

# **Beyond Legal Measures: A Review of the DRC's Initial Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

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## **Abstract**

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) established a reporting process to monitor compliance. Despite its shortcomings, this process provides an opportunity for states to engage in a frank, constructive and open dialogue with the African Commission on the measures they have adopted to realize women's rights and the challenges they face. The DRC's initial report on implementing the Maputo Protocol provides an opportunity to assess how the country has advanced women's rights. This article notes that the DRC has adopted legislation and policies to comply with some of its obligations under the protocol. However, these have not brought about much transformation in terms of effective enjoyment of rights due to the contested nature of many women's rights and the community's patriarchal mindset. The article argues that states should focus on extra-legal measures that can counteract negative attitudes and beliefs towards women's rights.

**Keywords:** Maputo Protocol; African Commission on Human and Peoples' Rights; state reporting; safe abortion; access to justice; political participation; domestic violence

## **Introduction**

The obligation imposed on state parties to report on the progress made and challenges faced in realizing human rights is a salient feature of international human rights treaties.<sup>1</sup> The presentation of state reports and their consideration by human rights bodies play a critical role in ensuring regular appraisal of the promise made by states to improve human rights. The state reporting process seeks to ensure that states' human rights obligations are implemented, complied with and enforced.<sup>2</sup>

It aims to foster internal and external scrutiny of a country's human rights record,<sup>3</sup> and allows human rights stakeholders to engage in "constructive dialogue", which reduces hostile confrontation between the monitoring body and states.<sup>4</sup> It is because states often avoid confronting their human rights record that a mechanism founded on mutual collaboration and dialogue was established to monitor human rights compliance.<sup>5</sup> State reporting enables the state to reaffirm its commitment to human rights ideals, undergo scrutiny, and receive support from other national and international human rights actors. It is an opportunity to improve human rights protection in the country.

The state is free to decide which of its institutions will develop and submit initial and periodic reports before human rights bodies. In practice, the ministry dealing with human rights, justice, the interior, foreign affairs or women's issues generally performs that role in the African context, with the support of relevant government institutions.<sup>6</sup> If the entire reporting process is left to state organs alone, they may present a sanitized picture of the state's human

rights achievements that barely reflects reality.<sup>7</sup> Therefore, human rights monitoring bodies require that the drafting of the state report includes government departments, and national and international civil society organizations (CSOs) involved in protecting and promoting human rights.<sup>8</sup> In addition, they provide clear guidance on the type of measures states must adopt. For example, the African Commission on Human and Peoples' Rights (African Commission) urges states to explain the progress realized, the level to which rights have been implemented and whether individuals are fulfilling their duties.<sup>9</sup> Interested parties, such as CSOs, can challenge the accuracy of state information or complement it by submitting shadow reports that contain empirical data to guide the African Commission when it examines state reports.<sup>10</sup> Part of these reports may aim to explain how states did or did not realize the rights of vulnerable categories, understood to be groups of persons (such as indigenous populations)<sup>11</sup> most likely to suffer or experience harm due to, inter alia, their social status, and economic and historic conditions.<sup>12</sup> In effect, the domestic organ in charge of state reporting must ensure that the report provides a holistic, objective and frank picture of the human rights situation in the country.

However, this picture must not merely provide an account of legislation adopted or bills the government has introduced to realize its obligations under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).<sup>13</sup> To guarantee the rights of women effectively, it is widely recognized that non-legal measures (such as awareness-raising and the education of community members) should complement states' legislative, judicial and administrative efforts.<sup>14</sup> This is because human rights regimes and the drafting of human rights norms, particularly those relating to women and children, are alien to many communities and somewhat antithetical to local practices in Africa.<sup>15</sup> The tension that characterizes liberal human rights standards protecting women, and the retrogressive and harmful practices tolerated in the name of culture, religion and tradition in most parts of Africa, also show the limits of legislation and policies in ameliorating the lived realities of women on the continent.<sup>16</sup> It is through knowledge dissemination that a state can obtain the community buy-in to realizing the rights in the Maputo Protocol. This position is valid to a large extent for many African countries, including the Democratic Republic of Congo (DRC), given that the 2006 DRC Constitution (the Constitution), which preceded ratification of the Maputo Protocol, already contains rules and principles that, if implemented, could enhance women's rights.<sup>17</sup>

This article examines the extent to which measures adopted by the DRC to realize rights recognized under the Maputo Protocol actually advance women's rights.<sup>18</sup> It assesses the nature and type of legal and extra-legal measures the DRC has adopted pursuant to article 26(1) of the protocol. This provision, read together with article 62 of the African Charter on Human and Peoples' Rights (African Charter), enjoins states to report, every two years, on legislative and other measures they have put in place to realize women's rights.<sup>19</sup> In 2009, the African Commission adopted Guidelines for State Reporting under the Maputo Protocol (2009 Guidelines) to indicate the legislative, judicial, administrative and other measures states must adopt to fulfil their reporting obligations. The contested nature of some women's rights calls for states to complement the adoption of legislation and policies with relevant extra-legal measures for the greater realization of women's rights.<sup>20</sup> Extra-legal measures may reduce existing tensions around the "radical provisions of the African Women's Protocol",<sup>21</sup> such as safe abortion, political participation and domestic violence.

Two reasons provide ample justification for this article. First, the dearth of research on state reporting under the Maputo Protocol, in particular, scholarship that tackles, through a case study analysis, how the reporting mechanism has or has not strengthened the promotion and protection of women's rights, and furthered constructive dialogue among women's human rights stakeholders.<sup>22</sup> Scholarly evaluation of state reports using empirical information will assist the African Commission in reviewing state compliance with the Maputo Protocol. This is notwithstanding that states are failing to submit their initial or periodic reports. Over half of the 42 states that by September 2022 had ratified the protocol have failed to comply with their reporting obligations.<sup>23</sup> Secondly, evaluating the initial reports, submitted ten years after a country has ratified the Maputo Protocol, provides an opportunity to understand how women's rights are being realized.<sup>24</sup> Informed by empirical reasons, this article selects five rights to examine: access to justice; political participation; harmful practices; protection of women against domestic violence; and safe abortion. The aim is first to explore rights that are an innovation of the Maputo Protocol (such as the freedom from all forms of violence, including domestic violence, and the right to medical abortion) and, secondly, to discuss the rights that remain controversial in Congolese society, in particular the right to safe abortion.

The next section of this article provides a background to the ratification of the Maputo Protocol, highlighting the rationale behind its ratification by DRC. The article then offers a brief overview of issues arising from consideration of the DRC's initial report and its drafting process. It then analyses the realization of the five selected rights by emphasising the nature and type of extra-legal measures states must adopt for their full realization. In conclusion, the article shows that the DRC's focus on legislation and policies to comply with the Maputo Protocol has not brought about much transformation in terms of women's effective enjoyment of rights. This is due to the contested nature of many rights, the patriarchal mindset, and the conservative attitude of the community at large towards women's rights.<sup>25</sup>

### **Background to the ratification of the Maputo Protocol**

The DRC signed the Maputo Protocol in December 2003, ratified it in July 2008 and deposited the instrument of ratification in February 2009.<sup>26</sup> The ratification was preceded by parliamentary approval of the Maputo Protocol in 2006 and the authorization to ratify it as contemplated under article 214(1) of the Constitution.<sup>27</sup> The Maputo Protocol was published in the Official Gazette in March 2018.<sup>28</sup> It thus forms part of the DRC's domestic law.<sup>29</sup>

The signing of the Maputo Protocol coincided with the settlement in 2003 of the political and military crises that had split the country into three parts for almost half a decade.<sup>30</sup> Ratification was supported by the commitment of participants in the Inter-Congolese Dialogue (DIC) and the government to improve the plight of women, combat sexual violence<sup>31</sup> and enable women's political participation at all levels of decision-making.<sup>32</sup> The active participation of women during the DIC facilitated the consideration of women's human rights issues during the negotiations.<sup>33</sup> The DRC, as a country transitioning to democracy, seems to have adhered to the values and standards encapsulated in the Maputo Protocol in showing its willingness to protect women.<sup>34</sup> The ratification of the Maputo Protocol also responded to demands by national and international human rights activists for the adoption of a legal framework to protect various women's rights.<sup>35</sup> The Maputo Protocol complements domestic

standards on the protection of women's rights and constitutes the benchmark against which the effectiveness of domestic laws at protecting women's rights can be assessed.<sup>36</sup>

However, the process of ratification faced resistance, as some religious and political groups believed the Maputo Protocol could be used to allow abortion under any circumstances.<sup>37</sup> Through its not for profit organizations, the Catholic Church spearheaded the resistance on account that faith and culture prevent the suppression of innocent life.<sup>38</sup> As a consequence, academics, law students and the population at large strongly criticized the right to safe abortion, which they regarded as being pervasive, and advocated that some ground-breaking provisions that empower women in the community (for example in the political sphere) be set aside.<sup>39</sup> The activism against the ratification of the Maputo Protocol also created a distorted view of what it seeks to achieve. This article emphasizes the role that extra-legal measures can play to change this misleading understanding, by presenting other protections that the Maputo Protocol offers to improve women's rights, starting with how the DRC should fulfil its reporting obligations.

### **A brief overview of issues arising from consideration of the DRC Report and the drafting process**

The report the DRC submitted to the African Commission in 2017 (the DRC Report)<sup>40</sup> was both an initial and combined periodic report. The DRC is one of 21 state parties to the Maputo Protocol that have, as of April 2023, complied with their reporting obligations.<sup>41</sup> The DRC Report was considered at the African Commission's 61st ordinary session, which took place from 1–15 November 2017 in The Gambia.<sup>42</sup> The concluding observations were however only adopted two years later at the African Commission's 65th ordinary session held from 21 October to 10 November 2019.<sup>43</sup> Given that concluding observations help countries to improve their human rights track records by highlighting factors that hinder the realization of women's rights and areas of concern, they should be adopted and published timeously. This can help states to address issues requiring improvement and to receive necessary support from national and international women's rights actors. Adopting concluding observations at almost the same time as another state report is due may impede the effective redress of issues raised in the previous report. However, states can partly be blamed for the late adoption of concluding observations, especially when they delay responding to the African Commission's follow-up questions.

In any case, the successful drafting of the DRC Report was due to an effective institutional organization and to international support. The African Commission undertook promotional visits to the DRC, during which it reiterated the importance of submitting state reports under the African Charter and the Maputo Protocol.<sup>44</sup> The government's political commitment and will through its various ministries involved in the reporting process were also critical in facilitating the drafting of the report. In 2009,<sup>45</sup> the DRC government created the Inter-Ministerial Technical Committee for the Preparation and Monitoring of Initial and Periodic Human Rights Reports (Inter-Ministerial Committee).<sup>46</sup>

However, the drafting of the DRC Report remained state-centred and less inclusive of sub-national entities. According to the report, the process of its preparation involved "civil society organisations including associations and human rights organisations".<sup>47</sup> This statement is vague.

Although the drafting committee provided names of government departments and organs involved in the reporting process,<sup>48</sup> it failed to mention the CSOs involved in the process and their geographical reach. The report also failed to mention the focus areas of these CSOs. It further appears that organizations working on the promotion and protection of the rights of women with disabilities and older women, sexual and reproductive health, violence reduction and prevention, the rights of internally displaced women, indigenous women and women living with HIV/AIDS were not consulted. The possible exclusion of such critical stakeholders may indicate that the drafting committee was not equipped with sufficient expertise to report on the realization of the rights of vulnerable women. Furthermore, some members of CSOs involved in the drafting process indicated that the process did not benefit from the expertise of organizations operating outside the capital city, Kinshasa.<sup>49</sup> The involvement of CSOs based in provinces other than Kinshasa would have diversified the information. Further, although they participated in the drafting process, the representatives of the National Human Rights Commission and the Cadre Permanent de Concertation de la Femme Congolaise [Permanent Consultation Framework for Congolese Women] lamented their exclusion from the final meeting on the adoption of the report before it was submitted to the African Commission.<sup>50</sup> In a sense, the drafting and adoption of the report were not as inclusive as is presented. The Inter-Ministerial Committee may have ensured that the DRC Report does not contain information that may tarnish the image of the state. If a state has nothing to hide, there is no logical reason to refrain from submitting the final report to entities that participated in its development.

### **The extent to which selected women's rights have been realized**

The main issues addressed in this section are, first, whether (with regard to the rights under study in this section) effective legislative, institutional, administrative and policy frameworks were adopted. Secondly, whether extra-legal measures were taken in terms of sufficient awareness-raising and education around access to justice, political participation, the prohibition of practices harmful to women, domestic violence and the right to safe abortion.

#### ***Access to justice including legal aid***

Access to justice ensures the protection and realization of many women's rights.<sup>51</sup> It is an important measure of the rule of law.<sup>52</sup> The Maputo Protocol requires that women have access to "judicial and legal services".<sup>53</sup> Local, national and regional initiatives must be established to help women access justice and strengthen the capacity of law enforcement officials in their understanding, interpretation and enforcement of equality between men and women.<sup>54</sup> Did the state meet its obligations under article 8 of the Maputo Protocol?

The Constitution establishes, on paper, a solid foundation for equality before the law and equal protection.<sup>55</sup> Article 14 of the Constitution enjoins the state to eliminate all forms of discrimination against women. Although article 12 on the right to equality and equal protection does not make specific provision regarding women, the non-discrimination clause requires that women and men are treated equally.<sup>56</sup> Given that men and women enjoy the right to be heard by a competent judge within a reasonable time, it is clear that women have a constitutional right to an effective remedy.<sup>57</sup> However, one of the key issues facing women or disproportionately affecting them, is the lack of adequate means to access justice effectively. The obligation on litigants to pay administrative fees to institute lawsuits hampers

women's prospects to exercise their right to be heard before competent tribunals.<sup>58</sup> These fees have been identified as an obstacle to persons living in poverty accessing justice, although tribunals may waive the fees when litigants are indigent.<sup>59</sup> The Civil Procedure Code provides for conditions under which individuals may be considered as indigent to benefit from the waiver of legal fees, but this is a discretionary power conferred on the president of a tribunal.<sup>60</sup> There is no guarantee that (female) litigants will have legal assistance should they need it. If one considers the historical marginalization of women and the unequal distribution of resources and power between men and women, it is clear that the absence of a constitutional guarantee on legal assistance and its discretionary nature is likely to deprive women of an effective right of access to justice more than men.<sup>61</sup> This is particularly true because, except in matters related to sexual violence, obtaining legal assistance may be time-consuming and any assistance may be ineffective.<sup>62</sup>

Various legislation has attempted to strengthen access to justice for women. One relevant act is the 2006 Sexual Violence Act, which criminalizes 14 forms of sexual violence, including rape, forced prostitution, sexual harassment and forced marriage. The adoption of this legislation was accompanied by intensified awareness-raising campaigns led by government organs and CSOs, as well as the enforcement of the act by courts and tribunals.<sup>63</sup> These efforts enabled victims of sexual violence to have their cases heard by competent tribunals.<sup>64</sup> Despite such progress, numerous victims of rape and other forms of sexual violence to whom courts have allocated monetary compensation as a remedy rarely cash these sums.<sup>65</sup> A number of reasons may be invoked. First, victims do not follow-up with the registrar of the court or tribunal to enforce the verdict against the perpetrator.<sup>66</sup> Secondly, before courts can enforce any criminal or civil-related judgments, including those related to sexual violence, victims are required to pay 10 per cent of the total compensation.<sup>67</sup> In addition, in cases involving sexual violence committed by soldiers, compensation is generally ordered but not paid by the state as the soldier's employer.<sup>68</sup>

Furthermore, there is an urban and rural divide in accessing justice mechanisms, which the DRC did not report.<sup>69</sup> Many judicial institutions are located in urban areas. This leaves women and a large segment of the population without proper access to justice.<sup>70</sup> To circumvent the limited number of courts in rural areas, the judiciary organized mobile courts or audiences. However, mobile courts rely heavily on non-governmental organizations (NGOs) for funding and often prioritize certain types of cases, for example sexual violence-related cases, over others.

Collaboration among government institutions, and international and national NGOs has facilitated awareness-raising campaigns and educative meetings on women's access to justice with youth,<sup>71</sup> traditional leaders and relevant state officials and security forces.<sup>72</sup> The establishment of legal clinics by CSOs enabled victims of sexual violence and other acts to be sensitized about their rights and existing legal remedies.<sup>73</sup> These clinics were not established in many rural areas. If they had been, they could have educated victims of gender-based violence who do not understand legal mechanisms and procedures (such as what a competent tribunal is, what the procedure is to approach it, what the alternative dispute resolution mechanisms are and how to access free legal assistance). Fear of retaliation may also increase the impunity of violators of women's rights.

### *Political participation and decision-making*

The Maputo Protocol and domestic laws have provisions related to women's political participation. Under the protocol, the right to political participation and decision-making is three-tiered: participation in the electoral process without discrimination;<sup>74</sup> equal representation in the process;<sup>75</sup> and equal partnership between men and women when establishing and implementing state policies.<sup>76</sup> The Constitution enjoins the state to safeguard women's full participation in the nation's development process and to ensure equitable representation of women in the national, provincial and local spheres of government.<sup>77</sup> A myriad of legislative measures have been taken.<sup>78</sup> Some of the notable ones that deserve examination include the Act on Gender Parity and the electoral act.

It is contended that neither of these laws promotes women's political participation. The provisions of Act 15/013 of 1 August 2015 on Parity between Women and Men do not contain rules that require political parties or state organs to ensure that equality between men and women is enforced. Equally, although the 2017 amendment to the electoral law provides that parties should have male and female candidates, it also admits that the absence of either of the genders on the list does not render the list invalid.<sup>79</sup> Following a constitutional petition in 2018, the Constitutional Court ruled that article 13 of the electoral law did not uphold inequality. It indicated that:

“[G]ender equality cannot be conceived of either in arithmetic terms or as a mathematical equation, with regard to equal opportunities between men and women, and secondly that commitment to political parties are [sic] free so that the number of women and men actually engaged in the life of political parties is likely to vary from one political party to another and could not be foreseen in advance to render inadmissible lists which would not provide a determined number of seats for women.”

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This ruling of the Constitutional Court and the absence of equal representation of women and men in the national and provincial legislative assemblies underscore the patriarchal mindset of the judiciary, legislature and government. Parliament disregarded the National Human Rights Commission's plea to enforce the constitutional requirement of gender representation.<sup>81</sup> A number of reasons have been proposed to explain why the legislature and the Constitutional Court were reluctant to push for equal representation. It is said that women usually do not engage much in political activities at any level.<sup>82</sup> A few women candidates are often chosen randomly without any previous political experience. If political parties are forced to have an equal number of male and female candidates on their lists, they might end up failing to find suitable female candidates.<sup>83</sup> These justifications are generally a result of male chauvinism. In past elections, female candidates were removed from party lists and replaced by male candidates.<sup>84</sup> There is also growing activism on the part of women politicians, which suggests that their efforts should be bolstered with the removal of legislative and institutional barriers to their participation. Awareness must be raised to overcome cultural and social beliefs that politics is only for men. During the presidential elections in 2006, there were four female candidates; there were none in 2011<sup>85</sup> and one female candidate in 2018. The reality is alarming with regard to national legislative and provincial elections.<sup>86</sup>

Political party activists, government officials, church and traditional leaders, and members of the rural community should be sensitized for effective implementation of the right to political participation and the presence of women in decision-making processes. These categories of persons wield power to induce a change in their respective level of influence. According to the DRC Report, awareness-raising activities that were organized targeted “political parties and their leaders, journalists, the media, community and opinion leaders in order to incorporate gender, civic and electoral education in their programmes and activities”.<sup>87</sup> It is unfortunate that there is no mention of statistics regarding activities that were conducted and their geographical reach in the 26 provinces. Since the report itself acknowledges that rural communities have been left behind in many of these activities and in the absence of any numbers, it is therefore questionable whether the government has realized this right holistically.<sup>88</sup> Moreover, the lack of steps taken to overcome various challenges, as required by the 2009 Guidelines, implies that the burden to conduct awareness-raising campaigns has been left to NGOs alone.

### ***Practices harmful to women***

Harmful practices against women are perhaps the most serious infringement of the Maputo Protocol that the government has left unaddressed. Although a definitional issue existed before the adoption of the protocol,<sup>89</sup> the latter has defined harmful practices broadly to encompass “behaviour, attitudes and / or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity”.<sup>90</sup> Article 5 of the Maputo Protocol demonstrates that harmful practices cannot be cured by legislative measures alone. It emphasizes the need to educate the public through both formal and informal education channels. States were aware of the possibility that a holistic approach was needed to address harmful practices.

Existing legislation can be said to have curtailed some aspects of harmful practices in the DRC, particularly the two laws on sexual violence that prohibit and criminalize “sexual mutilation, exploitation of minors for purposes of debauchery, pimping, forced prostitution, harassment and sexual slavery, forced marriage, slavery, zoophilia, the deliberate transmission of sexually transmitted infections, child trafficking and exploitation for sexual purposes, pregnancy and forced sterilization, prostitution and pornography involving children”.<sup>91</sup>

The institution of a specific unit within the National Congolese Police, tasked with protecting women and children, contributed to combating impunity for those who conduct or abet harmful practices in the country.<sup>92</sup> The police approach, however, is more reactive than pre-emptive. To be pre-emptive, it should prevent the occurrence of harmful practices, some of which are supported by customs and traditions. For instance, sexual mutilations are practised by the Ngwaka tribe, in the northern DRC.<sup>93</sup> The mutilation of the genital parts of survivors of sexual violence is one of the practices perpetrated by rapists.<sup>94</sup> Conflict-related harmful practices, particularly in areas still controlled by armed groups and where the government does not exercise control, remain pervasive. Some scholars have argued that society does not generally challenge traditional practices that dehumanize women and girls.<sup>95</sup>

Fewer efforts have been made to conduct public awareness through “information, formal and informal education and outreach programmes”.<sup>96</sup> The DRC Report does not mention any of the activities organized by CSOs in different provinces to change societal perception about

harmful practices. Clear government policy and programmes directed to solve, “(i) early marriages of girls, marriage by abduction, (ii) girls dropping out of school, (iii) prostitution of young girls, (iv) sexual violence and abuse of widows”,<sup>97</sup> and continuous awareness raising would have achieved the goals in the Maputo Protocol.

### ***Domestic violence***

In the DRC, seven out of ten women are victims of domestic violence.<sup>98</sup> Nevertheless, the state has not adopted specific legislative measures,<sup>99</sup> probably because domestic violence is included in the violent acts criminalized under the Criminal Code as well as in specific laws combating sexual violence.<sup>100</sup> This approach, however, fails to consider the specific nature of domestic violence. Domestic violence is usually perceived as violence committed under the conjugal roof. Consequently, acts such as “unwanted or forced sex” between partners known as marital rape are rarely prosecuted, as it is believed that rape “primarily happens between strangers” and that it could not occur within a marriage.<sup>101</sup> These acts are trivialized both by the community and the state, which makes it difficult for victims to report incidents and access justice.<sup>102</sup> Domestic violence may be psychological, physical, sexual or take the form of discrimination against girls committed in private or public.<sup>103</sup> The negative effects of this violence require the establishment of a coherent legal and institutional framework to combat them and raise public awareness. The consequences include, but are not limited to, women’s impoverishment, sudden death,<sup>104</sup> physical and psychological trauma, and the woman’s lack of control over her body.<sup>105</sup>

From another perspective, it can be argued that the absence of a specific law on domestic violence does not mean that domestic violence cannot be prosecuted under the current legal framework. First, unwanted sex is sanctioned under the provision of rape, whether between married or unmarried couples.<sup>106</sup> The sanction is between five and 20 years imprisonment, and a fine of CDF 100,000 (approximately USD 50). The accused is not entitled to bail and the prosecutor does not need permission to prosecute the offender.<sup>107</sup> Secondly, acts of domestic violence falling under sexual slavery,<sup>108</sup> voluntary transmission of sexually communicable diseases,<sup>109</sup> forced pregnancy<sup>110</sup> or sexual harassment<sup>111</sup> are also sanctioned under sexual violence laws. Thirdly, other types of non-sexual domestic violence that represent physical or emotional, socio-cultural, professional or institutional violence<sup>112</sup> may be prosecuted according to the Penal Code, Child Rights Act, Labour Code or any other relevant laws.

It is relevant to consider fundamental societal attitudes and behaviours that prevent existing sexual violence laws from addressing domestic violence. Otherwise, even a specific law on domestic violence may fail to address the main problems. As the African Commission rightly noted in its concluding observations, “[t]he large proportion of men in the DRC, even among the highly educated ones, do not approve of gender equality and are still so much attached to stereotyping”.<sup>113</sup> On a positive note, however, the DRC Report indicates that the government is willing to draft a bill on domestic violence. The bill would be informed by the level of trivialization of such violence in the community and the fact that such acts are no longer solely in the private domain.<sup>114</sup> Such a law would strengthen the existing 2009 National Strategy on Combating Gender-Based Violence by the Ministry of Gender, Family and the Child, which lacks specific directives on domestic violence.<sup>115</sup> This strategy aims to ensure that laws are enforced to combat the impunity of perpetrators of sexual violence. Given that legal mechanisms do not play a pre-emptive role, the strategy ensures that prevention of and

protection from sexual violence are made a priority, and that reforms of the army, police and justice system take the gender dimension into account.<sup>116</sup> The focus on the army and the police is guided by the belief that these two security sectors are the number one perpetrators of sexual violence. This implies that, unlike what the state claimed in its report, policies still overlook aspects of domestic violence when combating gender-based violence.<sup>117</sup> Further, the strategy is underpinned by the adoption of the 2009 UN Security Council (UNSC) resolution 1888 to combat sexual violence, particularly that committed during armed conflict.<sup>118</sup>

The absence of a specific law on domestic violence is exacerbated by the scant attention paid to sensitizing the community. The DRC Report does not explain the extent to which the state engaged with community members (religious or traditional leaders, youth, journalists or unions) on possible roles they might play to help women realize their rights. One CSO recommended that women should be sensitized because the persistence of domestic violence could be attributable to their ignorance of their rights and possible legal remedies. Most victims are not aware that acts of domestic violence are sanctioned by the law.<sup>119</sup> A number of other extra-legal measures were suggested: establishing local committees to protect families in rural areas; conducting studies to understand reasons that inform the persistence of domestic violence; establishing a favourable environment for family members, colleagues and friends to discuss domestic violence; and ensuring the provision of psycho-social support to victims.<sup>120</sup> The importance of these measures is linked to the nature of domestic violence: it is generally committed in the absence of external witnesses. Empowering victims and the community through knowledge dissemination is perhaps one of the prerequisites for preventing domestic violence.

### ***Provision for safe abortion***

The Maputo Protocol enjoins states to adopt necessary measures to “protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest” and in situations where “the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus”.<sup>121</sup> Through General Comment No 2 on article 14(1)(a), (b), (c) and (f) and article 14(2)(a) and (c), the African Commission provides guidance to state parties with regard to the nature, extent and scope of the right to safe abortion to facilitate its enforcement and implementation.<sup>122</sup> Under the Maputo Protocol, states have the obligation to respect, protect, promote and fulfil this right.<sup>123</sup> As argued by the African Commission, when women are forced to maintain a pregnancy that resulted from rape, incest or sexual assault, they are kept in a constant state of trauma that can affect their mental health.<sup>124</sup> This provision has met serious challenges, as noted in the DRC Report.

The DRC Report clearly indicates that the state has not taken any legal measures to give effect to the right to medical abortion.<sup>125</sup> It quotes articles 166 and 167 of the Penal Code, which still criminalize abortion.<sup>126</sup> The resistance is justified by the need to protect society and this must have been suggested by “discussions, studies and other proposals” that took place before the ratification of the Maputo Protocol.<sup>127</sup> The only avenue for authorized abortion is when the pregnancy endangers the mental and physical health of the mother, or the life of the mother or the foetus, which reflects one, but not all, of the aspects covered by the Maputo Protocol.<sup>128</sup> The government’s failure to take further steps to legalize safe abortion

is based on the understanding by pro-life members of the community that life at any stage should be protected, and rape, incest or sexual assault should not justify depriving a human being of life.

Resistance against article 14 of the Maputo Protocol is largely informed by people's misconception of what the provision entails. The then vice prime minister proposed the decriminalization of abortion to reduce the likelihood of children being abandoned,<sup>129</sup> but this proposal has not been followed through. According to pro-life campaigners, legalizing abortion will undermine Congolese mores.<sup>130</sup> Not only can it be argued that such "Congolese mores" do not exist, but the concept itself remains controversial and its content may be subject to change over time and place. The DRC Report does not mention "mores" as a ground on which to reject safe abortion, but rather "philosophical foundations" of the right to procreate and the refusal to procreate.<sup>131</sup> The unsubstantiated reference to philosophy raises more questions than answers. Regardless of whether one approves or disapproves of the right to safe abortion, it is important to note that the Maputo Protocol is only concerned with pregnancy conceived as a result of sexual assault, rape or incest, and therapeutic abortion.<sup>132</sup> Interpreting this provision as authorizing persons to abort whenever they so wish is misleading.

There are empirical reasons that warrant the authorization of safe abortion.<sup>133</sup> Despite its criminalization, abortion has been practised secretly. Reports indicate an increase in fetuses found thrown away by those who have secretly practised unsafe abortion.<sup>134</sup> Another element to consider is the fate of a child born from rape or sexual assault, considering the number of women who have been raped during armed conflicts. In addition, some have drawn a link between the increase in the rate of maternal death and the prohibition of abortion in the country.<sup>135</sup> A study by the University of Kinshasa and the Guttmacher Institute estimated that:

"146,713 induced abortions occur every year in Kinshasa, yielding an abortion rate of 56 per 1,000 women aged 15–49. We also calculated that more than 343,000 unintended pregnancies occur annually, resulting in an unintended pregnancy rate of 147 per 1,000 women aged 15–49. Taken together, these findings show that two in five unintended pregnancies end in abortion. Women in Kinshasa are clearly struggling to prevent unintended pregnancies, which often result in unwanted childbearing and abortion."<sup>136</sup>

In the absence of any government interest in furthering the right provided under article 14(2)(c) of the Maputo Protocol, CSOs have continued to raise awareness of the importance of contraception and family planning methods. Organizations are making efforts to promote legislative reforms to harmonize provisions of the Penal Code and the Maputo Protocol.<sup>137</sup> However, the government has made no efforts regarding the right to safe abortion.

## **Conclusion**

The several measures adopted by the DRC to advance women's rights demonstrate that the country has made strides since it ratified the Maputo Protocol. For a country that was pejoratively named the capital of rape because of the high number of reported cases of sexual violence,<sup>138</sup> these efforts indicated the state's willingness to adopt a constitutional and

legislative framework to prevent violations of women's rights. The number of laws, institutions and policies the DRC has put in place and the partnership it has developed with national or international organizations on women's rights have started to show the emergence of a political will to improve the lived realities of women. This political will also facilitated a frank and constructive dialogue between the delegation and the African Commission during the presentation of the DRC Report. However, the scrutiny of five selected rights shows several areas of concern.

This article has noted that most of the promises made have not been implemented in practice, and that concrete steps to improve, in reality, the fate of several women have been hindered by a patriarchal attitude towards women's rights.<sup>139</sup> Men and women have internalized the supposed "inferiority"<sup>140</sup> of the latter to justify their unequal participation in the conduct of state affairs. State institutions have made few efforts to change this mindset.<sup>141</sup> While the presentation of the report to the African Commission did foster a constructive dialogue, the DRC focused mainly on legislation and policy. Many of the rights in the Maputo Protocol require the DRC to take additional measures in terms of awareness raising, both in rural and urban areas, and a radical transformation of the educational curricula at primary, secondary and tertiary levels, so that a culture of promoting and protecting women's rights takes hold in everyone's mind. The African Commission's concluding observations also note the dearth of extra-legal measures with respect to rights to political participation and decision-making, safe abortion, protection from domestic violence and access to justice, which are some of the areas where much still needs to be done. Actors involved in promoting and protecting women's rights in the country can leverage the head of state's commitment to appoint women to key government positions to ensure that the promotion and protection of women's rights is prioritized through concrete awareness raising and education activities in urban and rural areas of the country.

**Competing interests.** None

## NOTES

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42. “43rd activity report of the African Commission on Human and Peoples’ Rights” (June to 15 November 2017) at 5, para 18.
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44. The Commission undertook missions in 2011 and 2016 and discussed the issue of reporting, including the technical support the country needed for such a process.
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47. *Id* at 4, para 5.
48. *Id* at 25, paras 79–83.
49. Interview with Mwamba Mushikonkwe, then president of the DRC National Human Rights Commission, Kinshasa, DRC, 14 October 2019.
50. WhatsApp discussion with Rose Mutombo Kiese, then president of CAFCO, November 2019.
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52. CM Fombad and E Kibet “Editorial introduction to special focus: The rule of law in sub-Saharan Africa: Reflections on promises, progress, pitfalls and prospects” (2018) 18 *African Human Rights Law Journal* 205 at 206; CM Fombad “An overview of the crisis of the rule of law in Africa” (2018) 18 *African Human Rights Law Journal* 213 at 218–28.
53. Maputo Protocol, art 8(a).
54. *Id*, art 8.
55. The Constitution, art 12.
56. *Id*, art 13.
57. *Id*, arts 19 and 21.
58. A Meyer *Etude sur l’Aide Légale en République Démocratique du Congo* [Study on legal aid in the Democratic Republic of Congo] (January 2014, *Avocats Sans Frontières*) at 17, available at: <[https://www.asf.be/wp-content/uploads/2014/02/ASF\\_RDC\\_EAL\\_2013.pdf](https://www.asf.be/wp-content/uploads/2014/02/ASF_RDC_EAL_2013.pdf)> (last accessed 10 February 2023).
59. *Ibid*.
60. Civil Procedure Code, art 146.
61. S Fredman *Discrimination Law* (2011, Oxford University Press) at 2.
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63. DRC Report, above at note 40 at 31, paras 119–22.
64. *Ibid*.
65. “RDC: Les victimes des crimes sexuels obtiennent rarement justice et jamais réparation: Changer la donne” [DRC: Victims of sexual crimes rarely get justice and never reparation: The need for a paradigm

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66. T Makunya “Violées oui, indemnisées non!” [Raped but not compensated] in *Justice et Droit au Quotidien: Recueil des Articles Publiés dans le Cadre du Projet Contribuer à la Liberté d’Expression en RDC de 2011 à 2013* (2014, RCN Justice & Démocratie) at 109–10.
  67. Criminal Procedure Code, art 129; and Civil Procédure Code, art 152; T Kibangula “Viols en RDC: Quand les victims doivent ‘payer pour obtenir justice’” [Rape in DRC: When victims must ‘pay for justice’] (5 December 2013) *JeuneAfrique*, available at: <<https://www.jeuneafrique.com/166930/politique/viols-en-rdc-quand-les-victimes-doiventpayer-pour-obtenir-justice/>> (last accessed 10 February 2023).
  68. Act 22/065 on Fundamental Principles on the Protection of Victims of Conflict Related Sexual Violence and Other Serious Crimes Against Peace and the Security of Humankind was promulgated on 26 December 2022. As stated in the preamble to the act, it aims, inter alia, to remove “all conditions related to legal fees and other formalities likely to impede or restrict the exercise and benefit of redress” by victims of sexual violence.
  69. Although in para 120 of the DRC Report, the government argues that “it has recruited judges and established magistrates’ courts in all the provinces”, this approach raises a number of issues. First, some crimes cannot be tried by magistrates’ courts as they are beyond their jurisdiction. Secondly, the law provides that magistrates’ courts must be established in all the 27 cities and 145 territories. This has not been done. Thirdly, there are still too few magistrates, despite efforts to recruit 2,000 magistrates and prosecutors in 2010 and 2011.
  70. 69.24 per cent of Congolese people live in rural areas: DRC Report, above at note 40 at 44, para 208.
  71. Within universities, student clubs have been created to disseminate knowledge about certain human rights, particularly those that affect women and girls.
  72. DRC Report, above at note 40 at 31, paras 121–22.
  73. *Id* at 31, para 119.
  74. Maputo Protocol, art 9(1)(a).
  75. *Id*, art 9(1)(b).
  76. *Id*, art 9(1)(c).
  77. The Constitution, art 14.
  78. Many of the laws mentioned by the government are not effective on the ground. The 2004 Act on the Organisation and Functioning of Political Parties prohibits any discrimination based on gender; under art 3(5) of Act 08/005 of 10 June 2008 on Public Financing of Political Parties, parties are required to submit lists of candidates, taking account of parity between women and men, before they can be funded. Not only is this provision not implemented by the Electoral Commission, the law on Public Financing of Political Parties has never been enforced.
  79. Act 17/013 of 24 December 2017 Amending and Complementing Act 06/006 of 9 March 2006 on the Organisation of Elections, art 13. A new amendment came into force in 2022 but leaves much to be desired with respect to incentives for women’s political participation.
  80. (Author’s translation). Decision R Const 624/630/631 (Constitutional Court) of 30 March 2018. The original French reads: “La Cour considère que l’incise de l’article 13 visé au moyen trouve son explication non point dans une volonté de compromettre le principe de la promotion de la femme proclamé par le constituant, mais uniquement, d’une part dans le fait que l’égalité genre ne peut se concevoir ni en des termes arithmétiques, ni en une equation mathématique, s’agissant d’une égalité de chances entre l’homme et la femme, et d’autre part par le fait que l’engagement dans les partis politiques est libre, en sorte que le nombre de femmes et d’hommes effectivement engagés dans la vie des partis politiques est susceptible de variation d’un parti politique à un autre et ne peut être maîtrisé en amont pour justifier l’irrecevabilité de toutes listes qui n’auraient pas prévu un nombre déterminé de sièges aux femmes.”
  81. B Kahombo “The Democratic Republic of the Congo’s National Commission on Human Rights” in CM Fombad (ed) *Compendium of Documents on National Human Rights Institutions in Eastern and Southern Africa* (2019, Pretoria University Law Press) 101 at 120.
  82. Ngemba and Malchiodi Freins à la Participation, above at note 35 at 81 and 171.
  83. Kangashe *La Constitution Congolaise*, above at note 34 at 75.
  84. Testimony of a female political candidate during a political campaign session in Bukavu, 2016. See also Ngemba and Malchiodi Freins à la Participation, above at note 35 at 110.
  85. “Rapport sur les violences contre les femmes au Nord et Sud-Kivu, en République Démocratique du Congo” [Report on violence against women in North and South Kivu, DRC] (2013) at 5, available at:

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  91. DRC Report, above at note 40 at 37, para 160.
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  105. “Les violences domestiques”, above at note 98 at 14.
  106. Act 06/018 of 20 July 2006 Modifying and Complementing Decree of 30 January 1940 Relating to the Criminal Code of DRC, art 170.
  107. Act 06/019 of 20 July 2006 Modifying and Complementing Decree 06 August 1959 Relating to Criminal Procedure Act, preamble.
  108. Act 06/018, above at note 106, art 174(e).
  109. Id, art 174(i).
  110. Id, art 174(k).
  111. Id, art 174(d).
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  114. DRC Report, above at note 40 at 39, para 175.
  115. Id at 40, para 176.

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119. “Les violences domestiques”, above at note 98 at 9.
120. Ibid.
121. Maputo Protocol, art 14(2)(c).
122. 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, preamble.
123. Id, para 63.
124. Id, para 37.
125. DRC Report, above at note 40 at 48, para 231.
126. Five to ten years imprisonment for the woman who aborts and five to 15 years for the person who encourages her to abort.
127. DRC Report, above at note 40 at 48, para 231.
128. Id at 48, para 232.
129. Ibid.
130. “Faut-il dépenaliser l’avortement en RDC” [Should abortion be decriminalized in DRC] (8 August 2015) Radio Okapi, available at: <<https://www.radiookapi.net/emissions-2/parole-aux-auditeurs/2015/04/15/faut-il-depenaliser-lavortement-enrdc>> (last accessed 10 February 2023).
131. DRC Report, above at note 40 at 48, para 230.
132. Maputo Protocol, art 14(2)(c).
133. Kalonda “Sexual violence in Congo-Kinshasa: Necessity of decriminalizing abortion” (2012) 33 *Revue Medicale de Bruxelles* 482 at 482–86.
134. “Bukavu: Un foetus retrouvé sur Avenue Saïo dans la commune d’Ibanda” [Bukavu: A fetus found on Avenue Saïo in the commune of Ibanda] (30 August 2018) *La Prunelle*.
135. “Clandestine abortion is common in Kinshasa, and procedures are often unsafe” (Guttmacher Institute news release, 7 November 2017), available at: <<https://www.guttmacher.org/news-release/2017/clandestine-abortion-commonkinshasa-and-procedures-are-often-unsafe>> (last accessed 10 February 2023).
136. S Chae et al “The incidence of induced abortion in Kinshasa, Democratic Republic of Congo, 2016” (2 October 2017) *Plos One*, available at: <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0184389>> (last accessed 10 February 2023).
137. The Association of Congolese Women Lawyers is currently exerting pressure on the government to align domestic laws with the Maputo Protocol: Y Amekeya “RDC: Des femmes réclament à legaliser l’avortement” [DRC: Women call for legalized abortion] (5 September 2018) *Africa Rdv*, available at: <<https://www.africardv.com/societe/rdc-des-femmesreclament-a-legaliser-lavortement/>> (last accessed 27 April 2023).
138. C Lewis “The making and re-making of the ‘rape capital of the world’: On colonial durabilities and the politics of sexual violence statistics in DRC” (2021) *Critical African Studies* 1 at 2–3.
139. “Concluding observations”, above at note 20, para 77(ii).
140. Id, para 77(iii).
141. Id, para 77(ii).