attention to the African Charter and Maputo Protocol in their curriculums.

The adoption of the Proposed Constitution provides a great opportunity for advancing the rights in the African Charter and the Maputo Protocol.<sup>66</sup> This is because the scope of the rights enshrined in the current Constitution have been widened.<sup>67</sup> Unlike the current Constitution, the proposed constitution has put an obligation on the courts to consider international human rights instruments while interpreting the Bill of Rights.<sup>68</sup>

The CHRAGG, with its newly appointed Chairman Tom Nyanduga, a former member of the African Commission, and NGOs with and without observer status with the African Commission can play an instrumental role in advancing the work of the Commission in Tanzania. This can be done by integrating the African Charter, Maputo Protocol and work of the Commission in their programmes. It is important to have coordination amongst various players to enable working together and sharing experience.<sup>69</sup>

Much as they are major players in exposing human rights violations in the country, the press has not placed the

African Charter, Maputo Protocol and the work of the Commission in the spotlight of their reports, writings and programmes. Undoubtedly, this is a result of lack of training and knowledge of key issues. It is the duty of civil society organisations to bridge the knowledge gap in media houses by engaging them effectively.

The existence of negative cultural practices in the country continues to defeat the full realisation of women's rights as enshrined in the Maputo Protocol. Practices such as FGM, domestic and gender-based violence still need special attention by all players on human rights.

Reporting obligations in other human rights instruments also pose a challenge to the state to fulfil its obligation under the African Charter and the Maputo Protocol. The report timing in many instruments collides; as a result it brings to bear budgetary implications and a work load that has posed to be a challenge to the country.

66 The proposed constitution was passed on 4 October 2014 by the Constituent assembly and it awaits adoption through a referendum to be scheduled any time.

67 Unlike the current Constitution, the proposed constitution provides for special group rights such as, the rights of employers and employees (art 45); rights of farmers, pastoralists and fishers (art 46); children's rights (art 53); youth rights (art 54); rights of disabled persons (art 55); women's rights (art 57); rights of elderly people (art 58); socio-economic rights such as right to health (art 51); the right to education (art 52); and the right to a clean environment (art 50).

68 Article 65(1)(a) of the proposed constitution.

69 Mmbando (n 32 above).

# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN UGANDA

*Agaba Daphine Kabagambe\**



## 1 Introduction

Uganda's human rights history has been as tumultuous as its political history. The various political leaders that she has had since attaining independence in 1962 have often come into power with the promise of improving the human rights situation. However, like their predecessors, they have often ended up forgetting about their promises as soon as they entrench themselves in power. Since acquiring independence, Uganda has gone through one military regime after another and each regime has been forcefully taken over through coups or wars aimed at regime change. These periods of instability have greatly affected the extent to which the various regimes observe and adhere to human rights protections.

When the National Resistance Movement (NRM) government came into power in 1986,<sup>1</sup> it held so much promise for transforming Uganda into a democratic country committed to the

achievement of good governance and human rights principles. To this end, the NRM government went about putting in place democratic institutions, most of which had been destroyed during the five year NRA guerrilla war. One of the first steps taken was the drafting of a constitution which commentators have commended for being one of the most participatory constitutions anywhere. This is due to the fact that committees were set up in all regions of Uganda, aimed at soliciting people's views of what they wanted to appear in the constitution.<sup>2</sup> As a result, a very progressive constitution was drafted with an elaborate chapter four reserved to fundamental human rights and freedoms. The constitution put in place institutions mandated to uphold and protect human rights, such as the judiciary, the parliament and the Ugandan Human Rights Commission.<sup>3</sup> In showing its compliance with human rights principles, the Ugandan government signed and ratified all the core interna-

\* LLM HRDA (Pretoria), doctoral candidate, the Dullar Omar Institute, University of the Western Cape.

1 The National Resistance Movement (NRM) was coined from the National Resistance Army (NRA) led by Yoweri Museveni which

came into power in 1986 after five years of armed resistance against the Obote government that culminated into his deposition by way of a military coup.

2 O Furley & J Katalikawe 'Constitutional reform in Uganda: The new approach' (1997) 96 *African Affairs* 243 252-256.

3 The Constitution of the Republic of Uganda, 1995.

tional human rights treaties including the African Charter and the Maputo Protocol.<sup>4</sup>

One of the most notable contributors to ensuring that the government adheres to the promotion and protection of human rights are human rights organisations. Over the last 20 years, there has been a proliferation of both national and international human rights organisations in Uganda. One contributing factor to their proliferation has been the stable and relatively peaceful environment of the NRM government. Amongst their achievements are: pushing for the ratification of various international and regional human rights treaties; advocating for the incorporation of human rights principles in the various laws, policies and programmes; and presenting reports to the international human rights bodies on the human rights situation in Uganda, amongst others. In its first years, the NRM government seemed tolerant of divergent views. However, as it has further entrenched itself (having been in power for more than 28 years) by amending the Constitution to remove term limits, it has become less tolerant to dissenting views. This has led to the curtailing of the work of non-governmental organisations, mostly through restrictive legislation or limiting the kind of work they can do.

One of the most noteworthy achievements that the NRM has been lauded for has been the uplifting and improvement of women's status. For example, the Constitution explicitly sets

out provisions protecting women's rights. Such policies have been favourable to women allowing for their inclusion in parliament and in local councils through the quota system. Again, affirmative action measures have been undertaken to uplift the status of girls and women including those who come from disadvantaged backgrounds, in education and employment.<sup>5</sup> Furthermore, women were comprehensively involved in the constitutional making process. Such developments have uplifted the economic, physical and social status of women in Ugandan society.

However, women still have a long way to go before they can fully realise their rights. One of the major issues is the huge disparity amongst women in the urban areas with those in the rural areas. Due to the fact that over 80 per cent of Uganda's population resides in the rural areas,<sup>6</sup> a very small percentage of women are able to fully enjoy their rights. Thus, many women continue to face numerous challenges in accessing health services (leading to high maternal and infant morbidity rates), poverty, lack of decision making power in their homes and in public spaces, domestic violence, lack of access to markets to sell their produce and cultural norms and practices that perpetuate patriarchy and the subordination of women.<sup>7</sup>

4 African Commission on Human and Peoples' Rights 'Report of the joint promotion mission undertaken to the Republic of Uganda' 25-30 August 2013, presented at the 55th Ordinary Session, held from 28 April-12 May 2014, in Luanda Republic of Angola.

5 Art 33 of the Constitution of Uganda.

6 The Danish Institute for Human Rights 'Access to justice and legal aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between various actors' (2011) 30.

7 FIDH 'Uganda becomes the 28th state party to the Maputo Protocol' <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/uganda/Uganda-becomes-the-28th-State> (accessed 25 August 2015).

## 2 Ratification of the African Charter and the Maputo Protocol

Uganda unreservedly ratified the African Charter on 27 May 1986.<sup>8</sup> One of the motivating factors for the ratification of the African Charter was the political will at the time. The timing of the African Charter can best be termed as 'perfect' timing as it was ratified in 1986 when the NRM government had just come into power. Due to the fact that the new NRM government had overthrown what it referred to as a non-transparent and non-democratic regime that was violating numerous human rights, it was very eager to demonstrate internally, regionally and internationally that unlike previous regimes, it was committed to the promotion and protection of human rights.<sup>9</sup> To this end, regional and international human rights treaties that had not been ratified, including the African Charter, were readily signed and ratified as a sign that the new government was ready to embrace principles of human rights, transparency, democracy and good governance.<sup>10</sup>

On the other hand, Uganda signed the Maputo Protocol on 18 December 2003 but it was not until 22 July 2010 that Uganda ratified the Maputo Protocol.<sup>11</sup> The delay can be attributed to opposition from mostly religious

factions, which were in opposition to some of the clauses in the Maputo Protocol, specifically those on abortion. Therefore, upon ratification, Uganda entered reservations to article 14 (1)(a) and (2)(c) of the Maputo Protocol which emphasises that states shall 'protect the reproductive rights of women by approving medical abortions in instances of rape, sexual assault, incest and where the continuance with the pregnancy endangers the mental and physical health of the mother and the foetus'.<sup>12</sup> The justification for this reservation was that it was not in line with Uganda's laws such as the Constitution read together with the Penal Code, which outlaws abortion.<sup>13</sup> Religious groups which were vehemently opposed to these clauses wrote several petitions protesting their conversion into Ugandan law.<sup>14</sup> Uganda has not yet withdrawn its reservation to the Maputo Protocol despite recommendations from the African Commission asking Uganda to withdraw this reservation and to revise its legislation on termination of pregnancy in instances of life threatening conditions to the mother.<sup>15</sup>

## 3 Domestication or incorporation

Uganda is a dualist country. Rules operating in international law are not bind-

8 Concluding Observations of the African Commission on the 2nd Periodic Report of the Republic of Uganda' Presented at the 45th ordinary session of the African Commission held in Banjul, The Gambia from 13-27 May 2009. Full citation

9 K Eunice 'On the international and internal ratification of treaties according to constitutional processes of the Republic of Uganda' Organization of the study of Treaty Law 5-7 [www.treatylaw.org](http://www.treatylaw.org) (accessed 2 September 2015).

10 Eunice (n 9 above).

11 FIDH (n 7 above).

12 Statement by Mrs Hannah Forster, Executive Director, African Centre for Democracy and Human Rights Studies and Chairperson of the NGO Forum Steering Committee, at the official opening of the 50th ordinary session of the African Commission, 24th October 2011, The Gambia.

13 SO Orach 'Violating human rights to protect human rights – What a contradiction and whose agenda is it?' [http://www.ucmb.co.ug/files/UCMBdocs/Reports/ARTICLE S/Violating%20human%20rights%20to%20protect%20human%20rights.pdf](http://www.ucmb.co.ug/files/UCMBdocs/Reports/ARTICLE%20S/Violating%20human%20rights%20to%20protect%20human%20rights.pdf) (accessed 9 December 2015).

14 The Maputo Protocol 'A clear and present danger: The fight against the Maputo Protocol' *Human life International* (2011).

15 Report on the Joint promotional visit to Uganda (n 4 above) 60.

ing upon Uganda unless they are ratified and translated into national law.<sup>16</sup> Therefore, article 123 of the Uganda Constitution, on the execution of treaties, conventions and agreements, sets out that the President may make arrangements, treaties, conventions and any other form of agreement between Uganda and any international organisation or body. Furthermore, it gives parliament the power to make laws setting out the ratification of treaties, agreements and conventions agreed to by the state.<sup>17</sup> In order to dispense its role, parliament adopted the Ratification of Treaties Act in 1998.<sup>18</sup>

The focal point for treaties is the Ministry of Foreign Affairs. The process taken prior to the ratification of an international treaty requires that the Ministry of Foreign Affairs first distributes the treaty to various line ministries. The line ministries then come up with a cabinet memo justifying their approval of the ratification of that particular treaty.<sup>19</sup> Once they have approved it, the Minister of Foreign Affairs ratifies the treaty and then drafts a bill. The bill often sets out the human rights instrument in the schedule thus giving it the force of the law. The bill is then taken back to the Cabinet for its approval and then it is taken to the Parliament for its enactment into law.<sup>20</sup> However, if the ratification of the treaty requires reviewing of the Constitution (where it relates to armistice, peace or where its implementation would require amendment to the Constitution) then the approval by

Parliament through a resolution is required.<sup>21</sup> The parliament either domesticates the treaty by adopting the whole text as a schedule to the domesticating Act or through the transformation of the provisions of the treaty into provisions of an act of Parliament, which in some instances are re-drafted.<sup>22</sup>

This is the process set out under Uganda's law. However, in practice, this procedure is often not followed; some steps may be skipped or an entirely arbitrary process might be undertaken. For instance, to date the African Charter has not been domesticated even though it was ratified in 1986. However, as will be shown later, both lawyers and judges use the African Charter in the Ugandan courts of law.<sup>23</sup> Furthermore, use of the African Charter in courts has not been uniform as in certain instances it has been used both in defining the law and also in limiting rights. Therefore, as pointed out by the African Commission, there is an urgent need for the government of Uganda to uniformly implement the strategies of domesticating instruments that have been ratified by Uganda in order to ensure effective promotion and protection of human rights.<sup>24</sup>

16 The Republic of Uganda 'Report to the African Commission' presented at the 39th ordinary session of the Commission in May 2006, 6-7.

17 Constitution of Uganda (n 3 above).

18 Ratification of Treaties Act (CAP 204) 5 of 1998.

19 The State Report to the African Commission (n 16 above) 23.

20 Ratification of Treaties Act (n 18 above).

21 As above.

22 C Mbazira 'Uganda and the UN treaty bodies: Reflections on the past and thoughts for the future in the implementation of economic social and cultural rights' in United Nations Office of the High Commissioner for Human Rights *Uganda and United Nations Human Rights Mechanisms: A compilation on the occasion of the 60th anniversary of the Universal Declaration of Human Rights* (2005) 20.

23 A Nolkaemper *National courts and the international rule of law* (2011) 81.

24 Report on Joint Promotional Visit (n 4 above) 61.

#### 4 Legislative and policy reforms

The Ugandan Constitution was adopted in 1995; a few years after Uganda ratified the African Charter. At the time the African Charter was ratified in 1986, the old Constitution of 1967 was in operation. Therefore, when the 1995 Constitution was drafted, a provision was put into the new constitution in article 287 which stated:

where any treaty, agreement or Convention with any country or international organisation was made or affirmed by Uganda or the government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution ... the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the government, as the case may be, shall continue to be a party to it.

The purpose of this provision was to ensure that the treaties that had existed before the Constitution were not invalidated by the adoption of the new constitution. However, in some instances, this provision has been interpreted by courts as declaring treaties like the African Charter to be self-executing, an assertion that has been refuted by scholars.<sup>25</sup>

Furthermore, the Ugandan Constitution contained several provisions that are similar to those in the African Charter. First off, the Constitution sets out, in its principles, a section on 'foreign policy objectives'. This section states amongst other things that Uganda's foreign policy shall be based on respect for international law and treaty obligations and strongly opposes all forms of

domination, oppression, racism and any other forms of exploitation. It further states that Uganda 'shall actively participate in international and regional organizations that stand for peace and wellbeing and progress of humanity', and that 'the state shall promote regional and pan-African cultural, economic and political cooperation and integration'.<sup>26</sup> Furthermore, chapter four of the Constitution is dedicated to the 'protection and promotion of fundamental and other human rights and freedoms'. Article 20 specifically states that 'fundamental rights and freedoms are inherent and not granted by the state'.

However, unlike the African Charter, the Constitution does not include economic, social and cultural rights in its Bill of Rights. The African Charter was a ground-breaking regional document in that it gave recognition both to civil and political rights as well as economic, social and cultural rights in the same document. By doing this, the Charter emphasised the indivisibility or interdependent nature of both these rights and the fact that one cannot be achieved without the other. On the other hand, in the Uganda Constitution, these rights were relegated to the section on 'directive principles of state policy'. As a result, there has been a lot of debate on the justiciability of these directive principles.

Additionally, over the reporting timeframes to the African Commission, Uganda has formulated as well as amended a series of laws and policies to respond to the recommendations by the African Commission. These include the Access to Information Regulations 2011, Prohibition and Prevention

25 B Kabumba 'The application of international law in the Ugandan judicial system: A critical inquiry' in M Killander (ed) *International and domestic human rights litigation* (2010) 83-107.

26 Constitution of Uganda (n 4 above) 'Foreign Policy Objectives XXVIII' 1995.

against Torture Act 2012, Anti-Money Laundering Act of 2013, National Development Plan and Uganda Health Policy.<sup>27</sup>

Regarding women's rights, the Constitution sets out in article 21 that all persons are equal before the law in all spheres, shall enjoy equal protection of the law and shall not be discriminated against on any ground including sex. Article 31 sets out the minimum age for marriage as 18 and both men and women are entitled to equal rights in marriage, during marriage and at the termination of the marriage. Article 33 sets out that the state shall avail the appropriate opportunities and facilities to improve women's welfare and enable them to reach their full potential. The same article states 'women shall have affirmative action for the purpose of redressing the imbalances created by history, tradition or custom'. This has led to the increase in women's participation in politics from 20 per cent before 1996 to over 40 per cent in 2013.<sup>28</sup>

In addition to this, gender responsive laws and policies have been adopted such as the Gender Policy (2007), Domestic Violence Act (2010) as well as the Female Genital Mutilation Act (2010). However, certain laws which are vital for the realisation of women's rights, such as the Marriage and Divorce Bill and the Sexual Offences Bill, have been shelved for years despite various calls for their enactment into law. Also, Uganda still maintains reservations to article 14 of the Maputo Protocol which aims at permitting the termination of pregnancy in life threatening conditions despite the fact that

unsafe abortions constitute 13 per cent of preventable maternal deaths.

Furthermore, implementation of the enacted laws such as the FGM Act and Domestic Violence Act is fraught with numerous challenges including: the costs associated with the complaints process; allocation of budgets for the implementation of such laws; and the need for revising other laws such as the Local Council Act to include provisions of these laws and the need to train medical officers, police officers and judicial officials to implement the provisions set out in these laws. Also, other harmful practices still persist, which hinder women's enjoyment of their rights, such as early and forced marriage and widow inheritance.<sup>29</sup> Therefore, there is a need for the African Commission to go beyond recommending formulation of more laws and policies to their actual implementation. The formulation of laws is only the first step to the improvement of human rights and should not be seen as an end in itself. The focus on drafting legislation has led to a situation which can best be referred to as 'legislation overload' whereby the government's main response to the issues raised by the African Commission is to draft new pieces of legislation. Thus, the African Commission should go beyond merely offering recommendations calling for the passing of legislation, to its actual implementation.

One way of doing this is to focus more on disaggregated data and any other information showing how human rights principles have been implemented. This should take into consideration the rural and urban divide as well as especially vulnerable populations. The

27 Report of the Joint Promotional Visit (n 4 above) 55-56.

28 Report on the Joint Promotional Visit (n 4 above) 18.

29 International Federation for Human Rights (FIDH) 'Women's rights in Uganda: Gaps between policy and practise' (2012).



African Commission should also consider undertaking an analysis of the policies and programmes implemented towards the improvement of human rights in Uganda. This is because the Ugandan government has been very proactive in drafting legislation but not implementing it, thus the situation on the ground is still very dire. Furthermore, the process of drafting more laws often assumes that Ugandans will revert to the law once their rights have been violated. However, this assumption is erroneous considering that in Uganda, poverty coupled with ignorance of the law are so pervasive that they lead to the failure by a substantial part of the population to access legal services.<sup>30</sup> This leads to a situation whereby the majority of people whose rights have been violated cannot access the support of Uganda's legal system. This calls for more proactive and creative methods of human rights protection which do not solely rely on formal justice mechanisms.

## 5 Court judgments

International law does not become law in Uganda until an Act of Parliament has been adopted, domesticating it.<sup>31</sup> Article 2(2) of the Constitution states that the Constitution is the supreme law of the land and any law that is inconsistent with the provisions therein shall be declared null and void as the Constitution shall prevail over it. Furthermore, article 119(5) of the Constitution points out:

[N]o agreement, contract, treaty, convention or document by whatever

name called, to which the government is a party or in respect of which the government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as parliament may by law prescribe.

The usage of international and regional documents by Ugandan courts has not been consistent. In most cases, Ugandan courts shy away from using international texts but rather prefer to use their own domestic law. Some of the reasons advanced for this include lack of extensive knowledge, research and understanding of the modalities of the usage of international law by lawyers, and sometimes judges who prefer not to use it at all.<sup>32</sup> Also, there is a lack of awareness on the decisions of the African Commission by lawyers and judges; these decisions are rarely referenced in a court of law.<sup>33</sup> In cases where they have been used, they have not been interpreted consistently so as to set judicial precedents that can be continuously improved upon so as to advance their incorporation into Ugandan law.

This discussion sets out some of the cases where the African Charter has been cited. It should be noted that the Maputo Protocol was only ratified in 2010 and thus the timeframe has not allowed for extensive usage of the Maputo Protocol in Ugandan courts. One of the cases where the African Charter was used was *Mwenda v Attorney General*. In order to expound on the nature and content of the right to freedom of expression, the court cited pertinent clauses from the 'Declaration of Principles on Freedom of Expression in Africa' which was adopted by the African Commission to give normative

30 The Danish Institute for Human Rights (n 6 above) 33.

31 Ratification of Treaties Act (n 18 above). See also the State Report to the African Commission (n 16 above).

32 Kabumba (n 25 above) 83-107.

33 Report on the Joint Promotional Visit (n 4 above) 33.

content to article 9 of the African Charter.<sup>34</sup>

In the case of *Attorney General v Susan Kigula & 417 Others* which concerned the constitutionality of the death penalty, reference was made to the African Charter, amongst other provisions.<sup>35</sup> The Court used the African Charter in supporting and emphasising the connection between the constitutional provisions and the right to life and torture. The Supreme Court emphasised that the fact that article 4 of the African Charter spelt out the right to life and torture did not mean that it had therefore outlawed the death penalty. The Court further emphasised that usage of the word 'arbitrarily' in the African Charter showed a limitation on the right; that in certain instances, a person could be lawfully deprived of the right to life. Note should be taken that usage of the African Charter in this instance was not to spell out a legal principle but to buttress or further emphasise provisions in the Ugandan Constitution on the right to life. That notwithstanding, the Court held that the death penalty should be abolished and replaced with punishments such as life imprisonment.<sup>36</sup>

In certain instances, judges have held contrasting positions on the usage of international texts like the African Charter. In *Uganda Law Society & Another v the Attorney General* which dealt with the indictment, trial and execution of

two soldiers on the same day for the murder of three civilians, the petitioners sought a ruling declaring the process a violation of the right to life as well as fair trial. Justice Twinomujuni, who gave the lead judgment in the Constitutional Court, stated that the African Charter was self-executing by virtue of article 286 of the Constitution which states that where Uganda was party to a treaty or convention or agreement after October 1962, that agreement was not to be affected by the coming into force of the 1995 Constitution and thus Uganda shall continue to be party to it. He thus stated that since the African Charter was signed in 1981 and ratified in 1986, it had become 'part and parcel' of the Constitution. He also read article 286 together with article 45 of the Constitution which states:

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned.

Thus he asserted that even though the right to appeal was not clearly spelt out in the Ugandan Constitution, the fact that it is one of the provisions of the African Charter made it applicable in the Ugandan Context.<sup>37</sup>

However, while one of the judges, Kavuma JA, who gave the minority judgment in the case, agreed with the ruling made by Twinomujuni J that the killing of the two soldiers was unconstitutional, he disagreed with the position taken by the lead judge on the African Charter. He stated that despite the fact that the African Charter by virtue of article 286 was one of the international

34 *Obbo and Another v Attorney-General* (2004) AHRLR 256 (UgSC 2004) sec 16.

35 *Attorney General v Susan Kigula & 417 Others* 03 of 2006, Uganda: Supreme Court, 21 January 2009 <http://www.refworld.org/docid/499aa02c2.html> (accessed 28 October 2015).

36 Following this case, guidelines specifying 35 years as the natural life of the person were developed however these have not been operationalised.

37 *Uganda Law Society & Another v The Attorney General Constitutional Petitions No 2 & 8 of 2002* [2009].

treaties recognised in Uganda, he did not support the assertion that the African Charter automatically became part and parcel of the Ugandan Constitution. This view is supported by other scholars who state that the inclusion of article 286 was mainly for the purpose of validating the agreements that had been in place prior to the Constitution. This does not make them self-executing, as 'an act of Parliament' is required before the treaty can be converted into national law.<sup>38</sup>

Kavuma JA went ahead to state that the right to appeal is to be conferred by virtue of a statute and that the African Charter was the statute that bridged the gap in terms of section 286 rather than article 45. Yet, there seems to be an anomaly in this due to the fact that the African Charter has not been translated into national law by an Act of Parliament. These contradictions show the challenges faced by Ugandan courts in the consistent application of international law in the domestic space. Therefore, due to the fear of wrongfully applying these international law principles, most lawyers and judges decide to completely refrain from using international human rights instruments and only use the domestic ones. Therefore, there is a need to domesticate the African Charter and also to conduct more training for judicial officers on the appropriate usage of international legal texts in the domestic context.

## **6 Awareness and use by civil society**

In advancing human rights in Uganda, civil society organisations (CSO's) use various strategies including networking, advocacy, research, lobbying, education

and community mobilisation. One of the main activities undertaken by NGOs has been to lobby government officials in various departments to implement the recommendations laid out by the African Commission. CSOs were instrumental in lobbying the government to ratify the Maputo Protocol in 2010. They are still pushing for the withdrawal of reservations to the Maputo Protocol. CSOs also use the two instruments in their research and in their human rights work.

One of the main ways through which NGOs and civil society have utilised the African human rights mechanisms is by obtaining observer status with the African Commission. Currently, 10 civil society organisations based in Uganda have observer status with the African Commission. These are: Foundation for Human Rights Initiative (FHRI); Human Rights Network (HURINET); Ugandan Association for Women Lawyers (FIDA); East and Horn of Africa Human Rights Defenders Project; Pan African Movement; Kituo Cha Katiba – The East African Constitutional Centre for Constitutional Development; African Freedom of Information Centre; Strategic Initiative for Women in the horn of Africa; African Centre for the Treatment and Rehabilitation of Torture Victims (ACTV); and Human Rights Centre-Uganda.<sup>39</sup>

These organisations have contributed to the promotion of human rights in Uganda by sending shadow reports to the African Commission to complement state reports, by providing information on the human rights situation which the government might have left out. In its

<sup>38</sup> Kabumba (n 25 above) 83-107.

<sup>39</sup> African Commission on Human and Peoples' Rights 'Uganda' <http://www.achpr.org/states/uganda/> (accessed 28 October 2015).

2006 concluding observations, the African Commission noted that it had received shadow reports from: the Foundation for Human Rights Initiative (FHRI); the Uganda Association for Women Lawyers (FIDA-U); and a joint report from the International Gay and Lesbian Human Rights Commission (IGLHRC) and Sexual Minorities Uganda (SMUG).<sup>40</sup> Civil society organisations, as well as human rights lawyers, were also very instrumental in ensuring that the Constitutional Court annuls the discriminative anti-homosexuality bill in 2014.<sup>41</sup>

However, the submission of shadow reports is not consistent as these organisations did not submit reports in the subsequent reporting periods on the implementation by the Ugandan government of the recommendations pointed out by the African Commission. As the NRM government has entrenched its power over the subsequent years, it has increasingly disregarded human rights. Various strategies have been used to narrow the operating environment for such organisations including the drafting of laws meant to narrow their operation. At the time of writing this report, an NGO bill is being discussed by parliament which organisations have criticised for giving too much power to the government under the guise of supervising the work of NGOs. Other tactics used by the government include threats, closing workshops and reprimanding NGOs claiming they are intruding into political matters.

40 African Commission 'Concluding observations and Recommendations on the Second Periodic Report of the Republic of Uganda' 40th ordinary session, 15-29 November 2006, in Banjul, The Gambia.

41 'Uganda Court annuls anti-homosexuality law' *BBC News* 1 August 2014 <http://www.bbc.com/news/world-africa-28605400> (accessed 8 September 2015).

## 7 Higher education and academic writing

Regarding education, the Constitution sets out that all persons have a right to education and universities have thus gone ahead to incorporate human rights as one of the fields of study both in the legal field and in the social sciences. For instance, the Makerere University has a faculty of law which runs a programme under the Human Rights and Peace Centre (HURIPEC) which aims to teach human rights to interdisciplinary government students and also integrate them into human rights activities in various human rights organisations around the country.<sup>42</sup>

Uganda has nine universities which are accredited to teach law including Makerere University and Uganda Christian University.<sup>43</sup> All these universities have a human rights course unit both within and outside their law faculties, which teaches about the African human rights system. For instance, under the college of humanities and social sciences of Makerere University, there is a bachelor's degree in ethics and human rights and some of the course units are: African Traditional Systems and Human Rights, and Human Rights in Africa.<sup>44</sup> However, most of Ugandan curricula on human rights place emphasis on the United Nations human rights system rather than the African human rights system.

42 State Report to the African Commission (n 16 above) 25.

43 Uganda National Council for Higher Education <http://www.unche.or.ug/latest-news/list-of-universities-accredited-to-teach-law-in-uganda.html> (accessed 8 September 2015).

44 Makerere University 'Courses – Bachelor of ethics and human rights' <http://courses.mak.ac.ug/programmes/bachelor-ethics-and-human-rights> (accessed 8 September 2015).

## **8 National human rights institutions**

In compliance with the African Charter, the Constitution established several institutions mandated to uphold human rights such as the Uganda Human Rights Commission (UHRC). The UHRC is very vibrant and functional. The Constitution gives the UHRC an expansive mandate which goes beyond merely monitoring and reporting on human rights violations, to providing legal remedies to those whose rights have been violated. Where a rights holder is not satisfied with the decisions of the UHRC, they can appeal to the High Court of Uganda.<sup>45</sup>

The UHRC acts as a court with a functional 'human rights tribunal' which receives, investigates and concludes cases of those whose rights have been violated. It then provides monetary compensation and encourages mediation between the parties towards an agreeable resolution. The UHRC has been instrumental in working with the African Commission for the promotion and protection of human rights in Uganda. To this end, it has affiliate status with the African Commission. Also, the fact that the current chairperson of the UHRC, Med SK Kaggwa, is also a member of the African Commission has greatly enhanced its work and has allowed for fruitful collaboration between the two bodies.

The UHRC often aids the government in coming up with a comprehensive periodic state report to the African Commission by providing the appropriate information and calling for the domestication of some international

treaties.<sup>46</sup> It also undertakes human rights education and training to various groups such as the police, health workers, administrators and teachers under its mandate with the aim of ensuring that they adhere to human rights principles in their work. It has also been instrumental in drafting documents aimed at ensuring the respect of human rights. These include the Guidelines for Managing Public Demonstrations, amongst others.

## **9 State reporting**

Despite ratification of the African Charter in 1986, it was not until 1 April 2000 that Uganda submitted its first State Report to the African Commission. The Report covered the period from 1986-2000. Its second report was submitted on 1 May 2006 covering the period of 2000-2006. Uganda attributed the delay in submitting reports timeously to lack of qualified personnel to write the state report as those who had been trained had either left the country or changed jobs.<sup>47</sup>

The subsequent reports were, however, submitted on time as the next periodic report was submitted on 1 November 2008, and the next on 26 March 2011. The most recent periodic report was submitted on 25 September 2013.<sup>48</sup> The Concluding Observations to the 1st state report were given at the African Commission's 27th ordinary session which took place from 27 April

45 Report on the Joint Promotional Visit (n 4 above) 13-29.

46 Report on the Joint Promotional Visit (n 4 above) 30.

47 EVO Dankwa 'Report on promotional visits to Uganda and Kenya' 12-21 July 1998 <http://www.achpr.org/states/uganda/missions/promo-1998/> (accessed 8 September 2015).

48 'State reports and concluding observations' <http://www.achpr.org/states/reports-and-concluding-observations/> (accessed 26 August 2015).

to 11 May 2000. The Concluding Observations for the 2nd state report were given during the 40th ordinary session from the 15-29 November 2006. The observations for the 3rd state report were given during the 45th ordinary session which took place from the 13-27 May 2009. The Commission gave its observations for the 4th state report during the 49th ordinary session from 28 April-12 May 2011. The Commission is yet to respond to Uganda's 5th state report which was submitted in 2013.<sup>49</sup>

State reports are prepared under the Ministry of Foreign Affairs which also represents the country during the African Commission's sessions.<sup>50</sup> The delegation that goes to the African Commission sessions is often a mixture of the various ministries such as representatives from the Ministry of Justice and Constitutional Affairs and those from the Ministry of Gender. Gender representation is also a factor as the delegation often has female representation. For instance, when Uganda presented its 2006 state report to the African Commission, the delegation comprised of two females and two males.<sup>51</sup> The 2008 state report delegation had 4 males and 2 females<sup>52</sup> and the 2011 state report delegation was represented by one male and one female.<sup>53</sup>

Since Uganda submitted its first periodic report, a series of issues have been brought up throughout the subsequent reports to be addressed by the Ugandan government. These include: police brutality especially during assemblies and protests, the poor state of Ugandan prisons and the restrictive NGO operation environment with a bill that has been looming over them for years. Some of these observations have been responded to by putting in place laws, programmes and policies to respond to the issues.

However, certain laws that have been drafted by the state further impinge on human rights such as the HIV and AIDS Prevention and Control Act which the President signed into law on 31 July 2014. This law had been criticised by human rights activists as being discriminatory since it criminalises the transmission of HIV and calls for mandatory testing. In effect, the Act criminalises HIV thus it may deter people from voluntarily testing for HIV due to fear of being held criminally liable.<sup>54</sup> Another worrying piece of legislation is the Public Order Management Act of 2013. Domestic and international organisations have criticised the bill for severely restricting freedom of expression as well as peaceful assembly. If assented to by the President, it has the potential of curtailing human rights.<sup>55</sup>

Additionally, one of the issues that was raised in response to the earlier

49 State reports and concluding observations (n 48 above).

50 Report on the Joint Promotional Visit (n 4 above) 13.

51 Concluding Observations (n 40 above) 1-2.

52 African Commission 'Concluding observations of the African Commission on the third periodic report of the Republic of Uganda' presented at the 45th ordinary session held in Banjul, The Gambia, 13-27 May 2009 1.

53 African Commission 'Concluding observations of the African Commission on the fourth periodic report of the Republic of Uganda' presented at the 49th ordinary session, Banjul, The Gambia, 28 April-12 May 2011 1.

54 'HIV Prevention Act angers Ugandan AIDS activists' *Voice of America* 27 August 2014 <http://www.voanews.com/content/hiv-prevention-act-aids-activists/2429821.html> (accessed 8 September 2015).

55 'Uganda: Public Order Management Bill' *Article 19* 13 August 2013 <https://www.article19.org/resources.php/resource/37201/en/uganda:-public-order-management-bill> (accessed 8 September 2015).

state reports was the duplication of reports. The African Commission asked Uganda to refrain from submitting reports on the implementation of the African Charter which were exactly similar to those submitted to the UN Human Rights Committee and other international human rights bodies.<sup>56</sup> The Commission further pointed out that such a reporting practice demonstrates a lack of commitment on the part of the Ugandan government to conduct research and present issues that are peculiar to the African Charter and to the African situation in general. The government improved the subsequent reports by adhering to the guidelines set out by the African Commission and thus the reports improved significantly over time to address the issues pointed out by the African Commission.

However, it should be noted that it is an almost impossible task to ascertain whether laws, policies and programmes that are implemented in a certain period are a direct result of one piece of legislation, in this case the African Charter or the Maputo Protocol. This is due to the fact that Uganda reports to several human rights bodies both at the regional and international level, thus, the same recommendations may be pointed out by such other bodies. Also, a series of factors beyond the recommendations may push government to pass certain policies. Such factors may include: the need for political support of a regime, to push for a certain agenda which is in line with their political views and to

gain international support in order to work amicably with other countries. Therefore, even if on paper Uganda has seemingly undertaken steps that are human rights compliant, one can only conclude that at best, the recommendations from the African Commission contributed to a certain law or policy reform.

## 10 Communications

So far, three cases have been brought to the African Commission involving Uganda. The first case was decided by the African Commission in 1995 and concerned a citizen from the Democratic Republic of Congo (which was then Zaire) called Nziwa Buyingo. He alleged that he had been subjected to arrest, arbitrary detention and torture by Ugandan soldiers in Kisoro, Uganda in December 1987. However the Commission failed to get any response from him on whether or not he had received access to the available remedies in Uganda. Thus, the African Commission declared the communication inadmissible.<sup>57</sup> The second communication was filed in 1996 by the *Association pour la sauvegarde de la paix au Burundi* (ASP-Burundi, Association for the Preservation of Peace in Burundi) which alleged that, Uganda, Kenya, Tanzania, Zambia and Zaire (now Democratic Republic of Congo) had violated a series of African Charter rights by imposing an embargo on Burundi. These included: the right to life and integrity, the right to education, the right to economic social and cultural development and the frustration of attempts to strengthen peace, solidarity and friendly relations. The African Commission found that the

56 This observation was made by the African Commission in its concluding observations made in 2006 to the Uganda's 2nd periodic report submitted to the Commission in the same year. The Republic of Uganda 'Report to the African Commission on Human and Peoples' Rights presented at the 39th ordinary session of the Commission on Human and Peoples' Rights' Banjul, The Gambia, 25 May 2006.

57 8/88 *Nziwa Buyingo/Uganda* <http://www.achpr.org/communications/decision/8.88/> (accessed 8 September 2015).

states were not guilty of a violation of any of the Charter rights as the embargo had been put in place to pressure the government of Burundi to put in place democratic institutions, establish the rule of law and to respect human rights.<sup>58</sup>

Additionally, in early 1999, the Democratic Republic of the Congo (DRC) submitted a communication to the African Commission against Burundi, Rwanda and Uganda. DRC alleged that the armed forces of these three countries had committed grave violations of human rights and massacres under the 'fallacious' pretext of safeguarding their interests. Thus, these countries had acted in blatant disregard of the fundamental principles that govern friendly relations between states, avoidance of use of force in international relations, respect for the territorial integrity and sovereignty of states and the non-interference in the internal affairs of states. Therefore, the three states had violated numerous provisions of the African Charter including the right to life, the right to liberty, the right to equality, the right to health and the right to education.

In this instance, the African Commission ruled in favour of the DRC by finding that the three countries were indeed in violation of numerous rights of the African Charter. The African Commission asked the countries to withdraw its troops from the DRC, asked for adequate reparations to the victims of the numerous violations as a result of the actions of the armed forces of the three countries and to abide by

the African Charter provisions, UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States and other applicable laws.<sup>59</sup> At the time of handing down the decision, the African Commission noted that some positive developments had already occurred in this matter, specifically the withdrawal of the armed forces of the respondent states from that of the complainant state.<sup>60</sup>

## 11 Special mechanisms and promotional visits

The African Commission has undertaken several promotional visits to Uganda under article 45 of the Charter. The first visit was undertaken from 12 to 21 July 1998 in order to inform the relevant stakeholders about the mandate of the African Commission and also to encourage the country to submit a state report as it had not submitted any reports as at that time. This was so despite the fact that Uganda was amongst the first set of countries to have a national – Grace Ibingira – serve as a commissioner of the African Commission. Uganda expressed that the non-submission of its report was mostly due to lack of qualified people to write a comprehensive and analytical report, and that the personnel who had been trained to undertake the writing process with the Ministry of Foreign Affairs had either left the country or left the ministry.<sup>61</sup> The second visit was undertaken by the Special Rapporteur on Prisons and Conditions of Detention in Africa,

58 157/96 *Association pour la sauvegarde de la paix au Burundi/Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia* <http://www.achpr.org/communications/decision/157.96/> (accessed 8 September 2015).

59 227/99 *Democratic Republic of Congo/Burundi, Rwanda, Uganda* <http://caselaw.ihlda.org/doc/227.99/> (accessed 8 September 2015).

60 227/99 *Democratic Republic of Congo/Burundi, Rwanda, Uganda* <http://caselaw.ihlda.org/doc/227.99/> (accessed 8 September 2015).

61 Dankwa (n 47 above).



Vera M Chirwa, from 11 to 22 March 2001. This visit was aimed at documenting conditions of detention in Africa and establishing dialogue with the government on how to improve conditions of detention and rehabilitation in Uganda. Some of the recommendations by the Commissioner were: to reduce congestion in prisons by reforming the police and courts; improve general hygiene and the health conditions of prisoners; and to improve the drafted prison bill to reflect all the challenges of Uganda's prison system.<sup>62</sup>

The African Commission undertook a third promotional visit upon the invitation of the Ugandan government from 25 to 30 August 2013. This promotional visit was very important and comprehensive as it enabled the African Commission to interact with various stake holders which allowed for an informed view of the human rights situation in Uganda. Amongst the groups that the Commissioners visited were: the Ministry of Foreign; the Prime Minister; the Ministry of Justice and Constitutional Affairs; the Electoral Commission; a few prisons; the Speaker of Parliament; and a few human rights organisations. As a result of these interactions, the African Commission was able to come up with a comprehensive report on the human rights situation in Uganda and to devise practical recommendations specific to Uganda.

Also as a result of this visit, the report was more detailed than any of the concluding observations that the African

Commission had given over the years in response to Uganda's periodic reports. The visit was successful as it revealed a lot of pertinent information on Uganda. One of the reasons for this was the fact that within the delegation, there was a Ugandan who is also a Commissioner. Honourable Commissioner Med SK Kaggwa is the Special Rapporteur on Prisons and Conditions of Detention in Africa. He is also the chairperson of the Uganda Human Rights Commission. His vast human rights experience in Uganda as well as contacts made over the course of his human rights career enabled a connection between the delegation and the right people and places. This greatly contributed to comprehensive findings on the human rights situation in Uganda.

In addition to the official visits mentioned above, a research and information tour was undertaken by a member of the African Commission's working group on indigenous populations/communities in Africa. This took place between 14 to 17 July and then from 24 to 29 July 2006. The visit was aimed at dissemination of information to the Ugandan government about the position of the African Commission on the rights of indigenous peoples in the country. It was also aimed at identifying challenges faced by the indigenous peoples such as the Batwa Pygmies of Western Uganda and formulating diverse strategies for addressing the human rights situations of such indigenous communities.<sup>63</sup> These objectives were met through this visit and several recommendations were devised, which included: the need to recognise the Batwa and the pastoralists as indigenous peoples in the sense in which the word

62 African Commission on Human and Peoples' Rights 'Report on the mission of the Special Rapporteur on prisons and conditions of detention in Africa to Uganda' presented at the 33rd ordinary session of the African Commission, 15-29 May 2003, Niamey, Niger DOC/OS(XXXIII)/324CcIII.

63 Report of the African Commission's working group on indigenous populations/communities' Research and Information

is understood internationally; and the need to adopt appropriate legislation in this respect.

## **12 Factors that may enhance or impede the impact of the African Charter, the Maputo Protocol and the African Commission**

One of the good practices that the African Commission undertakes is working closely with the UHRC. This collaboration should be carried forward and enhanced principally because the UHRC is the primary human rights body for monitoring the promotion and protection of human rights in Uganda. Thus, it has wide coverage throughout all the regions in Uganda and receives funding from the government. In collaboration with the UHRC and suitably placed human rights organisations, the African Commission should also conduct sensitisation programmes for the judges, lawyers and legislators on how to incorporate the African Charter, Maputo Protocol and the jurisprudence of the African Commission in their work.

Additionally, the African Commission should shift its focus from merely recommending the enactment of more legislation to laying emphasis on monitoring the implementation of such legislation. Over the years, the recommendations from the African Commission have tended to become more general and thus it is sometimes

difficult to measure progress. Some of the general recommendations include ensuring the establishment of adequate legislation on freedom of expression to fulfil its obligations under the African Charter.<sup>64</sup> Another was to ensure that legal aid is available to every citizen.<sup>65</sup> Such recommendations may be too broad, such that any step taken by the government may be assumed sufficient. Furthermore, such recommendations do not set any benchmarks to measure progress from one reporting period to another. The giving of general recommendations also impedes the purpose of the reporting process where unique challenges facing Uganda are not discussed in detail but, rather, are at times general and repetitive. This in turn may have the effect that state reports are equally general and repetitive. This calls for specific recommendations whose progress can be measured in the next periodic report.

There is also a clear need for the African Commission to build upon its previous recommendations and keep following up on the recommendations that have not been implemented. For instance, in its earlier recommendations, the African Commission pointed out that NGOs had not submitted alternative reports to make for a balanced situational review on the human rights situation in Uganda. Thus, the government was asked to encourage NGOs to submit alternative reports. However, this did not happen and was not reported on in the subsequent report and, consequently, the African Commission did not bring this recommendation up again or ask for reasons why this was the case. Also, the issue of extending the reporting period was not dealt with by

visit to the Republic of Uganda, 14-17 July, 24-29 July 2006. The report was adopted at the 43rd ordinary session of the African Commission, 7-22 May 2008.

64 Concluding observations (n 52 above) 7.

65 Concluding observations (n 53 above) 6.

the African Commission. The Ugandan government asked the African Commission to look into the issue of extending the reporting period to three years in order to give it enough time to implement the recommendations pointed out by the African Commission and to give comprehensive feedback to the African Commission in the next reporting period.

Last but not least, the African Commission should encourage civil society organisations to continue submitting shadow reports to the periodic state reports. This will help the African Commission to gather enough information on implementation of the recommendations in its previous reports thus gaining a better and more informed understanding of adherence to human rights in that reporting period.



# THE IMPACT OF THE AFRICAN CHARTER AND THE MAPUTO PROTOCOL IN ZIMBABWE

*Tarisai Mutangi\**



## 1 Introduction

The adoption of a Constitution in 2013 (the 2013 Constitution) was a paradigm shift in the legal framework for the protection of human rights in Zimbabwe.<sup>1</sup> Amongst other things, the 2013 Constitution provides for an entrenched and elaborate Bill of Rights literally domesticating all civil and political rights as they are enshrined in international human rights treaties. Further, the Constitution now provides for justiciable economic, social and cultural rights such as rights to health, shelter, education and water, amongst others. It also provides for environmental rights.

The 2013 Constitution also provides for a new legislative interpretation regime in which the Bill of Rights must be central whenever legislation is being interpreted.<sup>2</sup> Any court interpreting any legislation must prefer an interpretation that is consistent with international law.

It then follows that whenever a national law with a bearing on the Charter or Maputo Protocol is subject to interpretation, the court concerned must prefer an interpretation that is consistent with these instruments.

The new equality provisions in the 2013 Constitution have improved the protection of women's rights. Gender equality has been earmarked as one of the national objectives where the state is obligated to 'promote the full participation of women in all spheres of Zimbabwean society on the basis of equality with men'.<sup>3</sup> This national objective of gender equality has introduced a fifty per cent membership quota system in constitutional commissions and other bodies established by government or parliament. The economic empowerment of women is also stressed to enable them to access land on an equal basis with men.<sup>4</sup>

As to justiciable rights, section 56 of the 2013 Constitution is the equality provision prohibiting discrimination and promoting equality. 'Women and men have the right to equal treatment, including the right to equal opportuni-

\* LLM HRDA (Pretoria), Managing Partner, Donsa-Nkomo and Mutangi Attorneys, Lecturer at Midlands State University and consultant based in Zimbabwe.

1 See Constitution of Zimbabwe (Amendment) Act 20 of 2013.

2 Sec 45 of the 2013 Constitution.

3 Sec 17(1)(a) of the 2013 Constitution.

4 Sec 17(1)(c) of the 2013 Constitution.

ties in political, economic, cultural and social spheres,<sup>5</sup> while gender and sex are listed as grounds upon which discrimination is prohibited. Interestingly, custom, which used to be an exception to discrimination in the previous constitutional order is now a listed ground with section 26 on marriage rights emphasising the need for 'equality of rights and obligations of spouses during marriage and at its dissolution'.<sup>6</sup>

Chapter 12 of the 2013 Constitution establishes independent institutions to support democracy including the Gender Commission and the Zimbabwe Human Rights Commission.<sup>7</sup> The Gender Commission is therefore the premier institution in terms of promotion and protection of women's rights while the Zimbabwe Human Rights Commission deals with general human rights issues. Meanwhile gender continues to be mainstreamed into programmes and policies of government with the assistance of United Nations agencies such as UN Women and line ministries.

## **2 Ratification of the African Charter and the Maputo Protocol**

Zimbabwe became a state party to the African Charter on 30 May 1986. Communication with the African Commission is through the Ministry of Justice and Legal Affairs and more specifically the office of the Permanent Secretary.<sup>8</sup> It was not until 2000 that Zimbabwe came into the lime light of

African Commission processes because of the increasing cases of human rights abuses and violation of several of its obligations under the African Charter. Because of the high number of cases filed against Zimbabwe and the increased resolutions and statements by the African Commission on Zimbabwe, the last ten years have seen increased communication between the African Commission and the government of Zimbabwe.

The most recent regional instrument ratified by Zimbabwe is the Maputo Protocol. This was ratified on 15 April 2008. Using the Maputo Protocol as an example, the process of ratification started off with the Ministry of Gender. The responsible Minister tabled the proposal for ratification before Cabinet which approved the ratification process. The ratification was presented to parliament which did not debate it, but simply took note of the proposed ratification. The ratification instruments were prepared and lodged through the Ministry of Foreign Affairs.<sup>9</sup>

By and large, Zimbabwe pursues an ad hoc system in terms of ratification of international instruments. It is not possible to find any rules that justify ratification of any instrument. It appears that the decision to initiate the ratification process is initiated by the line minister who desires that a certain instrument be ratified by Zimbabwe for reasons that are best known by that ministry. Once the Cabinet approves the ratification, the above procedure is followed resulting in final ratification of the instrument concerned.

5 Sec 56(2) of the 2013 Constitution.

6 Sec 26(c) of the 2013 Constitution.

7 At the time of writing, the Gender Commission Bill, a law to implement constitutional provisions on the Gender Commission, was before parliament and could be enacted in the short term.

8 Interview with government official.

9 Interview with a government official at the Ministry of Foreign Affairs.

### 3 Domestication and incorporation

As regards hierarchy of sources of law in Zimbabwe, the 2013 Constitution provides in section 3 that: 'This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'. This means that any law, despite its nature or origin, should conform to the provisions of the Constitution.

Zimbabwe is a typical dualist state. In terms of section 327(2) of the 2013 Constitution, all international treaties, agreements and conventions ratified by Zimbabwe which bind Zimbabwe and other countries such as the African Charter and Maputo Protocol, 'shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament'. This means that domestication is a prerequisite for international instruments to form part of the domestic law.

However, section 327 of the 2013 Constitution has a history of being changed from monist to dualist, back to monist and then finally dualist as it stands today by virtue of constitutional amendment. In the case decided by the Supreme Court of Zimbabwe sitting as a Constitutional Court in *Kachingwe and Another v Minister of Home Affairs and Others*,<sup>10</sup> it was held that 'the Constitution of Zimbabwe Amendment (12) Act, 1993 (4 of 1993)' ... amended the then dualist section 111B ... 'so that any convention, treaty or agreement which was acceded to, concluded or executed

by or under the authority of the President before 1 November 1993 and which, immediately before that date, did not require approval or ratification by Parliament, remained part of the law of Zimbabwe after the 1993 Amendment'. Zimbabwe ratified the African Charter in 1986, thus making it part of the law of Zimbabwe without need for any further legislative act. This technically seems to be the position in Zimbabwe. Nevertheless, the Maputo Protocol, having been ratified in 2008, does not form part of domestic law until such time as it has been domesticated by virtue of a legislative act, in terms of the current provisions of section 327 of the 2013 Constitution.

The 2013 Constitution provides for a full catalogue of civil and political rights on one hand and justiciable economic, social and cultural rights on the other hand. Save for provisions on equality between men and women in relation to opportunities and matrimonial issues, women's rights are not at all distinctly provided for. Women-specific rights such as those against harmful cultural practices are not specifically provided for in the 2013 Constitution. In that vein, ratification of the Maputo Protocol has not resulted in any legal reform to bring national law in conformity with international standards.

While the Charter is part of domestic law, there have not been any efforts to achieve full incorporation of the Maputo Protocol into national legislation. This is only possible with the domestication process as far as the Protocol is concerned. Other international instruments such as the Geneva Conventions have been fully domesticated by parliament resulting in the Geneva Conventions Act [Chapter 11:06] and the Child Abduction Act

10 SC145/04 (18 July 2005) <http://www.chr.up.ac.za/index.php/browse-by-subject/514-zimbabwe-kachingwe-and-others-v-the-minister-of-home-affairs-and-others-2005-ahr-228-zwsc-2005.html> (accessed 10 August 2015).

[Chapter 5:05] which give effect to some aspects of the Convention on the Civil Aspects of International Child Abduction, signed at the Hague on the 25 October 1980.

#### 4 Legislative and policy reform

There are no records of whether a compatibility study was done before the 1986 ratification of the African Charter by Zimbabwe. Similarly, this research was unable to find a record to show that a compatibility study was carried out before ratification of the Maputo Protocol in 2008. Since ratification of the African Charter in 1986, several laws have been passed in Zimbabwe, some giving effect to the African Charter and some derogating from the rights that are provided for in the African Charter. Amendment 17 to the Constitution which was passed in 2005 expanded the grounds on which discrimination is prohibited to include disability, sex, gender and marital status. The same Amendment also recognises and protects women's rights to equal access to land. It also legislated for affirmative action for previously disadvantaged groups. Amendment 19 of the Constitution passed in 2008 created the Zimbabwe Human Rights Commission and Zimbabwe Electoral Commission. Enabling legislation such as the Domestic Violence Act of 2006 was passed to further afford protection of rights of women. These and other progressive pieces of legislation do not however make explicit reference to the African Charter.

However, retrogressive legislation was passed by Zimbabwe after its accession to the African Charter leading to major human rights abuses and violations which have been the subject of litigation in national courts as well as with

the African Commission. Two of these are key. These are the Public Order and Security Act of 2002 (POSA) and the Access to Information and Protection of Privacy Act of 2002 (AIPPA). POSA seriously curtailed the exercise of freedom of assembly and the African Commission in its 2002 Fact Finding Mission Report, recommended its repeal. AIPPA on the other hand limited freedom of the press and freedom of expression. Again the African Commission recommended the repeal of this legislation. Since becoming party to the African Charter, Zimbabwe has therefore had a mix of progressive and retrogressive legislative reform.

Zimbabwe adopted its inaugural National Gender Policy in 2004, which Policy has since been replaced by the National Gender Policy 2013-2017. It is encouraging to note that the current Gender Policy makes reference to the Maputo Protocol in so far as it stands as a point of reference in terms of what the Policy seeks to achieve. One could say the Policy seeks to give effect to the obligations contained in the Maputo Protocol amongst other instruments such as CEDAW and the SADC Gender Protocol of 2008. However, the Maputo Protocol is so incorrectly cited to the extent that one wonders whether the drafters of the Policy had a copy of the Maputo Protocol during drafting. It is cited as the 'protocol to the 2003 African Charter on Human and People's Rights on the Rights of Women'.

The Gender Policy goes on to shed light on the extent and nature of legislative reform that followed its adoption in 2004. It claims that 17 pieces of legislation to advance gender equality and equity objectives have since been adopted or amended. These include the Matrimonial Causes Act (1987); Admin-



istration of Estates Act (1997); Maintenance Act (1999); Sexual Offences Act (2001); Education Act (2004); Labour Act, [Chapter 28:01]; Criminal Law (Codification & reform) Act (2006); and Domestic Violence Act (2007), amongst others. The 2004 Public Sector Gender Policy put in place Gender Focal Points in all government ministries and state-controlled corporations and in 2012, a process was initiated to set up a Gender Commission, which was established under the 2013 Constitution. The implementing legislation is before parliament in the form of the Gender Commission Bill.

## 6 Court judgments

International human rights instruments may be directly applied at the domestic level after domestication through parliamentary approval. This is provided for in section 327(1) of the 2013 Constitution. This has been the position since 1993 where the old section 111B was held not to have the effect of requiring approval by Parliament of any convention, treaty or agreement which was acceded to, concluded or executed by or under the authority of the President before 1 November 1993 and which immediately before that date, did not require approval or ratification by Parliament.<sup>11</sup> Despite this provision, application of the African Charter by the Zimbabwe Supreme Court (ZSC) has been disappointing. This assessment covers the period 2002 to 2011 and out of the 642 surveyed cases, the ZSC made reference to the African Charter in just three cases.

The first case in which the African Charter was referred to is *Capital Radio v*

*Broadcasting Authority of Zimbabwe, Minister of State for Information and Publicity and the Attorney General of Zimbabwe*.<sup>12</sup> In that case, Capital Radio, which had been granted a license to broadcast in Zimbabwe, brought in broadcasting equipment, but the Minister of Information and Publicity sought to stop the applicant from broadcasting on grounds that this violated the Presidential Powers (Temporary Measures) Act. The Presidential Powers Act was later superseded by the Broadcasting Act. Capital Radio's constitutional challenge was that a number of provisions of the Broadcasting Act infringe section 20(1) of the 1980 Constitution, which guarantees freedom of expression.

One of the issues that the Zimbabwe Supreme Court (ZSC) had to grapple with was whether section 20 includes freedom of the media. The court relied on the UDHR, ICCPR and the African Charter. Chidyausiku CJ made reference to article 9 of the African Charter and the twin articles 19 of the UDHR and ICCPR. He further quoted the African Commission's interpretation of article 9 and concluded by saying that 'Zimbabwe ... is a party to the African Charter and consequently article 9 should provide guidance in interpreting section 20 of the constitution'. The Court then held that freedom of expression has to be interpreted to include freedom of the press and is also enjoyed by corporate persons. About six sections of the Broadcasting Act were found to fail constitutional muster, and were accordingly struck down.

<sup>11</sup> See sec 111B of the Constitution of Zimbabwe.

<sup>12</sup> SC128/02.

The ZSC was not so progressive in *Association of Independent Journalists and Others v Minister of Information and Publicity and Others*.<sup>13</sup> In that case, the applicants challenged sections 79, 80, 83 and 85 of the Access to Information and Protection of Privacy Act. Section 79 provides for the accreditation of journalists, section 83 outlaws the practice of journalism without accreditation and section 85 provides for the development of a code of conduct by the Media and Information Commission and confers on it disciplinary powers and provides guidelines on sanctions for misconduct. The applicants sought to have these four sections declared unconstitutional.

The Court referred to jurisprudence from the Inter-American Commission and Court on Human Rights as well as the European Court on Human Rights. There was no reference to the African Charter or the African Commission's Declaration of Principles on Freedom of Expression in Africa. Principle IX of the Declaration provides as follows:

Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts. Effective self-regulation is the best system for promoting high standards in the media.

In the case of *Nancy Kachingwe and Another v Minister of Home Affairs and Another*,<sup>14</sup> the ZSC made extensive reference to the African Charter, the ICCPR and the European Convention on Human Rights. In that case, the applicants challenged the conditions of police cells and alleged that they consti-

tuted inhuman and degrading treatment in contravention of section 15 of the Constitution. The Court held:

I have no doubt, in my mind, that the holding cell that the court inspected at Highlands Police station, the same holding cell in which Kachingwe was detained overnight, does not comply with elementary norms of human decency, let alone, comply with internationally accepted minimum standards.

The Court further held that Kachingwe and Chibebe were detained in conditions that constituted inhuman and degrading treatment in violation of section 15(1) of the Constitution. The Court observed that the African Charter prohibits torture and inhuman and degrading punishment in article 5 and concurred that the African Charter and the ICCPR were signed before 1993 and became part of Zimbabwe law by virtue of section 111B of the Constitution. The Court further made reference to the jurisprudence of the African Commission in which there was a finding of violation of article 5 of the African Charter.<sup>15</sup> Surprisingly, the ZSC did not find a violation of section 15(1) of the Constitution in another case of inhuman and degrading treatment and punishment in prisons in the case of *Woods v Commissioner of Prisons and Another*<sup>16</sup> and there was no reference to the African Charter.

Concluding on this point, it is hoped that in the future, superior courts in Zimbabwe will apply the African Charter and the Maputo Protocol to protect rights more robustly and achieve justice for all. The current jurisprudence has

13 SC136/02.

14 SC145/04.

15 Communication 225/95 *Huri-laws v Nigeria*; Communication 222/99 *Civil Liberties Organisation v Nigeria* 151/96 and Communication 232/99 *John D Ouko v Kenya*.

16 SC137/02.

shown glaring paucity in the application of these important regional human rights instruments. However, with the advent of section 46 of the 2013 Constitution, the interpretation clause which enjoins courts to prefer interpretations consistent with international law, it is anticipated that more reliance will be placed by courts on authoritative interpretation of international human rights instruments. Further, section 326 of the Constitution now requires courts to prefer interpretations that are consistent with customary international law, to the extent that it is not contrary to the 2013 Constitution.

## **7 Awareness and use by civil society<sup>17</sup>**

The African Charter and Maputo Protocol are very well known in the NGO sector especially with respect to NGOs that have international human rights programmes. For instance, Zimbabwe Lawyers for Human Rights (ZLHR) has an international litigation project through which they engage international human rights institutions and procedures. They have observer status before the African Commission hence orient some of their projects around this area.

On its part, the Zimbabwe Human Rights NGO Forum focuses on ending impunity in the context of torture. After failing to secure effective remedies at national levels, the Forum has on several occasions approached regional mechanisms such as the African Commission for relief. It has accordingly filed a number of communications before the African Commission, many of which

have been decided on the merits and often against Zimbabwe.<sup>18</sup> This goes a long way to showing that the African Charter and Maputo Protocol are right at the core of these internationally focused programmes and projects.

Both organisations have submitted shadow reports most notably in 2006 when Zimbabwe submitted her inaugural and combined report to the African Commission. The ZLHR worked tirelessly in terms of preparing a shadow report that was submitted parallel to Zimbabwe's inaugural Universal Peer Review (UPR) in 2011. Although this is before a United Nations mechanism, it indicates the extent to which some NGOs are reaching out in terms of utilising regional and international standards and human rights protection mechanisms.

Other organisations such as the Zimbabwe Women Lawyers Association (ZWLA) are increasingly getting involved in utilising the African Charter and the Maputo Protocol in their projects and programmes especially after having been accorded observer status by the African Commission.<sup>19</sup> Although they have been engaging and utilising mainly national mechanisms and laws, observer status is clear testimony of their growing involvement in human rights dialogue at the interna-

<sup>17</sup> Information gathered from interviews held with personnel from the NGO sector especially Zimbabwe Lawyers for Human Rights and the Zimbabwe Human Rights NGO Forum.

<sup>18</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006).

<sup>19</sup> Catholic Commission for Justice and Peace in Zimbabwe, African Bar Association, Southern African Research and Documentation Centre (SARDC), Zimbabwean Human Rights Association (ZIMRIGHTS), Legal Resources Foundation (LRF), Human Rights Trust of Southern Africa, Zimbabwe Human Rights NGO Forum, Media Monitoring Project, Zimbabwe Lawyers for Human Rights (ZLHR), Zimbabwe Association of Doctors for Human Rights (ZADHR) and Zimbabwe Women Lawyers Association.

tional level. One has to bear in mind that the African Commission is the oversight institution monitoring implementation of the Maputo Protocol hence such organisations are drawing near this Commission to influence its role in monitoring national implementation.

## **8 Awareness and use by practising and other lawyers<sup>20</sup>**

The Law Society of Zimbabwe (LSZ), to which every practising lawyer mandatorily registers, oversees the legal profession in Zimbabwe especially through enforcing ethical conduct as well as negotiating for legal fee tariffs for various legal services. However, since the early 2000s with the deteriorating human rights situation and disregard for rule of law on issues such as the land reform programme, the LSZ has increasingly been involved in advocacy and litigation with an international flavour around these issues. This means that advocacy programmes initiated by the LSZ together with continuing education initiatives for LSZ members, are now being punctuated with reference to regional and international human rights instruments and institutions.

Illustratively, the LSZ now teams up with prominent NGOs in the human rights sector in providing national workshops on human rights litigation at the national level targeting upcoming lawyers to consider human rights litigation as a career. A close look at the content of these workshops has shown that there is a deliberate intention to introduce young lawyers to international human rights law, processes and procedures in a bid to draw their atten-

tion to issues of international concern. Instruments such as the UDHR, the African Charter and the ICCPR are commonly cited and utilised as resource material in such workshops. For example, between 24 and 27 June 2015, the LSZ convened a workshop for lawyers on economic, social and cultural rights where such rights in the African Charter were analysed from the perspective of African women, amongst other objectives. The approach ensured that delegates made use of the Maputo Protocol to the extent that it represents the context of an African woman in relation to some aspects of socio-economic and cultural rights.

As regards reliance by lawyers on the African Charter and Maputo Protocol in litigation, it has come up very clearly that only very few lawyers are aware of the existence of the African human rights system or any other human rights system in the world. The root of this problem goes back to the fact that human rights as a module have only been recently introduced in universities' curricula in Zimbabwe. Even so, the module remains elective and hence tends to slip through the fingers of many lawyers. The interviews conducted in this area revealed that many lawyers do not take human rights as a career possibility on its own hence they leave it to human rights NGOs and activist lawyers.

## **9 Higher education and academic writing**

There are only three law schools in Zimbabwe. The most established one is at the Faculty of Law, University of Zimbabwe. The other ones, and relatively new, are at Midlands State University, Gweru, Zimbabwe and the Great

<sup>20</sup> Based on information provided from the LSZ advocacy and policy department.

Zimbabwe University in Masvingo. The law schools offer a module in human rights as an elective at the University of Zimbabwe and compulsory at Midlands State University. It remains to be seen at Great Zimbabwe University, which only enrolled its inaugural group of law students in 2015. The content of the module includes the national bill of rights, the African human rights system and the United Nations system for the promotion and protection of human rights. As a result, there is deliberate inclusion of the African Charter and the Maputo Protocol as part of the sources of the catalogue of rights protected therein.

In September 2015, the Midlands State University launched a master of laws programme entitled LLM in Constitutional Law and Human Rights. One of the core-modules of the degree programme is Advanced Human Rights. The curriculum discusses the Maputo Protocol extensively under the legal framework of the African human rights system. Further, one of the electives of the degree programme is a module on Women's Law in which the Maputo Protocol is exclusively relied upon in the African context.

There is no evidence of formal academic publications in Zimbabwe, except for Zimbabwean authors who tend to publish in international journals for lack of publishing opportunities in the country. The Midlands State University has recently launched an online law review known as *Midlands State University Law Review*, which focusses on legal issues of relevance to Zimbabwe. This is a platform on which many local lawyers and authors have started to share ideas. Invariably, such discussions include the African Charter

and the Maputo Protocol among other instruments.

## **10 National human rights institutions<sup>21</sup>**

The Zimbabwe Human Rights Commission (ZHRC), created in terms of Chapter 12 of the 2013 Constitution, was first established in 2009 following the adoption of the Constitution of Zimbabwe Amendment 19. In 2012, the ZHRC was operationalised when Parliament adopted the Zimbabwe Human Rights Commission Act. Notwithstanding financial challenges facing the institution, it now has a full complement of secretariat to implement its programmes. In 2015, the ZHRC conducted the very first baseline survey of the human rights situation in Zimbabwe in order to inform its Strategic Plan going forward.

Bearing in mind that the ZHRC must still fully open its doors to the public, in terms of involvement in a variety of complaints, it is premature to discuss the content of its programmes in as much as they relate or make reference to the African Charter or the Maputo Protocol. However, one can conclude that the ZHRC will most likely engage these international human rights instruments in view of the provisional reference in its 2015 Strategic Plan to 'international human rights' ratified and domesticated in Zimbabwe. Now, taking into account that the African Charter is already part and parcel of the Zimbabwean legal system and the ZHRC's proposed mandate of assisting

21 This part of the report was prepared from the information gathered from interviews with UNDP Zimbabwe officials, which organisation is involved in capacity building initiatives with the Human Rights Commission in order to adequately prepare as it looks ahead to commence its mandate.

in the preparation of state reports, one can only hope that both instruments will play a central role in the ZHRC's programmes.

## 11 State reporting

In 1994, the government of Zimbabwe established the Inter-ministerial Committee on Human Rights and Humanitarian Law (IMC) with the mandate to carry out various human rights functions on behalf of the government. Amongst its responsibilities are the writing of state party reports to different treaty monitoring bodies, dissemination of concluding observations and following up on recommendations of treaty bodies as well as advising government on which human rights instruments to accede to.<sup>22</sup> The IMC is comprised of 22 government ministries and departments and is hosted by the Department of Policy and Legal Research under the Ministry of Justice and Legal Affairs which is its secretariat. Important and relevant departments such as the army, police, security, gender, health, the ombudsman and justice are part of the Committee. The setting up of the IMC was applauded by various treaty monitoring bodies that Zimbabwe reports to such as the Committee on the Rights of the Child, Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of all Forms of Discrimination against Women.<sup>23</sup> Senior civil

servants represent these government ministries and departments in the Inter-ministerial Committee.

Using the last state party report that Zimbabwe submitted to the African Commission as an example, the process of preparing state reports is initiated by the IMC Secretariat which is hosted by the Ministry of Justice. The secretariat produces a first draft which is then shared with the entire IMC. The IMC is organised through sub-committees with various expertise and knowledge on different issues. It is the responsibility of these sub-committees to give further details, analysis and information including statistics from different government ministries and departments on each of the issues under the African Charter that the government will be reporting on. Once a substantive first draft has been developed, the report is shared with members of civil society and other government departments that are not involved in the preparation of the draft as well as independent bodies and commissions. The sharing of the report is the beginning of a consultative process where the Inter-ministerial Committee will hold meetings with different stakeholders to seek their input and in some cases written submissions are made by stakeholders.

Based on the input from stakeholders, further drafts of the report are prepared until a final draft is passed on to Cabinet through the channels of the Ministry of Justice for approval before submission to the African Commission. The final report is shared with civil society to enable them to prepare their shadow reports.

The state through the relevant department in the Ministry of Justice and Legal Affairs disseminates the

22 Zimbabwe reported on the setting up of this Committee to the African Commission on Human and Peoples' Rights in its Second report submitted in 1997 [http://www.achpr.org/english/Archives/State%20reports/eng/Zimbabwe/Zimbabwe\\_2\\_eng.pdf](http://www.achpr.org/english/Archives/State%20reports/eng/Zimbabwe/Zimbabwe_2_eng.pdf). (accessed 26 November 2015).

23 Concluding observations for each of these treaty bodies applauding Zimbabwe on the creation of the Inter-ministerial Committee are available at <http://www.ohchr.org/EN/countries/AfricaRegion/Pages/ZWIndex.aspx>. (accessed 26 November 2015).

concluding observations. The main targets for dissemination are members of the IMC and relevant government departments and ministries with a responsibility to implement, take action or make follow ups on the concluding observations and recommendations of the African Commission. There seems to be no set out process by civil society or government to disseminate the concluding observations to the general public.

The government of Zimbabwe has received several Concluding Observations based on the three periodic reports that it has submitted so far to the African Commission. This section looks at some of the concluding observations issued by the African Commission in respect of the second periodic report which was presented and considered in 2007. Steps have been taken to give effect to some of the observations although no measures have been taken in respect of the others.

In respect of the recommendation to expedite the establishment of a human rights commission, Zimbabwe passed a constitutional amendment legislation in 2009 creating the ZHRC. Commissioners for the human rights body were appointed in May 2010. However, the enabling legislation, the Zimbabwe Human Rights Commission Bill, has still not yet been passed into law due to disagreements on some of the provisions between the two feuding political parties in the Unity Government.

Zimbabwe ratified the Maputo Protocol in 2008, in response to the African Commission's concluding observations. However, the country has still not acceded to other key instruments such as the Protocol establishing the African Court and the Convention

on Preventing and Combating Corruption.

The African Commission recommended the government of Zimbabwe to incorporate socio-economic rights in its constitution. As discussed above, this feat has since been achieved following adoption of the 2013 Constitution. Through the Government of National Unity, steps are now being taken to amend the media laws in Zimbabwe and in particular the Access to Information and Protection of Privacy Act as well as security laws such as the Public Order and Security Act. This forms part of an on-going legislative reform and review process in the aftermath of the 2013 Constitution.

Overall, some of the concluding observations of the African Commission relate to legislative and institutional reforms which still remain contentious issues within the political context of the country. As a result of disagreement, the never ending impasse and horse trading between parties has stalled a number of reforms that could see an improvement in human rights, rule of law and independence of the judiciary.

## **12 Communications**

From around 2000, there has been an upsurge of communications filed against Zimbabwe because of the deteriorating human rights situation in the country. A total of seven communications were filed and decided upon between 2002 and 2011.<sup>24</sup> In four of these communications, the African Commission found that the government of Zimbabwe had violated provisions of the African Charter and recommendations were made for

24 Index to the African Human Rights Law Reports.

redress including payment of compensation and repeal or amendment of laws. The findings and recommendations of the African Commission have not been widely publicised beyond a few reports in the media and dissemination within the circle of human rights organisations. The cases and their findings are not widely known within broader Zimbabwean civil society.

The Ministry of Justice and the Attorney General's department represent the state in communications. When findings and recommendations are made against the state, the Ministry of Justice submits these to the relevant government ministry or department affected by the decision. There is no wide publication or dissemination of the findings and recommendations broadly within government beyond the concerned departments.

While several recommendations have been made, few steps have been taken to give effect to these. For example in the case of *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe*,<sup>25</sup> the African Commission in 2009 found Zimbabwe to be in violation of articles 1, 2, 3, 7(1)(a) and (b), 9, 12(4) and 26 of the African Charter. The African Commission recommended amongst other things that the government of Zimbabwe should rescind the deportation orders against Mr Andrew Meldrum, and ensure that the Supreme Court finalises the determination of the application by Mr Meldrum on the denial of accreditation as a journalist. However, none of these findings and

recommendations has been implemented.

In the case of *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe*,<sup>26</sup> the African Commission found the state to be in violation of articles 9(2), 14 and 15 of the African Charter and recommended the government of Zimbabwe to provide adequate compensation to the complainants for losses incurred due to the violations. In another case, *Scanlen & Holderness*,<sup>27</sup> the African Commission found Zimbabwe to be in violation of several articles of the African Charter and recommended that the government take several actions amongst them being (i) repealing sections 79 and 80 of the Access to Information and Protection of Privacy Act (AIPPA); (ii) decriminalising offenses relating to accreditation and the practice of journalism; (iii) adopting legislation providing a framework for self-regulation by journalists; and (iv) bringing AIPPA in line with article 9 of the African Charter and other principles and international human rights instruments.

In the fourth case of *Zimbabwe Human Rights NGO Forum v Zimbabwe*,<sup>28</sup> the African Commission held that Zimbabwe was in violation of articles 1 and 7(1) of the African Charter and recommended the establishment of a commission of inquiry to investigate the causes of the violence which took place from February to June 2000. It further recommended bringing those responsible for the violence to justice, and identifying victims of the violence in order to provide them with just and adequate compensation. The author is aware that the government of Zimbabwe neither

25 Communication 294/2004. *Article 19 and Others v Zimbabwe* (2010) AHRLR 126 (ACHPR 2010).

26 Communication 284/2003.

27 Communication 297/2005.

28 Communication 245/2002.



established a commission of inquiry into the violence nor took other steps to redress the human rights violations that took place during that time. In fact, an amnesty law for perpetrators of the political violence which was passed in 2000 remains in force in the form of Clemency Order 1 of 2000.

### **13 Special mechanisms and promotional visits of African Commission**

In 2002, the African Commission sent a special fact finding mission to Zimbabwe to investigate the cases of human rights abuses after the holding of Presidential elections which were marred with high levels of political violence.<sup>29</sup> The purpose of the mission was to gather information on the state of human rights in Zimbabwe. The Mission report noted the flurry of repressive legislation such as the Public Order and Security Act of 2002 (POSA) and the Access to Information and the Protection of Privacy Act of 2002 (AIPPA), both of which stifled democratic space and freedom of expression in Zimbabwe. Based on these and other observations on the rule of law and independence of the judiciary, the Mission report made several recommendations to the government of Zimbabwe.<sup>30</sup>

Since the Mission, Zimbabwe has taken some measures to restore independence of the judiciary and respect for the rule of law, though these measures have not been adequate to instil public and stakeholder confidence at national, regional and international levels. In 2006, the Minister of Justice, Chief Justice of Zimbabwe and other senior judges of the Supreme and High Courts met with members of civil society including the LSZ for the first time since 2000 to discuss issues of the rule of law and the impasse between the civil society and the judiciary. Between 2006 and 2007, the Judiciary and the Ministry of Justice were part of a UNDP – Zimbabwe – lead process to assess the capacity needs of the Judiciary in Zimbabwe and an analysis of the issues of rule of law and independence of the judiciary. Government showed goodwill in agreeing to table and discuss these issues with stakeholders. Though this was a positive response to the recommendations of the Mission and other regional and international bodies, other challenges in this area have continued, such as the selective application of law which saw many opposition party leaders arrested, detained and tried. Political gatherings of the opposition party were not allowed under POSA and were often disrupted.

Through Constitutional Amendment 19 of 2009, Zimbabwe ultimately established two significant independent bodies which are the Zimbabwe Electoral Commission and the ZHRC. This came almost three years after the recommendations of the fact finding mission and in the context of further highly contested elections of 2008, the creation of the Unity government and increasing

29 The Fact Finding Mission was from 24-28 June 2002 after a decision was made by the African Commission to undertake this mission at its 29th Ordinary Session which was held in Tripoli in April of the same year.

30 Working on national dialogue and reconciliation across the political divides; Creation of an environment conducive for democracy and human rights through repealing of the AIPPA and POSA and abiding by court judgments; Restoring rule of law and respect of independence of the judiciary; Establishment of an independent human rights body and an Independent Electoral Commission in the place of the Electoral Supervisory Commission, which was viewed as highly compromised;

Zimbabwe was behind in terms of its reporting obligations and was reminded to submit outstanding reports under the African Charter.

national, regional and international pressure for legislative and institutional reform.

The increased cases of human rights abuses and violations in Zimbabwe especially between the period 2000 and 2008 attracted both international and regional attention. Civil society in Zimbabwe worked hard to highlight these abuses and bring attention as well as remedies. One of the forums and mechanisms that was widely utilised was the African Commission. As a result of this, the African Commission attempted during this period to engage its special mechanisms on Zimbabwe, though with limited success. For example, after operation *Murambatsvina* (a government clean-up exercise to rid the major cities of illegal vendors, buildings and squatters amongst others) in June 2005, the African Commission's Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons, Commissioner Nyanduga issued a statement, expressing his concerns on the operation. He urgently appeal to the government of Zimbabwe

To halt the eviction and demolition exercise, and assist the victims of the operation, by providing them with humanitarian assistance in the form of temporary shelter, accommodation, water, food, medicines and other forms of assistance, while looking for an amicable solution to the illegal settlements and squatter problem in a manner that upholds the dignity of the individuals and the families, which have become victims of the ... operations.<sup>31</sup>

As a follow up to this action, the Special Rapporteur was then requested by the African Commission to undertake a

31 Nineteenth activity report of the African Commission (2005) 12 [http://www.chr.up.ac.za/test/images/files/documents/ahrd/theme02/african\\_commission\\_19th\\_activity\\_report.pdf](http://www.chr.up.ac.za/test/images/files/documents/ahrd/theme02/african_commission_19th_activity_report.pdf) (accessed 1 October 2015).

Fact-finding Mission to Zimbabwe between 30 June and 4 July 2005. This Mission was not carried out after failure of negotiations with the Zimbabwe government. The Ministry of Foreign Affairs in Zimbabwe requested the Special Rapporteur to leave the country.<sup>32</sup>

In December 2005, the African Commission passed a resolution on the human rights situation in Zimbabwe urging the government of Zimbabwe to implement the recommendations in the July 2005 Report of the UN Special Envoy on Human Settlement Issues, in particular to ensure full and unimpeded access for the provision of aid and protection to the victims of the forced evictions and demolitions by impartial national and international humanitarian agencies and human rights monitors, and to ensure that those responsible for the violations are brought to justice without delay. The 2005 resolution also called on the government of Zimbabwe to respect human rights by repealing or amending repressive legislation, such as the Access to Information and Protection of Privacy Act, the Broadcasting Services Act and the Public Order and Security Act.

In June of 2007, the Special Rapporteur of the African Commission on Human Rights Defenders in Africa, Ms Reine Alapini-Gansou issued a press statement in which she expressed particular concern around the alleged acts of violence and harassment of human rights defenders in Zimbabwe. Her press statement was in particular reference to the unlawful arrest and detention of members of the Women of Zimbabwe Arise grouping. The Special Rapporteur urged the Zimbabwean

32 As above.

authorities to take all necessary measures to guarantee the freedom of human rights defenders in Zimbabwe to carry out their work as human rights defenders.

In addition to these special mechanisms' engagements, the African Commission has issued several resolutions on the human rights situation in Zimbabwe. The following are only a few examples. In and around the period of the highly contested presidential election in Zimbabwe in 2008, the Commission passed statements and resolutions expressing its concerns over the human rights violations occasioned by the violence that followed the March 2008 elections.<sup>33</sup> Prior to these highly contested elections, the Commission passed a resolution in which it urged the government to ensure the holding of a free and fair election.<sup>34</sup>

#### **14 Factors that may enhance or impede the impact of the African Charter, the Maputo Protocol and the African Commission**

Many of the factors affecting the impact of the two instruments as well as the African Commission have been discussed in other parts of this report. As stated earlier, many of the obligations contained in the African Charter have been domesticated through the Bill of Rights of the 2013 Constitution except the right to asylum. By and large, the government still struggles in ensuring that all citizens enjoy civil and politi-

cal rights as provided for in the 2013 Constitution. The human rights situation in the country has not improved since the record low attained at the turn of the millennium. Freedoms such as expression including artistic expression and association continue to be muzzled by repressive laws that criminalise utterances regarded as undermining government, police or the President's authority.

The adoption of the Maputo Protocol in the National Gender Policy heralds improvement in the impact of this instrument. Women's rights are regarded as the least contentious in Zimbabwe; hence their realisation is often supported even by politicians. On their part, women's rights based organisations as well as UN Women continue to provide technical and in some cases financial support to the government to meet its obligations regarding gender mainstreaming in the work place as well as society at large.

On its part, the African Commission suffers from the general negative attitude of government towards international institutions. This attitude of resenting international oversight is reflected in the government of Zimbabwe's treatment of the SADC Tribunal and its unwillingness to ratify the Protocol on the African Court. It then follows that unless this attitude changes, it would be critical for interventions to utilise other options of engaging the state to ensure that provisions of the African Charter and Maputo Protocol are given effect in Zimbabwe.

#### **15 Conclusion**

By and large, the African Charter and Maputo Protocol are popular international human rights instruments in

33 See African Commission Resolution 132 adopted at the 43rd ordinary session of the African Commission, Ezulwini, Swaziland; 7-22 May 2008.

34 See African Commission Resolution 128 adopted at the 42nd ordinary session of the African Commission in Brazzaville, Republic of Congo, 2007.

Zimbabwe. Their impact is low but the instruments continue to take root in the legal system through the efforts of influential partners such as development agencies and civil society organisations. The 2013 Constitution is a timely contribution to this process, to the extent that it provides for a robust approach to human rights and makes radical changes to the legal framework. The Bill of Rights is central to all decision-making and legislative interpretation. Gender mainstreaming in all spheres of life is now a national objective. All these changes can only result in better protection of human rights through the African Charter and Maputo Protocol.

# CONCLUSION, SUMMARY OF FINDINGS AND RECOMMENDATIONS

*Victor Oluwasina Ayeni\**

## 1 Introduction

This book is a modest contribution of the Centre for Human Rights, through its alumni network, to the debate on the domestic impact of regional human rights treaties in Africa. Given the sheer number of regional human rights instruments in Africa and the practical and logistical challenges of undertaking a continent-wide study, the book assesses the impact and effectiveness of only two regional human rights instruments – the African Charter and the Maputo Protocol – in 17 African countries, namely, Burkina Faso, Cameroon, Côte d'Ivoire, Ethiopia, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda and Zimbabwe.

Evidence obtained from the 17 countries suggests that the African Charter and the Maputo Protocol have had a modest yet significant impact in each of the selected countries. The two instruments, however, do not have the same

effect in all states. Rather, their effects have been conditional on a combination of factors, including state level characteristics, the nature of the treaty and the level of interaction, persuasion and pressure applied on state actors by domestic and international compliance partnerships.

With regard to the theory of compliance with international law that best explains the domestic effects of the African Charter and Maputo Protocol in the 17 selected states, evidence from the country chapters tends towards modern constructivism, a synthesis of traditional normative theory and rational choice models.<sup>1</sup> Each of the studied states demonstrates a normative sense of obligation to abide by the provisions of the African Charter and the Maputo Protocol yet some willingness to exploit various instrumental and cost-saving options to comply as little as possible.<sup>2</sup> In addition to material inducements, normative considerations – such as the persuasive power of human rights obli-

\* LLB (Akungba-Akoko), BL (Abuja), LLM HRDA (Pretoria), doctoral candidate, Centre for Human Rights, University of Pretoria. Email: victorayeni7@gmail.com.

1 See ES Bates 'Sophisticated constructivism in human rights compliance theory' (2015) 25 *European Journal of International Law* 1170.

2 See A von Staden 'Rational choice within normative constraints: compliance by liberal democracies with the judgments of the European Court of Human Rights' *SSRN eLibrary*, 6 February 2012.

gations imposed by the two instruments, repeated transnational interactions, argumentation and continuous exposure to international human rights norms – sometimes play a significant role in cases where effect was given to provisions of the African Charter and the Maputo Protocol in the selected states.

The evidence in this book supports at least three major theories of compliance with international law: the domestic politics theory, transnational legal process theory and the ‘spiral model of human rights change’ as developed by Risse, Ropp and Sikkink.<sup>3</sup> Domestic actors – policy makers, legislators, judges and domestic civil society organizations – are the primary drivers of impact of the African Charter and the Maputo Protocol in all the selected states. Repeated interaction between state and non-state actors in domestic and international fora is responsible for heightened treaty impact in all the 17 studied states.

Evidence from most of the country chapters also reveals that the African Charter and the Maputo Protocol have their greatest impact during political transition, especially in new democracies. The findings of this study are also consistent with the view of Murray and Long that human rights treaties will have their most significant impact if they have ‘added value’,<sup>4</sup> that is, if recourse to them will provide a remedy that cannot otherwise be realised through a domestic human rights framework.

One of the major findings of this study is that it is insufficient to create awareness about the African Charter or the Maputo Protocol or to translate provisions of these instruments into local languages. The African Charter and the Maputo Protocol have maximal impact when policy makers, legislators, judges and members of civil society organisations are aware of the jurisprudence of the African Commission and other human rights bodies in respect of these instruments and know how to demand and apply relevant provisions in their own contexts. The jurisprudence of monitoring bodies breathes life into human rights provisions.

Findings from the various country chapters point to at least one conclusion – that awareness is central to improving the impact of the African Charter and the Maputo Protocol at the domestic level. More than anything else, ‘bringing’ the African Charter or the Maputo Protocol ‘home’ requires taking it to the people for whose benefit the instruments were adopted. It is not all right to complain that governments are not implementing decisions of the African Commission when the people who have the power to challenge governments are not empowered with the requisite knowledge and skill to do so. The gap between the promise of the African Charter and the Maputo Protocol on the one hand and government’s performance on the other hand will be filled only through knowledge-based and skill-driven awareness programmes. Awareness has the ability to put international human rights on ‘auto-pilot:’ when citizens are well-informed, they will go to parliament to domesticate treaties and incorporate treaties in judicial decisions.

One of the country chapters reports an instance where a member of the

3 T Risse, SC Ropp & K Sikkink *The persistent power of human rights* (2013); T Risse, SC Ropp & K Sikkink *The power of human rights* (1999).

4 See R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples’ Rights* (2015) 10-26; BA Simmons *Mobilising for human rights* (2009) 125.

Constitution Review Committee in Sierra Leone admitted ignorance of the African Charter and the Maputo Protocol prior to being appointed to the committee. In another instance, a judge in Ethiopia also admitted to not having used the African Charter in over two decades of judicial service. These are not isolated examples; they are a representative sample of the level of awareness of the African Charter, Maputo Protocol and jurisprudence of the African Commission. However, these instruments and jurisprudence are popular with civil society organisations working in the field of human rights and also, although less so, among policy makers, legislators and ordinary citizens.

In the years to come, the judiciary remains the most important state institution for the internalisation of human rights norms. The chances of getting parliaments in every country to directly domesticate each and every human rights instrument is quite slim, and the probative value of a blanket 'constitutional' domestication (as is the case in Kenya and many monist states) has not been tested empirically. In order to put the judiciary in a position where it can freely internalise international human rights norms, there is a need for African countries to borrow a leaf from South Africa and Côte d'Ivoire. Following the example of South Africa, national constitutions in every country in Africa should impose an obligation on courts to consider international law when interpreting bills of rights. In Côte d'Ivoire, ratified international treaties have a higher status than the constitution. It is also recommended that courts in Africa should revisit the supremacy arguments earlier advanced by Nigerian courts. Duly ratified treaties should be superior to domestic laws, and principles of international human rights law

should not remain subordinate to national constitutions. The judiciary, not parliament, is the most likely place for these transformative thoughts to begin.

## **2 Summary of study findings**

### **(a) Ratification**

In all the countries studied, the President is responsible for negotiating, signing and ratifying international human rights treaties on behalf of the state. Ratification of international treaties is a two-stage process. It has both external and internal dimensions.<sup>5</sup> While the internal dimension depends on national processes, the international dimension involves the transmission of the instrument of ratification.<sup>6</sup> In some countries, such as Nigeria and Lesotho, the processes are merged into one and carried out by the President or any other officer duly designated for that purpose.<sup>7</sup> In all monist states, and in some dualist states, such as Ethiopia, Mauritius, South Africa, Tanzania, Zimbabwe and Swaziland, external ratification by the President must be preceded by an 'internal process of ratification' by parliament. In other words, ratification of international treaties must be approved by parliament before the instrument of ratification is transmitted to the relevant international organisation.

There is wisdom in involving parliament in the process of treaty ratification. The traditional role of the executive arm of government is to implement laws

5 F Viljoen *International human rights law in Africa* (2012) 24.

6 As above.

7 It must be noted that the Nigerian government is currently reviewing her laws to involve the parliament formally in the process of treaty ratification.

while a parliament makes law. It would amount to usurpation of legislative function if 'rule-making' treaties, ratified solely by the executive arm of government, are made part of the national law without passing through legislative process. In order to make treaties directly applicable at the domestic level, it is fundamental that parliament should be involved prior to ratification. This is the only legitimate way to break the dualist tradition.

In all Francophone countries selected for the study, parliamentary internal ratification processes are complemented by a compatibility analysis carried out by the apex court before the executive arm of government can proceed with external ratification. For example, a compatibility study was carried out in Burkina Faso prior to ratification of the Maputo Protocol in 2006. A process close to a compatibility study was undertaken prior to ratification of the Maputo Protocol in South Africa.<sup>8</sup>

The official reason for ratification of the African Charter was not publicly available in all the countries studied. However, what is clear is that African states, most of which were under dictatorial regimes at the time, ratified the African Charter and other international human rights instruments as a result of international pressure demanding domestic reform.<sup>9</sup> Since the adoption of the Maputo Protocol is more recent, a few governments have publicly provided their reasons for ratifying the Protocol. For instance, the government of Burkina Faso claimed it ratified the Maputo Protocol 'to advance women's rights'.

8 <https://pmg.org.za/committee-meeting/10181/> (accessed 31 August 2015).

9 See KO Kufuor *The African human rights system: Origins and evolution* (2010).

**(b) Designation of government focal points**

The African Commission, at its 13th ordinary session, recommended to the OAU Assembly of Heads of States and Governments (now the AU Assembly) that all state parties to the African Charter designate high ranking officials in their respective countries to act as Focal Points in the relations between the African Commission and state parties.<sup>10</sup> The OAU Assembly approved this recommendation at its 29th ordinary session in 1993,<sup>11</sup> and since then, several state parties have designated focal points. The focal point for the African Charter in the majority of countries studied is the Ministry of Justice, while the Ministry of Women's Affairs is usually responsible for the Maputo Protocol. However, in Burkina Faso, the Ministry of Justice is responsible for both the Charter and the Protocol. In Cameroon, Ethiopia and Ghana, the Ministry of Foreign Affairs is the focal point for both instruments while in Côte d'Ivoire, a fully-fledged ministry has been dedicated for human rights. This ministry handles communication between Côte d'Ivoire and the African Commission.

10 Sixth Activity Report of the African Commission (1992-1993) 105-106; See VO Ayeni 'Domestic impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: a case study of Nigeria' unpublished LLM Dissertation, University of Pretoria 2011 23.

11 Resolution on the African Commission on Human and Peoples' Rights, Twenty-Ninth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, 28-30 June 1993, Cairo, Egypt available at <http://www1.umn.edu/humanrts/africa/resafchar29th.html> (accessed 28 November 2015).



**(c) Domestication**

Domestication of international human rights treaties may take place at two levels: directly through incorporation or indirectly through transformation.<sup>12</sup> While incorporation is the wholesale enactment of the provisions of a treaty, usually with specific reference to the treaty being incorporated,<sup>13</sup> transformation occurs where treaty norms influence a legislative enactment or amendment without explicit reference to the treaty.<sup>14</sup>

Nigeria is the only Anglophone state under study to have directly domesticated the African Charter.<sup>15</sup> The African Charter and the Maputo Protocol are part of the domestic law in Burkina Faso, Cameroon, Côte d'Ivoire and Kenya. Technically, these countries do not require domestication for duly ratified international treaties to be applicable within their territories. Although the constitutions of the four countries listed above stipulate the monist approach to domestic application of international treaty standards, a deep culture of dualism prevails in practice in those countries.

With the exception of Kenya, and to some extent, Nigeria, all dualist countries in the study followed the path of indirect domestication with regard to the African Charter and the Maputo Protocol. Indirect domestication, otherwise referred to as 'transformation', occurs where treaty norms influence a legislative enactment or amendment without explicit reference to the treaty. The constitutions of most of the studied

countries guarantee basic civil and political rights. In most cases, constitutional guarantees are co-extensive with provisions of the African Charter on civil and political rights, although some notable inconsistencies exist. For instance, the Constitution of Lesotho does not expressly recognise the right to dignity. In Mauritius, there is no constitutional protection of the right to integrity and security of the person and freedom from cruel punishment, among others. Only South Africa and Kenya have justiciable socio-economic rights in their Bills of Rights. In Nigeria, Lesotho, and Sierra Leone, socio-economic rights are under the Directive Principles of State Policy. The rights of peoples to self-determination, development, culture and language are constitutionally recognised and guaranteed only in Ethiopia.

In Côte d'Ivoire, the African Charter, Maputo Protocol and other duly ratified international treaties have a higher status than the constitution. Treaties have a status higher than ordinary legislation, though equal to the constitution, in Ethiopia. In Nigeria, duly ratified treaties are superior to ordinary legislation but lower in status than the constitution. In South Africa, national laws are superior to international law. An argument was made in respect of Nigeria where the author noted that in a limited number of cases, it is possible for provisions of duly ratified international treaties to be directly applicable in Nigeria prior to domestication.

**(d) Legislative reform and adoption**

No compatibility studies were reported to have been carried out in any country prior to adoption of the African Charter. However, more recently, laws in Burkina Faso, Cameroon and Côte d'Ivoire

12 J James-Eluyode 'Enforcement of international humanitarian law in Nigeria' (2003) 3 *African Human Rights Law Journal* 266.

13 Viljoen (n 4 above) 536.

14 As above.

15 Viljoen (n 4 above) 529.

require the apex courts of those countries to undertake a compatibility analysis before a treaty can be ratified. As such, the constitutional court of Burkina Faso issued a legal opinion in 2006 confirming that the Maputo Protocol was in conformity with the country's constitution. A process close to a compatibility study was undertaken prior to ratification of the Maputo Protocol in South Africa.<sup>16</sup>

Legislative reform to give effect to the African Charter and the Maputo Protocol are mostly implicit. However, direct causal relationships were established in a number of instances between the African Charter and the Maputo Protocol on the one hand and some domestic legislative and policy reform on the other. For instance, in Nigeria, decisions of the African Commission were used by civil society organisations and other activist forces to pressure government to repeal or amend some military decrees which violated provisions of the African Charter. A letter written to the Speaker of the Burkinabe Parliament by Salamata Sawadogo, a Burkinabe who was then the Chairperson of the African Commission, was reported to have played a significant advocacy role in the adoption of legislation allocating gender-based quotas for parliamentary and local elections in Burkina Faso.

Paragraph 8 of the Preamble to the Constitution of Burkina Faso expressly refers to the African Charter as an integral part of the constitution. During the review process that led to the adoption of the Kenyan Constitution in 2010, the African Charter is reported as featuring prominently in discussions on the Bill of

Rights. For instance, the provisions of the African Charter which relate to preservation of family values were cited often.

The provisions of the African Charter and the Maputo Protocol did not influence the constitution or subsequent amendments, to date, in South Africa. None of the seventeen Constitutional Amendment Acts adopted since the 1996 Constitution came into force have altered the provisions of the Bill of Rights. However, during public hearings on the Women Empowerment and Gender Equality Bill in 2014, civil society organisations in South Africa requested that the Maputo Protocol be included under the bill's objectives.<sup>17</sup> Equality provisions of the Maputo Protocol were also invoked during public hearings on the Traditional Courts Bill, in September 2012, to challenge certain discriminatory provisions.<sup>18</sup>

In The Gambia, the long title of the Women's Act states that it was enacted to incorporate and give effect to the provisions of CEDAW and the Maputo Protocol.<sup>19</sup> There is also strong evidence pointing to the fact that the Legal Aid Act of The Gambia was enacted to give effect to the African Charter. The Maputo Protocol played a crucial role during the formulation of gender justice laws in Malawi. A Bill to domesticate articles 1-24 of the Maputo Protocol in Nigeria was being debated

16 <https://pmg.org.za/committee-meeting/10181/> (accessed 31 August 2015).

17 <https://pmg.org.za/taled-committee-report/2202/> (accessed 31 August 2015). See also <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/140129cals.pdf> (accessed 13 September 2015).

18 Report of the Select Committee on Security and Constitutional Development on the Traditional Courts Bill (2012); <https://pmg.org.za/taled-committee-report/286/> (accessed 31 August 2015).

19 See Long Title, Women's Act of 2010.

in parliament as at the time of compiling this report.<sup>20</sup>

**(e) Policy reform**

While a number of national policies have been adopted and give effect to the provisions of the African Charter and the Maputo Protocol across all 17 states under study, these policies seldom reference either the African Charter or the Maputo Protocol specifically. However, in Nigeria and Zimbabwe, direct influence of the African Charter is noted in the National Action Plan for the Promotion and Protection of Human Rights as well as in the National Gender Policy. The Nigerian National Action Plan and Gender Policy make reference to the African Charter and the Maputo Protocol several times. Most of the countries studied have policies on poverty reduction and HIV/AIDS prevention and treatment, among others. Côte d'Ivoire went as far as appointing a government minister for HIV/AIDS. The Draft White Paper on Remand Detention Management of the Department of Correctional Services in South Africa makes reference to articles 4, 5, 6 and 7 of the African Charter.<sup>21</sup>

The Ministry of Public Health and Sanitation in Kenya is reported to have used the report of the African Commission's Working Group on Indigenous

Populations and Communities<sup>22</sup> to develop strategies for the public health needs of marginalised and vulnerable groups in Kenya. The African Charter is also reported to have played a role in the formulation of the National HIV/AIDS Policy in Malawi. Similarly, the National Gender and Empowerment Policy Framework of The Gambia expressly referenced the Maputo Protocol and the National Gender Policy of Swaziland also articulates that its contents were guided by provisions of the African Charter and Maputo Protocol.<sup>23</sup>

**(f) Judicial decisions**

Researchers were unable to find references to the African Charter or Maputo Protocol in decisions of domestic courts in Cameroon, Côte d'Ivoire, Burkina Faso and Mauritius. The jurisprudence of the African Commission has also not been used or referred to in any court decision in Francophone Africa. The African Charter, Maputo Protocol and jurisprudence of the African Commission have been most impactful on judicial activities in Anglophone Africa, particularly, Ghana, Kenya and Nigeria.

Courts in Nigeria and Kenya have directly invoked article 24 of the African Charter to protect citizens against environmental pollution. Kenyan courts have also made reference to the African Commission's Guidelines on Fair Trial as an authoritative interpretation of the obligations of Kenya under the African

20 See Nigeria's Fourth Periodic Country Report: 2008-2010 on the implementation of the African Charter on Human and Peoples' Rights in Nigeria (2011) 5; Nigeria's Fifth Periodic Country Report: 2011-2014 on the implementation of the African Charter on Human and Peoples' Rights in Nigeria (2014) ii & 2.

21 Department of Correctional Services 'Draft White Paper on Remand Detention Management in South Africa' 2013. <http://www.dcs.gov.za/docs/landing/White%20paper%20on%20Remand%20Detention%20in%20SA%20Draft%20Final.pdf> (accessed 13 September 2015).

22 African Commission 'Report of the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities'.

23 [http://www.undp.org/content/dam/swaziland/docs/publications/UNDP\\_SZ\\_Gender\\_SwazilandNationalGenderPolicy2010.pdf](http://www.undp.org/content/dam/swaziland/docs/publications/UNDP_SZ_Gender_SwazilandNationalGenderPolicy2010.pdf) (accessed 25 August 2105).

Charter.<sup>24</sup> In *Rono v Rono*, the Court of Appeal of Kenya held that customary laws of intestate succession, which disinherited women, contravene article 18 of the African Charter. In Nigeria, the African Charter has been referenced in more than 70 decided cases, often<sup>25</sup> as a basis for remedy, interpretive guidance or as a legal source of legitimacy.

The South African Constitutional Court in *National Commissioner of the South African Police Service v Southern African Litigation Centre and Others*,<sup>26</sup> cited article 5 of the African Charter and the African Commission's interpretation of that article in the case of *Huri-Laws v Nigeria*.<sup>27</sup> South African courts have relied most heavily on the African Charter's provisions relating to rights and duties in the context of the family. In part, this is because the South African Constitution has no provisions on the right to freely marry and raise a family.<sup>28</sup> It is, however, unfortunate that in most of the landmark socio-economic rights decisions handed down in South Africa, such as *Grootboom*,<sup>29</sup> *Treatment*

*Action Campaign*<sup>30</sup> and *Mazibuko*,<sup>31</sup> the Constitutional Court failed to cite relevant provisions of the African Charter or the socio-economic rights jurisprudence of the African Commission.<sup>32</sup> South African courts have a duty to consider international law, including African regional human rights instruments, when interpreting the Bill of Rights.

In the Swaziland case of *Fakudze v The Director of Public Prosecutions*,<sup>33</sup> the domestic court referred to the Principles and Guidelines on the Right to a Fair Trial, adopted by the African Commission, and relied on it as an interpretative guide. While interpreting the right to legal representation in the case of *DPP v Sole*,<sup>34</sup> a Lesotho court made reference to article 7(1) of the African Charter as interpretive aid.<sup>35</sup> In *Judicial Officers Association of Lesotho v The Prime Minister*,<sup>36</sup> a Lesotho court referred to article 7 and 26 of the African Charter. While interpreting the right to freedom of expression in *Ousman Sabally v IGP*, The Gambian Supreme Court referred to the decision of the African Commission in *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*.<sup>37</sup>

Unlike the African Charter, the Maputo Protocol has not enjoyed a great deal of judicial use at the domestic level. This perhaps is due to the fact that the Maputo Protocol is relatively recent and some state parties to the African

24 African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa' [http://www.achpr.org/english/declarations/Guidelines\\_Trial\\_en.html](http://www.achpr.org/english/declarations/Guidelines_Trial_en.html) (accessed 10 October 2011).

25 The list of these cases is on file with the author.

26 [2014] ZACC 30; 2015 (1) SA 315 (CC).

27 Communication 225/98, *HURILAWS v Nigeria 13th Annual Activity Report* para 39.

28 See the South African chapter. See also O Motlhasedi & L du Toit 'The impact of the African Charter and the Maputo Protocol in South Africa' in this book. See also *Dawood and Another v Minister of Home Affairs and Others* consolidated with *Shalabi and Another v Minister of Home Affairs and Others* and *Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 at para 29; *Volks NO v Robinson and Others* and most recently, in *DE v RH* [2005] ZACC 2 para 82.

29 See the South African chapter. See also *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC).

30 2002 (5) SA 721 (CC).

31 2010 (4) SA 55 (CC).

32 See Motlhasedi & Toit (n 28 above).

33 (237/08) [2008] SZHC 161 [http://www.swazilii.org/files/sz/judgment/high-court/2008/161/SZHC\\_237\\_2008.pdf](http://www.swazilii.org/files/sz/judgment/high-court/2008/161/SZHC_237_2008.pdf) (accessed 8 August 2008).

34 [2001] LSHC 101 (unreported).

35 See also *Judicial Officers Association of Lesotho v The Prime Minister* [2006] LSHC.

36 [2006] LSHC.

37 (2000) AHRLR 227 (ACHPR 1999).

Charter are yet to ratify the Maputo Protocol. However, in *Kishindo v Kishindo*,<sup>38</sup> a Malawian court referred to article 4 of the Maputo Protocol when distributing marital property following the dissolution of a marriage. In the Kenyan case of *KELIN & Others v Medicins Sans Frontiere and Others*, petitioners cited the provisions of the African Charter and the Maputo Protocol among other human rights instruments to argue against the forced and coerced sterilization of women living with HIV.<sup>39</sup> The Court of Appeal of Lesotho in the celebrated case of *Molefi Ts'epe v The Independent Electoral Commission and Others* also referred to several undomesticated treaties, including the Maputo Protocol and article 18(4) of the African Charter.<sup>40</sup> In most cases, domestic courts cite the Maputo Protocol as one of the numerous human rights instruments protecting a particular women's right.

**(g) State reporting**

Only four countries – Burkina Faso, Ethiopia, Kenya and Nigeria – out of the 17 countries selected for this study are up to date in their reporting obligation under the African Charter.<sup>41</sup> The other 13 countries have the following number of overdue reports: Cameroon (1), Côte d'Ivoire (1), The Gambia (11), Ghana (9), Lesotho (7), Malawi (1), Mauritius (4), Sierra Leone (1), South Africa (5), Swaziland (7), Tanzania (4),

Uganda (1) and Zimbabwe (4).<sup>42</sup> To date, Malawi is the only country to have submitted a specific report in the appropriate form (Part B) on the Maputo Protocol.

In most countries, the Ministry of Justice is responsible for preparing state report, although the ministry of foreign affairs (MoFA), women affairs and other relevant government departments are sometimes involved. In Mauritius, the process is led by the Human Rights Unit in the Office of the Prime Minister but the final report is submitted by the MoFA. In Burkina Faso, the state report is compiled by the Ministry of Justice and Human Rights but the actual submission and presentation is done by the MoFA. There is limited civil society involvement in the reporting process in Cameroon and Mauritius.

Generally, concluding observations of the African Commission are not widely disseminated by states, except in Kenya where it was reported that the government usually organises 'dissemination workshops' after receiving copies of concluding observations from the African Commission. The government of Zimbabwe ratified the Maputo Protocol following a concluding observation of the African Commission.

One of the clearest demonstrations of the potential impact of the state reporting procedure is documented in the Côte d'Ivoire chapter. The country hosted the 52nd ordinary session of the African Commission in 2012 where it submitted its first ever state report under the African Charter. In its concluding observations, the African Commission requested the government of Côte d'Ivoire to: (i) first, ratify the following

38 [2014] MWHC 2.

39 Constitutional Petition No 605 of 2014. See also *Muigai v John Bosco Kariuki & Another* (2014).

40 See the South African chapter. See also *Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LeCA 2005). See also *Security Lesotho v Moepa Constitutional Case No 12 of 2014*.

41 African Commission 'State reporting' available at <http://www.achpr.org/states/> (accessed 14 December 2015).

42 As above.

human rights instruments: the Convention for the Protection and Assistance of Internally Displaced Persons in Africa; the African Charter on Democracy, Elections and Good Governance; and the Protocol to International Covenant on Civil and Political Rights (ICCPR) on the abolition of death penalty; and (ii) secondly, make the article 34 (6) Declaration pursuant to the Protocol to the African Charter on the Establishment of the African Court. The African Commission also used the platform of making concluding observations to spotlight the lack of specific legislation protecting human rights defenders, the presence of discriminatory provisions against women in national legislation, the presence of harmful traditional practices that affect women, and the low level of resources dedicated to implementation of Resolution 1325 on women, peace and security, among others.

It is interesting to note that subsequent to these recommendations, the government of Côte d'Ivoire made the article 34(6) Declaration. The Declaration was deposited on 23 July 2013. In June 2014, the country adopted Law 2014-388 on the protection and promotion of human rights defenders. It also adopted a National Action Plan on UN Security Council Resolution 1325 on women, peace and security. It is also believed that the visits of Commissioner Reine Alapini-Gansou to Côte d'Ivoire, in 2014 and 2015, as Special Rapporteur on Human Rights Defenders, played a role in the adoption of the law on human rights defenders in Côte d'Ivoire.<sup>43</sup>

43 <http://ci-ddh.org/2015/01/visite-de-la-rapporteur-spciale-des-defenseurs-des-droits-de-l'homme-aupres-de-la-cadh/> (accessed 13 September 2015).

The evidence in this book also shows that states tend to give greater priority to reporting under the UN than the African human rights system. This is very clear in the case of The Gambia, which has submitted up to date state reports with some human rights mechanisms but whose most recent report to the African Commission was in 1994. Reasons for delay in submitting state reports to the African Commission include lack of competent personnel, conflicting reporting obligations and political instability.

#### *(h) Individual communications*

From 1987, when the African Commission was inaugurated, to November 2015, the African Commission has found violations in 83 communications, involving 27 states that are party to the African Charter.<sup>44</sup> Nigeria has the highest number of violation cases followed by Cameroon and Zimbabwe. The African Commission found violations of the African Charter in the following number of communications relating to the following countries selected for this study: Burkina Faso (1), Cameroon (6), Ethiopia (1), The Gambia (2), Ghana (2), Kenya (3), Malawi (2), Nigeria (20), Sierra Leone (1), Swaziland (1), Uganda

44 See African Commission on Human and People's Rights, 'Communications', available at <http://www.achpr.org/communications/> (accessed 26 August 2015); IHRDA, *African human rights case law analyser* <http://caselaw.ihrda.org/body/acmhpr/> (accessed 26 August 2015). In its 32nd and 33rd (joint) activity report adopted by the Executive Council of the AU in January 2013, the Commission reported that since inception, it has handled a total of 426 Communications and concluded 210 Communications. As at December 2014, the Commission had 89 pending communications. See Statement by the Chairperson of the African Commission on Human and Peoples' Rights on the human rights situation in Africa (28th Session of The United Nations Human Rights Council), available at <http://www.achpr.org/news/2015/04/d171> (accessed 8 September 2015).

(2) and Zimbabwe (6).<sup>45</sup> So far, the African Commission is yet to make a finding of violation against Côte d'Ivoire, Lesotho, Mauritius, South Africa and Tanzania, despite allegations of serious human rights violations taking place in these countries.

The African Court has found two countries, namely Burkina Faso and Tanzania, to be in violation of the African Charter in two cases respectively. Nigeria and The Gambia have also been found to be in violation of the African Charter and other international human rights instruments by the ECOWAS Community Court of Justice (ECCJ) in a total of eight cases: five in the case of Nigeria and three in the case of The Gambia.<sup>46</sup> Measures to implement these decisions are few and far between. Some cases of full and partial compliance were however recorded in Cameroon, The Gambia, Kenya and Nigeria.

There has been a noticeable decrease in terms of the number of communications submitted against Nigeria since the country returned to civil rule in 1999. For instance, information on the website of the African Commission shows that only one communication has been submitted or decided against Nigeria since 1999.<sup>47</sup> During this period however, there has been a rise in the number of communi-

cations submitted against this country at the ECCJ.

**(i) *Awareness and use of the African Charter and the Maputo Protocol by civil society, practising lawyers, academics and NHRIs***

One challenge identified in all the reports is the low level of awareness and use of the African Charter and the Maputo Protocol amongst lawyers and domestic judges. Lawyers generally do not consider the African Charter or the Maputo Protocol as a main source of reference in their submissions. Even in Nigeria and Kenya, where these two instruments are directly applicable, they are most often than not cited only as subsidiary sources. One interesting example is given in the Ethiopia chapter, in which a judge admitted that he has not used the African Charter in almost two decades of judicial service. This example, which is likely not limited to Ethiopia, is typical of the experience and familiarity of judges across Africa of these two instruments. It raises legitimate questions about the extent to which governments have trained local judges on the use of duly ratified human rights treaties.

The various chapters in this book report limited use of the African Charter and the Maputo Protocol by civil society organisation. Evidence suggests that civil society engagement is crucial to the modest yet significant impact of the African Charter and the Maputo Protocol in the selected countries. In 2012, three civil society organisations – namely the Centre for Democracy and Human Rights, the Institute for Human Rights and Development in Africa and the Centre for Human Rights at the University of Pretoria – received the

45 African Commission 'Communications' available at <http://www.achpr.org/communications/> (accessed 15 December 2015).

46 HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: compliance and influence' unpublished LL.D. Thesis, University of Pretoria 2013 13 & 376. See also <http://www.courtecowas.org/> (accessed 15 December 2015).

47 African Commission 'Nigeria' <http://www.achpr.org/states/nigeria/> (accessed 15 December 2015).

African Commission's awards for their commitment to the promotion and protection of human rights in Africa.<sup>48</sup>

All the countries selected for this study, with the exception of Lesotho and The Gambia, have NHRIs. Many of these institutions attend sessions of the African Commission regularly and make statements about the human rights situations in their countries. They participate in the process of generating state reports and sometimes use provisions of the African Charter and the Maputo Protocol in their advocacy activities. Although Côte d'Ivoire, Ghana, Malawi, Swaziland and Zimbabwe have NHRIs, these institutions are yet to obtain affiliate status with the African Commission. NHRIs in Burkina Faso, Cameroon, Ethiopia, Kenya, Mauritius, Nigeria, Sierra Leone, South Africa, Tanzania and Uganda have affiliate status with the African Commission. The South African Human Rights Commission (SAHRC) has a good record in respect of using the African Charter and the Maputo Protocol. The SAHRC makes reference to provisions of the African Charter and also to the jurisprudence of the African Commission in its programmes on the Right to Food in South Africa.<sup>49</sup> The SAHRC considers the African Charter as establishing the relevant legal framework for the recognition of right to food.<sup>50</sup> In 2012, the SAHRC and the national human rights commissions of Cameroon and Uganda received the African Commission's award for their commit-

ment to the promotion and protection of human rights.<sup>51</sup>

Academic writing focusing on the African Charter and the Maputo Protocol is generally scarce. However, extensive academic writing on the African Charter and the Maputo Protocol is reported in South Africa, Nigeria, Uganda and Lesotho. It is impossible to fully discuss the impact of the African Charter and the Maputo Protocol in South Africa without mentioning the role of two academic institutions, namely the Centre for Human Rights (CHR) based at the University of Pretoria and the Dullah Omar Institute (formerly the Community Law Centre) based at the University of the Western Cape. The work of these research centres, and especially the CHR's Master of Laws (LLM) in Human Rights and Democratisation in Africa (HRDA), the African Human Rights Law Journal (AHRLJ) and the African Human Rights Law Reports (AHRLR), represent among the most tangible impact of the African Charter and the Maputo Protocol in any institution of learning in Africa. It is also important to mention the African Human Rights Moot Competition, an event which has been described as the largest annual gathering of law students and lecturers of law in Africa.<sup>52</sup> Since the inaugural edition in 1992, the programme, which is organised by the Centre for Human Rights, has hosted more than 1071 teams from over 146 universities in Africa.<sup>53</sup> Each year, participants argue one hypothetical case based on alleged violations of African regional human rights instruments,

48 SAHRC 'SAHRC receives African Commission Award for its commitment to the realisation of human rights' available at <http://www.sahrc.org.za/home/index.php?ipkMenuID=91&ipkArticleID=139> (accessed 15 December 2015).

49 <http://www.sahrc.org.za/home/index.php?ipkArticleID=270> (accessed 10 September 2015).

50 As above.

51 SAHRC (n 49 above).

52 <http://www.chr.up.ac.za/index.php/moot-court-2015.html> (accessed 28 November 2015).

53 As above.



especially the African Charter and the Maputo Protocol.

*(i) Limiting and enhancing factors*

Ignorance about the provisions and potential uses of the African Charter and the Maputo Protocol is the number one factor impeding the impact of the two instruments at the domestic level. All the chapters report that there is a general lack of awareness about the African Charter and the Maputo Protocol by cabinet members, legislators, judges, lawyers, academics, members of the press, and members of the public, especially women, youth and children. It is impossible for citizens to agitate for their rights if they are not aware such rights exist or do not know the remedial systems in place at the supranational level to secure them where domestic remedies become unavailable.

There is also a lack of political will by top-level political actors and a general lack of human rights culture in many of the selected states. It should be recalled that in 2005, Zimbabwe's Ministry of Foreign Affairs requested the African Commission's Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons to leave the country. Non-domestication of the African Charter and the Maputo Protocol in Anglophone and Francophone countries alike affects the impact of these instruments. In Mauritius, the Maputo Protocol is yet to be ratified. This contributes to the neglect of the Maputo Protocol by courts and civil society organisations in Mauritius.

Poverty and high level of illiteracy, coupled with political instability in many of the countries studied for this book impede the impact of the African Charter and the Maputo Protocol. In

Sierra Leone and Côte d'Ivoire, political instability was identified as a major factor that has limited the impact of the African Charter and the Maputo Protocol. Traditional practices which discriminate against women and entrench patriarchy also limit the domestic effects of the African Charter and especially the Maputo Protocol.

In all the selected countries, there are no legal frameworks in place spelling out the procedures for implementation of decisions of the African Commission, the African Court or other regional human rights monitoring bodies in Africa. The lack of a law reform commission in Swaziland was also identified as a factor that impedes legislative reform in line with the African Charter and the Maputo Protocol. The political arrangements in some states which practice federalism has been identified as yet another factor that limits the impact of the African Charter and the Maputo Protocol at the sub-national level. This is particularly the case in Nigeria. For instance, while the national government in Nigeria is taking some steps to bring its laws into conformity with the Maputo Protocol, these laws when finally adopted will not have any effect at the sub-national level unless sub-national governments adopt specific legislation to that effect.

It was also reported that conflicting reporting obligations to UN and AU human rights bodies hampers some states from keeping up to date with their state reports under the African Charter and the Maputo Protocol. As a result of conflicting reporting timelines, states tend to give priority to their reporting obligation at the UN level at the expense of their regional reporting obli-

gations. This practice was reported in Lesotho<sup>54</sup> as well as in The Gambia.

The non-binding nature of the African Commission's decisions sometimes creates room for states to consider ignoring the African Commission's decisions without legal consequence. In this regard, it may be that the African Commission has also contributed to the limited impact of the African Charter by making recommendations and remedial orders that are often vague. In some cases, the African Commission did not make any recommendation for states to implement.

Limited media coverage of the work of the African Commission and the African Court also hamper the domestic effects of the African Charter and the Maputo Protocol. It is significant to mention that some positive factors actually impede the impact of the African Charter and the Maputo Protocol. In South Africa, for instance, the relatively progressive nature of the Bill of Rights and the transformative mindedness of the South African Constitutional Court have rendered the African human rights system less appealing to civil society organisations and litigants.

Speaking specifically of factors that have enhanced the impact of the African Charter, high levels of civil society engagement top the list, although this is not the case across all countries. In Nigeria, the most important enhancing factor is the direct domestication of the African Charter. Other factors which have enhanced the impact of the African Charter and the Maputo Protocol in Nigeria include strong civil society, judi-

cial activism, academic writing and the overall international and domestic contexts. In South Africa, the most significant enhancing factor is the value which the African Charter, the Maputo Protocol and the jurisprudence of the African Commission add to the domestic legal framework in the areas of the right to family life, right to food and the protection of women, coupled with the existence of strong civil society and research institutions. In Ethiopia, the translation of the African Charter into Amharic was reported as a major enhancing factor. Political transition in South Africa, Kenya, Sierra Leone and Côte d'Ivoire, among others has also provided vital opportunities for the internationalisation of the African Charter and the Maputo Protocol in those countries.

The development of citable jurisprudence on the African Charter and the Maputo Protocol in Kenya and Nigeria has greatly enhanced the impact of the African Charter and the Maputo Protocol in the two countries. It is important not to lose sight of the decisions of the ECOWAS Community Court of Justice (ECCJ), the East African Court of Justice (EACJ) and the Southern African Development Commission (SADC) Tribunal which have held that several states have been in violation of the African Charter. It is also important to mention the collaboration and support of international partners, without which many major activities of the African Commission and civil society organisations would be impossible.

### 3 Recommendations

In order to improve the impact of the African Charter and the Maputo Protocol in the selected states and in other African states in general, the following

54 See Report of the promotional mission to the Kingdom of Lesotho (2006) paras 129-136 [www.achpr.org/english/Mission/Lesotho/Mission%20Report\\_Lesotho.pdf](http://www.achpr.org/english/Mission/Lesotho/Mission%20Report_Lesotho.pdf) (accessed 9 September 2011).

suggestions are made first to state parties of the two instruments, then to civil society and finally to the African Commission:

**(a) State parties**

- (i) Governments should raise awareness about the African Charter and the Maputo Protocol among cabinet members, legislators, judges, lawyers, academics, civil society and members of the public especially women, youth and children. State officials may borrow a leaf from Mauritius by translating provisions of the African Charter and the Maputo Protocol into local languages and ensuring that these documents are disseminated not only in urban areas but also in rural communities. This is an important step for social internalisation of the norms of the African Charter and the Maputo Protocol.
- (ii) Adequate budgetary provision should be made for the periodic training and capacity building of civil servants whose line of duty relates to the protection of human rights at the domestic level. This includes staff of NHRIs, ministries of justice, gender and foreign affairs offices and other relevant government departments. The African Commission should engage state delegations during presentation of state reports on steps taken to train top-level government officials, such as cabinet members, legislators and judges, on use of the African Charter, the Maputo Protocol and other regional human rights instruments in Africa. This is an important step for political and legal internalisation of international human rights norms in Africa.
- (iii) Steps should be taken in every state to directly domesticate the African Charter and the Maputo Protocol. This may be done by following the Kenyan or Nigerian examples. In Kenya, the Constitution provides that all duly ratified treaties are directly applicable and form part of the domestic law. In Nigeria, the entire African Charter was incorporated into domestic law through an Act of parliament. At the very least, states should borrow a leaf from South Africa where the Constitution imposes an obligation on courts to consider international law when interpreting the Bill of Rights. It is also suggested that in future, political bodies within the African Union should consider the possibility of making domestication of duly ratified treaties obligatory for all state parties to regional human rights instruments in Africa. States that have incorporated the African Charter and the Maputo Protocol in their domestic law should raise awareness about these treaties and encourage citizens to use them interchangeably with domestic laws.
- (iv) The practice of stifling democratic space and restricting civil society operations should be discouraged. Specifically, the government of Ethiopia should consider abolishing the policy which requires civil society organisations to generate 90 percent of their funding from local sources.
- (v) There is a need for state parties to the African Charter to ratify other regional human rights instruments

in Africa that may help to advance the objects of the African Charter and the Maputo Protocol. The African Court Protocol and African Charter on Democracy, Elections and Good Governance, among others are examples of such treaties. Along this line, the government of Mauritius is encouraged to ratify the Maputo Protocol. States that are yet to make the article 34(6) Declaration under the African Court Protocol should also urgently do so.

- (vi) Measures should be taken by national governments, with the support of development partners, to reduce the rate of poverty and illiteracy, and to improve the overall socio-economic conditions of people in Africa. Poverty, high levels of illiteracy and poor socio-economic conditions significantly impede the domestic impact and effectiveness of human rights treaties in Africa.
- (vii) Traditional practices which discriminate against women and entrench patriarchy should be proscribed. Governments are encouraged not to stop at making laws which prohibit these practices but, at the same time, must ensure that the laws are effectively implemented.
- (viii) Legal mechanisms should be put in place prescribing procedures for the implementation of decisions of the African Commission and the African Court at the domestic level. An institutional mechanism should also be created to coordinate this process.
- (ix) Law reform commissions should be established in states that are yet to have them. Along this line, the

government of Swaziland is encouraged to set up a law reform commission. The lack of a law reform commission in Swaziland has been identified as one of the factors that impede legislative reform in line with the African Charter and the Maputo Protocol.

- (x) Curricula of educational institutions should be revisited to incorporate elements of the African human rights system in relevant academic disciplines. This is important for the training of lawyers and also for the continuous legal education of members of the bar and the bench.
- (xi) The regional human rights master's programme, the African Human Rights Moot Competition, the African Human Rights Law Journal (AHRLJ) and the African Human Rights Law Report (AHRLR) should all be encouraged and supported.
- (xii) Judges and legislators at the domestic level should deploy the African Charter and the Maputo Protocol in their work. The development of citable jurisprudence on the African Charter and the Maputo Protocol in Kenya and Nigeria has greatly enhanced the impact of these instruments in those countries.
- (xiii) Provision should be made in the national budgets of every state for the implementation of decisions of relevant international, human rights tribunals.

**(b) *Civil society organisations***

- (i) Civil society organisations should comply with their reporting obligations by virtue of their observer

status with the African Commission. It is reported in the various chapters that civil society organisations that enjoy observer status with the African Commission do not submit their activity reports as required by the Commission's Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights.

- (ii) Civil society organisations should monitor the process of state reporting; submit shadow reports where appropriate, ensure easy access to state reports and concluding observations, help with the dissemination of concluding observations and follow up on their implementation.
- (iii) Civil society organisations have generally taken the lead in creating awareness about the African Charter and the Maputo Protocol through advocacy and promotional activities. However, they often fail to involve the media in these activities. The use of the media to promote the African Charter and the Maputo Protocol should not be left to state actors alone.
- (iv) During submission of individual communications, civil society organisations assisting complainants should ensure that communications submitted to the African Commission include very specific relief. This will assist the African Commission in formulating specific recommendations at the conclusion of the case. They should also follow up on states' implementation of these decisions and report to the African

Commission on their follow up activities.

- (v) NGOs and other civil society organisations should explore options outside the African Commission and African Court in their attempts to 'bring home' the benefits of the African Charter and the Maputo Protocol. The ECOWAS Community Court of Justice, for example, and more recently the East African Court of Justice have become viable alternatives for enforcing provisions of the African Charter.

**(c) African Commission**

- (i) The African Commission should create a special mechanism on law reform to monitor and to liaise with states in the process of transition to democracy. In addition, such a mechanism could be deployed to assist states that are reviewing their constitutions or adopting important legislative instruments or amendments. States are generally more receptive to human rights norms during political transition and evidence from this study shows that if there is effective engagement with relevant domestic actors during political transition, and prior to the adoption of national constitutions or important domestic legislation, there is a higher likelihood that human rights instruments will have an impact on legislative outcomes and processes at the domestic level.
- (ii) It is submitted that the African Commission would do well to ensure that its recommendations are more specific. It may not be helpful to ask a state to bring all

its laws into conformity with the African Charter, without specifying in the remedial order what specific laws, or even what provisions of those laws, should be brought in line with the African Charter. Vague recommendations have been shown to be difficult to implement and follow up.

- (iii) The African Commission might consider the possibility of persuading more states to host its ordinary sessions. This could greatly improve the level of awareness and the overall impact of the African Charter and the Maputo Protocol in those states. Significant impact was recorded, for example, when Côte d'Ivoire hosted the 52nd ordinary session of the African Commission.
- (iv) There is a need for the African Commission to consider the possibility of adopting more model laws on critical human rights issues in Africa. Following the many success stories of the Model Law on Access to Information in Africa, coupled with the advocacy undertaken by the Special Rapporteur on Freedom of Expression to promote that law, adoption of model laws may be an area the African Commission should look into in future. The Model Law on Access to Information in Africa has been applauded within and outside Africa for its significant impact on access to information legislation in Africa.
- (v) The African Commission should also build on its previous recommendations, and keep following up on those recommendations that have not been fully or effectively implemented. There is no reason why a country submitting

its fifth state report, for instance, should not be reminded of recommendations or concluding observations issued during consideration of the first or second state report. This approach should also be adopted for recommendations arising from previous mission reports and decisions of the African Commission.

- (vi) Media coverage of the work of the African Commission and of the decisions of the African Court should be intensified. Special training programmes should also be organised, under the auspices of the African Commission, for members of the press to sensitise the media about the African Charter, the Maputo Protocol and other regional human rights treaties in Africa.

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Zimbabwe Amendment Act of 1993.

## QUESTIONNAIRE USED FOR THE STUDY

The following questionnaire was used by researchers to carry out the study at the country level:

### **(i) Introduction**

- Brief background and context of human rights in the country
- Overview of the status of women's rights in the country

### **(ii) Ratification of African Charter and the Maputo Protocol**

- Have the countries ratified the African Charter and the Maputo Protocol? If so, when? Were any reservations entered? If yes, give reasons entered for reservations and whether they were later withdrawn. Provide reasons for withdrawal. If not withdrawn yet, is this issue being discussed or considered?
- What is the process of ratification: Role of Parliament or the Executive?
- What were the reasons for the ratification of the two instruments – were any reasons articulated in parliamentary debates or elsewhere? Please identify sources.

### **(iii) Identify government focal point**

- Establish which department, person or 'bench' is the 'focal point' of the state's response and responsibilities on the African Charter and the Maputo Protocol. While so doing, the researchers must take into account the following:
- Are there different focal points?
- What are their views about the channel of communication with the African Commission and the institutionalisation of the state's responsibilities in relation to the African Charter and the Maputo Protocol?

### **(iv) Domestication or incorporation**

- What is the constitutional status of the African Charter and the Maputo Protocol? (between the African Charter, the Maputo Protocol and the constitution or other legislation, which prevails?)
- To what extent do the African Charter and the Maputo Protocol rights correspond to the domestic Bill of Rights? Are the African Charter and the Maputo Protocol rights included in a justiciable Bill of Rights? Has the Bill of Rights been changed after the state becoming a party to the Charter?
- Has the African Charter or the Maputo Protocol been domesticated or 'incorporated' into ordinary legislation?

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- Which domestic legislation refers to the provisions of the African Charter and the Maputo Protocol?

**(v) Legislative reform or adoption**

- Was a compatibility study of domestic law with the African Charter and the Maputo Protocol undertaken before ratification of the two instruments? If yes, what were the findings of the study?
- Has any implicit or explicit legislation been amended or adopted to give effect to the African Charter and the Maputo Protocol?

**(vi) Policy reform or formulation**

- Has any government policy (HIV/AIDS Strategy, Poverty Reduction Strategy Paper (PRSP), plan of action, white paper, codes, etc.) been adopted or amended to give effect to the African Charter and the Maputo Protocol? (explicit or implicit)
- To what extent do government policies reflect the provisions of the general comments of the African Commission concerning women's human rights?

**(vii) Court judgments**

- Have the African Charter, the Maputo Protocol, case-law by the African Commission or Resolutions or General Comments adopted by the African Commission been referred to as an interpretive source in any judgment by any of the domestic courts? If so, what was the effect on the judgment?
- Have domestic courts used any provision of the African Charter or the Maputo Protocol as a basis of a remedy (as self-executing)? If so, describe.

**(viii) Awareness and use by civil society**

- What is the extent of awareness of the African Charter and the Maputo Protocol among civil society organisations?
- To what extent have NGOs used the African Charter and the Maputo Protocol in their work? Advocacy, promotional tools, policy reviews, litigation, law reform, etc. (explicit or implicit?) Also, do they use concluding observations issued after state reports and other reports or resolutions of Commission, etc.?
- Have NGOs with observer status submitted shadow reports to the Commission?

**(ix) Awareness and use by lawyers and judicial officers (law societies and other practising lawyers)**

- What is the extent of awareness of the African Charter and the Maputo Protocol among lawyers and the law society?
- To what extent have lawyers used the African Charter and the Maputo Protocol in their arguments before courts?
- To what extent do judicial officers demonstrate awareness or lack thereof of the African Charter and the Maputo Protocol?

**(x) Higher education and academic writing**

- Do the curriculum of law schools and other higher education institutions/ university faculties include the African Charter and the Maputo Protocol? If so, when was it introduced; what is its content?
- To what extent do academics (especially in law) refer to or discuss the African Charter and the Maputo Protocol in academic writing? If so, what views are expressed?

**(xi) National human rights institutions (NHRIs, Ombudsman offices, etc.)**

- Do these institutions include reference to the African Charter and the Maputo Protocol in their programmes?
- Do these institutions follow up on the implementation of concluding observations and/or decisions of the African Commission?
- Are they involved in the submission of state reports to the African Commission?

**(xii) State reporting**

- Which department(s) is responsible for state reporting under the African Charter and the Maputo Protocol?
- Describe the process of preparing a report (inclusion of women, civil society; cross-departmental).
- How many state reports have been presented to the African Commission?
- Were the reports submitted within the time frame? If not, what were the reasons for the delay?
- Who constituted the government delegation during the presentation of the state report? Were there women? Are concluding observations disseminated (by state, civil society)?
- What were the pertinent concluding observations?
- Has the government taken any steps to give effect to concluding observations? What steps? If no steps were taken, why not?

**(xiii) Communications**

- If any communication has been decided against the state, what exposure has been given to this finding?
- Has the government taken any steps to give effect to this finding?
- If no communication has ever been presented, do NGOs and civil society consider taking cases to the African Commission? If not, why not?

**(xiv) Special mechanisms - promotional visits of the African Commission**

- Has a promotional, protective or fact-finding visit by the African Commission taken place to the country? If so, what has the effect been and has any recommendation been given effect to by government? Has a special mechanism of the Commission visited the country and made recommendations to the country concerning women's human rights? What has its effect been?

**(xv) Factors that may impede or enhance the impact of the African Charter, the Maputo Protocol and the African Commission**

- What are the factors that impede or enhanced the 'impact' of the African Charter in your country?
- Consider whether a session of the African Commission has ever taken place in your country, and, if so, what its role was.
- Consider whether a national has been a member of the African Commission and, if so, what role this factor played.
- Consider the role of the media.