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As a founder of Equality Now as well as the former United Nations High Commissioner for Human Rights, judge at the International Criminal Court, President of the International Criminal Tribunal for Rwanda, and judge at the High Court of South Africa, it is my pleasure to introduce “Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of Women and Girls in Africa”. Developed by Equality Now, Secretariat for the Solidarity for African Women’s Rights coalition (SOAWR), this Digest of case law with reference to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) will be an important tool to all legal practitioners, judges and lawyers, and advocates for the rights of women and girls across Africa.

This significant resource comes during the 15th anniversary year of the adoption of the Maputo Protocol. With its entry into force just two years after its adoption by the African Union, a new era of progressive human rights law, specifically on the rights of women and girls in the African context, was ushered in. Now, as ever, the moment of turning words into reality for women and girls by implementing the Protocol through law, policy and progressive jurisprudence is upon us.

African Union member States must first ratify the Maputo Protocol if they have not already done so, and then make it a living instrument through
domestication and through respecting and implementing decisions from the national, regional or even the international level. Civil society organizations stand ready to help governments to do just that. Equality Now and the SOAWR coalition, for example, have conducted ratification campaigns, trainings of lawyers and judges across the continent on the rights enshrined therein and how they should be applied in practical terms, and brought cases at the national and regional level, including at the African Commission on Human and Peoples’ Rights and the Economic Community of West African States (ECOWAS) Court of Justice.

The vision of the Maputo Protocol must continue to be upheld and promoted so that we will realize a just world, in Africa, and beyond, in which women and men, boys and girls, have equal rights under the law and full enjoyment of their human rights in all aspects and at all stages of their lives.

Judge Navanethem Pillay

United Nations High Commissioner for Human Rights, 2008-2014
Equality Now is indebted to and grateful to various individuals who have played critical roles towards the success of this case Digest. We acknowledge Dr. Scholastica Omondi’s immense contribution to this Digest, by carrying out the bulk of the initial research, analysis and compilation of some of the cases that form part of this Digest. We recognize the great contribution and work of Equality Now staff for conceptualizing, reviewing, editing and researching on the Digest to enrich it to what it is now. In particular we acknowledge the contribution of Antonia Kirkland, Divya Srinivasan, Esther Waweru, the late Eva Ayiera, Flavia Mwangovya, Judy Gitau and Naitore Nyamu. We also appreciate the invaluable input received from Carole Agengo, Christine Nanjala (Office of the Director of Public Prosecutions), Daisy Jebet (FIDA Kenya), Elsy Saina (ICJ Kenya), Emily Kinama (Katiba Institute), Flora Manyasa, George Kimani (National Gender and Equality Commission), Justice (rtd) Mary Ang’awa, Kavinya Makau, Lorraine Ochiel (ICJ Kenya), Mariam Kamunyu (Centre for Human Rights), Mirriam Nthenge (Centre for Reproductive Rights), Muthoni Muriithi (Oxfam International), Pamela Tutui (Judiciary of South Sudan), Prof. Jill Cottrell Ghai (Katiba Institute), Sofia Rajab-Leteipan, Tabitha Saoyo (KELIN) and William Ndengenyinka (GLIHD).

We thank Crimson Communications Ltd for the design of the Digest. We would also like to thank Wellspring Philanthropic Fund and Sigrid Rausing Trust for their financial contribution which made it possible for this case Digest to be prepared. Finally, we are grateful to Judge Navanethem Pillay for writing the foreword for this Digest and for her continued and indefatigable support to the cause of women’s rights and gender justice.

Faiza Jama Mohamed
Director, Africa Office
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1. Introduction

This Digest aims to promote the use of one of the world’s most comprehensive and progressive human rights instruments - the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol or the Protocol) [the text of the Maputo Protocol is available here1]. The Maputo Protocol was adopted by member States of the African Union in Maputo, Mozambique on 11 July 2003, with the aim “to ensure that the rights of women are protected in order to enable them to enjoy fully all their human rights”.2 The Protocol builds on existing international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Universal Declaration of Human Rights (UDHR), but also goes beyond these instruments to address the unique human rights challenges faced by women and girls in the African context.

As of September 2018, 40 countries in Africa had ratified the Maputo Protocol. Fifteen years on from the adoption of the Protocol, significant progress has been made in the implementation of the Protocol, including by the adoption of legislation implementing Protocol provisions at the national level, inclusion of gender equality concerns in governmental policies and plans, and progressive decisions by national courts and the African Commission on Human and Peoples’ Rights. One of the most important tools for the implementation of the Maputo Protocol is through regional and national judicial decisions which apply the spirit and provisions of the Maputo Protocol in deciding human rights cases.

This Digest is an analysis of specific court decisions from various jurisdictions in African States and in regional human rights mechanisms that have referred to or implemented the Maputo Protocol. It summarizes relevant cases that have applied provisions of the Maputo Protocol, and provides a commentary on key cases. This Digest aims to facilitate the use of and reliance on the provisions of the Maputo Protocol by judicial officers and legal practitioners, by equipping them with the necessary knowledge of existing jurisprudence in relation to the Maputo Protocol. It seeks to provide a tool that judges and magistrates can use as a reference point in anchoring their decisions involving women and girls’ rights, and that legal practitioners can use to argue that courts must refer to provisions of the Maputo Protocol to guide their decisions on the rights of women and girls.

We hope that this Digest serves as a useful tool in the fight to ensure that the rights and protections guaranteed under the Maputo Protocol become a reality for women and girls across Africa.

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2. Methodology

We aim to discuss key case law decided by domestic courts in Africa, or at the regional level, which discuss, cite or apply the provisions of the Maputo Protocol, in order to illustrate how the Protocol can be used and relied on in human rights litigation. Cases were drawn from both civil and common-law jurisdictions.

This Digest includes 46 cases, all of which either rely on or refer to the provisions of the Maputo Protocol. Of the 46 cases, 41 cases are discussed at length, while the remaining five (all from Kenyan courts) are merely mentioned since the issues discussed therein were very similar to those dealt with under other cases in that section. The Digest includes decisions of courts in 9 different African countries, in addition to decisions of regional bodies including the ECOWAS Court of Justice, the African Commission on Human and Peoples’ Rights, the African Court on Human and Peoples’ Rights and the Special Court for Sierra Leone. An analysis of these cases shows that Kenyan and South African courts have been the most dedicated in promoting and relying on the Protocol, as there are 15 cases from Kenya; and 10 from South Africa which mention the Maputo Protocol.
Though an effort was made to identify as many cases as possible that refer to the Maputo Protocol, this Digest does not purport to be a comprehensive guide to all cases in the African region that have cited the Maputo Protocol. It was challenging to compile based on the reported judicial decisions currently freely available in online searchable databases. In addition, due to the researchers’ own language limitations, cases from Anglophone countries are likely to be more thoroughly represented than cases from Francophone and Lusophone countries in Africa.

The Digest is organized in terms of the specific thematic rights and freedoms guaranteed under each article of the Maputo Protocol. There are no cases included under some of the articles of the Protocol if either none exist or the researchers were unable to find cases referring to these articles online. The Digest however, reiterates the rights under these articles for logical flow to the reader. Many of the cases would fit under several sections as there are often multiple discriminatory aspects of the law, or multiple human rights violations within a single case. The cases are thus cross-referenced to all relevant provisions of the Maputo Protocol, as far as possible.

Each case analysis begins with the identification of the women’s or girls’ rights issue that is the subject of the case. This is followed by a summary of the facts of the case. The analysis discusses the reasoning of the particular court’s or commission’s decision based on the applied laws. In the commentary section, the decision is analysed within the context of the relevant provisions of the Maputo Protocol.
3. Contextual Background

The African Union (AU), and its predecessor – the Organization of African Unity (OAU), have long focused on human rights, and more recently, on women’s rights in particular. The OAU enacted the African Charter on Human and Peoples’ Rights (African Charter) in 1981, establishing the African Commission on Human and Peoples’ Rights (ACHPR) to oversee the implementation of the African Charter. The Maputo Protocol was later adopted in 2003, after many years of advocacy by non-governmental organizations (NGOs) in Africa, who were calling for a strengthening of the African Charter’s provisions on gender equality.

This chapter provides a brief background on the African human rights system, including key instruments relevant to the rights of women and girls, and regional mechanisms that may be used to enforce their rights.4

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3.1 African Human Rights Instruments Relevant to the Rights of Women and Girls

3.1.1 African Charter on Human and Peoples’ Rights

The African Charter, also referred to as the Banjul Charter, is a regional human rights instrument that embodies, recognizes and protects various human rights. As of the date of writing, it has been ratified by 54 Member States of the African Union (almost all the Member States, except the newest member Morocco), and is the parent treaty of the Maputo Protocol.

Article 2 of the African Charter enshrines the principle of non-discrimination including on the grounds of sex and Article 18(3) “calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions.” Articles 60 and 61 of the African Charter recognize regional and international human rights instruments and African practices consistent with international norms on human and peoples’ rights as being important reference points for the application and interpretation of the African Charter. All rights in the African Charter apply to women and girls, and some are of particular relevance, including those on equality and non-discrimination and those dealing with personal liberty, integrity, and dignity.

The shortcomings of the African Charter in relation to the rights of women and girls included the failure to explicitly define discrimination against women and girls; lack of guarantees of the right to consent to, equality in marriage; and emphasis on traditional values and practices that in many cases impede the advancement of women and girls’ rights in Africa.

The Maputo Protocol was adopted by the African Union in Maputo, Mozambique on 11 July 2003, and came into force on 25 November 2005. It is the main regional instrument in Africa for the protection of women and girls’ rights. As of September 2018, 40 countries had ratified the Maputo Protocol.

The Protocol places obligations on the member States, including eliminating all forms of discrimination against women and girls, through appropriate legislative and institutional measures and prohibiting all forms of harmful practices which negatively affect the human rights of women and girls. It requires States to protect the dignity of women and girls, and their freedom from exploitation, degradation and violence. It further requires them to take specific positive action to promote participative governance and equal participation of women in the political life of their countries through affirmative action, and adopting legislative measures to guarantee women and girls equal opportunities in education, work and career advancement. The member States are also under an obligation to ensure the right of women to health, including respect and promotion of sexual and reproductive health, food security, adequate housing, positive cultural context, healthy environment, sustainable development, widow’s rights, inheritance, and special protection of elderly women, women with disabilities and women in distress. In fulfilling these obligations, they have to find appropriate remedies for the violation of fundamental freedoms and rights of women and girls as determined by competent judicial, administrative and legislative bodies. However, these duties are subject to the reservations entered by the countries, implying that the reserving States are not bound to implement the specific obligation to which they have submitted a reservation.5

The principles enshrined in the Maputo Protocol are in some instances based on existing international human rights standards, but in many others significantly advance international human rights standards and specifically enhance the protection and promotion of women and girls’ rights in Africa. In particular, the Maputo Protocol makes explicit the protection of women and girls’ rights in areas which are not expressly covered by existing treaties by:

- providing specific legal protection against violence against women and girls, both in the public and private sphere (Articles 1(j), 3(4), and 4);
- requiring States to prohibit, through legislative measures backed by sanctions, all forms of female genital mutilation (Article 5);
- providing protections to adolescent girls, including the right to be free from abuse and sexual harassment in schools (Article 12(1) (c));
- specifically articulating widows’ rights to equality (Article 20);
- prohibiting forced marriages and specifying 18 years as the minimum age of marriage (Article 6(a) and (b));
- articulating a women’s right to retain her maiden name and to participate equally in decisions regarding the parties’ matrimonial regime and residence (Article 6(e) and (f));
- expressly articulating women’s right to abortion in specified circumstances (Article 14(2) (c)); and specifically addressing women’s rights and States’ obligations in relation to HIV/AIDS (Article 14 (1) (d) and (f)).
3.2. **Mechanisms for Enforcement of Human Rights in the African System**

3.1.1 **The African Commission on Human and Peoples’ Rights (ACHPR)**

The ACHPR, which began functioning in 1986, was established under Article 1 of the African Charter. It is a quasi-judicial body which plays an oversight role in the promotion and protection of human rights, as well as monitors State compliance with the African Charter (and its Protocols, including the Maputo Protocol).

The Commission comprises of eleven part-time Commissioners who hold two ordinary sessions annually, lasting about two weeks each, and two extra-ordinary sessions, which last about ten days each. The Commission's mandate is limited to violations of human rights and freedoms guaranteed by States parties arising from the African Charter (and its Protocols) after the specific dates of ratification.

An individual, State or an NGO, or several NGOs can bring a matter on violation of the human rights of citizens to the attention of the Commission, under its Individual Communications procedure. An admissibility precondition is that before the case is filed at the Commission, all available domestic dispute resolution mechanisms and remedies should be exhausted⁶.

The African Commission has special mechanisms such as special rapporteurs and working groups to bolster its activities in the promotion of human and peoples’ rights, including the Special Rapporteur on the Rights of Women in Africa.

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⁶ Article 56 of the African Charter
3.1.2 African Court on Human and Peoples’ Rights

The African Court on Human and Peoples’ Rights (the African Court) is a judicial body established by the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (the African Court Protocol). The African Court Protocol was adopted by member States of the then OAU in June 1998. It entered into force on 25 January 2004 after ratification by more than 15 countries. As of March 2018, 30 States have ratified the African Court Protocol. Of these, only 8 States (Burkina Faso, Benin, Côte d’Ivoire, Ghana, Mali, Malawi, Tanzania and Tunisia) have made a declaration allowing individuals and NGOs to directly access the African Court.

Like any other judicial body, the core mandate of the Court is to interpret and apply the African Charter, and to act as an enforcement mechanism for the rights in the Maputo Protocol. It complements and reinforces the functions of the African Commission.

3.1.3 African Court of Justice and Human Rights

In 2003, AU Member States signed a protocol to establish an African Court of Justice to serve as a supreme court for the organization. This court was never established and, in July 2004, the AU Assembly of Heads of State and Government decided to integrate it into a new African Court of Justice and Human Rights (the ACJHR). The Protocol on the Statute of the African Court of Justice and Human Rights (the ACJHR Protocol) was adopted in Egypt in July 2008 and mandated the merger of the African Court on Human and Peoples’ Rights and the African Court of Justice. The ACJHR Protocol will come into force only when 15 countries have ratified it. As of September 2018, 31 States have signed but only 6 States have ratified the ACJHR Protocol. Upon entry into force of the ACJHR Protocol, the African Court Protocol will remain in force for a transitional period not to exceed one year.
3.1.4 Role of National Courts

Where States have ratified the Maputo Protocol, national judiciaries should apply the Protocol in protecting the rights of women and girls. The application however depends on whether the specific country that has ratified the Protocol is a monist or dualist State in the application of international norms, standards and laws. Monist States apply the international instruments directly without having to pass national legislation domesticating the instrument. Dualist States have to pass national legislation domesticating the international instrument after ratification. For example, Kenya was a dualist State before the promulgation of the Constitution in 2010. Parliament had to pass a statute to domesticate an international instrument after ratification. Article 26) of the Constitution of Kenya 2010 provides that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.

As cases cited in this Digest however show, courts in many dualist States are also willing to rely on undomesticated regional and international human rights instruments for interpreting and applying domestic law, since the ratification of the instrument itself implies the commitment by the State to comply with these instruments. It is against this background that this case Digest centres on the decisions of national and regional courts on the application of the Maputo Protocol and other relevant international and regional instruments. It is hoped that by examining various decisions in the region, judges will be persuaded to apply international and regional instruments while deciding cases involving the human rights of women and girls.
4. Analysis of Court Decisions on Women’s Rights in Africa

The following sections present an analysis of some selected court decisions on women’s rights from across Africa, which reference or rely on the Maputo Protocol. The presentation is done thematically, in line with the provisions of the Maputo Protocol.

4.1 The Elimination of Discrimination against Women (Article 2)

The Protocol defines discrimination against women as “any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life”7.

Article 2 provides that member States have an obligation to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures”. In complying with this requirement, States are required to take a number of specific measures such as including

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7 Article 1 of the Maputo Protocol
equality principles in their national constitutions and legislation, enacting appropriate legislative and regulatory measures that prohibit or curb all forms of discrimination, integrating a gender perspective in all policy developments and activities, taking positive and corrective action in cases where discrimination against women already exists in law or in fact, and supporting local, national, regional and continental initiatives directing at eradicating discrimination against women. Additionally, Article 2 requires States to commit to modifying the social and cultural patterns of conduct of women and men with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on ideas of gender superiority or on gender stereotypes.

Most States have incorporated provisions on the prohibition of discrimination in their constitutions and statutes. However, some States continue to have clauses which exclude the application of constitutional non-discrimination provisions in certain areas, such as personal law or customary law.

Of the three cases discussed under this section, the first case is a decision from the South African Constitutional Court, dealing with the issue of the right to equality in inheritance laws. The second case is an unfavorable decision from the Kenyan High Court regarding the applicability of equality and non-discrimination principles to Muslim personal law. The third case is from Uganda and analyzes the issue of discriminatory provisions in seeking a divorce.

4.1.1  Bhe & Others v. Magistrate and Shibi v. Sithole and Others [2004] ZACC 18 (Constitutional Court, South Africa)

Issue – discrimination based on gender due to the application of the rule of male primogeniture, which is based on the notion that only the male gender is entitled to inherit.
Facts

The applicant, who was the deceased’s sister, was ineligible to become heir of the deceased’s intestate estate. This was despite the fact that the deceased had neither a civil nor customary law wife, was childless, and did not have surviving parents or grandparents. This was the result of the application of section 23 of the Black Administration Act, and regulation 2 (e) in particular, requiring devolution of an African’s estate to be made according to custom. The applicable custom did not allow women to inherit. One of the deceased’s male cousins was named the rightful representative of the estate, with a second male cousin designated as the sole heir of the deceased’s intestate estate. In the High Court, the applicant was granted a declaratory order pronouncing her as sole heir in her deceased brother’s estate.

Decision

This ruling declared Section 23 of the Black Administration Act and its associated regulations to be discriminatory to women, on grounds of sex and gender as it prevented women from inheriting.

Analysis

The Court held that “the exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors”. The Court also emphasized that a number of international instruments to which South Africa was a party (including CEDAW, the African Charter and the Maputo Protocol) underscored the need to protect the rights of women and abolish all laws that discriminate against them. It concluded that the exclusion of women from inheritance on the basis of gender was a clear violation of the equality and non-discrimination principles in the South African Constitution, as well as a violation of the human right to dignity.
Commentary

This case also covers issues addressed in Articles 3 (Right to Dignity) and 21 (Right to Inheritance) of the Maputo Protocol.

4.1.2 *In Re Estate of CCBH* [2018] eKLR (High Court, Kenya)

**Issue** – right of children born outside marriage to inherit under sharia law, equality and application of personal law

**Facts**

CBH died and was survived by two widows and 18 children. A succession dispute arose amongst the heirs to the estate, which estate was to be distributed in accordance to Islamic Sharia law. The applicants, grandchildren of CBH, were not allowed to inherit their father’s share of his estate on his death, and their father was not legally married to their mother. They argued that Sharia law, which unjustly discriminates against women, children and non-Muslims from inheriting from the estates of husbands and fathers should be struck down as unconstitutional.

**Decision**

The Court held that Sharia law had to be applied in this case, and that the applicants were not entitled to inherit under Sharia law.

**Analysis**

To support their submissions, the applicants referred to international and regional conventions, including the African Charter on the Rights and Welfare of the Child, as well as the Maputo Protocol. They argued that being denied their right to inheritance due to the marital status of their parents, the applicants were being subjected to violence and discrimination. They cited Article 2 of the Maputo Protocol regarding the elimination of discrimination against women and girls, as well as the definition of
“violence against women” in Article 1(j) which included economic harm as well as the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private life.

The Court noted that the international instruments were part of Kenyan law, and also that the Kenyan Constitution upheld the principle of equality and non-discrimination. However, it relied on Article 24(4) of the Kenyan Constitution which noted that the equality provisions of the Constitution would be qualified to the application of Muslim law in matters relating to personal status, marriage, divorce and inheritance. Since CBH was a practicing Muslim, and Sharia law did not allow children born out of wedlock to inherit, the Court found that the applicants could not inherit.

While the Court “appreciated” the submissions of the applicant as considered that referring to any child as illegitimate was outrageous, it felt that it was bound to apply Article 24 of the Constitution since the Kenyan Constitution declared the supremacy of the Constitution over all other laws including international treaties and conventions.

**Commentary**

Despite the observation of the Court of the supremacy of the Constitution of Kenya over all other laws, including international treaties and conventions, the court proceeded to uphold Sharia law over the Constitution.

### 4.1.3 *Uganda Association of Women Lawyers & Others v. Attorney General [2004] UGCC 1 (Constitutional Court of Uganda)*

**Issue – discriminatory provisions in divorce laws**

**Facts**

Uganda’s Divorce Act allowed husbands to obtain a divorce if they proved adultery by the wife. However, for a wife, it was not enough to prove
adultery. She had to prove aggravated adultery on the part of the husband (which was adultery in addition to another offence like incest, bigamy, cruelty etc.). The petitioners challenged the constitutional validity of these provisions on the ground that they discriminated against women and perpetuated inequality between the sexes.

**Decision**

The Court found that the impugned provisions of the Divorce Act were discriminatory towards women, and hence, unconstitutional.

**Analysis**

The Court found that it was “glaringly impossible to reconcile the impugned provisions of the Divorce Act with our modern concepts of equality and non-discrimination between the sexes”. It held that all the grounds of divorce provided under the Divorce Act should apply equally to both men and women who are party to the marriage. Additionally, the Court also found that certain other provisions of the Divorce Act were discriminatory and unconstitutional, such as the provision which only permitted a husband petitioning for divorce to obtain damages from the wife in case of adultery, the provision which allowed a successful husband petitioner to claim the property of his wife without affording the same opportunity to the wife, and the provision which only allowed the wife to claim alimony from the husband.

In its analysis, the Court commented that the provisions of the Ugandan Constitution with respect to women’s rights were the most liberal in sub-Saharan Africa, and was fully in consonance with international and regional instruments including CEDAW and the Maputo Protocol. However, the Court noted that the implementation had not matched the spirit of the Constitution and Parliament has the duty to scrap all inconsistent laws to ensure that substantive equality is achieved in reality.
Commentary

This decision of the Ugandan Constitutional Court was pronounced before the Maputo Protocol came into force, since the Protocol required 15 ratifications by AU member States before it could come into effect. However, the case still recognized the Maputo Protocol as an important regional instrument for the advancement of the rights of women.

Apart from Article 2, this case addresses issues covered under Article 7 (Separation, Divorce and Annulment of Marriage) of the Maputo Protocol.

4.2 Right to Dignity (Article 3)

This Article provides that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights. Women also have the right to respect as a person and to free development of their personality. States have a duty to adopt and implement appropriate measures to prohibit any exploitation or degrading treatment of women, protect their rights to respect for their dignity and protect women from any form of violence, particularly sexual and verbal violence.

Of the three cases discussed in this section, the first is a decision from a court in South Africa related to violence against women, while the second is a case from Zimbabwe with regard to gender stereotypes in reporting. The third case is a decision by the High Court of Kenya relating to abusive and undignifying treatment of women in health care facilities.

4.2.1 Naidoo v. Minister of Police [2015] ZASCA 152
(Supreme Court of Appeal of South Africa)

Issue – police response to complaint of domestic violence, right to dignity, violence against women
Facts

The Appellant was assaulted and injured by her then husband and rendered unconscious. After obtaining medical treatment, she approached the police station to record a charge of assault against Mr. Naidoo under South Africa’s domestic violence law. The police officer refused to file a charge until she obtained a protection order from the magistrates’ court, though obtaining such a protection order was not legally required for filing a charge. On return to the police station, the appellant was arrested, ostensibly pursuant to a charge of assault laid against her by Mr. Naidoo. The next day, when she was being taken to the magistrates’ court, she was physically assaulted by a police officer who threw her into the rear of a police van. She suffered injuries as a result of this assault. The appellant filed a claim against the police for damages.

Decision

The Court found that the police had acted in breach of their statutory duty and wrongfully caused physical and emotional harm to the appellant, Mrs. Naidoo. It awarded damages of R 280,000 to appellant.

Analysis

The Court found that the police had been negligent in their treatment of the domestic violence complaint sought to be filed by Mrs. Naidoo. In this regard, the Court noted that South Africa had enacted the Domestic Violence Act, 1988 after taking cognizance of the international and regional initiatives relating to the protection of women against all gender-based discrimination. In particular, the Court referred to CEDAW and the Maputo Protocol, which have “as their particular focus the protection of the right to human dignity and the protection of women against all forms of violence that member States are obliged to enforce by legislative measures”. The Court reaffirmed that under international law, the State is obliged to protect women against violent crime and gender discrimination inherent in violence against women. The police failed to take reasonable
positive steps to prevent harm to the appellant and instead subjected the appellant to emotional harm, humiliation and trauma, which all amounted to a breach of legal duty by the members of the police.

The Court held that the appellant, who was already traumatized due to the domestic violence inflicted on her, had also suffered psychological harm due to the harrowing experience she underwent at the police station while attempting to file her complaint. It also held that the subsequent arrest and detention of the appellant was unlawful since the police had instigated Mr. Naidoo to file a baseless counter-charge of domestic violence against Mrs. Naidoo as a ruse to cajole Mrs. Naidoo to withdraw her complaint.

**Commentary**

Apart from Article 3, this case also highlights issues covered under Articles 4 (Rights to Life, Integrity and Security of the person) and 25 (Remedies) of the Maputo Protocol. This case puts a spotlight on the important issue of enforcement of rights. The Maputo Protocol requires States to not only prohibit violence against women, but also to punish the perpetrators and provide effective remedies to the victims of violence and other rights violations. In this regard, the State’s duties to prevent and protect women from violence cannot be fulfilled unless State authorities like the police respond positively to complaints from women. In this case, rather than fulfilling these rights, the State instead violated the right to dignity of the victim of violence against women, by subjecting her to exploitative and degrading treatment.

**4.2.2 Mugwadi v. Dube & Others [2014] ZWHHC 314 (High Court of Zimbabwe)**

**Issue – gender stereotypes resulting in inequality, defamation**

**Facts**

A Zimbabwean newspaper published an article about a female rockstar regarding her supposed drug addiction. The article also claimed that the
musician had been “sexually abused by several musicians to the extent that nobody really cares about her anymore”. It further falsely alleged that the musician was unable to identify the father of her baby, since there were several possible fathers. The plaintiff musician sued the newspaper for defamation, and sought damages of USD 1 million.

**Decision**

The Court found that the article was defamatory and ordered payment of damages.

**Analysis**

The Court found that the article was defamatory in nature as it was calculated to bring the plaintiff into contempt and ridicule and to lower her in the esteem of reasonable members of society generally. The Court noted that the basis of the article appeared to be the defendant’s various encounters with the plaintiff at local nightspots and his belief that “nice girls” did not drink the brand of beer that the plaintiff liked to drink. It found that the article was motivated by gender biases and stereotypes on the part of the defendant, who had certain views on how women should behave in public and believed that women who occupied such spaces were ordinarily viewed as prostitutes. The Court cited Article 5 of CEDAW in this regard, which recognized that roles are attributed to women based on stereotypes, which is discriminatory. It commented further that such stereotypes affect the career prospects of women who are equally talented as their male counterparts, and results in gender inequality.

The Court found in favor of the plaintiff and ordered the newspaper to pay damages of USD 10,000. The Court stated that the amount was decided keeping in mind amongst other things, “our country’s obligations in terms of international and regional protocols and conventions, as well as the provisions in our new Constitution that seek to protect the right to non-discrimination on the basis of sex and gender, and gender stereo-
types.” In a footnote, the Court also drew particular attention to Articles 2 (Elimination of discrimination against women) and 3 (Right to dignity) of the Maputo Protocol.

Commentary

Apart from Article 3, this case addresses issues covered under Article 2 (Elimination of discrimination against women) of the Maputo Protocol. The High Court of Zimbabwe took a broad view of international and regional law related to women’s rights in this case. Noting that the legal sphere had penetrated into many aspects of people’s public and private social spheres, the Court used an innovative approach to apply principles enshrined in the Maputo Protocol and CEDAW while determining the quantum of damages in a defamation case. This decision particularly promotes the spirit of Article 2(2) of the Maputo Protocol, which requires States parties to commit to modifying the social and cultural patterns of conduct of women and men to eliminate practices that are, amongst others, based on stereotyped roles for men and women.

4.2.3  **Josephine Oundo Ongwen v. Attorney General & Others [2018] eKLR (High Court, Kenya)**

**Issue – Mistreatment of poor pregnant women in public hospitals**

**Facts**

The petitioner was a woman from a low-income background who delivered her baby in a public hospital that was required to provide free maternal healthcare as per government policy. She was forced to share a bed with another woman and was not given any help when her delivery was forthcoming. She was required to walk alone to the delivery room which was fully occupied, and lost consciousness in the corridor where she was forced to deliver on the concrete floor. She was then verbally abused by the nurses who found her in this condition.
**Decision**

The Court held that the petitioner’s rights to maternal healthcare and dignity were infringed, and awarded damages to the petitioner. It also directed the hospital and the Cabinet Secretary for Health to provide public apologies to the petitioner. It declared that the government had “failed to develop and/or implement policy guidelines on healthcare, thus denying the petitioner her right to basic healthcare”.

**Analysis**

The Court referred to Article 43 of the Kenyan Constitution, as well as provisions of the International Covenant on Economic Social and Cultural Rights (ICESCR) and the African Charter, which all provide for the right to health. It noted that the right to health includes proper treatment at hospital, availability of necessary equipment, facilities and medication. The Court found that the petitioner was provided none of the above by the public hospital, which was a violation of basic rights.

The Court then relied on Article 3 of the Maputo Protocol which recognizes the right to dignity of women. It found that the fact that the petitioner was forced to give birth on a concrete floor in an open area without privacy, and was then verbally abused by the nurses, amounted to a violation of her right to dignity.

**Commentary**

Apart from Article 3, this case involves issues covered under Articles 14 (Health and Reproductive Rights), 24 (Special Protection of Women in Distress) and 25 (Remedies) of the Maputo Protocol.

**4.3 The Rights to Life, Integrity and Security of the Person (Article 4)**

Women’s right to life is the most fundamental of all rights. It forms the basis for the enjoyment of other rights. The right to security encompasses women’s own safety that is guaranteed by the State.
The Maputo Protocol recognizes women’s entitlement to respect for their life, integrity and security of their persons. Any form of exploitation, violence, or cruel, inhuman and degrading treatment or punishment violates this right. The State must enact and enforce laws to prohibit, prevent, eradicate and punish all forms of violence against women, whether it takes place in public or private.

States are required by the Maputo Protocol to identify the causes and consequences of such violence and address them, including by taking necessary legislative, administrative, social and economic measures to prevent, punish and eradicate violence against women. Violators of women’s rights should be punished, victims rehabilitated and reparation provided for. The State must put in place measures for women to access services and information on their rights. No death penalty should be passed on a nursing or pregnant woman.

The three cases analyzed below, dealing with the issues, reveal judicial measures that have been taken by courts to protect women’s right to life, integrity and security of the person. The first case is a positive decision relating to sexual and physical assault of a woman. This case was the first ruling by the regional Economic Community of West African States (ECOWAS) Court of Justice that directly applies the provisions of the Maputo Protocol. The second is a domestic case from South Africa, which deals with the requirement to prosecute sexual offences, even when there is delayed reporting. The third case is a ruling by the African Commission on Human and Peoples’ Rights (ACHPR) applying the provisions of the African Charter on Human and Peoples’ Rights (African Charter) to a case involving forced abduction, rape and marriage of an adolescent girl.

4.3.1 Dorothy Chioma Njemanze & 3 Ors v. Federal Republic of Nigeria, ECW/CCJ/APP/17/14 (ECOWAS Court of Justice)

Issue – verbal, physical and sexual assault, threats and unlawful detention
Facts
The second, third and fourth plaintiffs were abducted by some people in a white bus (allegedly branded as Abuja Environmental Protection Board (AEPB), and Society against Prostitution and Child Labour). They were then unlawfully detained in inhuman conditions and sexually and physically assaulted by officials of the AEPB. The first plaintiff, Ms. Njemanze approached the AEPB office to secure the release of her friends (the fellow plaintiffs). When Ms. Njemanze attempted to get her friends released, she was repeatedly threatened and harassed verbally, physically and sexually by the officers of the AEPB, the Nigerian Police and the Nigerian Military. Her attempts to file a complaint at the Maitama Police Station were not fruitful as the police officer on duty insulted her and even threatened to arrest her and her colleagues ‘because according to him they looked like prostitutes’.

The plaintiffs instituted a case in the ECOWAS Court seeking a declaration that failure by the State to protect their rights amounted to a violation of the African Charter, as well as Articles 2, 3, 4, 5, 8, and 25 of the Maputo Protocol. Nigeria denied all allegations, and argued that the plaintiffs were commercial sex workers.

Decision
The Court found that the State of Nigeria had violated multiple rights of the plaintiffs under the African Charter, the Maputo Protocol, CEDAW and other international instruments; including the right to dignity, the right against discrimination, the right to life, integrity and security of person and the right to remedies.

Analysis
The Court found that the plaintiffs had been illegally detained and harassed. It held that the State had arrested the plaintiffs merely on the grounds that they were women who were out on the streets late at night; which was a
form of gender discrimination. The Court held that branding the women as prostitutes constituted verbal abuse, though the plaintiffs were unable to adduce sufficient evidence to prove physical and sexual abuse by State authorities. The Court found multiple violations of the Maputo Protocol (in addition to violations of the African Charter). In particular, it held that failure by the State to recognize and protect the rights of the plaintiffs and take steps to give effect to the rights of the plaintiffs amounted to violation of Articles 2, 3, 4(1) and (2), 5, 8 and 25 of Maputo Protocol.

Further, the Court found that the plaintiffs had made formal complaints to State authorities, who promised to investigate but never did. The Court held that failure to investigate and prosecute those responsible for the offences amounted to violation of the international obligations of the State. It also found that the treatment of the plaintiffs by the agents constituted gender-based discriminatory conduct that is contrary to Articles 2 and 8 of the Maputo Protocol. The conduct also amounted to inhuman and degrading treatment contrary to Articles 3 and 4(1) of the Maputo Protocol.

The Court awarded damages of six million Naira to the first, third and fourth plaintiffs. It did not make an award to the second plaintiff as her claim was statute barred.

**Commentary**

This case was the first ruling by the ECOWAS Court of Justice which directly applied the provisions of the Maputo Protocol. Apart from Article 4, this case addresses issues covered under Articles 2 (Elimination of Discrimination against Women), 3 (Right to Dignity) 8 (Access to Justice and Equal Protection before the Law) and 25 (Remedies) of the Maputo Protocol.

The case referred to the precedent set in the case of *Brenner v Botha*7, in which a shop manager, in the privacy of his shop, called a female shop attendant

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7 1956 (3) SA 257(T), 259.
a ‘bloody bitch’. The court held that such verbal use of degrading and dehumanizing words amount to violence, violation of integrity and a threat to one’s life. The case further developed and widened the English common law position that restricts compensation of victims of sexual harassment to ‘proof that as a consequence, they developed a mental condition’.

4.3.2 Bothma v. Els & Others [2009] ZACC 27 (Constitutional Court of South Africa)

Issue – prosecution of sexual offences, unreasonable delay, right to respect for life and right to be free from violence

Facts

The applicant, Mrs. Bothma instituted a private prosecution charging commission of sexual assault against her while she was a thirteen-year-old girl. She also alleged that a similar pattern of sexual abuse had continued for more than two years (until she was sixteen). The accused person was a family friend of Mrs. Bothma’s parents. The alleged incident had taken place thirty-nine years before the prosecution was instituted by the applicant. The High Court issued a permanent stay on the prosecution holding that the unreasonable delay, for which it regarded Mrs. Bothma as being fully culpable, would result in irreparable trial prejudice to Mr. Els (the accused).

Decision

The Constitutional Court overturned the permanent stay on prosecution granted by the High Court, and allowed the prosecution to proceed.

Analysis

The Court noted that the need for courts to give an effective response to rape, and especially the rape of young girls, has been emphasised throughout the world. It cited Article 4 of the Maputo Protocol which stated that “every
woman shall be entitled to respect for her life and the integrity and security of her person”. It also relied on Article 4(2) of the Maputo Protocol, which requires the State to take effective measures to enforce laws prohibiting violence against women, and to adopt the necessary measures to ensure the prevention, punishment and eradication of all forms of violence against women. The Court relied on these provisions from the Maputo Protocol, and also referred to the African Charter on the Rights and Welfare of the Child to bring out the gravity and brutality of the offence of rape, especially when children are involved.

Based on this, the Court held that the High Court had given insufficient weight to the special character of the offence while deciding whether to grant a stay on the prosecution. It noted that the High Court was wrong to conclude that Mrs. Bothma was solely culpable for the delay, since the very conduct complained of could have stifled her psychological and emotional capacity to declare openly what had happened. The Court found that the nature of offence was inextricably linked to the delay in filing the complaint, since Mrs. Bothma had “internalized the shame of the events”, as well as feelings of guilt, betrayal and fear of stigmatization if she spoke out about the offence. This led her to suppress the memories of the rape, and also transformed her “into a deeply traumatized adult incapable for decades of comprehending the source of her woes”. It was only after she received counselling that she developed knowledge of the meaningful wrong that had been done to her when she was a child, which encouraged her to initiate the prosecution after several decades.

The Court found that the delay of almost four decades had created a significant prejudice to Mr. Els in making his defence. However, it held that the High Court had erred in determining that this prejudice was insurmountable. It applied the balancing test, and weighed the prejudice to Mr. Els against the nature of the offence and the societal interest in the prosecution of sexual offences. Based on this, the Court concluded that the stay of prosecution must be set aside.
Commentary

Apart from Article 4, this case also highlights issues which are covered under Article 3 (Right to Dignity) and Article 25 (Remedies) of the Maputo Protocol. This case also demonstrates the appreciation by the Court of the fact that the passage of time did not render the prosecution of human rights violations impossible. It thus illustrates that there can be no limitation of time in prosecuting human rights violations and affording remedies to the victims of such violations.


Issue – sexual violence against women, abduction and defilement, forced marriage, failure to provide appropriate remedy.

Facts

In 2001, a 13-year-old girl, Zebene Negash was abducted and raped by Aberew Jemma Negussie. She was rescued, and Aberew was arrested. After he was released on bail, he abducted Ms Negash again and held her for more than a month until she managed to escape, but only after he had forced her to sign a marriage certificate. Aberew was then convicted by the lower court to 10 years’ imprisonment for rape and abduction. However, on appeal, the High Court quashed the decision of the lower court on the basis that the “evidence suggests that the act was consensual” and released Aberew and his accomplices. Ms Negash and her lawyers were not given notice of or heard during the appeal.

Decision

It was held that the failure by the Ethiopian government to put in place mechanisms to prevent abduction and rape of a minor girl, and investigate
and punish those responsible for the offence, amounted to violation of State obligations under the African Charter on Human and Peoples’ Rights, specifically, integrity of the person, dignity, liberty, and security of the person. The African Commission ordered the State to pay compensation of USD 150,000 to Ms Negash.

Analysis

The Commission noted that in this case, the primary violations were committed by private citizens, who had abducted the victim, raped her and forced her to sign a purported marriage contract. These acts constituted a violation of numerous rights in the African Charter, including the right to life and security of person (Article 4), right to liberty (Article 6), right to dignity (Article 5).

Though the acts were perpetrated by private individuals, the Commission held that a State also incurs international responsibility for rights violations, if the State has failed to exercise due diligence to prevent the violation or respond to it as required by the African Charter. The Commission noted that in the present case, the State must have been aware or deemed to be aware of the prevalence of marriage by abduction and rape in areas where the practice was rampant. This required escalated measures by the State to prevent the practice. Further, the Commission noted that Ms Negash was abducted a second time because the perpetrator was ‘inexplicably’ released from custody without guaranteeing Ms Negash’ safety. Accordingly, the Commission found that the State failed to meet “its duty to prevent the violations, and thus failed in its ‘duty to protect’.”

Additionally, the Commission found that the State “clearly failed in its duty to diligently investigate the acts, identify all those who participated in or facilitated the abduction and rape of Ms Negash, and sanction their acts”. The decisions of the higher courts were also “manifestly arbitrary”, without any proper reasoning, which amounted to violations of Ms. Negash’s right to have her cause heard (Article 7 of the African Charter) and the right to
 protección de la ley (Artículo 3 de la Carta Africana). La Comisión declaró que el Estado debe implementar “medidas escaladas y objetivo” para enfrentar la ‘matrimonio’ por abducción y violación.

Los denunciantes también argumentaron que el Estado había violado los Artículos 2 y 3 de la Carta Africana (Derecho a la Libertad de Discriminación, y Derecho a la Igualdad ante la Ley y Protección de la Ley). La Comisión señaló que la discriminación era “la distinción injustificada o tratamiento diferencial de personas en situaciones relevantemente análogas”, y citó la definición de discriminación encontrada en el Artículo 1(f) del Protocolo de Maputo. La Comisión afirmó que “infligir violencia a alguien solo porque es mujer, en lugar de un hombre” es discriminación. Sin embargo, la Comisión encontró que en los hechos del caso presente, no había “persona de situación similar que fuera protegida en forma necesaria por el Estado Respondente o que fuera sancionada por violaciones similares a las sufridas por Ms Negash. No es posible, en los circunstancias, identificar la diferenciación o distinción que es el gravamen de la discriminación.” Por lo tanto, la Comisión concluyó que no hubo violación del derecho a la no-discriminación.

**Comentario**

La Comisión Africana en este caso realizó su análisis bajo la Carta Africana y no el Protocolo de Maputo, ya que en ese momento, Etiopía no había ratificado el Protocolo de Maputo. Sin embargo, los temas discutidos son similares a los cubiertos por el Protocolo de Maputo, particularmente los Artículos 2 (Eliminación de Discriminación contra las Mujeres), 3 (Derecho a la Dignidad) y 4 (Derecho a la Vida, Integralidad y Seguridad de la Personas) del Protocolo de Maputo.

La decisión de la Comisión Africana en este caso fue ampliamente positiva, y un fallo inédito que reconoció la responsabilidad del Estado bajo la Carta Africana para prevenir y abordar efectivamente casos de violencia contra mujeres y niñas. Sin embargo, la razón de la Comisión con respecto a la violación del derecho contra la discriminación fue basada...
on a narrow understanding of discrimination, and was not in line with international human rights standards, including the jurisprudence of the CEDAW Committee. The Commission found that the violence against women in this case did not amount to discrimination since there was no “comparator”, i.e. a similarly situated person who was accorded the necessary protection by the State or accorded justice for violations similar to those suffered by Ms Negash. However, as recognized by the CEDAW Committee in General Recommendation No. 19, discrimination includes “gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately”.8 In this case, forced marriage by abduction and rape is a crime committed against women and girls in Ethiopia, and is a form of gender-based violence since it is “violence directed against a woman because she is woman”. In this situation, it is not possible to find a male comparator who was provided justice by the State for violations similar to those suffered by Ms Negash simply because these violations, and the practice of abducting women to force them into marriage, are largely committed only against women and girls. It is the gendered nature of the offence that by itself amounts to discrimination against women.

4.4 Elimination of Harmful and Discriminatory Practices (Article 5)

The Maputo Protocol obligates States to prohibit, condemn, enact legislation and take all measures to eradicate and eliminate all forms of harmful practices that negatively affect women’s rights and contradict international standards. In addition, they must take measures such as public awareness through formal and informal education as well as outreach programs. Specifically, practices of female genital mutilation, scarification, and para-medicalization of female genital mutilation should be prohibited.

through legislative measures backed by sanctions. Victims of all harmful practices must be supported by the State through provision of services such as health, legal and judicial support, emotional and psychological counseling, and vocational training to ensure they become self-supportive. The State must also protect women at risk of such harmful practices.

Of the three cases analyzed in this section, the first is a case from Uganda which deals with the custom of payment of bride price at the time of marriage. The second case is a decision from South Africa in relation to the harmful practice of abducting girls for the purpose of marriage. The third case is equally from Uganda and relates to the constitutionality of female genital mutilation.

### 4.4.1 Mifumi v. Attorney General [2015] UGSC 13
(Supreme Court of Uganda)

**Issue** – custom of payment of bride price at marriage and refund at the time of dissolution

**Facts**

Mifumi (U) Ltd, an NGO, along with 12 others, petitioned the Court to declare the marriage custom and practice of demanding bride price, and its refund in the event of divorce as unconstitutional. ‘Bride Price’ denotes the property which is given by the groom’s parents to the bride’s parents in customary marriage.

**Decision**

The Court found that the custom of payment of bride price at the time of marriage did not promote women’s inequality and did not violate the Ugandan Constitution. However, the custom of demanding refund of bride price as a pre-requisite to a valid dissolution of a customary marriage was unconstitutional as it violated a woman’s right to equality and dignity.
Analysis

At the outset, the Supreme Court objected to the use of the term ‘bride price’ since they believed that this was a colonial term, which indicates that brides in a customary marriage are ‘purchased’ by the groom and his family.

The petitioners argued that the payment of bride price at the time of marriage violated the equality provisions in the Ugandan Constitution, as it treats wives as “mere possessions”. The Court noted that though the custom of bride price was popular in Uganda, the popularity of a custom alone cannot be a justification for its maintenance (such as in the case of female genital mutilation). However, the Court found that in this case, there were valid reasons for people to still value the custom of bride price, since it is considered as a token for gratitude to the bride’s family for the girl’s nurture and upbringing. The Court agreed with the contentions of the petitioner that in some cases, men view bride price as “consideration for their entitlement to the woman’s labour, obedience, her sexual availability and fertility”; and that such an attitude could contribute to domestic violence. Despite this, it concluded that the abuse of the custom by some men was not sufficient to declare that the custom and practice of demand of bride price promotes inequality and violence in marriage. The Court also found that the custom and practice of demand for payment of bride price did not fetter the free consent of persons intending to marry.

With regard to the issue of refund of bride price at the time of dissolution of marriage, the counsel for the petitioners had argued that Uganda’s international obligations under CEDAW required the State to take appropriate measures to modify or abolish customs and practices that constitute discrimination against women. The petitioners had also argued that under the Maputo Protocol, States Parties are obliged to outlaw cultural practices and traditions that affect the dignity of women.

Though the Court did not directly address the petitioner’s arguments regarding Uganda’s obligations under CEDAW and the Maputo Protocol,
it found that the custom of refund of bride price was oppressive towards women, and also devalued the “worth, respect and dignity of a woman”. Further, it found that this custom “completely ignores the contribution of the woman to the marriage up to the time of its break down”. Requiring the woman to refund the bride price may also in some instances have the effect of keeping the woman in an abusive marriage, if she or her parents were unable to return the property given at the time of marriage. Hence, the Court found that this custom was unconstitutional as it violated the provisions of the Ugandan Constitution which dealt with equality of rights in marriage and at its dissolution; as well as the provision which prohibited laws, cultures, customs and traditions which were against the dignity, welfare or interest of women.

Commentary

The decision of the Ugandan Supreme Court was partly positive in terms of women’s rights since it declared that the custom of refund of bride price violated a woman’s right to equality; and was a custom that violated the dignity of woman. However, its decision that the payment of the bride price itself does not promote inequality of women or violate their right to freely enter into a marriage contradicts the observations of the CEDAW Committee in this regard. The Joint General Recommendation of the CEDAW Committee and the Committee on the Rights of the Child on Harmful Practices specifically notes that the payment of bride price could increase the vulnerability of women and girls to violence and other harmful practices. Further, in some cases, families could “agree to the temporary “marriage” of their daughter in exchange for financial gains, also referred to as a contractual marriage, which is a form of trafficking in human beings”. The General Recommendation also states that “[t]he CEDAW Committee has repeatedly stressed that allowing marriage to be arranged by such payment or preferment violates the right to freely choose a spouse

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9 CEDAW/C/GC/31-CRC/C/GC/18
10 Ibid.
and has in its GR No. 29 (2013) outlined that such practice should not be required for a marriage to be valid, and such agreements should not be recognized by the State party as enforceable.” 11

Apart from Article 5, this case addresses issues covered under Articles 2 (Elimination of Discrimination against Women), 3 (Right to Dignity), 6 (Marriage) and 7 (Separation, Divorce and Annulment of Marriage) of the Maputo Protocol.

4.4.2  
**Nvumeleni Jezile v. The State** 2015 (2) SACR 452 (High Court of South Africa)

**Issue** – custom of abducting girls for the purpose of marriage – trafficking for sexual purposes and rape

**Facts**

The appellant was convicted by the trial court on grounds of human trafficking, rape and assault. The appellant married a 14-year-old girl who had been forced into marriage by her family members. He then abducted the girl and forced her to enter into sexual intercourse with him against her will. Though the girl tried to escape a few times, she was returned to the appellant by her own male family members. The appellant argued that all his actions were taken in accordance with the custom of *ukuthwala* or forced arranged marriages. He further submitted that it was “an integral part of *ukuthwala* that the “bride” may not only be coerced, but will invariably pretend to object (in various ways) since it is required, or at least expected, of her to do so.” Accordingly, he appealed his conviction on the ground that he did not have the requisite criminal intent.

**Decision**

The High Court upheld the conviction of the appellant on criminal charges of trafficking and rape.

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11 Ibid.
Analysis

The Court after referring to South Africa’s constitutional and criminal law provisions relating to gender equality, trafficking, forced marriage, and rape, also noted South Africa’s international obligations. In particular, the Court referred to Article 26 of CEDAW which requires States to take appropriate measures to modify the social and cultural patterns of the conduct of men and women, in order to eliminate prejudices and discriminatory customary and other practices, as well as Article 16 which deals with equality in marriage and the right to enter into marriage with free and full consent. The Court noted that South Africa was also party to the Maputo Protocol, which “is to similar effect as CEDAW”.

The Court relied on submissions by amicus to find that the traditional form of ukuthwala required consent by both parties to the marriage, though a “mock abduction” was part of the ritual performed. The form of ukuthwala practiced in this case, if any, was an aberrant form which involved coercion of the girl who clearly did not consent to the marriage or sexual intercourse and had tried to run away on more than one occasion. The Court concluded that practices associated with the aberrant form of ukuthwala could not secure protection under the law. The Court also found that the appellant could not attempt to rely on these traditional practices to avoid liability for offences of trafficking for sexual purposes and rape.

Commentary

Apart from Article 5, this case deals with issues covered under Articles 3 (Right to Dignity), 4 (Rights to Life, Integrity and Security of Person) and 6 (Marriage) of the Maputo Protocol.

4.4.3 Law and Advocacy for Women in Uganda v. The Attorney General, [2010] UGCC (Constitutional Court, Uganda)

Issue – the constitutionality of the practice of female genital mutilation (FGM), burden of proof
Facts

This was a petition filed at the constitutional court of Uganda asking the Court to declare that the practice of Female Genital Mutilation (FGM), which is practiced by several Ugandan communities, contravenes/violates several women’s rights under the constitution of Uganda. These include protection from cruelty, right to be treated with dignity, right to life, protection from torture, cruel, inhuman and degrading treatment and punishment, right to healthcare, amongst others.

The petitioner argued there were many negative impacts of FGM that include the cruel manner in which FGM is conducted characterized by excruciating pain, the potential health effects, which could include urinary incontinence, death due to excessive bleeding or sepsis, and spread of HIV/AIDS due to use of unhygienic instruments (resulting in a violation of the right to life).

Decision

The court held that whereas everyone has the right to practice their culture, tradition and religion under Article 37 of the Constitution of Uganda, such practices can only exist so long as they do not constitute disrespect for human dignity, or subject any person to any form of torture, cruel, inhuman and degrading treatment. The court boldly held that FGM is a practice that violates women’s rights, their dignity, and is condemned by both the Constitution of Uganda and international law.

Analysis

In rendering its judgment, the Court noted that ‘it is clear beyond any doubt that the practice of Female Genital Mutilation is condemned by both the Constitution of Uganda and international law [the treaties, covenants, conventions and protocols to which Uganda is a party].’ Though the court does not specifically mention the Maputo Protocol, it references the protocols to which Uganda is a party (as noted above). This observation
is in line with Article 5 of the Maputo Protocol that requires States Parties to ‘prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards.’

The court noted that FGM has very harmful consequences to the health and dignity of women and girls, and declared the custom void under the provisions of the Ugandan Constitution.

**Commentary**

Apart from Article 5, this case deals with issues covered under Articles 3 (Right to Dignity) and 4 (Rights to Life, Integrity and Security of Person) of the Maputo Protocol. This case also shows other aspects of the effects of FGM, for example urinary incontinence, which can cause social stigma, increased chances of contracting HIV/AIDS through sharing of cutting instruments, and the fact that FGM has no medical benefits at all to the victims. Apart from violating several women’s and girls’ rights, FGM is often a precursor to child, early and forced marriages, a sexual violation of women’s and girls’ dignity, since a circumcised woman or girl is regarded as an adult ready to take up adult responsibilities such as marriage. The concept of bride price is closely connected to the status of a woman as circumcised or uncircumcised in communities that practice the rite. The link between FGM and bride price in effect subjects women to inhuman and degrading treatment that takes away their inherent dignity, respect and protection of the law by treating them as goods for sale whose value vary on whether they are circumcised or not.

**4.5 Marriage (Article 6)**

The Protocol requires that men and women enjoy equal rights and be treated as equal partners on entering into a marriage. In order to meet this objective, the Protocol mandates the member States to undertake legislative measures to ensure that marriages are only entered into with the free and full consent
of both parties, to set the minimum age of marriage for women at 18 years, and that monogamy is encouraged. It also requires the written recording and registration of all marriages for the purpose of legal recognition. Further, a married woman should have the right to retain her maiden name, to retain her own nationality or acquire that of her husband, and to acquire her own property and to administer and manage it freely.

Of the four cases discussed under this section, the first is a case by the African Court of Human and Peoples’ Rights (the African Court) regarding minimum age of marriage and consent to marriage. The second case is from Tanzania with regard to the minimum age of marriage. The third case, a decision by a Zimbabwean court, addresses the need to register marriages and is related to the inheritance rights of women in unregistered marriages. The fourth case, from South Africa, deals with the protection of the rights of the second wife in polygamous marriages.

4.5.1 Association Pour Le Progrès Et La Défense Des Droits Des Femmes Maliennes (APDF) & The Institute for Human Rights & Development in Africa (IHRDA) v. Republic of Mali, 2018 (African Court of Human and Peoples’ Rights)

Issues – minimum age of marriage, consent to marriage, inheritance rights

Facts

The Government of Mali passed a new Family Code in 2011. The applicants, both human rights organizations, argued that certain provisions of the Family Code violated rights in various regional human rights instruments including the African Charter, the Maputo Protocol, and the African Charter on the Rights and Welfare of the Child (ACRWC). The provisions challenged included the ones on minimum age of marriage which was set at 16 for girls and 18 for boys (and also allowed special exemption for girls to be married
at 15 for compelling reasons), the provisions which did not require religious ministers who perform marriages to verify parties’ consent to the marriage, and inheritance laws which enshrined religious and customary laws as the default regime in matters of inheritance (Islamic law prescribed women shall only receive half the inheritance received by a man).

**Decision**

The Court found that Mali, by enacting the Family Code, had violated Articles 6(a) and (b) and 21 of the Maputo Protocol related to minimum age of marriage, consent to marriage and right to inheritance. It also found that these provisions violated the right to non-discrimination and the obligation to eliminate harmful traditional and cultural practices as set out in the Maputo Protocol, ACRWC and CEDAW. The Court ordered the State to amend the law and to comply with its obligations under Article 25 of the African Charter relating to information, teaching, education and sensitisation of the populations.

**Analysis**

With regard to the provisions on the minimum age of marriage, the Court relied on Article 6(b) of the Maputo Protocol. It noted that Article 6(b) and certain provisions of ACRWC “focus on the obligation for States to take all appropriate measures to abolish negative practices and customs… especially measures to guarantee the minimum age for marriage at 18 years”. It found that it was the State’s responsibility to ensure that the minimum age of marriage was 18 and that the provisions were non-discriminatory (even if a section of the population opposed this). Thus, it concluded that there was a violation of Article 6(b) of the Maputo Protocol.

The Court also relied on Article 6(a) of the Maputo Protocol which requires that “no marriage shall take place without the free and full consent of the parties”. It found that the provisions of the Family Code which allowed application of religious and customary laws on consent for marriage and
also allowed for different marriage regimes depending on whether it was celebrated by a civil officer or a religious minister were not consistent with the Maputo Protocol or CEDAW. In doing so, it noted that “the way in which a religious marriage takes place in Mali poses serious risks that may lead to forced marriages and perpetuate traditional practices that violate international standards”.

The Court found that the Islamic law currently applicable in Mali regarding inheritance and customary practices was not in conformity with the instruments ratified by the State, as Article 21 of the Maputo Protocol and provisions of the ACRWC guarantee equality of treatment for women and children without any distinction.

**Commentary**

Apart from Article 6, this case deals with issues covered under Article 2 (Elimination of Discrimination), Article 5 (Elimination of Harmful Practices) (Right to Dignity) and Article 21 (Right to Inheritance) of the Maputo Protocol.

This landmark decision was the first case in which the African Court applied the provisions of the Maputo Protocol.

**4.5.2 Rebeca Z Gyumi v. Attorney General, Miscellaneous Civil Cause No 5 of 2016 (High Court, Tanzania)**

**Issue – setting of different age requirements for girls and boys in contracting marriages, gender discrimination.**

**Facts**

Rebeca, the applicant, challenged the constitutionality of sections 13 and 17 of the Law of Marriage Act, on the grounds that they prescribed different minimum ages of marriages for boys and girls. Section 13 set the minimum age of marriage as 15 years for girls and 18 years for boys, and allowed marriages between boys and girls above the age of 14 with the
permission of the Court. Section 17 required girls under the age of 18 to obtain the consent of the father to the marriage. Section 17 privileges the consent of the father, since the mother can only give consent where the father is dead.

**Decision**

The Court held that sections 13 and 17 of the Marriage Act were unconstitutional. It directed the Government to amend the law within one year to set the minimum age of marriage at 18 for both boys and girls.

**Analysis**

The Court observed that child marriages subject children to complex matrimonial and health concerns. The Court noted that it was “glaring” from the provisions of section 13 that it gave preferential treatment to boys regarding eligible marriage ages. Hence, since the provisions prescribe “differential treatment to persons in a similar situation”, they were discriminatory and violated the principle of equality guaranteed by the Tanzanian Constitution.

The Court referred to Article 6 of the Maputo Protocol, which “encourages State parties to ensure that there is equality between men and women and both are regarded as equal partners in marriage”. The Court also noted that the Maputo Protocol requires marriages to take place with the free will and full consent of both parties, and sets the minimum age of marriage for women at 18 years. Accordingly, the Court concluded that since Tanzania had ratified the Maputo Protocol, it was “high time” that the State took appropriate legislative measures to guarantee these rights.

The State tried to justify child marriages on the grounds of customary and religious beliefs. However, the court disagreed with the State, noting that under Tanzanian law, the provisions of the Law of Marriage Act overrode rules of customary and Islamic law. In this regard, it took inspiration
from the provisions of the ACRWC, which called for the elimination of harmful social and cultural practices, particularly those customs which were prejudicial to the health or life of the child, or which discriminated on the grounds of sex (including child marriage). The Court concluded that sections 13 and 17, apart from being discriminatory, no longer served any useful purpose. It declared these sections to be null and void.

**Commentary**

Apart from dealing with issues under Article 6 of the Maputo Protocol, this case also covers issues under Article 2 (Elimination of Discrimination) and Article 5 (Elimination of Harmful Practices).

This is an important case in which young girls went to court on behalf of all girls under the risk of child marriages without necessarily having to wait for their rights to be violated. The case also brings out an important fact that any action that leads to sexual offences with children is outlawed in line with the Sexual Offences Act. Subjecting children to child marriages exposes them to abuse in the performance of conjugal “duties” that amount to sexual offences. The Government has appealed this decision before the Supreme Court of Tanzania, and the appeal was currently pending at the time of compiling this Digest.

### 4.5.3  *Hosho v. Hasisi* [2015] ZWHHC 491 (High Court of Zimbabwe)

**Issue** – registration of marriages, inheritance rights of widows involved in an unregistered customary marriage

**Facts**

The plaintiff sought to evict the defendant from the property which he had purchased under an agreement of sale from a third party and registered in his name. The defendant, Lillian Hasisi, opposed the eviction on the grounds that she was entitled to the house by virtue of being the surviving
spouse as a result of an unregistered customary law union. Ms. Hasisi did not have any documents to prove the existence of her union, and was unable to support her claim with witnesses who were present at the customary marriage ceremony, since they were all deceased. Due to this, the property was transferred to the surviving son of the owner of the property (through a previous marriage), who had then sold the property to the plaintiff.

**Decision**

The Court found on facts that the defendant had failed to prove the existence of a marriage between herself and the owner of the property, and was thus not entitled to the property which now legally belonged to the plaintiff.

**Analysis**

The Administration of Estates Act in Zimbabwe recognizes a union contracted according to customary rites even if it has not been formally solemnized. Hence, a marriage certificate is not legally required for a widow to be able to enforce her inheritance rights. When an unregistered union or marriage is proven to exist, the surviving wife has the right to ownership of the house when the husband dies intestate. The Court observed that this principle was in sync with the spirit and intent of Article 21 of the Maputo Protocol which provides that the widow has the right to continue living in the marital house.

However, in order to obtain the benefit of these inheritance rights, proof of existence of the customary union is essential. The defendant had failed to adduce sufficient evidence in this regard. The Court commented that facts such as this bring to light why “a registered marriage is ultimately more secure for women”. It also stated that international law is also in favour of registration, including Article 6(d) of the Maputo Protocol, which is categorical that States are to take measures to ensure that “every marriage is recorded in writing and registered in accordance with national laws, in order to be legally recognised”. The Court noted that “addressing these challenges requires proactive measures by relevant State bodies so as to
protect vulnerable groups from the results of failure to register”, such as providing ready access to administrative facilities for registration, as well as improving knowledge of the law.

**Commentary**

This case, on the facts, resulted in a negative outcome for the woman who failed to enforce her inheritance rights arising out of her unregistered customary marriage. However, the Court recognized the right of widows to live in the marital house as set out in Article 21 of the Maputo Protocol. Though this case had a negative outcome on the facts, it serves to shed light on the importance of registration of marriages as required by Article 6 of the Protocol to ensure that women are able to access their legal rights.

4.5.4  *Ngwenyama v. Mayelane & Another* [2012] ZASCA 94 (Supreme Court of Appeal, South Africa)

**Issue – polygamous customary marriages**

**Facts**

The provisions of the Recognition of Customary Marriages Act (RCMA) required that a husband in a customary marriage who wished to enter into a further customary marriage ‘must’ apply to the court to approve a written contract governing the matrimonial property system of the marriages. In this case, the deceased husband entered into two customary marriages which were both subsisting at the time of his death. However, he failed to comply with the procedural requirements of the RCMA before entering into the second marriage. The first wife sought to have the second marriage declared null and void for this defect, as well as on the grounds that she had not been consulted before the husband entered into the second marriage.

**Decision**

A valid customary marriage could not be declared as null and void merely due to non-compliance with certain provisions of the RCMA.
Analysis

The Court applied the principle of purposive interpretation of the statute, and noted that the purpose of the RCMA was to advance the rights of women married according to customary law in order to protect the rights of these women to matrimonial property. Hence, the Court concluded that the provisions of the RCMA cannot be solely used to protect the first wife, but a purposive interpretation of the provision is required to ensure that the second wife is equally protected. The Court found that if the second marriage was held to be void due to failure to comply with the procedural requirements, this would constitute an infringement of the right to dignity, right to equal status in marriage and rights to physical and emotional integrity of the second wife. It would also defeat the purpose of equality.

In this regard, the Court referred to provisions of CEDAW, as well as Article 6(b) of the Maputo Protocol, which “obliges state parties to enact appropriate national legislative measures to guarantee that the rights of women in marriage and family, including polygamous marital relationships are promoted and protected”. Hence, the Court concluded that the “legislature did not intend non-compliance to invalidate a valid customary marriage”.

Commentary

It is important to acknowledge here that Article 6 of the Maputo Protocol encourages monogamy as the preferred form of marriage. However, if polygamous marriages are allowed, at the very least, the rights of women in polygamous marital relationships should be promoted and protected.

This decision was appealed to the Constitutional Court of South Africa. The decision of the Constitutional Court12 dealt with issues not considered by the Court of Appeal, i.e. regarding whether the second marriage was valid though it had been contracted without the consent of the first wife. The Constitutional Court upheld the appeal on this separate ground,

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finding that the second marriage was null and void because the deceased husband had failed to obtain the consent of the first wife. However, the Constitutional Court upheld the Court of Appeal’s interpretation of the provisions of the RCMA.

4.6  Separation, Divorce and Annulment of Marriage (Article 7)

The Protocol mandates the member States to undertake appropriate legislative measures in order to ensure that in the event of separation, divorce or annulment of marriage, men and women enjoy equal rights. They are to ensure that separation, divorce or annulment of marriage is effected by judicial order, and that both men and women have the same rights in seeking separation, divorce or annulment of marriage. It further requires that in such instances, both men and women have reciprocal rights and responsibilities towards their children, and that there be an equitable sharing of joint property derived from the marriage.

There are four cases discussed under Article 7, of which the first case is from Malawi, and relates to division of property at the time of divorce. The next three cases are all cases from Kenyan courts which deal with similar issues relating to the equitable sharing of property derived from the marriage. At the end of this section, certain additional cases from Kenya are also highlighted, though not discussed in detail since they are similar in facts and analysis to the other cases discussed in this section.

4.6.1  *Kishindo v. Kishindo* [2014] MWHC 2 (High Court of Malawi)

**Issue - division of matrimonial property, right to equality**

**Facts**

The case dealt with the disputed distribution of matrimonial property at the time of divorce. The matrimonial property (consisting of two houses
and some household items) was acquired during the marriage. The two houses were located in Old Naisi and Domasi. The wife applied to get the Naisi house since the property was registered in her name and given to her by her husband as a gift in compliance with his obligations under customary law. However, the husband was currently living in the Naisi house to Mrs. Kishindo’s exclusion due to marital difficulties.

**Decision**

The Court held that matrimonial property must, in the absence of reasons to the contrary, be divided equally between the spouses. It ordered that all the property, if not sold or agreed upon, will be valued and distributed according to such value equally. The determination of whether Mrs. Kishindo would get the Naisi house would depend on the value of the property and the couple’s agreement on the same.

**Analysis**

The Court held that houses constructed in compliance with obligations under customary law, as well as any houses built after should be considered as general matrimonial property. The Court applied section 24 of the Malawian Constitution, which states that women have the right not to be discriminated against on the basis of their gender or marital status, which includes the right, on the dissolution of marriage (howsoever entered into), to a fair disposition of property that is held jointly with the husband. Applying this principle, the Court noted that the matrimonial home built in the course of marriage, even if built on one spouse’s land or registered in one spouse’s name is considered as co-owned or co-controlled by the spouses. It held that all property is subject to being shared fairly subject to gender equality. Once the court determines that property is jointly held with a husband, equal sharing follows as a matter of course unless circumstances are proved which make equal sharing unfair.

In this regard, the Court referred to certain international instruments to which Malawi was a party, including the UDHR and CEDAW, which require that both men and women have equal rights during the marriage.
and at the time of dissolution. The Court also relied on Article 7(d) of the Maputo Protocol, which provides that “[i]n case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the property deriving from the marriage”.

4.6.2 *CMN v. AWM [2013] eKLR (High Court, Kenya)*

**Issue – division of matrimonial property on divorce when the property was entirely paid for by the husband**

**Facts**

During the subsistence of the marriage, the husband CMN purchased and developed a property, which was then used as a joint residential house by CMN, his wife (AWM) and their children. Their marriage was subsequently dissolved and AWM re-married. The wife, AWM, had not made any financial contribution to the purchase or maintenance of the property in question. After the divorce, CMN sought a declaration from the Court that he was the sole owner of the property, even though the property was jointly registered in the names of both CMN and AWM.

**Decision**

The Court held that the matrimonial property in question must be equally divided between the husband and the wife.

**Analysis**

The Court referred to Article 45 of the Kenyan Constitution, which states that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage, and at the dissolution of the marriage. Further, the Kenyan Constitution states that the general rules of international law form a part of the law of Kenya. Hence, the Court relied on the UDHR and CEDAW which both recognize the equality of rights of spouses to a marriage. In addition, the Court referred to Article 7(d) of the Maputo Protocol, which requires equitable sharing of property at the time of dissolution of marriage.
Based on these laws, the Court concluded that the principle of equality must be applied when it comes to the division of matrimonial property. Despite the fact that the husband CMN had met all the financial requirements towards the acquisition of property, the Court found that how much each spouse contributed towards the purchase of matrimonial property was no longer the relevant question while determining the division of matrimonial property. It concluded that the current legal position requires the Court to apply the principle of equality. Additionally, this conclusion was supported by the fact that CMN registered AWM as the joint owner of the property, which can be considered as a gift by CMN to AWM of a half share in the property.

**Commentary**

This decision, in recognizing that spousal contribution was irrelevant in the division of matrimonial property, dispensed with the requirement for spouses to prove financial contribution in order to have a share of the matrimonial property.

**4.6.3 ZWN v. PNN [2012] eKLR (High Court, Kenya)**

**Issue** – determination of the contribution of spouses, especially women, in the division of matrimonial property.

**Facts**

The parties were a married couple who got divorced, and were approaching the Court regarding a dispute on the division of matrimonial property. ZWN argued that the properties were matrimonial property and had been acquired jointly during the marriage where she made direct and indirect contribution in the acquisition and development. PNN, on the other hand, argued that he was the registered proprietor of the properties which he solely acquired and developed.

**Decision**

The Court ordered equal distribution of the properties between both the parties.
Analysis

The Court referred to Kenya’s constitutional provision regarding the equal rights of parties to a marriage at the time of dissolution of the marriage, even though the 2010 Constitution had not been promulgated at the time this case was instituted. In this regard, it drew support from the fact the Kenyan Constitution provided that the general rules of international law were part of the law of Kenya. It referred to the provisions of UDHR, CEDAW and Article 7(d) of the Maputo Protocol, which deal with equitable sharing of property deriving from marriage.

The Court noted that it was not disputed that the property was acquired after marriage, and in the facts of the case believed that it was fair and just to apply the principle of equal contribution. Relying on the provisions of the Kenyan Constitution and the international and regional law obligations mentioned above, the Court held that the woman plaintiff was entitled to half share of all the matrimonial properties.

Commentary

This case went on appeal to the Court of Appeal in Kenya, which upheld the decision of the High Court. The Court of Appeal, in upholding the High Court’s decision, noted that the right to equality was “inherent and indefeasible” to all human beings. Accordingly, it held that the High Court had not erred in seeking guidance from Kenya’s 2010 Constitution as well as international/regional covenants that Kenya had ratified in order to inform its decision.

4.6.4 JAO v. NA [2013] eKLR (High Court, Kenya)

Issue – gender discrimination in the division of the matrimonial property.

13 The Court of Appeal decision can be accessed at http://kenyalaw.org/caselaw/cases/view/132157/ (Accessed 2 September 2018)
**Facts**

JAO, the plaintiff and NA, the defendant were married under the African Christian Marriage and Divorce Act. JAO obtained a divorce, and sought for equal distribution of property that was acquired during the marriage and registered in the name of the defendant, NA.

**Decision**

The Court held that the wife was entitled to half of the share of the matrimonial property. The Court was satisfied that she had contributed, and that her contribution needed not be financial in nature.

**Analysis**

The Court found that the properties in question were acquired during the subsistence of the marriage, and hence, were considered matrimonial properties under the law. The Court noted that with regard to determining the contribution of a spouse towards matrimonial property, the contribution need not be only financial. It could be in the form of “taking care of the children of the marriage, taking care of the home or even improvement of the property”. The Court referred to provisions of the Kenyan Constitution, the UDHR, CEDAW and Article 7(d) of the Maputo Protocol. It concluded that these provisions have shown the Court the way forward, i.e. “towards the principle that matrimonial property should be shared on 50:50 basis”.

**Commentary**

This decision is significant in that it recognized that spousal contribution towards the acquisition of matrimonial property can be non-financial.

**4.6.5 Additional Cases**

In addition to the cases discussed above, in a number of other cases before Kenyan Courts, Article 7(d) of the Maputo Protocol has been cited.
either by the parties or by the Court in relation to the issue of division of matrimonial property. These cases are listed below:

- *ANM v. DMN* [2015] eKLR (High Court, Kenya)
- *Rael Mbithe Mwangangi v. James Mutual Musembi* [2015] eKLR (High Court, Kenya)
- *PAW-M v. CMAW-M* [2016] eKLR (High Court, Kenya)
- *AWM v. PGM* [2016] eKLR (High Court, Kenya)
- *MWW v. SWM* [2017] eKLR (High Court, Kenya)

### 4.7 Access to Justice and Equal Protection before the Law (Article 8)

Article 8 enshrines the important principle that women and men are equal before the law, and have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure: effective access by women to judicial and legal services, including legal aid; support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitize everyone to the rights of women; that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights; that women are represented equally in the judiciary and law enforcement organs; and the reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

Access to justice is a wide concept, which begins from enactment of laws that protect women’s rights, creation of awareness of the rights, women’s understanding of the laws, and ability to reach relevant institutions where they can file complaints or seek protection. Further, the concept
includes the ability of law enforcement officers and decision makers to create a conducive environment in which women’s rights are protected and violations addressed. Proper interpretation and application of laws to protect women’s rights is a further requirement for access to justice. In all cases where women seek recognition and protection of their rights and redress of violations, the issue of access to justice arises. Indeed, most cases in this Digest touch on access to justice as well as remedies.

Of the three cases discussed under this Article, the first is a ruling by the African Commission on Human and Peoples’ Rights relating to access to justice for women who were victims of physical and sexual violence. The second and third cases are decisions from the ECOWAS Community Court of Justice in relation to violence against women and the right to have one’s case heard.

4.7.1 The Case of Egyptian Initiative for Personal Rights & Interights v. Egypt, ACHPR Communication No. 323/06 (2011) (African Commission on Human and Peoples’ Rights)

**Issue** - physical and sexual violence based on gender.

**Facts**

The communication was brought on behalf of four women who were victims of assaults during a demonstration in 2005 organized by the Egyptian Movement of Change with regard to the referendum seeking to amend the Egyptian Constitution allowing multi-candidate presidential elections.

All the four women experienced physical violence as they were beaten, kicked and slapped; they underwent sexual violence through stripping of their clothing by the perpetrators who indecently assaulted them; lastly, the victims were verbally insulted through names such as ‘slut’ and ‘whore’.
The alleged perpetrators were both the police and other individuals present at the demonstration. All these acts took place before the police and high-ranking officers of security who did nothing to help the victims.

The women tried to submit complaints regarding the assaults to the Public Prosecution Office, but investigators refused to take statements from eyewitnesses and the women received threats asking them to withdraw their complaints. The cases were classified as misdemeanors and the Public Prosecution Office decided not to prosecute due to the inability to identify the perpetrators.

**Decision**

The Commission found that the State was in violation of Articles 2 (Right to be free from Discrimination), 3 (Equality before Law), 18(3) (Elimination of Discrimination against Women), 16(1) (Right to Health) of the African Charter, amongst others. The Commission awarded damages of EP 57,000 to each victim and urged the State to investigate the violations. It also urged the State to ratify the Maputo Protocol.

**Analysis**

The analysis by the African Commission was under the African Charter, since Egypt had neither signed nor ratified the Maputo Protocol. The Commission concluded that the complainants had been discriminated against on the grounds of sex. Thus, there was a violation of Articles 2 (right to be free from discrimination) and 18(3) (which deals specifically with the elimination of discrimination against women) of the African Charter. As part of its analysis linking discrimination to gender based violence, the Commission referred to the definition of violence against women under Article 1 of the Maputo Protocol, which defines violence against women as ‘acts perpetrated against women which cause or could cause physical, sexual, psychological and economic harm including the threat to take such acts’. 
It noted that:

(i) The victims were exclusively women

(ii) They were not protected from the perpetrators during the demonstrations

(iii) The violations were perpetrated on the victims because of their gender

Given that there was no evidence that the male protestors were stripped naked and sexually harassed as the women were, the Commission found that Article 2 of the African Charter was violated. While analyzing the claim that Article 18(3) was violated, the Commission was of the opinion that the verbal abuse used was aimed at degrading and violating the integrity of women who refuse to abide by traditional, religious and social norms. Further, the physical assaults were gender specific in nature as the victims were subjected to sexual harassments and physical violence only directed to women such as breast fondling.

In applying the principle of non-discrimination, the Commission held that some distinctions between the sexes may be necessary if they are legitimate and justifiable. However, in this case, the Commission concluded that the treatment meted out to the women was “neither legitimate, nor justifiable because there was no reasonable cause behind the discrimination that was inflicted upon the victims”.

The Commission concluded that the incidents “took place in a form of systematic sexual violence targeted at the women” present at the demonstrations. It found that the violence was “perpetrated based solely on the sex of the persons present in the scene of the demonstration”, and that the violence was discriminatory and gender specific. The African Commission was in agreement with CEDAW on the view that violence against women affects their enjoyment and exercise of fundamental human rights in other spheres of life, and held that violence against women was a form of discrimination against them.
Additionally, the Commission found a violation of Article 3 of the African Charter (similar to Article 8 of the Maputo Protocol) since the State failed to protect women from the assaults, and because freedom from discrimination is also an aspect of the principles of equality before the law and equal protection of the law under Article 3 of the African Charter.

The Commission held that a violation of any provision of the Charter was a *prima facie* violation of Article 1 of the Charter that mandates States Parties to recognize all rights and freedoms in the instrument while taking all measures to give effect to them. It found that a State may be held accountable for violating the Charter based on acts of private individual or non-state actors.

**Commentary**

The Commission’s decision was important, as it followed the principles laid down in CEDAW and the Maputo Protocol to conclude that violence against women is a form of gender discrimination. Apart from dealing with issues covered under Article 8 of the Maputo Protocol, this decision also addresses issues dealt with under Article 2 (Elimination of Discrimination against Women), Article 3 (Right to Dignity), Article 4 (Right to Life, Integrity and Security of person) and Article 14 (Right to Health) of the Maputo Protocol.

4.7.2  *Aminata Diantou Diane (represented by APDF & IHRDA) v Mali, 2018 (ECOWAS Community Court of Justice)*

**Issue – access to justice; physical and economic assault by in-laws**

**Facts**

Aminata’s husband suffered a stroke attack which left him unconscious and incapacitated. Following this, Aminata’s brothers-in-law physically assaulted her and confiscated most of her husband’s property. Aminata’s in-laws also abducted her husband and initiated a divorce action against her in lieu of her husband, whose whereabouts remained unknown. Aminata sought justice before the Malian Courts but did not receive any relief.
**Decision**

The ECOWAS Court found Mali in violation of Aminata's right to protection and to have her cause heard. The Court ordered Mali to pay Aminata financial reparation worth Fifteen Million XOF. It also ordered Mali to take adequate measures to locate Aminata’s husband.

**Analysis**

Aminata argued that Mali had violated Articles 2, 3, 4, 6, 8 and 25 of the Maputo Protocol. While the Court did not specifically refer to the provisions of the Maputo Protocol in its decision, it found that Aminata’s (and her children’s) rights to protection had been violated. While making this finding, the Court referenced the African Charter on Human and Peoples’ Rights and the positive obligation of the State to protect the rights of women and children (Article 18(3)). The Court also relied on Article 14(2) of the ICCPR and Article 7 of the African Charter in regard to the right of Aminata in having her cause heard within a reasonable time frame. It found Mali in violation of Aminata’s right to protection and to have her cause heard.

**Commentary**

Apart from Article 8, this decision also addresses issues dealt with under Article 2 (Elimination of Discrimination against Women), Article 3 (Right to Dignity), Article 4 (Right to Life, Integrity and Security of person) and Article 25 (Remedies) of the Maputo Protocol.

**4.7.3 Mary Sunday v. Nigeria 2018 (ECOWAS Community Court of Justice)**

**Issue – domestic violence, access to justice**

**Facts**

The case was brought by two human rights organizations (Women Advocates and Documentation Centre and IHRDA) on behalf of the plaintiff, Mary Sunday. The plaintiff had been the victim of domestic
violence by her fiancé (Corporal Gbanuan), who was a policeman and agent of the government. She had suffered severe facial burns after her fiancé allegedly poured hot oil on her during a domestic dispute. The counsels representing the plaintiff had argued that Mary Sunday had suffered severe physical burn injuries, as well as psychological and emotional trauma due to the violent attack. She failed to obtain justice from the State justice system. The police report exonerated Corporal Gbanuan. The statements taken during the police investigation did not include statements from the two people involved, but only those from purported eyewitnesses and the police only interviewed Mary Sunday two years after the police report was filed. Additionally, the state Ministry of Justice lost Mary Sunday’s file after the investigating police officer died.

**Decision**

The ECOWAS Court awarded the sum of 15 million Naira in damages as compensation, as it found that the government of Nigeria had violated the plaintiff’s right to effective remedy.

**Analysis**

The plaintiff argued that the Nigerian government had violated Articles 2, 8, 13, 14 and 25 of the Maputo Protocol. The Court held that there was violation of the plaintiff’s right of access to justice, right to be informed of the procedure/process to which she is a party, and right to be heard within reasonable time and cited the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights.

However, the Court dismissed the plaintiff’s allegations of gender-based discrimination and violation of the victim’s right to good medical care. The Court found that the gender-based discrimination was not systematic and the present case only applied to one person. In addition, the Court noted that the State is not implicated in the act of domestic violence, including just because the alleged perpetrator is a police officer. With
regard to the complainant’s right to good health care, the Court found that the complainant did not show that the hospital services refused to give her care or were late in giving it to her, or even that the care given to her was inappropriate.

**Commentary**

Apart from Article 8, this decision also addresses issues dealt with under Article 2 (Elimination of Discrimination against Women), Article 4 (Right to Life, Integrity and Security of person), Article 13 (Economic and Social Welfare Rights) and Article 25 (Remedies) of the Maputo Protocol.

Though the decision of the ECOWAS Court in this case was largely positive, it does not appear that the Court took into account all aspects of the various issues at hand before deciding that the gender discrimination was not systematic in nature. As recognized by the CEDAW Committee in General Recommendation No. 19, discrimination includes “gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately”. Given that domestic violence is a form of gender-based violence, the Court should have ideally considered other aspects such as the prevalence of domestic violence in Nigeria and the State’s record in responding to cases of domestic violence, before concluding that there was no systematic gender-based discrimination.

**4.8 Right to Participation in the Political and Decision, Making Process (Article 9)**

The Protocol requires the member States to “take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures…” . This is in order to ensure that

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women participate in elections without discrimination, and that they are represented equally at all levels with men in the electoral process. It is also a measure seeking to achieve equality and partnership of women and men in the development and implementation of State polices.

The three cases discussed under this section are all cases from Kenya relating to the equal participation of women in the political process.

4.8.1 National Gender and Equality Commission & Others v. Independent Electoral and Boundaries Commission and Another [2013] eKLR (High Court, Kenya)

Issue – gender parity in the political process

Facts

The case dealt with the issue of fair representation in the political process. Under Article 90 of the Kenyan Constitution, each political party participating in the election process in Kenya was required to submit a party list to the Independent Electoral and Boundaries Commission (IEBC). Article 90 required that the party lists have the “appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed”. It also required that each party list should reflect the “regional and ethnic diversity of the people of Kenya”. The petitioner, the National Gender and Equality Commission (NGEC) contended that the IEBC had failed to conduct party elections in accordance with the provisions of Article 90, including with respect to the requirement that gender parity was achieved by alternating male and female candidates.

Decision

The Court found that the responsibility of the IEBC was limited to allocation of seats from the party lists submitted by the political parties by ensuring that the lists comply with the Constitution and relevant
laws. However, the membership of the party lists is determined by the political parties. Rather than annulling lists which did not comply with the Constitution, the Court ordered that IEBC publish the lists so that third parties could contest the contents of the lists with the IEBC and ensure that they are amended to comply with the Constitution.

**Analysis**

The Federation of Women Lawyers – Kenya, which had been impleaded as an interested party in this case emphasized that the case must be decided in accordance with the international instruments that underpin the rights of women. In particular, they referred to Article 7(b) of CEDAW, which requires the State to take all appropriate measures to eliminate discrimination against women in political and public life. In addition, they cited the Maputo Protocol, stating that it “obliges State parties to take specific positive action to promote active participation of women in political life including ensuring that there is increased and effective representation and participation of women at all levels of decision making”.

The Court analysed the party lists submitted by the IEBC, and found that there was no gender balance in most counties, and in some cases, the parties gave male-only lists. The Court found that “the IEBC failed to meet its obligation to conduct and supervise the conduct of the election for special seats under Article 90 by failing to publicise the party lists”. Further, “[t]he IEBC also failed to issue sufficient guidelines that are consistent with its obligation to observe, respect, protect, promote and fulfil the rights of persons identified as vulnerable and marginalised to participate in the political process”.

In order to ensure transparency in the process, the Court ordered the IEBC to publish the party lists. This would also allow interested parties to challenge the composition of party lists which did not follow constitutional requirements. In addition, the Court directed “the IEBC to develop a program.... to develop policies and measures geared towards increasing
the participation of women, youth, persons with disabilities, marginalised groups and other vulnerable persons to effectively participate in political processes”.

Commentary

This case also implicates issues covered under Article 23 of the Maputo Protocol (Special Protection of Women with Disabilities). This case highlights the important issue of the difference between legal rights and their practical on-the-ground application. Though the provisions of Kenyan law specifically provided for gender parity in the political and electoral process, these provisions were not being followed in practice. The Court rightfully understood that a legal requirement of affirmative action was not sufficient to achieve equal participation of women in the political process. It recognized the need for the State authorities to go further, and develop initiatives that remove barriers and help increase the participation of women and other marginalised groups in the political process.

4.8.2 Centre for Rights Education and Awareness & another v. Speaker of National Assembly & Others [2017] eKLR (High Court, Kenya)

Issue – exclusion of women in Kenya from participating in the decision-making processes.

Facts

The Kenyan Constitution of 2010 required the State to take legislative and other measures to ensure that “not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”. The petitioners asked the Court to declare that Parliament had failed in its constitutional mandate by not enacting legislation to cater for the two-thirds gender rule and that a mandatory order be issued against Parliament and the Attorney General directing them to enact the legislation within a specified period and report the progress to the Chief Justice. They also
required a declaration that failure by Parliament to enact the legislation would amount to violation of the rights of women to equality and freedom from discrimination and a violation of the Constitution.

**Decision**

The Court held that in failing to enact the legislation, Parliament had failed in its obligation under Article 21 of the Kenyan Constitution ‘to observe, respect, protect, promote and fulfil the right of men and women to equality under Article 27.’

**Analysis**

The Kenya Human Rights Commission intervened before the Court in this case and argued that Kenya was required to uphold equality and non-discrimination principles and make an effort to attain gender representation under the various international and regional agreements to which it was a party, including the Universal Declaration of Human Rights (UDHR), the Beijing Declaration and Platform for Action and the Maputo Protocol.

The Court noted that these international and regional conventions had been cited by the petitioners, and stressed that the Kenyan Constitution imports rules of international law and makes them part of the law of Kenya. It held that equality of rights under the law for both men and women was basic to democracy and commitment to human rights, and that the failure of Parliament to enact the required legislation was an “unacceptable and blatant breach of their constitutional duty”.

The Court declared that Parliament’s failure had led to violation of the rights of women to equality and freedom from discrimination and a violation of the Constitution. It therefore issued a mandatory order directing Parliament and the Attorney General to take steps to enact the required legislation within a period of sixty (60) days and report progress to the Chief Justice, and that if the legislation has not been enacted at the end of the period, the petitioners or any other person is at liberty to petition the Chief Justice to advise the President to dissolve Parliament.
Commentary

This case also addresses issues covered under Article 2 of the Maputo Protocol (Elimination of Discrimination against Women). The case further demonstrates the court’s supervisory role post judgment, which is progressive towards ensuring compliance and implementation of court decisions.

4.8.3 *National Gender & Equality Commission & Another v. Judicial Service Commission & Others [2017] eKLR (High Court, Kenya)*

**Issue – representation of women in the higher judiciary**

**Facts**

When three vacancies arose on the Supreme Court of Kenya, the Judicial Service Commission recommended the appointment of a Chief Justice (who was male), Deputy Chief Justice (who was female) and another judge (who was male). The petitioners argued that these appointments violated Article 27 of the Kenyan Constitution, which requires the State to take legislative and other measures to implement the principle that not more than two-thirds of the elective or appointive bodies should be of the same gender. In the newly constituted Supreme Court, out of the seven judges, only two were female. The Kenyan government had not put in place any policy measures to implement the two-thirds representation principle at the Supreme Court.

**Decision**

The Court found that the Kenyan Constitution required action to facilitate compliance with the gender parity principle in appointive positions, even in the absence of implementing legislation. It held that though it would have been ideal for another woman to be appointed to ensure that there were 4 male and 3 female judges in the Supreme Court, the failure to do so did not amount to a breach of the Constitution.
Analysis

The Court noted that Article 8 of the Maputo Protocol had similar provisions to Article 27 of the Kenyan Constitution on the equality between men and women. The Court highlighted the requirement in Article 8 that men and women shall have the right to equal protection and benefit of the law and that States should take appropriate measures to ensure effective access by women to judicial and legal services. It found that the Kenyan Constitution was clear that one gender should not occupy more than two-thirds of elective or appointive positions in a body, and noted that gender parity should be achieved in legislative and appointive positions even in the absence of legislation.

However, the Court held that the petitioners had an obligation to show that the number of male judges in the Supreme Court were more than two-thirds of the Court. Five of seven judges of the Supreme Court were male. The Court noted that two-thirds of seven people came up to 4.66 men, which could be rounded off to five men. Since the Constitution did not use percentages but fractions, the petitioner had to show a direct and clear breach of the Constitution (which it had failed to do).

Commentary

This case also addresses issues covered under Article 2 of the Maputo Protocol (Elimination of Discrimination against Women). The decision of the Court was partly positive since it recognized that the government entities should take steps to ensure gender parity in appointive positions in accordance with the Kenyan Constitution, even in the absence of legislation. However, the Court used a very technical interpretation of the Constitutional provisions to reject the challenge in this case. Given that Article 8(e) of the Maputo Protocol actually requires States Parties to take all effective measures to ensure equal representation of women in the judiciary (rather than merely one-third), a more liberal interpretation of the Constitution in favour of the rights of women would have been more in line with the spirit of Article 8 and 9 of the Maputo Protocol.
4.9 Right to Peace (Article 10)

Article 10 of the Maputo Protocol calls on member States to ensure that women have the right to a peaceful existence and increased participation in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels. Additionally, States parties are required to take necessary measures to reduce military expenditure in favour of spending more on social development, particularly the promotion of women.

Although this Digest does not reference any case citing the Maputo Protocol on the right to peace, the decision of the Prosecutor v Jean Paul Akayesu, Case No. ICTR-96-4-T (International Criminal Tribunal for Rwanda15, is instructive as it reflected the provisions of the Maputo Protocol on the right to peace under Article 10, and asserted the right of women to have peaceful conditions and not to be subjected to violence.

4.10 Protection of Women in Armed Conflicts (Article 11)

In Article 11, States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women. In accordance with the obligations incumbent upon them under the international humanitarian law, States Parties should protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.

The case discussed under this section is a ruling of the Special Court for Sierra Leone which analyzes whether forced marriage is considered a crime against humanity.

15 The decision can be accessed via http://unictr.irmct.org/en/cases/ictr-96-4 (Accessed 2 August 2018)
4.10.1 **Prosecutor v. Alex Tamba Brima [2007] SCSL 49**  
(Special Court for Sierra Leone)

**Issue – forced marriage as a crime against humanity**

**Facts**

The defendants were military commanders who spearheaded the coup of the Armed Forces Revolutionary Council (AFRC) in Sierra Leone in 1994. They were indicted before the Special Court for Sierra Leone on counts of crimes against humanity and war crimes, including murder, rape, sexual slavery, other forms of sexual violence, enslavement, acts of terrorism, collective punishment etc. In addition to these charges, the prosecutor attempted to add a charge of “forced marriage”.

**Decision**

The Trial Chamber found the defendants guilty of six counts of war crimes and four counts of crimes against humanity, including murder, rape and other forms of sexual violence. However, the Court dismissed the charge of “other inhumane acts” (forced marriage).

**Analysis**

The majority of the Trial Chamber dismissed the additional charge of forced marriage on the grounds that this charge was redundant. It held that the crime of forced marriage was subsumed within the crime of sexual slavery, and found that the prosecution did not adduce any evidence that forced marriage was a non-sexual act. Hence, the Chamber held that there was no lacuna in the law which would necessitate a separate crime of forced marriage under “other inhumane acts”.

The dissenting judge however, held that there ought to be a separate crime for forced marriage. In this regard, she cited international treaties which prohibited marriage without the consent of the parties, including the UDHR and CEDAW. The dissenting opinion also quoted Article 11(3) of the Maputo Protocol which provides that: “State Parties undertake to protect
asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide, and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.” Relying on these international treaties, the dissenting judge held that “[b]y vitiating the will of one party and forcing him or her to enter into and remain in a marital union the victim is subject to physical and mental suffering the phenomenon of forced marriage transgresses the internationally accepted conventions that both parties must consent to a marriage.” She concluded that forced marriage was a crime against humanity, and that it was not subsumed under other crimes against humanity since it did not necessarily involve elements of physical violence such as abduction, enslavement, or rape.

**Commentary**

Apart from Article 11, this decision addresses issues covered under Articles 3 (Right to Dignity), 4 (Right to Life, Integrity and Security of the person) and 6 (Marriage). It is notable that the dissenting judge cited the Maputo Protocol despite the fact that at the time the Protocol had been signed, but not ratified by Sierra Leone.

The decision in this case was appealed to the Appeals Chamber of the Special Court for Sierra Leone. The Appeals Chamber agreed with the dissenting judge on the issue of forced marriage, holding that it was a separate crime against humanity under “other inhumane acts”. It found that the crime of forced marriage could be distinguished from the crime of sexual slavery since forced marriage was “not predominantly a sexual crime”.

**4.11 Right to Education and Training (Article 12)**

Article 12 enshrines the right to education and training, specifying that States Parties shall take specific positive action to, inter alia, promote literacy among women, as well as take all appropriate measures with the view of achieving full realization of this right, particularly the elimination
of discrimination against women, eliminating stereotypes in textbooks and syllabuses, protecting girls from sexual harassment in educational institutions, and integrating gender sensitization and human rights education at all levels of the education curricula.

The case discussed under this section is a domestic decision from Zambia which deals with the issue of sexual violence by teachers and its impact on the education of girls.

4.11.1  *RM Katakwe v. Edward Hakasenke and Others, 2006/HP/0327 (High Court, Zambia)*

**Issue – gender-based sexual violence in the provision of education.**

**Facts**

In this case, the applicant, a 13-year-old girl, asked her teacher for past examination papers, but the teacher did not bring the papers to school despite several reminders. The teacher then asked her to collect the papers from his house. When she went to the teacher’s house, she found the teacher who directed her to a room where the papers allegedly were. The room turned out to be his bedroom, and he followed her and defiled her. He instructed her not to tell anybody, for if she did, he would lose his job and she would risk being expelled from school. The matter was brought to the attention of the school authorities, but they did not act. Further, the school authorities admitted that they knew that this teacher had engaged in sexual conduct with minor students in the past. However, they failed to take any preventive measures or warn the students.

The police failed to prosecute the defendant teacher. Thus, the applicant, through her guardian, filed a civil case and sought damages from the teacher, as well as the school for breach of duty to take care, personal injury and emotional distress. She also sought a declaration that the State was responsible for the protection and care of all children in learning institutions.
Decision

The Court found that the school had failed in its duty of care to its pupils by failing to prevent the sexual abuse from taking place. It awarded damages of K 45,000,000 (Zambian Kwacha 45,000,000) to the applicant for pain and suffering, mental torture, medical expenses and also as aggravated damages.

Analysis

The counsel for the applicant cited Article 4 of the Maputo Protocol, which provides that every woman is entitled to respect for her life and the integrity of her person. Article 4(2) also requires States to enact laws to prohibit violence against women, and to adopt legislative, administrative and other measures necessary to prevent, punish and eradicate all forms of violence against women.

The Court referred to counsel for the applicant’s submission on the Maputo Protocol in its judgment, and expressed surprise that the defendant teacher had attempted to argue that a 13-year-old pupil can be said to have consented to have sexual relationship with her teacher. It noted that under Zambian law, having sexual intercourse with a girl under the age of 16 would constitute the offence of defilement, irrespective of consent. It stated that in any event, a teacher could not argue that the child consented, since this amounted to taking advantage of the power relationship between the teacher and the pupil.

The Court held that the school takes over parental responsibility of the child for the time they are at the school. The law therefore places an obligation on the school to take care of the children for the period they are under their care. The owners of the school, in this case the government, owed a duty to the child. By the teacher defiling the child, the teacher was personally liable and the headmaster was vicariously liable as the employer of the teacher. The Court noted that the school administration, particularly the headmaster, had failed in its duty of care, since they were aware that the defendant was a “sexual pervert”. However, despite receiving a complaint
in the past, in that case, the school had transferred the victim student while failing to take any action against the defendant teacher. Additionally, the Court noted that there was dereliction of duty by the police since it failed to prosecute the defendant despite the evidence before them.

The Court awarded damages, noting that there was “enduring psychological brutalization”. It referred the matter to the Director of Public Prosecutions for possible prosecution and “implored” the Ministry of Education to make regulations to prevent such acts in the future, for instance to prohibit teachers from asking pupils to visit their homes.

Commentary

Though this case does not specifically refer to Article 12 of the Maputo Protocol, it is important to recognize that the right to education for girls cannot be adequately realized as long as girls continue to face the risk of being sexually abused in schools or by their teachers. Clause (c) of Article 12 provides that States Parties ought to take measures to protect women, especially the girl-child, from all forms of abuse in schools and other educational institutions, and provide for sanctions against perpetrators of such practices. In this case, the school failed in its duty to take any sanctions against the teacher, despite the fact that he had abused children in the past. Apart from Article 12, this case addresses issues covered under Articles 4 (Right to Life, Integrity and Security of Person) and 25 (Remedies) of the Maputo Protocol.

It is important to note that educational institutions must have clear policies to address sexual abuse of children in schools. There should be clear policies for both students and teachers which should be consistent with domestic and international standards.

This decision was relied upon in a similar case decided by a Kenyan High Court. In W.J & another v Astarikoh Henry Amkoah & 9 others [2015], the Court held that “the 3rd and 4th respondents [the employers of the

16 Available at http://kenyalaw.org/caselaw/cases/view/109721/ (Accessed 2 August 2018)
1st respondent] are vicariously liable for the unlawful acts of the 1st respondent, who sexually abused the petitioners, who were placed under his care. Indeed, I would go so far as to say that the TSC [Teacher Service Commission], the State and any educational or other institution in which teachers or other care givers commit acts of sexual abuse against those who have been placed under their care is vicariously liable for the wrongful acts of its employees.”

4.12 Economic and Social Welfare Rights (Article 13)

The Protocol mandates the member States to “adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities”. In this regard, they are to implement measures including to ensure transparency in recruitment, promotion and dismissal of women, to combat and punish sexual harassment in the workplace, to promote equality of access to employment, and promote the right to equal remuneration by both women and men for jobs of equal value. They are further required to promote the freedom of women to choose their professions, and provide adequate and paid pre and post-natal maternity leave in private and public sectors.

4.13 Health and Reproductive Rights (Article 14)

The Protocol requires the member States to protect, respect and promote women’s right to health including sexual and reproductive health. The protection of these rights covers the right of women to control their fertility, and to decide whether to have children, the number of children, and the spacing between the children. They also have the right to choose the form of contraceptive to use, and to be protected from sexually transmitted diseases, and to have family planning education. To realize these aspects, the Protocol requires States to take measures including the provision of affordable, adequate and accessible health services including information, education and communication programs, and to protect the rights of women by authorising medical abortion in cases of sexual assault,
rape, incest, and where the pregnancy endangers the physical and mental health of the mother or the life of the mother or the foetus.

These issues have to be examined in light of the General Comments adopted by the African Commission on Human and Peoples’ Rights in relation to Article 14. The first General Comment was issued in relation to Articles 14(1)(d) and (e) of the Maputo Protocol, in relation to the right of women to be protected from HIV/AIDS as well be informed on their own health status and that of their partner, particularly if affected by HIV/AIDS. The second General Comment on Article 14 deals with the right of women to access safe abortions, and discusses the obligations of States in this regard.

Of the three cases discussed under this Article, the first case is a decision by a Ugandan court in relation to the right to health of pregnant women. The second case is from Zimbabwe, and analyses the right of women to access emergency contraception and abortions and the obligations of State authorities in this regard. The third case is a decision by a Rwandan Court on the right of rape victims to obtain an abortion.


Issue – access to healthcare by pregnant women, right to health, State’s responsibility to fulfill the obligation of right to health

Facts

The plaintiff delivered two babies in the local hospital, but left the hospital with only one baby. The other baby was missing. The respondent hospital

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18 General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, available at http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf (Accessed 2 August 2018)
claimed that the second baby had been born dead. DNA analysis confirmed that the dead body that was provided by the hospital to the plaintiff and her husband (the second plaintiff) had no biological connection to the plaintiffs. The plaintiffs claimed that the unlawful disappearance of their baby violated their constitutional rights, and sought damages from the hospital.

**Decision**

The Court found that the second baby was born dead, and that there was no negligence on the part of the hospital staff in relation to the death of the second baby. However, the Court held that the plaintiffs were subjected to cruel, inhuman and degrading treatment as well as psychological torture in violation of Articles 24 and 44 of the Ugandan Constitution due to the loss of their second baby’s body and the consequent inability to conduct a burial.

**Analysis**

The High Court referred to Uganda’s international obligations under the ICCPR, ICESCR, the United Nations Convention against Torture and the African Charter, which provide for the right to be free from torture, cruel, inhuman and degrading treatment. The Court found that the body of the second baby was misplaced or lost due to negligence of the hospital staff, which made the hospital vicariously liable for the lost baby. The Court held that the loss of the baby’s body caused psychological torture to the plaintiffs, who were denied the opportunity to carry out burial rituals and get closure.

Pertinently, the Court stressed on the fact that the mother, while pregnant had been able to complete only one antenatal visit because she could not afford the cost of accessing health care services. Due to this, she was not even aware that she had been carrying a second baby till the time of the birth. The Court held that the effective realization of the right to health required the State to meet its obligations to respect (refrain from interfering directly or indirectly with the enjoyment of economic, social and cultural rights), protect (taking positive measures to ensure that non-state actors do not violate economic, social and cultural rights), promote
(to enhance awareness and provide accessible information to people regarding their rights) and fulfill (to take positive steps to advance the realization of the rights). In particular, the Court also emphasized that the rights of vulnerable and disadvantaged groups should be prioritized as part of the State’s duty to fulfill.

Based on this, the Court found that Uganda had violated its obligation to fulfill the right to health under various international instruments. Particularly, the Court held that this reflected a violation of Article 14(2) (a) and (b) of the Maputo Protocol “which requires State parties to take appropriate measures to provide adequate, affordable and accessible health services, including information, education and communication programs to women, especially those in rural areas; establish and strengthen existing pre-natal and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding”.

The Court also relied on General Comment No. 22 of 2016 issued by the United Nations Committee on Economic, Social and Cultural Rights. General Comment 22 requires States to ensure that all individuals have access to justice, and to a meaningful and effective remedy in instances where the right to reproductive and sexual health is violated. Reasoning that this principle is applicable in all cases of the violation of the right to health, the court ordered the police to conclusively investigate the disappearance of the baby, ordered the hospital to pay for psycho-socio care of the plaintiffs, and awarded damages of Ush 85 million to the plaintiffs.

**Commentary**

Apart from Article 14, this case addresses issues covered under Article 25 (Remedies) of the Maputo Protocol.

The High Court in this case relied on international law and the Maputo Protocol to pronounce a progressive decision with regard to women's right to health. In this case, the obligation to fulfill required the State to take positive steps to provide adequate ante-natal care to all women irrespective of their financial situation, which the State had failed to do in this case.
This case is an excellent example of how international law and the Maputo Protocol can be used to support national law and advance jurisprudence in a particular field. Uganda’s Constitution does not have an express provision on the right to health, though the National Objectives of State Policy includes an objective on the rights and opportunities of Ugandans to access health services. Despite this, the Court relied on Uganda’s international obligations particularly the ICESCR, the African Charter and the Maputo Protocol to determine that the plaintiff’s right to health had been violated in this case.

4.13.2 Mildred Mapingure v. Minister of Home Affairs and Others, Civil Appeal No. SC 406/12 (Supreme Court, Zimbabwe)

Issue – denial of emergency contraception.

Facts

The appellant was attacked and robbed, and raped at her home. She reported to the police immediately and requested to be taken to a doctor and be given medication to prevent pregnancy and sexually transmitted infections. Later she was taken to the hospital, and her injuries were attended. However, the doctor told her she could only be treated for preventive pregnancy if there was documentation from the police. In addition, the medication had to be administered within 72 hours of the sexual intercourse occurring. She went to the police station the following day but was informed that the police officer investigating the case was not available. She returned to the doctor, who again refused to give the treatment without the police report. Subsequently, she went to the investigating police officer, who referred her to the prosecutor. The prosecutor asked her to wait to terminate the pregnancy until the prosecution was over. She finally got a magisterial order but by that time it was too late and the hospital matron opined that it was no longer safe to terminate the pregnancy. Left with no choice, she eventually gave birth to the child.
She filed a suit in court seeking damages on the ground that the failure by the various officers to prevent the pregnancy led to her suffering and birth of the child. The High Court however dismissed her case on the basis that her misfortune was due to her own ignorance of the proper procedure to follow. It held that the officers had no mandate to advise her on questions of procedure related to her pregnancy, and that they were not directly or vicariously liable. She appealed.

**Decision**

The appellate court found that the police and the doctor had failed in their legal duties to assist the victim. However, it held that the magistrate and the matron did not fail in their duties, and the inability to terminate the pregnancy after it was confirmed was due to the failure of the appellant to follow the correct procedure.

**Analysis**

The Court cited Article 2 of CEDAW, which mandates States to eliminate all forms of discrimination against women in marriage and family. It also noted that Article 16(1) (e) of CEDAW provides for the right to decide the number of children, as well as the right to have access to and the means to enable them exercise this right. It relied on the Declaration on the Elimination of Violence against Women, which mandates governments to pursue a policy on elimination of violence against women, and to enable them have access to justice and relevant remedies. The Court also relied on Articles 4 and 14 of the Maputo Protocol, in particular Article 4(1) (f) which requires the State to “establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women”. It noted that certain provisions in Article 14 were especially relevant, including the rights of women to “to control their fertility …… to decide whether to have children, the number of children and the spacing of children [and] …… to choose any method of contraception”; as well as the requirement for States to “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest …”.

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The Court noted that the police may in specific circumstances, be legally required to act outside and beyond their ordinary mandate, in order to “aid and assist citizens in need, in matters unrelated to the detection or prevention of crime”. The Court found that the police had failed to compile the requisite report or accompany the appellant to the doctor despite her requests for assistance. It held that that the police had a legal duty to assist the appellant in her efforts to prevent her pregnancy, and they had failed to follow this duty and to act reasonably in this case. It further found that the doctor had failed in his duty of care, since he did not substantiate why he required a police report to prescribe the drug for preventing a pregnancy.

The Court opined that the international instruments referred to above required the “enactment of an enabling legal framework for the termination of pregnancy in appropriate circumstances. In practical terms, it would also entail availing the necessary information and affording the requisite facilities, to the extent that this is possible, in accordance with the prevailing material and financial means of the State.” However, the Court held that the duties of the authorities of the State did not extend to initiating court proceedings on behalf of the victim to obtain the magisterial certificate required for the abortion. It thus found that the prosecutorial and magisterial authorities were not liable as it was not within their function to give legal advice on the procedure required to terminate a pregnancy.

However, the Court noted that the statutory provisions dealing with medical termination of pregnancies in cases of rape were not clear and did not identify the specific authorities who needed to be approached, or systematically lay down the procedural steps that have to be taken to obtain the required magisterial certificate. The Court held that the State’s international obligations to afford assistance to rape victims to obtain an abortion required the State to amend the law for greater clarity and also to increase public awareness of the legislative and procedural measures in place.

The Court ordered that the applicant be paid damages for pain and suffering during pregnancy. However, the damages would be limited to
the period between the date of her rape and the date of confirmation of her pregnancy.

**Commentary**

Apart from Article 14, the Court also expressly relied on Article 4 (Rights to Life, Integrity and Security of the person) of the Maputo Protocol. Additionally, this case addresses issues covered under Articles 2 (Elimination of Discrimination against Women) and 25 (Remedies) of the Maputo Protocol.

### 4.13.3 *Igohozo v. Prosecution* [2016] 3 RLR (High Court, Rwanda)

**Issue – right to abortion for a child impregnated through rape.**

**Facts**

An adult male gave a 13-year-old girl beer disguised as coffee to drink, and raped her. The girl became pregnant. She subsequently suffered depression, stigma, and shame and was unable to continue with her education. She desired to terminate the pregnancy at all costs, including losing her life. Her mother applied to the Intermediate Court of Rwanda to grant the girl the right to abortion. The Intermediate Court declined to grant an abortion order on the following grounds: 1) that there was no criminal case as yet, prosecuted and concluded, in which a suspect had been convicted of the offence of defilement/rape, 2) there was no evidence to prove that the pregnancy was a threat to the girl’s life, 3) it was possible to get pregnant without being raped. The child’s mother appealed the order to the High Court. The Prosecution argued that only women, not minors, could seek abortion when raped, since under the statute, only raped pregnant women were given the right to terminate a pregnancy (this was a different criminal offence from that of defilement of a child).
Decision

The High Court reversed the decision of the Intermediate Court, granted the abortion right to the girl and ordered a specific government hospital to conduct the abortion. The Court served the order on the hospital and by the 2\textsuperscript{nd} day the abortion was successfully performed.

Analysis

The High Court held that in both rape and defilement there is lack of consent by the victim. It noted that though the criminal law uses the term ‘child defilement’ when the crime is committed against a child under the age of 18 years old, this does not change the fact that “a child was raped, since it was done against their consent”. The Court cited Article 14(2) (c) of the Maputo Protocol which requires the State to “take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assaults, rape…”.

The Court noted that the medical report had found evidence of forced sexual intercourse. Further, since a child under 18 could not legally consent to sexual intercourse under the law, there was no basis for the Intermediate Court to hold that the girl could have gotten pregnant by ways other than rape. Accordingly, the Court found that the girl had the right to request a medical abortion. The Court also noted that forcing the girl to have the baby would interfere with her education and her future.

Commentary

Apart from Article 14, this case addresses issues covered under Articles 4 (Right to Life, Integrity and Security of Person) and 12 (Right to Education and Training) of the Maputo Protocol. This case shows the difficulty in accessing reproductive health services such as abortion even where it is legalised. Although the Rwandan Penal Code allows abortion in cases of incest, rape, or forced marriages upon certificate from the court to that effect, and on health and therapeutic grounds upon a written report by two medical doctors, the process of getting the certificate or report may
take too long. Since the abortion is legally required to be performed within 22 weeks, in some cases, procedural delays can prevent the woman or girl from obtaining the abortion. Though the High Court acted promptly in this case to ensure that the abortion could be carried out, this case highlights the need for lower courts to correctly interpret and apply the law so that the right of women and girls to obtain abortions in such cases is not prejudiced.

4.14 Right to Food Security (Article 15)

The States parties are under an obligation to ensure that women have the right to nutritious and adequate food. They have to undertake the following measures in order to achieve realisation of this right: provision of clean drinking water; sources of fuel; land; and the means of producing nutritious food. In order to provide food security, they are required to put in place adequate systems of supply and storage.

4.15 Right to Adequate Housing (Article 16)

The Protocol mandates the member States to ensure that women have the right to equal access to housing and acceptable living conditions in a healthy environment. It also requires that access to adequate housing be granted to women whether married or not.

4.16 Right to Positive Cultural Context (Article 17)

The Protocol entitles women to the right to “live in a positive cultural context and to participate at all levels in the determination of cultural policies”. To realize this, the Protocol requires the member States to ensure that women participate at all levels of formulation of cultural polices.

The case analysed under this Article is a decision from a Zimbabwean Court regarding how violence against women affects the right of women to live in a positive cultural context.
4.16.1 *The State v. Chirembwe* [2015] ZWHHC 162 (High Court of Zimbabwe)

**Issue** – sentencing in rape cases, violence against women

**Facts**

The accused was convicted by the Trial Court of 12 counts of unlawful entry into property and 9 counts of rape. Over the course of about a year, the accused would break into domestic premises at night, armed with weapons like a knife or hammer and would threaten victims and demand money and valuable items from them. Sexual violence was also used as a tool by the accused to exercise power and control over some of his victims. The Trial Court, on finding the accused guilty, sentenced him to 290 years of imprisonment. The appeal dealt with issues of sentencing.

**Decision**

The Court held that the competing interests of society and the accused persons must be balanced in arriving at a desirable sentence. Despite the gravity of the offence here (there were multiple offences of rape), a sentence of 290 years serves no purpose other than being of shock value. The sentence was adjusted to 73 years’ imprisonment, of which 18 years will be suspended.

**Analysis**

The Court stated that an informed assessment of the sentence to be imposed in cases involving sexual offences requires a gendered approach, as well as the need to engage in a constitutional and human rights perspective. It held that rape is a particularly serious form of gender violence against women and girls which impacts on their ability to enjoy rights guaranteed under the Constitution as well as international instruments. The Court cited provisions of the Zimbabwean Constitution which provide that every person has the right to freedom from all forms of violence from *both public and private sources*, as well the right to dignity in their private and public life.
The Court also referred to CEDAW, particularly General Recommendation No. 19, which states that gender based violence against women is a form of sex discrimination. It relied on specific provisions of the Maputo Protocol including Article 3 (Right to Dignity for Women), and Article 4 which addresses violence against women including the punishment of perpetrators. The Court also referred to Article 17 of the Maputo Protocol which states that women have a right to live in a positive cultural context. It opined that “rape is a form of gender based violence that emanates from cultural attitudes towards women that permit the use of sex as an instrument of power and control”.

The Court stated that the pervasive nature of sexual violence meant that women and girls live in constant fear, which hampers the achievement of equality. Applying the provisions mentioned above, the Court concluded that it was the responsibility of the State to not just protect women from such violations of their fundamental rights, but also to prosecute and punish appropriately as part of its exercise of due diligence. The approach to sentencing should thus acknowledge the reality that sexual violence is a deeply engrained societal problem.

**Commentary**

This case while discussing sentencing guidelines in rape cases, serves to highlight the interconnectedness of the rights recognized under various articles of the Maputo Protocol, including Article 2 (Elimination of Discrimination against Women), Article 3 (Right to Dignity), Article 4 (Right to Life, Integrity and Security of person), Article 17 (Right to Positive Cultural Context) and Article 25 (Remedies) of the Maputo Protocol.

### 4.17 Right to a Healthy and Sustainable Environment (Article 18)

The Protocol protects the right of women to live in a healthy and sustainable environment. In this regard, it requires the States to ensure greater
participation of women in the planning, management and conservation of the environment, to promote research and development in new energy sources, to protect and enable the development of women’s indigenous knowledge, regulate disposal of waste, and proper handling of disposal of toxic waste.

4.18 Right to Sustainable Development (Article 19)

Article 19 provides that women have the right to “fully enjoy their right to sustainable development”. In this regard, States Parties are required to take measures to introduce a gender perspective in national development planning procedures; ensure participation of women in all levels of development policies and programmes; promote women’s access to and control over productive resources such as land; promote women’s access to credit, training, skills development and extension services in order to reduce poverty among women; take into account human development indicators relating to women while formulating development policy; and to minimize the negative or adverse effects of globalization, and certain trade and economic policies on women.

The case discussed under this Article is a decision of the Lesotho High Court regarding the reservation of seats for women in the political process.

4.18.1 Molefi Ts’epe v. Independent Electoral Commission and Others [2005] LSHC 96 (High Court, Lesotho)

Issue - differential treatment based on gender in the electoral process.

Facts

This case addressed the issue of the representation of women in political decision-making. This was an appeal by a male appellant who was barred by the Independent Electoral Commission from vying as a candidate in his home electoral division as his division had been reserved for female candidates only. He subsequently sought to have section 26 of the Election
Act, which provided for the reservation of one third of seats in every council for women, declared unconstitutional, as it was discriminative against him based on his sex. The reservation was implemented by reserving every third electoral division in a Council for women, with the process rotating for the next two terms of office.

Decision

While the Court agreed that there was discrimination based on sex, it nevertheless stated that the discrimination contemplated by Section 26 of the Election Act was reasonably justified and not unconstitutional.

Analysis

The Court relied on provisions of CEDAW, opining that it “places an activist duty on state parties to promote the lot of women and goes further to say that measures that might at first blush appear discriminatory should not be so regarded if they are intended to promote the equality of women to men provided such measures are only temporary and aimed to achieve that objective only”. The Court also noted that Lesotho was a signatory to the Maputo Protocol19, as well as the UDHR, CEDAW, and the SADC Declaration on Gender and Development. The Court held that the judiciary should keep these important international instruments in mind while interpreting domestic legislation, and that judges have a crucial role to play in ensuring the equality of the sexes.

The Court held that the reservation had been introduced in order to accelerate the advancement of women in the political decision making structures of Lesotho, since they had historically been disadvantaged. It concluded that though the provision was discriminatory on the face, this must be viewed in light of the “constitutional and international obligations of Lesotho to take appropriate measures to promote equality of opportunity for the disadvantaged”. Hence, the provision was reasonably justifiable in a free and democratic society, and not unconstitutional.

19 The Maputo Protocol was not yet in force at the time this judgment was delivered.
Commentary

This case also addresses issues covered under Article 2 (Elimination of Discrimination against Women) and Article 9 (Right to Participation in the Political and Decision-Making Process) of the Maputo Protocol.

The judgment of the High Court was appealed to the Court of Appeal in Lesotho. The Court of Appeal held that the Lesotho Constitution permitted the taking of measures to ensure the attainment of restitutionary equality, which are temporary and aimed at eliminating inequality in a specified segment of society. Accordingly, the court proceeded to dismiss the appeal. Though the Court of Appeal did not cite the Maputo Protocol, it relied on other international instruments including the ICCPR, CEDAW and the African Charter.

The right of women to sustainable development, as prescribed under the Maputo Protocol, is inextricably related to the right to participate in political and decision-making processes, particularly as regards the inclusion of women in the national development planning processes.

This was a progressive court decision as it advanced women’s right to sustainable development, particularly the requirement under Article 19 of the Maputo Protocol that States Parties must take all measures to ensure that participation of women at all levels in the conceptualization, decision-making, implementation and evaluation of development policies and programs. The decision sought to achieve this by upholding the legislative measures taken to ensure increased participation of women in decision making at the council level. The Court of Appeal decision also discussed the principle (citing General Comment No. 18 issued by the Human Rights Committee) that the advancement of equality can sometimes require States to take affirmative action, and that such action if it is needed to correct existing discrimination, is a form of “legitimate discrimination”.

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4.19  Widows' Rights (Article 20)

The Protocol imposes an obligation on the member States to protect the rights of widows by ensuring that they are not subjected to inhuman, humiliating or degrading treatment. They also have to ensure that widows automatically become the guardians and custodians of their children on the death of their husbands unless such is contrary to the best interests and welfare of the children. Additionally, the widow has the right to remarry, and in so doing marry the person of her choice.

The case discussed in this section is a case from a High Court in Zimbabwe regarding the rights of widows to matrimonial property.

4.19.1 Chiminya v. Estate & Others [2015] ZWHHC 272 (High Court, Zimbabwe)

Issue – right of widow to matrimonial home irrespective of will of deceased husband

Facts

A widow who had been married for 42 years in a registered customary union approached the court requesting that she be awarded the matrimonial home as the surviving spouse. Her late husband had bequeathed the matrimonial home through a will to his grandson. The respondent beneficiaries of the will opposed the application on the grounds that a wife who was customarily married could not inherit from the husband’s estate if the husband has left a will (except under the terms of that will).

Decision

The Court declared the will which disposed of the matrimonial house to be invalid and awarded the property to the surviving spouse. It found that it was against Zimbabwe’s Constitution (under Article 56(3) every person has a right not to be treated in an unfairly discriminatory manner, including on the grounds of sex, gender and marital status) to discriminate against the applicant merely because she was married under customary law.
Analysis

The Court noted that “women regardless of marital status have a right to equal protection by law and also have a right to own property”. It found that both registered and unregistered customary unions are recognized for inheritance purposes. Accordingly, the Court did not accept the respondents’ argument that the widow ought to be treated differently merely because her marriage was a customary union.

The Court referred to provisions of the Zimbabwean Constitution and applicable legislation to note that the husband, even though listed as an owner of the property, could not legally make a will that affects the other spouse’s rights, as a will that seeks to disinherit a legal beneficiary is invalid. The Court relied also on the Maputo Protocol and CEDAW to note that domestic law in Zimbabwe which recognized the rights of a surviving spouse in the deceased estate was in accordance with these conventions. Specifically, the Court cited Articles 20 and 21 of the Maputo Protocol, including the right of the widow to continue living in the matrimonial home.

Commentary

Apart from Article 20, this case covers issues addressed in Article 21 (Right to Inheritance) of the Maputo Protocol.

4.20 Right to Inheritance (Article 21)

The Protocol entitles widows to the right to inherit an equitable share of the property of their husbands, and the right to continue living in the matrimonial home. Where they remarry, they retain the right if the house belongs to them or they have inherited it. The Protocol also recognises the right of women and men to inherit their parents’ properties in equitable shares.

Both the cases discussed in this section are cases from South African courts that address the issue of discrimination against women in inheritance issues.
4.20.1 Ramuhovhi and Another v. President of the Republic of South Africa and Others [2016] ZALMPTHC 18 (High Court, South Africa)


Facts

This case was on women’s right to inheritance and sought to determine the constitutionality of Section 7(1) of the Recognition of Customary Marriages Act (RCMA) 1998, which regulates inheritance rights relating to polygamous customary marriages entered into prior to the commencement of the RCMA. Section 7 of the RCMA vests the wives in polygamous marriages different proprietary rights to their husband’s property upon death of the husband. It vested the first wife with greater proprietary rights over the deceased husband’s property yet all the wives had been married to the deceased. In effect, it discriminated against the other wives’ right to inheritance.

Decision

The court held that section 7(1) of the RCMA was discriminatory on grounds including sex, without any justification, and was therefore inconsistent with the Constitution to the extent that it was discriminatory.

Analysis

The Court noted that wives in ‘old’ polygamous marriages (i.e. ones entered into before the commencement of the RCMA) are excluded from the control and management of the communal property. It recognized that these women are particularly vulnerable, since they are still being excluded from their inheritance rights merely on the basis that they had entered into these marriages before the RCMA came into operation, and because they have entered into polygamous marriages as opposed to monogamous marriages. In this regard, the Court relied on various international and regional treaties ratified by South Africa, including CEDAW and the
Maputo Protocol\textsuperscript{20}, which recognize the “vulnerability of women and the importance of protection and providing for women’s fundamental human rights”. The Court held that denying these women equal protection perpetuates their vulnerability by denying their rights to matrimonial property.

The Court found that the provisions of section 7(1) of the RCMA were discriminatory on the basis of sex since “wives who are parties to old polygamous customary marriages should enjoy equal rights in the matrimonial property as between each other and as between each of them and the husband”. Additionally, the Court held that “the provision in section 7(1) is also discriminatory on the basis of race and or ethnic or social origin insofar as women in ‘old’ polygamous customary marriages are excluded from the protection afforded to women in monogamous marriages. It further differentiates between women in ‘old’ polygamous marriages and women in ‘new’ polygamous customary marriages, by providing protection only for the latter.”

Additionally, the court stated that until Parliament enacts legislation to govern the matrimonial property regimes of persons who are party to customary marriages concluded before the RCMA came into operation, the wives who are party to such a marriage shall have joint and equal rights of management and control over and in the marital property to their husbands.

**Commentary**

This decision advanced women’s right to inheritance as it enabled women in polygamous marriages who were initially discriminated against during inheritance on account of not being the first wife, to have equal and joint proprietary interest in the family property just like the first wife. Apart from Article 21 of the Maputo Protocol, this case also covers issues implicated in Article 2 (Elimination of Discrimination against Women) and Article 6 (Marriage). It is pertinent to note here that Article 6 of the

\textsuperscript{20} The Protocol was mentioned in a footnote.
Maputo Protocol clarifies that monogamy is encouraged as a preferred form of marriage. However, if polygamous marriages are allowed, at the very least, the rights of women in polygamous marital relationships should be promoted and protected.

4.20.2 Hassam v. Jacobs & Others [2009] ZACC 19 (Constitutional Court, South Africa)

**Issue** – discrimination on the bases of gender, marriage and religious belief in inheritance.

**Facts**

The applicant was married to Mr. Hassam, who had married two women in accordance with Muslim rites. Mr. Hassam had married a second wife without the applicant’s knowledge or consent. Mr. Hassam died intestate and the applicant was unable to inherit since the definition of ‘spouse’ in the Intestate Succession Act excluded widows from polygamous Muslim marriages.

**Decision**

The court held that section 1 of the Intestate Succession Act unjustifiably infringed section 9(3) of the Constitution by excluding widows from polygamous Muslim marriages from the definition of the term ‘spouse’ for the purpose of inheritance.

**Analysis**

The Court held that the purpose of the Intestate Succession Act would be “frustrated rather than furthered if widows to polygynous Muslim marriages were excluded from the benefits of the Act”. It noted that women often do not have any control over whether their husbands take additional wives. In this regard, the Court cited Article 6 of the Maputo Protocol21, which

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21 The Protocol was mentioned in a footnote
inter alia provides for the promotion and protection of the rights of women in polygynous marriages. The Court commented that Article 6 “serves to highlight the vulnerability of women in polygynous marriages”, and that their plight would be ameliorated only if their inheritance rights are secured by including them within the scope of the Intestate Succession Act.

The Court held that the exclusion of widows in polygynous Muslim marriages amounted to unfair discrimination under the South African Constitution. The equality rights of women were limited since the Act worked to the detriment of Muslim women and not Muslim men (because Muslim personal law did not permit women to have more than one husband). The Court also found that there was discrimination on the grounds of marital status and religion, since women only in polygamous Muslim marriages were not afforded the protection other marriages received.

**Commentary**

Apart from Article 21, this case deals with issues under Article 6 of the Maputo Protocol. The Constitutional Court in this decision expressly stated that it was leaving the question of whether polygynous marriages are themselves consistent with the Constitution as “strictly open” for the time being. The Court also commented that irrespective of how this broader question is resolved, women who are parties to such marriages should be given appropriate protection. This approach is in line with Article 6 of the Maputo Protocol which encourages monogamous marriages as the preferred form of marriage, but still provides for the promotion and protection of women who are in polygamous marriages.

4.21 **Special Protection of Elderly Women (Article 22)**

The Protocol places a responsibility on the member States to protect elderly women especially with respect to their physical, economic and social needs and access to employment and professional training. They also have to protect widows from violence, including sexual abuse, and discrimination based on age and ensures they are treated with dignity.
These obligations with respect to the elderly ought to be interpreted in light of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons, adopted by the African Union on 31 January 2016\textsuperscript{22}, while noting the increase in number and needs of older persons in Africa.

The case discussed in relation to this Article is from South Africa, and deals with customary practices that provide unequal inheritance rights to women who entered into marriages prior to a certain date.

**4.21.1 Elizabeth Gumede v. President of the Republic of South Africa and Others, [2008] ZACC 24 (Constitutional Court, South Africa)**

**Issue - customary practice, which discriminated against elderly women based on gender in the division of property upon divorce**

**Facts**

The case dealt with the issue of unfair discrimination on the grounds of gender and race in relation to women married under customary law as codified in the province of KwaZulu-Natal. Mrs. Gumede challenged certain provisions of the Recognition of Customary Marriages Act, which provided that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law. The customary law of KwaZulu Natal provided that the husband is the family head, is the owner of and has control over all family property in the family home.

Mrs. Gumede, now an elderly lady, had been married for 40 years before her marriage irretrievably broke down. If these legislative provisions were applied to the divorce proceedings, Mrs. Gumede would not be entitled to claim any family property on the dissolution of the marriage. Mrs. Gumede had no other means of income since her husband had refused to allow her to work during their marriage.

\textsuperscript{22} At the time of compiling this Digest, the Protocol had not entered into force.
Decision

The Constitutional Court upheld the High Court’s decision declaring the provisions of the relevant Acts as invalid as they contravened the constitutional provisions relating to gender and racial equality. Accordingly, the applicant was entitled to a share of the property upon divorce. The customary law position that she was not entitled to any property as all property belonged to the head of the home was declared discriminatory and unconstitutional.

Analysis

The Court noted that South Africa’s international treaty obligations required it to “do away with all laws and practices that discriminate against women”. In this context, the Court referred to Articles 2 (Elimination of Discrimination against Women), 6 (Marriage) and 7 (Separation, Divorce and Annulment of Marriage) of the Maputo Protocol in a footnote. The Court found the Recognition Act, read in conjunction with customary law, discriminated against women since only women in a customary marriage were subject to unequal proprietary consequences. Since gender was a listed ground of non-discrimination under the Constitution, the discrimination would be considered as unfair unless it was established that it was fair (which the Government failed to do in this case). The Court noted that this “marital property system renders women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent”.

Commentary

The decision struck down a customary law that excluded women from ownership and control of property in their household purely on account of their gender, upon divorce. Additionally, the decision could also be viewed as affording special protection to elderly women as the applicant in the case was an elderly woman. This case also addresses issues covered under Articles 2 (Elimination of Discrimination against Women), 6 (Marriage) and 7 (Separation, Divorce and Annulment of Marriage) of the Maputo Protocol.
4.22 Special Protection of Women with Disabilities (Article 23)

The Protocol places a responsibility on the member States to protect women with disabilities and pay regard to their physical, economic and social needs and facilitate access to employment and professional training. They also have to ensure that the women are protected from violence, including sexual abuse, and discrimination based on disability and ensure they are treated with dignity.

The case discussed under this section is a Kenyan case dealing with the issue of representation of women with disabilities in elective bodies. Two of the cases discussed elsewhere in this Digest, i.e. National Gender and Equality Commission v. Independent Electoral and Boundaries Commission (discussed under Article 9) and Director of Public Prosecution v. Prins (discussed under Article 25) also involve issues covered under Article 23 of the Maputo Protocol.

4.22.1 Ben Njoroge & Others v. Independent Electoral Boundaries Commission & Others [2013] eKLR (High Court, Kenya)

Issue – political representation of persons with disabilities

Facts

Articles 90 and 98 of the Kenyan Constitution provide that apart from the elected members of the Senate, two members (one man and one woman) representing persons with disability would be elected on the basis of proportional representation. This meant that parties would be allocated slots proportional to the number of seats they garnered in the election and members would be selected from the party lists, in the priority in which they were listed.

The petitioners (one man, one woman, both of whom suffered from some form of physical disability) contended that they had appeared on top of
their party lists. Despite this, the Independent Electoral and Boundaries Commission (IEBC) had nominated the second and third respondents (who were ranked second in their respective party lists). The IEBC contended that since the second respondent was visually disabled, they had sought to achieve diversity and thus nominated the second and third respondents.

**Decision**

The Court found that the IEBC had violated provisions of the Constitution by not nominating persons in accordance with the priority list submitted by the political parties. It nullified the nominations and ordered that the petitioners be nominated for election to the Senate.

**Analysis**

The second and third respondents in their submissions highlighted Article 13 of the African Charter, as well as Article 23 of the Maputo Protocol, with regard to ensuring the rights of women with disabilities to be free from violence and be treated with dignity. The Court noted that it appreciated the highlighted instruments but that they must be read in line with the Kenyan Constitution and the claims of the petitioners.

The Court held that there is no hierarchy amongst disabilities and that the IEBC had erred in trying to represent both physical and visual disabilities. As long as the principle of gender representation was met, the IEBC was bound to follow the priority lists.

**Commentary**

Apart from Article 23 of the Maputo Protocol, the petitioners also relied on Articles 22, 24 and 25 of the Protocol.

**4.23 Special Protection of Women in Distress (Article 24)**

Under the Protocol, the member States undertake to protect poor women and women heads of families including women from marginalized areas, and to provide them with conditions that cater for their special economic,
They further undertake to ensure that pregnant women or nursing women or women in detention are provided with an environment suitable to their condition and are treated with dignity.

4.23.1  **MAO & Another v. Attorney General & Others [2015]**

**eKLR (High Court, Kenya)**

**Issue** – detention of indigent women for inability to pay cost of maternity services in hospitals

**Facts**

The first petitioner was a HIV positive mother of six who worked as a casual labourer, and the second petitioner was a mother of five who worked as a hairdresser but did not have a fixed income. Both women were extremely poor and unable to meet the cost of necessities for themselves and their children. Both the petitioners delivered babies in the hospital, but were unable to cover the cost of hospital expenses for delivery. As a result, they were detained by the hospital until they could somehow raise money to pay the hospital bill. After these cases, the Kenyan government introduced a new policy whereby maternity fees would no longer be charged in public hospitals. However, no action was taken to implement this initiative.

**Decision**

The Court held that Kenya had “not fulfilled its constitutional and international obligations with regard to the right to health, the prevention of discrimination, the right to dignity and the prevention of cruel, inhuman and degrading treatment with respect to women seeking reproductive health services”. It declared the detention to be unlawful and arbitrary, and ordered the government to take necessary steps to protect patients from arbitrary detentions in healthcare facilities. It also awarded damages to the petitioners.

**Analysis**

The Court noted that the Kenyan Constitution guaranteed the right to health, as well as the right to non-discrimination. The Court found that
the hospitals’ detention of patients for their failure to pay the medical bill amounted to an arbitrary deprivation of liberty and violation of the right to freedom of movement. It noted that denial of reproductive healthcare services to women as well as acts resulting in severe mental suffering are forms of cruel, inhuman and degrading treatment which are prohibited by numerous regional and international instruments to which Kenya was a party. The poor conditions to which the petitioners were subject to in detention, the lack of food and sufficient mental and physical healthcare provided during this time, and the severe mental anguish caused by separation from their children all amounted to cruel and inhuman treatment.

The Court relied on Article 3 of the Maputo Protocol regarding the right to dignity, and found that the treatment of the petitioners by the hospitals fell short of the acceptable standards of health care that would guarantee the protection of the right to dignity. Additionally, “[t]he fact that the petitioners were detained for lack of enough money to pay their medical bills was again, of itself, a manifestation of the contempt with which their impecunious state was held…, and was a violation of their inherent dignity”. The Court also found a violation of the right to health, noting that accessibility to healthcare includes economic accessibility, and requires “non-discriminatory access to health facilities, goods and services, especially [for] the most vulnerable or marginalized sections of the population.”

The Court relied heavily on the International Covenant on Economic, Social and Cultural Rights and concluded that the denial or delay in providing emergency medical services to indigent pregnant women for monetary reasons was a threat to their rights to health and life. The Court referred to Article 2 of the Maputo Protocol regarding the obligation of States to take corrective and positive action where discrimination exists against women, both in law or in fact, including by reforming existing discriminatory laws and practices. Relying on the Protocol and other provisions of international law, the Court found that the petitioners were discriminated against because of their economic status as they were denied access to health care facilities, and were later denied basic provisions like beds and sufficient food during their detention due to their inability to
pay. It held that these facts, in addition to the failure of the government to effectively implement the fee waiver program for indigent pregnant women in public hospitals resulted in a “disproportionate impact on poor women’s ability to access health care, which constitutes discrimination on the basis of social origin, and negates the right of women to enjoy their constitutionally guaranteed rights and freedoms”.

Commentary

While the Court in this case did not specifically refer to Article 24 of the Maputo Protocol, the facts and analysis in this case are closely interlinked with the rights provided under Article 24. This case also addresses issues covered under Articles 2 (Elimination of Discrimination against Women), 3 (Right to Dignity), 14 (Health and Reproductive Rights) and 25 (Remedies) of the Maputo Protocol.

4.24 Remedies (Article 25)

The member States undertake to provide appropriate remedies for any women whose rights and freedoms, as recognised under the Protocol, are violated. The remedies have to be determined by competent judicial, administrative or legislative or other legally competent authority.

Both the cases discussed under this section are decisions of South African courts. The first case analyses the issue of imposition of a limitation period for sexual offences, while the second case is in relation to the failure of the statute to prescribe a penalty for the offence of sexual assault.

4.24.1 L & Others v. Frankel & Others [2018] ZACC 16 (Constitutional Court of South Africa)

Issue – constitutionality of limitation period for sexual offences

Facts

A group of eight people (both men and women) had come forward to accuse Frankel, a philanthropist businessman, of having sexually assaulted them
while they were children between the ages of 6 and 15 years. However, the Director of Public Prosecutions refused to prosecute since the limitation period under the law had passed. The Criminal Procedure Act in South Africa imposed a limitation period of 20 years for prosecution of all sexual offences other than rape or compelled rape.

**Decision**

Section 18 of the Criminal Procedure Act in so far as it imposed a limitation period of 20 years for prosecution of sexual offences other than rape and compelled rape, is unconstitutional.

**Analysis**

The High Court of South Africa had struck down the 20-year limitation period as unconstitutional on grounds of irrationality. In doing so, it had noted that South Africa was signatory to international human rights instruments including CEDAW and the Maputo Protocol, which imposed on the State a duty to “ensure that sexual offences are prosecuted and this duty is heightened in respect of sexual offences against women and children”.

An application was then made to the Constitutional Court of South Africa for a certificate of confirmation of the High Court’s judgment. The Constitutional Court, in upholding the High Court’s judgment, found that section 18 was irrational since it did not impose any limitation period for rape or compelled rape, but only did so for sexual offences. The Court noted that “systemic sexual exploitation of woman and children depends on secrecy, fear and shame” Further, the sexual trauma induced in survivors by the perpetrator and by society could make survivors reluctant to report. The Court also held that though sexual offences may differ in form, the psychological harm they may produce could be similar. Hence, there was no rational basis to enforce a 20-year limitation period only for sexual offences.

The Court also found that section 18 hindered South Africa’s effort to comply with its international obligations, including CEDAW and the United Nations Convention on the Rights of the Child (CRC); and
regional human rights obligations like the Maputo Protocol. It held that these instruments “prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of these rights”.

Commentary

This judgment innovatively applied a broad interpretation of sexual offences and the harm arising therefrom. The court further took note of the reluctance of survivors of sexual violence to speak out. This case also touches on issues falling under Article 2 of the Africa Charter and Article 2 of the Maputo Protocol on freedom from discrimination.

4.24.2 Director of Public Prosecutions v. Prins [2012] 106 ZASCA (Supreme Court of Appeal, South Africa)

Issue – penalty for sexual assault

Facts

Mr. Prins had been charged by the lower court for sexually assaulting the complainant by touching her breasts and private parts without her consent. He raised an objection to the charge sheet on the grounds that neither the particular provision under which he was charged nor the legislation itself [the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007] prescribed any specific penalty for the offence of sexual assault. The lower court found that the failure of the law to specify a penalty violated Mr. Prins’ right to fair trial, and dismissed the charges.

Decision

The Court of Appeal overturned the decision of the lower court and held that the general provision empowering courts to impose sentences in case of criminal offences could be used where the statute failed to prescribe a particular penalty.
Analysis

The Court noted that the rights of persons affected by sexual violence, particularly women and children, had to be balanced against the principle of legality and the right to fair trial of the accused. It found that it was obvious from the language of the provision that it was meant to define a criminal offence even if a specific penalty had not been provided. The Court further noted that the context of the legislation was provided by “the need to protect vulnerable people against sexual attacks in the light of the Constitution and South Africa’s international obligations...”. In this regard, the Court mentioned in a footnote that the counsel for the amicus had referred the Court to various conventions to which South Africa was a party, including CEDAW and the Maputo Protocol (particularly Articles 4 and 23).

The Court held that for the validity of a charge of committing a statutory offence, it was not necessary to specify the penal consequences of conviction, as the issue of penalty would only be relevant at the time of conviction. Further, the Court held that the trial court could rely on the general enabling provision of the Criminal Procedure Act which prescribed various sentences (such as imprisonment, fine etc.) that could be passed upon a person convicted of an offence.

Commentary

Apart from Article 25, this case implicates issues covered under Article 4 (Rights to Life, Integrity and Security of Person) and Article 23 (Special Protection of Women with Disabilities) of the Maputo Protocol. Article 23 of the Protocol was referred to by the amicus in this case, since one of the offences in the Criminal Law (Sexual Offences and Related Matters) Amendment Act for which no penalty was prescribed, was a sexual offence against persons who are mentally disabled. The Act had created specific offences in this regard to address the particular vulnerability of persons who are mentally disabled in respect of sexual abuse or exploitation.
5. Conclusion

We appreciate that there may be other decisions that reference the Maputo Protocol, over and above those cited in this Digest. This therefore means that there is need for more research and documentation of these cases at the national, regional and continental levels. Lawyers and litigants should endeavor to develop their cases in a manner that espouses the provisions of the Maputo Protocol and the rights of women. Judicial officers in judicial and quasi-judicial bodies must continue to develop jurisprudence on the rights of women and girls in Africa by progressively interpreting and applying the Maputo Protocol.
Annex 1

Recommended References


2. African Commission on Human and Peoples’ Rights:
   a. Communications: http://www.achpr.org/communications/
   b. Legal Instruments: http://www.achpr.org/instruments/
   c. Reports: http://www.achpr.org/search/
   d. Resolutions: http://www.achpr.org/resolutions/

3. African Court on Human and Peoples’ Rights:


6. Committee on Economic, Social and Cultural Rights
   a. Legal Instruments: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

7. Committee on the Elimination of Discrimination Against Women:
   a. Legal Instruments: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx

8. Committee on the Rights of the Child:
   a. Legal Instruments: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

9. ECOWAS Community Court of Justice:

10. Human Rights Committee:
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18. Special Court for Sierra Leone cases: http://www.rscsl.org/

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